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Evidence

Robert Urich

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EVIDENCE*

ROBERT URICH**

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* This survey covers cases reported in volumes 225 So.2d through 249 So.2d and laws enacted by the 1970 and 1971 regular sessions, the 1970 special session and the 1971 second special session of the Florida Legislature.

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I. PRESENT RECOLLECTION REFRESHED

A written memorandum may be used by a witness to refresh present memory of a past event. When such a memorandum is used, the opposing party has the right to examine the memorandum.¹ The most frequently encountered example of such use is where a police officer refers to his notebook to recall a past event. In *Allen v. State*,² a police officer, who was at the scene, was called as a witness by the state and used his notebook to refresh his recollection. Defense counsel moved for inspection of the memorandum at trial and at a plenary hearing. The court's subsequent denial of the motion was held to be reversible error since basic principles of fair play required that the defense have access to the memorandum for possible impeachment purposes.

Although *Allen* seems to merely restate a general rule of evidence,³ the application of the rule is not as broad as it might be. In *Darrigo v. State*,⁴ informal notes made by a police officer outlining admissions made by an accused, which were never reduced to verbatim statements, were held to be beyond the scope of discovery procedures.⁵ These memoranda were held to be "the work product of the officer,"⁶ and not discoverable even under the provision of Florida Rule of Criminal Procedure 1.220(a)(1), which allows pre-trial inspection of "defendant's written or recorded statements . . . whether signed or unsigned." Thus, memoranda which may be used by the police to refresh memory are not subject to examination by the defense unless such memoranda are referred to or used in the criminal proceeding itself.

II. EXAMINATION OF WITNESSES

A. *Direct Examination*

The decision on whether to utilize pointed questions or a narrative format for eliciting testimony is largely discretionary with the party

1. Henniger, *Best Evidence Rule*, in FLORIDA BAR CONTINUING LEGAL EDUCATION, EVIDENCE IN FLORIDA § 13.10 (1971).

2. 243 So.2d 448 (Fla. 1st Dist. 1971) [hereinafter cited as *Allen*].

3. C. McCORMICK, LAW OF EVIDENCE § 9, at 17 (1954).

4. 243 So.2d 171 (Fla. 2d Dist. 1971).

5. FLA. R. CRIM. P. 1.220.

6. *Darrigo v. State*, 243 So.2d 171, 173 (Fla. 2d Dist. 1971). But see *Dade County v. Monroe*, 237 So.2d 598 (Fla. 3d Dist. 1970).

calling the witness.⁷ However, when a party appears in proper person and also wishes to present testimony, the narrative form is the only logical way to proceed. In *Karwowski v. Peterman*,⁸ a Michigan attorney who intervened as a plaintiff and elected to represent himself proffered narrative testimony in support of his position. The reviewing court held that the trial did not abuse its discretion in rejecting the proffered narrative where it appeared that the trial had become chaotic, and where in addition to the narrative, the plaintiff had proffered over seven hundred documents without any predicate being provided. The form of testimony was also at issue in *Grech v. State*.⁹ There, the witness involved was ten years old and prefaced each of her statements with "I think" or "I believe." The court refused to hold the testimony speculative or uncertain, apparently on the basis that testimony otherwise competent is not made incompetent by such a preface in this type of situation.

In a suit brought by a real estate broker for his commission,¹⁰ the plaintiffs called the defendant as their witness. They dismissed him and later sought to call him as an adverse witness. The request to recall the witness was denied by the trial court. On appeal, this refusal was held to be error since the witness was not a nominal defendant and was, therefore, clearly an adverse witness.¹¹

Finally, it seems that the concept of harmless error describes the outer limits of direct examination. In *Becton v. State*,¹² the District Court of Appeal, Third District, affirmed a trial court order which allowed the prosecutor to "third degree" his own witness who repeatedly "did not recall" and could not remember. The error, if any, was found to be harmless.

B. Examination by the Court

It seems well established that a Florida trial judge may not comment on the weight or creditability of the evidence. In *Esposito v. State*,¹³ the court, in an effort to rehabilitate a state witness, commented that a witness who had been given a sentence to run concurrently with one already being served was not "let off with nothing," as the defense counsel had suggested. This statement was held to be unfair comment on the evidence. Yet during the period under survey, two reported decisions alluded to an examination of witnesses by the court. In *Cude v. Deal*,¹⁴ the court questioned the plaintiff's only expert witness in a medical malpractice suit in chambers and in the absence of counsel. The testimony was

7. C. ALLOWAY, FLORIDA EVIDENCE CASEBOOK pt. II, 10 (1971).

8. 238 So.2d 323 (Fla. 3d Dist. 1970).

9. 243 So.2d 216 (Fla. 2d Dist. 1971), *cert. denied*, 247 So.2d 439 (Fla. 1971).

10. *Goldberg v. Russo*, 233 So.2d 134 (Fla. 3d Dist. 1970).

11. *See* FLA. R. CIV. P. 1.450(a).

12. 227 So.2d 223 (Fla. 3d Dist. 1969).

13. 243 So.2d 451 (Fla. 2d Dist. 1971).

14. 234 So.2d 711 (Fla. 2d Dist. 1970).

taken down by a court reporter and was concerned with clarifying testimony relative to the proximate cause of plaintiff's injuries. The questioning was undertaken to aid the court in deciding a motion for a directed verdict and was done with the assent of both attorneys. The reviewing court found the procedure "irregular," but ruled that any objection had been waived by the consent to the examination. An uncontested divorce proceeding in which child custody was in issue produced an analogous situation.¹⁵ The plaintiff husband had filed a divorce action and had entered into a stipulation with the defendant mother consenting to the defendant's custody of their child. The defendant did not thereafter defend the action, and a default was subsequently entered. During later *ex parte* proceedings, the record of the decision disclosed the following, rather remarkable colloquy:

COURT: Do you want the baby?

PLAINTIFF: Yes, sir, I'd love to have the baby.

COURT: Okay, we're going to give the baby to you.¹⁶

After this exchange, plaintiff's counsel suggested that the defendant be given notice of the proceeding. The court then refused to let plaintiff's counsel "cross-examine his own witness" and proceeded with the hearing. The case was reversed on other grounds.

C. Cross-Examination

1. AVAILABILITY OF CROSS-EXAMINATION

A required predicate for the cross-examination of a witness is a direct examination of some sort. During the period surveyed the question of what constitutes a direct examination arose. In *Irvin v. State*,¹⁷ an individual was brought into the courtroom for the witness on the stand to identify. The individual merely stated his name and was not sworn in. Opposing counsel requested an opportunity to examine this individual, but apparently did not wish to call him as his witness. The request was denied. The reviewing court held that the denial was proper because the individual was never sworn in or called as a witness by either side.

2. SCOPE OF CROSS-EXAMINATION

The scope of cross-examination presents more complex problems. The general rule in Florida is that cross-examination extends to the entire subject matter of direct examination "and to all matters that may modify, supplement, contradict, rebut, or make clearer the facts testified to in chief"¹⁸ Statements made on direct are said to "open the door" to

15. *Williams v. Williams*, 227 So.2d 746 (Fla. 2d Dist. 1969).

16. *Id.* at 747.

17. 246 So.2d 592 (Fla. 4th Dist. 1971), *cert. denied*, 251 So.2d 878 (Fla. 1971).

18. *Cocoa v. State*, 62 So.2d 892, 895 (Fla. 1953) [*quoting with approval* 58 AM. JUR. Witnesses § 632 (1938)], *cert. denied*, 349 U.S. 931 (1954), *reh. denied*, 350 U.S. 855 (1955).

inquiry on cross. In *Williams v. State*,¹⁹ the defendant testified on direct that he had offered to take a lie detector test but had not been given such a test. On cross-examination, the state attorney inquired as to the reason the test had not been administered. That question was held to be within the proper bounds of a cross-examination.²⁰ Similarly, in a condemnation action,²¹ the plaintiff's expert witness testified on direct examination that he thought the highest and best use to which the condemnee's land could be put was timber farming. The trial court precluded cross-examination into matters of future use and the condemnee's apparent intent in holding the land. On appeal, this ruling was held to be an improper restriction on cross-examination since direct testimony about the highest and best use "opened the door" to the areas sought to be pursued. The door must, however, be opened on direct. In *Armstrong v. State*,²² the defendant in a murder prosecution testified that he had previously been shot in the arm. The trial court's refusal to allow inquiry into the details of the prior shooting was upheld on appeal.²³

3. LIMITATIONS ON CROSS-EXAMINATION

In addition to limitations on the general scope of cross-examination, certain specific limitations also have been applied. In a case which achieved some local notoriety, cross-examination of a state informer was found properly restricted "in order to prevent the trial from being converted into a trial of the state's witness."²⁴

Another limitation on cross-examination concerns questions relating to uncharged crimes.²⁵ In *Cunningham v. State*,²⁶ the defendant in a murder prosecution denied having been convicted of aggravated assault on four specific dates. The state proceeded to prove a conviction on one of the four dates but produced nothing in regard to the other three dates. This interrogation was held to be harmless error.²⁷

In *Duncomb v. State*,²⁸ it appeared that three state witnesses had been interviewed in the presence of each other by a prosecutor prior to trial. At trial, cross-examination was limited to revealing the details of

19. 238 So.2d 137 (Fla. 1st Dist. 1970), *cert. denied*, 241 So.2d 397 (Fla. 1970).

20. The rules regarding admission of polygraph results and mention of polygraph examination are summarized in Kuperstein, *Evidence, 1965-1967 Survey of Florida Law*, 22 U. MIAMI L. REV. 572, 572-73 (1968).

21. *Stack v. State Road Dept.*, 237 So.2d 240 (Fla. 1st Dist. 1970).

22. 243 So.2d 181 (Fla. 2d Dist. 1971).

23. This case is interesting for another reason. Apparently, the testimony concerning the shooting would have involved mention of a collateral crime. Therefore, it appears that the *Williams* rule door does not swing both ways. See section VII *infra*.

24. *Horwitz v. End*, 245 So.2d 116 (Fla. 3d Dist. 1971) (the witness involved was Charles Celona).

25. The admissibility *vel non* of uncharged crimes will be discussed in Section VII *infra*.

26. 239 So.2d 21 (Fla. 1st Dist. 1970).

27. See FLA. STAT. § 924.33 (1969).

28. 237 So.2d 86 (Fla. 3d Dist. 1970).

the interview. The court rejected an attempt to direct further testimony toward demonstrating that the action of the state attorney was unethical—apparently on the ground of immateriality. On appeal, it was held that the permitted cross-examination sufficiently advised the jury of the circumstances to allow them to make a judgment as to the witnesses' credibility.

In another criminal appeal, the District Court of Appeal, Third District, gratuitously suggested that it would not be error to permit cross-examination of a defendant as to "why he remained silent and did not talk to police when he invoke[d] his constitutional right to remain silent."²⁹ If such a rule should materialize, its net effect would probably be to discourage defendants who had asserted their rights under *Miranda v. Arizona*³⁰ from taking the stand in their own defense. Whether such a rule would pass constitutional tests seems doubtful. Additionally, it is clear that cross-examination may not apply to areas "far afield"³¹ of direct. Questions regarding why a defendant remained silent seem far afield of any conceivable questions on direct examination.

III. OPINION AND EXPERT TESTIMONY

A. Lay Opinion Admissible

The general rule regarding lay opinion testimony is that it is not admissible in the absence of special circumstances militating towards its admission.³² During the period under survey, lay opinion testimony was admitted in several interesting instances.

In *Town of Palm Beach v. Carter*,³³ the town manager testified in generalities about accidents with no apparent showing of first hand knowledge.³⁴ The manager testified that:

The life of the bathers [was in danger] . . . because surfboards were getting away from the surfers and they come ramming into the beaches and we had several people hurt. . . .³⁵

The court referred to this statement as "petitioner's conclusion."³⁶ This testimony is particularly notable in light of the number of cases in which "safety experts" testified as to the existence of hazards.³⁷

Additionally, it was recognized that the owner of condemned prop-

29. *Thomas v. State*, 249 So.2d 510, 513 (Fla. 3d Dist. 1971).

30. 348 U.S. 436 (1966).

31. *Lentini v. State*, 231 So.2d 275, 276 (Fla. 3d Dist. 1970).

32. C. McCORMICK, LAW OF EVIDENCE § 11 (1954); Spence and Orseck, *Witnesses*, in FLORIDA BAR CONTINUING LEGAL EDUCATION, EVIDENCE IN FLORIDA § 4.30 (1971).

33. 229 So.2d 3 (Fla. 4th Dist. 1969), *rev'd on other grounds*, 237 So.2d 130 (Fla. 1970).

34. On the requirement of first hand knowledge, see C. McCORMICK, LAW OF EVIDENCE § 10 (1954).

35. *Town of Palm Beach v. Calder*, 229 So.2d 3, 4 (Fla. 4th Dist. 1969).

36. *Id.* at 5.

37. *E.g.*, *Johnson v. Hatoum*, 239 So.2d 22 (Fla. 4th Dist. 1970), *cert. dismissed*, 244 So.2d 740 (Fla. 1971); *Jacksonville Elec. Co. v. Sloan*, 52 Fla. 257, 42 So. 516 (1906).

erty may testify to its value even though he has not been qualified as an expert.³⁸

In *South Venice Corp. v. Caspersen*,³⁹ three witnesses, two of whom were qualified as experts, testified as to the course of a stream and as to the location of a certain island in a bay. The lay witness testified that "we consider this Lemon Bay, yes."⁴⁰ This testimony was held admissible and not violative of the opinion rule, even though the witness could not "swear positively to the fact in question."⁴¹

Finally, the rule in medical malpractice cases⁴² that a jury can conclude the existence of negligence without the benefit of expert testimony was applied in a dental malpractice case.⁴³ In that case, however, the defendant gave sufficient testimony on cross to make a jury finding of negligence possible.

B. *Expert Subject Matter*

McCormick states that two elements are required for the use of expert testimony. First, the subject must be "beyond the ken of the average layman," and second, "the witness must have such skill, knowledge or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth."⁴⁴ The ken of the average layman has changed drastically since the general rules regarding expert subject matter were formulated, and this change has yielded a corresponding change in the areas where expert knowledge is admissible. Thus, in *Dawson v. Johnson*,⁴⁵ expert testimony was permitted concerning the pasturing of horses, apparently on the theory that such a matter was not within the scope of the knowledge of a Dade County trial jury. Similarly, expert testimony has been introduced to show that a particular shotgun was defective.⁴⁶ Earlier, either of these areas might have been found to be within the province of the jury.

Closer to the current dividing line is *Alton Box Board Co. v. Pantya*,⁴⁷ an air pollution damage case. Lay testimony was permitted concerning effects of air pollution on buildings as well as on humans. This testimony was held to be sufficient to allow jury consideration of the issue of pollution damage in light of other visual proof presented of the plant's smoke emission. The court applied the rule that the question of

38. *Hill v. Marion County*, 238 So.2d 163 (Fla. 1st Dist. 1970). The general rule on value testimony is stated in *Salvage & Surplus, Inc. v. Weintraub*, 131 So.2d 515 (Fla. 3d Dist. 1961).

39. 229 So.2d 652 (Fla. 2d Dist. 1970).

40. *Id.* at 655.

41. *Id.* at 656.

42. *Michaels v. Spiers*, 144 So.2d 835 (Fla. 2d Dist. 1962). But see *Foster v. Thornton*, 125 Fla. 699, 170 So. 459 (1936).

43. *Furnari v. Lurie*, 242 So.2d 742 (Fla. 4th Dist. 1971).

44. C. McCORMICK, *LAW OF EVIDENCE* 28-29 (1954).

45. 226 So.2d 445 (Fla. 3d Dist. 1969).

46. *Continental Cas. Co. v. McClure*, 225 So.2d 590 (Fla. 2d Dist. 1969).

47. 236 So.2d 452 (Fla. 1st Dist. 1970).

when expert testimony is required is determined by the issues involved.

A condemnation decision presented an analogous factual situation. In *Ragland v. State Department of Transportation*,⁴⁸ an expert on environment and population who styled himself a "plant toxonomist" and "human ecologist" testified concerning the effects of a proposed interstate highway interchange. His testimony ran rather far afield, but the trial court heard it and the appellate court acquiesced.

In *Crosby v. State*,⁴⁹ a state beverage agent was permitted to testify, apparently as an expert, on various types of stills. Similarly, during the survey period, expert testimony relating to custom and usage in interpreting an insurance policy⁵⁰ and on procedures involved in packing and shipping furniture⁵¹ was permitted.

In *Wolk v. Buch*,⁵² a slip and fall case allegedly resulting from negligence in selection of sidewalk paint and allowing the growth of a fungus on a sidewalk, expert testimony was permitted to show that first, the walkway was slippery, and second, that the condition was not obvious. The case is susceptible of two interpretations. If the witness was testifying that a certain fungus was slippery and transparent, or of the same color as the sidewalk, the testimony probably relates to an expert subject matter. If, on the other hand, the witness was testifying that a certain sidewalk was slippery and dangerous, the testimony probably was "within the ken of the average layman."⁵³

In *Johnson v. Hatoum*,⁵⁴ the plaintiff offered the affidavit of a "qualified safety expert" in opposition to a motion for summary judgment. The affidavit concluded that pedestrians in a certain drive-in restaurant were subject to an unreasonable risk of injury, and that the design of the premises did not meet the standard of care required. The affidavit was held to have been properly considered in opposition to the motion, and it seems that this area is one requiring expert treatment.

The requirement of expertise in the subject matter is also susceptible of misunderstanding. The problem is largely one of defining the subject matter. Thus, in *Ashburn v. Fox*,⁵⁵ medical experts and medical doctors testified to the standard of care required of an osteopath in diagnosing cancer. The usual rule dealing with the standard of professional medical

48. 242 So.2d 475 (Fla. 1st Dist. 1971).

49. 237 So.2d 286 (Fla. 2d Dist. 1970).

50. *Aetna Ins. Co. v. Loxahatchee Marina Inc.*, 236 So.2d 12 (Fla. 4th Dist. 1970). The court did not discuss any first hand knowledge which the expert might have possessed of "customer usage," nor did it view the evidence as presenting a hearsay problem.

51. *Terminal Transp. Co. v. Lamtron Indus. Inc.*, 233 So.2d 854 (Fla. 3d Dist. 1970), *cert. denied*, 238 So.2d 424 (Fla. 1970). The court also stated that this witness' testimony was more credible than lay testimony on the issue of delivery to a motor carrier in good condition. On this latter point, compare the instant case with *Maas Bros., Inc. v. Bishop*, 204 So.2d 16 (Fla. 2d Dist. 1967).

52. 231 So.2d 228 (Fla. 3d Dist. 1970).

53. See note 44 *supra* and accompanying text.

54. 239 So.2d 22 (Fla. 4th Dist. 1970), *cert. dismissed*, 244 So.2d 740 (Fla. 1971).

55. 233 So.2d 840 (Fla. 3d Dist. 1970), *cert. dismissed*, 242 So.2d 873 (Fla. 1971).

conduct allows physicians of other schools or experts in other lines to testify to "principles of the schools [which] do or should concur."⁵⁶ Opinions on intoxication seem to present special problems. The most frequent means of proof of intoxication in prosecutions for "driving under the influence" seem to be the opinion of the arresting officer. In *City of Orlando v. Newell*,⁵⁷ an officer who had also testified to the "acts, conduct, appearance and statements"⁵⁸ gave an opinion on intoxication which was held to have been properly admitted.⁵⁹

During the biennium, two cases dealt with what the court considered to be non-expert subject matter. The first case involved the meaning of a "No Parking Any Time" sign. The refusal by the trial court to permit expert testimony was based on the rule that expert testimony is not acceptable on a question of domestic law, and also because the meaning of such a sign was within the ordinary experience of a jury.⁶⁰ The second case involved a question of whether certain magazines were obscene. The court stated that: "There was no need, therefore, for the testimony of witnesses that the magazines are obscene under the standards recognized in the Roth case"⁶¹ This language might be interpreted as holding that such testimony is acceptable but not necessary. It is submitted, however, that if the matter is fully considered, the conclusion is inevitable that this is not subject matter requiring expert testimony.

C. Requirement of Certainty

Although there is no requirement that an expert state an opinion with absolute certainty, there is a well recognized tendency to reject opinions based on conjecture and speculation. In an eminent domain proceeding, an expert on real estate values gave testimony based on general estimates. When cross examined regarding the basis of his opinion, he resorted to responses such as "I can't tell you." On appeal it was held that the expert's testimony should have been rejected as speculative and conjectural, and that a jury verdict based on whole or in part on such speculation should be rejected. The appellate decision was based on the theory that there must be some avenue open to refute the expert's testimony, and this particular testimony was so indefinite and conjectural as to be unsusceptible to rebuttal.⁶² Another rather interesting case on the same problem was *Fletcher Co. v. Melroe Manufacturing Co.*⁶³

56. *Foster v. Thornton*, 125 Fla. 699, 705, 170 So. 459, 463 (1939).

57. 232 So.2d 413 (Fla. 4th Dist. 1970).

58. *Id.*

59. See also *State v. Liefert*, 247 So.2d 18 (Fla. 2d Dist. 1971); *City of Orlando v. Ford*, 220 So.2d 661 (Fla. 4th Dist. 1969).

60. *Consolidated Mut. Ins. Co. v. Ramy*, 238 So.2d 431 (Fla. 3d Dist. 1970), *cert. denied*, 240 So.2d 641 (Fla. 1970).

61. *Collins v. State Beverage Dept.*, 239 So.2d 613, 616 (Fla. 1st Dist. 1970), *citing Roth v. United States*, 354 U.S. 476 (1957).

62. *Walters v. State Road Dept.*, 239 So.2d 878 (Fla. 1st Dist. 1970).

63. 238 So.2d 142 (Fla. 1st Dist. 1970), *cert. denied*, 242 So.2d 463 (Fla. 1970).

wherein an expert testified to the construction of a "bobcat" front end loader which had been involved in a fire in the plaintiff's mill. The expert testified to the structure of the fuel feed system and how he thought the fire had started. Unfortunately, several tests failed to substantiate his theory of causation. The court ruled that the testimony was so speculative and conjectural as to be insufficient to support a verdict. The ruling appears to be correct since the expert appeared to offer nothing more than educated guesses as to the cause of the fire.

In the area of psychiatry and medicine, a "highly conjectural" opinion that an injury could have been the result of a certain event was placed in the category of "non-evidence."⁶⁴ Similarly, in another case, a deposition of a psychiatrist, which was based on certain test results, was excluded. Two examining physicians had testified and neither had used the tests in question. The deponent had also admitted that these tests were unreliable. The exclusion of the deposition which was based largely on these tests was upheld.⁶⁵

Although related to the problem of proof of intoxication previously discussed, the decision in *Rivers v. Conger Life Insurance Co.*⁶⁶ may be profitably compared with the "conjecture" decisions. On the issue of intoxication, a surgeon was allowed to testify that he smelled alcohol on a deceased's breath. No chemical tests were taken and on cross-examination the doctor testified that "one beer smells the same as twenty beers."⁶⁷ The evidence was held insufficient to prove intoxication, but the question remains as to whether an opinion that the deceased was intoxicated could be admitted on the same basis. Such an opinion should be unacceptable, yet the doctor probably had as much information as the average arresting officer whose opinion usually is admissible.⁶⁸

D. Form of Questions

Questions to an expert require a basis in the evidence presented. Therefore, proof that a defendant was fingerprinted is an essential part of the predicate for a fingerprint identification.⁶⁹ Apparently, the proof of fingerprinting must be made by the person who took the fingerprints.⁷⁰

Since an expert opinion is generally elicited by the hypothetical question,⁷¹ a continuing problem with the hypothetical question concerns what may properly be included in such a question. Generally, a hypothetical question cannot assume facts not in evidence.⁷² However,

64. *Humphries v. State*, 232 So.2d 23 (Fla. 1st Dist. 1970).

65. *Pacific Indem. Co. v. Dossey*, 246 So.2d 588 (Fla. 2d Dist. 1971).

66. 229 So.2d 625 (Fla. 4th Dist. 1969).

67. *Id.* at 628.

68. See notes 57-59 *supra* and accompanying text.

69. *Rhoden v. State*, 227 So.2d 349 (Fla. 1st Dist. 1969).

70. *Id.*

71. See generally C. McCORMICK, *LAW OF EVIDENCE* §§ 15, 16 (1954); Spence and Orseck, *Witnesses*, in *FLORIDA BAR CONTINUING LEGAL EDUCATION, EVIDENCE IN FLORIDA* §§ 4.56-.58 (1971).

72. *Arkin Constr. Co. v. Simpkins*, 99 So.2d 557 (Fla. 1957).

in *Autrey v. Carroll*,⁷³ a reading of the majority and dissenting opinions leads to the conclusion that the court's majority sanctioned the use of an expert's own testimony as part of a hypothetical question put to him. On appeal, the Supreme Court of Florida held that such an opinion was impermissible.⁷⁴ The facts involved an automobile accident reconstruction in which an expert had already testified to estimated speed and reaction time. The hypothetical question asked whether one automobile had altered its course more than a "reaction" distance from the point of impact. The question was found to be impermissible due to the use of the witness' own testimony in the hypothetical question, which assumed facts not properly in evidence for this purpose. Practically, the effect of this ruling seems to be that two expert witnesses will now be required to prove what counsel in *Autrey* had sought to prove with one. Whether this is conducive to the efficient administration of justice, particularly as applied to these facts, is questionable.

In *Collins v. State*,⁷⁵ a defendant responded to *Miranda* warnings by stating, "I know, I guess I will have to get a lawyer." This statement was included in a hypothetical question put to an expert witness on the issue of the defendant's sanity. The expert's responses were said to reveal the "state of mind of the appellant at the time made, as it might bear on the question of his sanity."⁷⁶

E. Procedures

Normally, depositions of expert witnesses may be admitted without the showing that is essential for the admission of other depositions.⁷⁷ In *Hall v. Haldane*,⁷⁸ a deposition of a treating physician was admitted without a showing that the witness was unavailable, even though the deposition notice did not contain a statement that it was being taken pursuant to the rules. The pivotal fact was that the defendant who objected had taken the deposition and had given the defective notice.

The cost of the expert witness' time in preparation of opinion testimony has been held taxable as costs.⁷⁹

The function of the court when expert testimony is involved has recently been restated. In *State Department of Transportation v. Myers*,⁸⁰ engineers testified to the need for condemning and taking land to an interchange. The court stated that:

We do not conceive it to be the proper function of the court to pit its judgment on highly technical engineering problems

73. 227 So.2d 697 (Fla. 3d Dist. 1969) [hereinafter cited as *Autrey*].

74. *Autrey v. Carroll*, 240 So.2d 474 (Fla. 1970).

75. 227 So.2d 538 (Fla. 3d Dist. 1969).

76. *Id.* at 539.

77. FLA. R. CIV. P. 1.390.

78. 243 So.2d 571 (Fla. 1971).

79. *Conboy v. City of Naples*, 230 So.2d 476 (Fla. 2d Dist. 1970). See FLA. STAT. § 90.231(2) (1969).

80. 237 So.2d 257 (Fla. 1st Dist. 1970).

against that of engineering experts employed for the purpose of designing state highways, structures, and facilities If expert testimony on the issue of necessity was in dispute, the court would be authorized to reconcile the conflicts and to accept that testimony deemed to be the most credible and reasonable.⁸¹

The reviewing court was careful to point out that the trial court cannot reject expert testimony unless it is so incredible, illogical, or unreasonable as to be unworthy of belief. Its ruling did not affect the corollary proposition that if the matter on which the expert testifies is within the province of the jury, the conclusions to be drawn are left to the jury.⁸²

IV. IMPEACHMENT AND OTHER FACTORS AFFECTING CREDIBILITY

Factors which affect the credibility of a witness may be brought forth in several ways.⁸³ Perhaps the most obvious way of attacking credibility is by proving that the witness has some interest in giving the particular testimony under attack. Thus, in *Sweet v. State*,⁸⁴ an investigator from the Florida Bureau of Law Enforcement had given testimony damaging to the defense. The agent denied having any romantic interest in one of the other witnesses, denied having had sexual relations with her, and denied receiving money from her. On cross-examination of the other witness, a proffer was made of testimony directly contrary to the previous statements of the agent. The reviewing court held that such cross-examination was permitted as a matter of right and mentioned that a wide range of inquiry should be permitted.

Before a witness is subject to impeachment, however, he must give testimony which is damaging to the party seeking to impeach the witness. In *Oliver v. State*,⁸⁵ the state was allowed to impeach a court witness with prior inconsistent statements before the witness had given any testimony adverse to the prosecution or favorable to the defense. The witness had claimed to know nothing, and the state attorney read the witness' sworn pretrial statements to "refresh his memory." The appellate court found the procedure erroneous.⁸⁶ The procedure in *Oliver* was distinguished by the same appellate court in *Sutton v. State*.⁸⁷ There, the court had called a witness who had "gone bad" at a pretrial hearing. The witness was impeached by testimony from the defendant's

81. *Id.* at 261.

82. *Id.*

83. See C. McCORMICK, LAW OF EVIDENCE §§ 33-47 (1954).

84. 235 So.2d 40 (Fla. 2d Dist. 1970), *cert. denied*, 239 So.2d 267 (Fla. 1970).

85. 239 So.2d 637 (Fla. 1st Dist. 1970), *rev'd on other grounds*, 250 So.2d 888 (Fla. 1971) [hereinafter cited in text as *Oliver*]. The Supreme Court of Florida agreed with the disposition of the impeachment point, *id.* at 890.

86. See also *Rankin v. State*, 143 So.2d 193 (Fla. 1962).

87. 239 So.2d 644 (Fla. 1st Dist. 1970) [hereinafter cited as *Sutton*].

first trial, and the impeachment was held to be within the court's discretion. *Sutton* seems largely based on decisions which hold that the state can impeach a witness who "goes bad." For example, in *Bogan v. State*,⁸⁸ the prosecutor was allowed to impeach a witness who had been granted immunity when he surprised the prosecutor by offering testimony which was different from his pretrial statement. Apparently, the prosecutor might also have been able to impeach the witness if he had changed his testimony to a simple failure to recall.⁸⁹

Although it is generally held that statements used to impeach a witness do not come in for the truth of the matter contained in them,⁹⁰ the rule seems to have been violated at least once recently. In *Salter v. State*,⁹¹ a robbery prosecution, the state called one eyewitness while the defendant took the stand and called two alibi witnesses. The state cross-examined the defendant and one of the alibi witnesses regarding statements made by the other alibi witness. The witness who had made the statements did not testify. In a per curiam opinion, the procedure was held to be harmless. It seems that the statements must have come in for their truth, and if so, it seems that this decision represents an example of the law of evidence being transmogrified by the "harmless error" statute.⁹²

The statements admitted in *Salter* also lacked a predicate necessary for admission. This requirement was reiterated in *Merrill v. State*.⁹³ In *Merrill* a hotel manager testified that he did not know that bookmaking was going on at the hotel. On rebuttal, the state sought to impeach the manager by showing that he had made prior inconsistent statements about his knowledge of the bookmaking. The reviewing court held that this procedure was impermissible because no predicate had been laid on the prior examination of the witness sought to be impeached.⁹⁴

Impeachment during the presentation of rebuttal testimony is, of course, permissible. In a civil suit for assault and battery, the defendant pleaded the affirmative defense of self-defense. Rebuttal evidence which showed that the plaintiff was missing a thumb at the time of the altercation was held acceptable. This evidence was introduced to disprove the defendant's version that plaintiff had attacked him by choking him with both hands at the throat. The evidence was admitted, not in sup-

88. 226 So.2d 110 (Fla. 2d Dist. 1969).

89. See *Beckton v. State*, 227 So.2d 223 (Fla. 1st Dist. 1969), discussed in Part II *supra*.

90. C. McCORMICK, LAW OF EVIDENCE § 39 (1954).

91. 226 So.2d 230 (Fla. 4th Dist. 1969) [hereinafter cited as *Salter*].

92. FLA. STAT. § 924.33 (1969).

93. 228 So.2d 305 (Fla. 3d Dist. 1969), *cert. dismissed*, 239 So.2d 825 (Fla. 1970).

94. A foundation or predicate is required by FLA. STAT. § 90.10 (1969). This requirement is also a part of the general common law of evidence. C. McCORMICK, LAW OF EVIDENCE § 37 (1954).

port of the plaintiff's case in chief, but in rebuttal of the defendant's affirmative defense.⁹⁵

An expert witness may be impeached by a showing of an inconsistent expert opinion. Thus, in *Langston v. City of Miami Beach*,⁹⁶ the "value" testimony of the plaintiff's expert witness in an eminent domain proceeding was held impeachable by other "value" testimony which was "given at another time and place."⁹⁷

A witness may also be impeached by a showing of a conviction of a crime.⁹⁸ The Florida view is that the conviction need not be for an "infamous" crime or even for a crime involving "moral turpitude."⁹⁹ Thus, the showing that a witness to a traffic accident has been convicted of assault and battery has been permitted.¹⁰⁰ It has also been recognized that a comment by the prosecutor that the defendant had "spent the better part of his life in jail" was prejudicial despite the fact that the defendant had admitted two felony convictions and numerous arrests for drunkenness.¹⁰¹

In *Haslett v. State*,¹⁰² the defendant made three different statements regarding a shortage of funds in the county clerk's office. The court held that the statements were admissible and were not impeachment. The court stated that:

The evidence was used to show inconsistent statements on Haslett's part and to show guilty knowledge. In three instances he had stated he took the money represented by the three checks to cover the missing funds, but the checks were drawn on March 6th and 7th and he said the funds were not missing until March 8th.¹⁰³

It seems that the versions were being used for impeachment, but the court refused to characterize the testimony as impeachment since such a characterization would prevent the statements from being received for the truth of the matters contained therein.¹⁰⁴

Another impeachment decision which is consistent with the weight of authority is *Yanzito v. Wagner*.¹⁰⁵ The plaintiff in that case had been involved in an automobile accident and offered one version of testimony on direct and gave another version on cross which was at some variance with his prior deposition. On redirect examination, it was held to be proper to refuse the plaintiff's request to read the deposition to

95. *Johns v. Ford Motor Credit Co.*, 226 So.2d 403 (Fla. 1st Dist. 1969).

96. 242 So.2d 481 (Fla. 3d Dist. 1971).

97. *Id.* at 483.

98. C. MCCORMICK, LAW OF EVIDENCE § 43 (1954).

99. C. ALLOWAY, FLORIDA EVIDENCE CASEBOOK pt. II, 22 (1971).

100. *See Franklin v. Dade County*, 230 So.2d 730 (Fla. 3d Dist. 1970).

101. *Fitzgerald v. State*, 227 So.2d 45 (Fla. 3d Dist. 1969).

102. 225 So.2d 186 (Fla. 2d Dist. 1969).

103. *Id.* at 192.

104. *See* notes 90-91 *supra* and accompanying text.

105. 244 So.2d 761 (Fla. 1st Dist. 1971).

the jury even though it "more accurately expressed the recollection of the minor plaintiff."¹⁰⁶ The deposition would seem to be inadmissible under any of the rules governing depositions.¹⁰⁷ It certainly was not proper impeachment, and even if it were, the deposition should not have been read to the jury to show the truth of the matters it contained after the deponent had testified and was available to testify again.

V. COMPETENCY AND PRIVILEGES

A. *Children*

"When a child of tender years is offered as a witness, it is the court's duty, and its general practice, to examine the child to ascertain his competence to testify."¹⁰⁸ In *Miller v. State*,¹⁰⁹ a child of seven years, who "didn't know what was meant by swearing on the Bible,"¹¹⁰ was not allowed to testify. Although the point was not assigned as error, and the appellate court did not pass on it, it appears that the inquiry into the child's competency to testify was inadequate.¹¹¹ Another child witness, a ten-year-old, was called in *Grech v. State*.¹¹² The witness prefaced her statements with "I think" or "I believe." It was held that she did not offer speculative or uncertain testimony and was otherwise competent to testify.

A rule was also established concerning the testimony of adult children in a divorce proceeding. The District Court of Appeal, Fourth District, held that a trial court's refusal to force a couple's twenty-three-year old son to respond to questions about an allegedly meretricious relationship of his father was error. The rule appears to be that the testimony of adult children must be admitted in a divorce action if the testimony is relevant, noncumulative, and otherwise admissible.¹¹³

B. *Settlement Offers*

Offers to compromise or settle claims are generally excluded on the basis of a strong public policy favoring out of court settlements.¹¹⁴ During the survey, the strength of this prohibition was reaffirmed. In an action by a bus passenger against a county bus operator, evidence of a settlement with another bus passenger came in and an objection was made. The trial court sustained the objection and instructed the jury

106. *Id.* at 762.

107. FLA. R. CIV. P. 1.280-1.340.

108. C. ALLOWAY, FLORIDA EVIDENCE CASEBOOK pt. II, 3 (1971).

109. 233 So.2d 448 (Fla. 1st Dist. 1970).

110. *Id.* at 449.

111. See *Bell v. State*, 93 So.2d 575 (Fla. 1957). "The prime test of testimonial competency of a young child is his intelligence rather than his age. In addition the witness should possess some obligation to tell the truth." *Id.* at 577.

112. 243 So.2d 216 (Fla. 3d Dist. 1971), *cert. denied*, 247 So.2d 439 (Fla. 1971).

113. *Spencer v. Spencer*, 242 So.2d 786 (Fla. 4th Dist. 1971), *cert. denied*, 248 So.2d 169 (Fla. 1971).

114. *Jordan v. City of Coral Gables*, 191 So.2d 38 (Fla. 1966).

to disregard the statement. Later in the same trial, a county investigator testified that he had admitted liability during settlement negotiations. The statement was admitted, but later stricken, and the jury was admonished to disregard it. On appeal, it was held that the cautionary instructions did not cure the error. Strong public policy keeps these matters out of the realm of the jury's deliberative knowledge. Hence, the verdict was not reached in a "laboratory atmosphere" uncontaminated by matters which public policy keeps out.¹¹⁵

In a suit on a marine insurance policy, the insurer attempted to discover facts involved in a settlement of a claim against the manufacturer of an insured yacht. It was held that such negotiations were beyond the scope of discovery and that admission of such evidence was "generally not permitted."¹¹⁶ Apparently, however, this doctrine of exclusion has no application in criminal proceedings. In *Sweet v. State*,¹¹⁷ an investigator from the Florida Bureau of Law Enforcement was allowed to testify that a defendant charged with murder in the first degree had offered to plead guilty to some lesser crime. Allowing this testimony seems indefensible if one recalls the congestion in the criminal courts. The public policy favoring "plea bargaining" would appear to be at least as strong as the policy favoring settlement of tort claims. Further, there seems to be no ground for admitting this evidence in a criminal proceeding unless the defendant takes the stand to deny his guilt.¹¹⁸

C. Psychiatrists and Psychologists

Psychiatrists and psychologists have a statutory privilege to protect their confidential professional communications with their patients.¹¹⁹ The breadth of this privilege was tested twice during the period under survey. In *Yoko v. Lindsley*,¹²⁰ discovery was sought from a treating psychiatrist.¹²¹ In denying discovery, the court held that the fact that plaintiff had introduced the element of mental suffering in her claim for damages did not automatically invite inquiry into all past communications with her psychiatrist. The burden was placed on the party seeking to depose the psychiatrist to demonstrate that the plaintiff's mental condition had, in fact, been introduced. Inquiry is thus limited by the relevancy of the material being sought, and protective orders may be imposed.¹²² The privilege for psychiatrist-patient communications is more

115. *Dade County v. Clarkson*, 240 So.2d 828 (Fla. 3d Dist. 1970).

116. *Liberty Mut. Ins. Co. v. Flitman*, 234 So.2d 390 (Fla. 3d Dist. 1970).

117. 235 So.2d 40 (Fla. 2d Dist. 1970), *cert. denied*, 239 So.2d 267 (Fla. 1970).

118. *Cf. Harris v. New York*, 91 S. Ct. 643 (1971). *But cf. State v. Galasso*, 217 So.2d 326 (Fla. 1968); *Young v. State*, 234 So.2d 341 (Fla. 1970). *See Note*, 25 U. MIAMI L. REV. 531 (1971).

119. FLA. STAT. § 90.242 (1969) and FLA. STAT. § 490.32 (Supp. 1970). *See also* section XIII *infra*.

120. 248 So.2d 187 (Fla. 4th Dist. 1971).

121. For a discussion of the importance of the distinction between treating and examining physicians, see C. MCCORMICK, LAW OF EVIDENCE §§ 266-67 (1954).

122. *See* FLA. R. CIV. P. 1.310(b).

strictly controlled in criminal proceedings. The Florida rules of criminal procedure control the procedure for pleading defenses of mental condition and for appointing psychiatric examiners.¹²³ Thus, a psychiatrist appointed to examine a rape defendant has been granted a limited privilege to refuse disclosure of communications at trial. The District Court of Appeal, Third District, has stated that: "It is not proper for a psychiatrist to repeat at trial the interrogation of the accused taken during his mental examination. To do so may be error."¹²⁴

The scope of the information available to the psychiatrist and its later admission at trial attracted the attention of the Supreme Court of Florida in *Parkin v. State*.¹²⁵ In that case, a criminal defendant interposed the defense of insanity, and the trial court appointed two experts to examine the defendant. At the hearing before the psychiatrists, the defendant sought to invoke his fifth amendment privilege against self-incrimination. The trial court ordered the defendant to cooperate under pain of having his evidence of insanity excluded at trial. On appeal, the supreme court affirmed the trial court and held that the experts appointed under this rule are neutral experts, and therefore, may be examined by both sides. In some interesting dicta, the court stated that if a defendant makes admissions and is subsequently found sane, the admissions may be used by the prosecution if the matters are opened up by the defendant. The court also stated that the statements obtained from the patient are evidence of mental condition only and are not evidence of the factual truth of the matters contained therein. These two statements of dicta seem to contain some degree of internal inconsistency.

D. Attorney-Client

The problem of the attorney who becomes a witness for his client arose twice during the period under survey. In *Hubbard v. Hubbard*,¹²⁶ the court held that an attorney who testified for his client in a divorce proceeding was not entitled to an attorney's fee. Such a course of conduct was held to be a breach of Canon 19.¹²⁷ Another case held that an attorney who becomes a witness loses his right to a fee under a contingent fee contract.¹²⁸

In *Schetter v. Schetter*,¹²⁹ an attorney taperecorded a conversation

123. See FLA. R. CRIM. P. 1.210. See also FLA. STAT. § 90.242 (1969); FLA. STAT. § 490.32(2)(a) (Supp. 1970); FLA. STAT. § 909.17 (1969).

124. *Richardson v. State*, 248 So.2d 530, 531 (Fla. 3d Dist. 1971). Query—whether the inclusion of the phrase, "may be error," is significant?

125. 238 So.2d 817 (Fla. 1970), cert. denied, 91 S. Ct. 1189 (1971).

126. 233 So.2d 150 (Fla. 4th Dist. 1970). [Subsequent to the period under survey, the Supreme Court of Florida took what appears to be a contrary position in *Hill v. Douglass*, No. 41,241 (Fla. filed March 1, 1972), rev'g 248 So.2d 182 (Fla. 1st Dist. 1971).]

127. ABA CANONS OF PROFESSIONAL ETHICS No. 19.

128. *Hill v. Douglass*, 248 So.2d 182 (Fla. 1st Dist. 1971), rev'd, No. 41,241 (Fla. filed March 1, 1972).

129. 239 So.2d 51 (Fla. 4th Dist. 1970).

with a defendant. At the end of the conversation the attorney told the defendant that he had recorded the conversation. However, the attorney, without the defendant's permission, subsequently gave the recording to a psychiatrist to determine the defendant's mental condition. The attorney-client privilege was held applicable, and the court stated the rule that it is error to permit a third party to give expert testimony based on a recording of a communication if the original communication is privileged.

This privilege of the communication is not absolute, however. It has been held that an attorney may reveal communications with a client when the attorney has been accused of wrongful conduct. The revelation may be made when the information sought is necessary to determine whether an attorney's conduct was wrongful.¹³⁰

In a case which defies classification, a facet of the attorney-client privilege was discussed. In *Grand Union Co. v. Patrick*,¹³¹ an insured's report to his insurer was held privileged. Since the purpose of the report was to aid the defense of an impending suit, it had the effect of a communication between attorney and client. The effect of this decision may be to extend protection to a communication which one reasonably believes will be relayed to an attorney who is preparing for a suit. However, this type of report also bears a generic resemblance to the protected accident report.¹³²

E. Work Product

The work product doctrine originated in the leading case of *Hickman v. Taylor*.¹³³ Since the doctrine's birth, it has become the source of a number of distinct evidentiary privileges unrelated to its attorney-client genesis. During the period under survey, the protection of the privilege was apparently extended to police officers.¹³⁴

The work product doctrine also took on a new dimension in the area of eminent domain proceedings. The District Court of Appeal, Second District, held that an appraiser, hired by an attorney for a condemnee, could not be deposed and examined at trial as his findings were part of the attorney's work product.¹³⁵ The district court certified the question as one of great public interest in light of a previous decision permitting discovery of similar information gained by the condemnor.¹³⁶ On review, the Supreme Court of Florida held that the work product

130. *Wilson v. Wainwright*, 248 So.2d 249 (Fla. 1st Dist. 1971). The attorney involved was a public defender. Therefore, the rule may be extended to court-appointed counsel.

131. 247 So.2d 474 (Fla. 3d Dist. 1971).

132. FLA. STAT. §§ 317.171, 186.08 (1969), discussed in section IX *infra*.

133. 329 U.S. 495 (1947). The doctrine was adopted in Florida in 1949 in *Atlantic C.L. R.R. v. Allen*, 40 So.2d 115 (Fla. 1949).

134. *Darrigo v. State*, 243 So.2d 171 (Fla. 2d Dist. 1971). Although the court used the term "policeman's work product," it is submitted that there really is no such thing, and the term was coined as a convenient way to limit discovery of the policeman's personal notes. See *Dade County v. Monroe*, 237 So.2d 598 (Fla. 3d Dist. 1970).

135. *Carlson v. Pinellas County*, 227 So.2d 703 (Fla. 2d Dist. 1969).

136. *Shell v. State Road Dept.*, 135 So.2d 857 (Fla. 1962).

of the condemnee was not discoverable in the absence of an attempt by the condemnee to discover the work product of the condemnor.¹³⁷ The supreme court intimated that the work product would be discoverable if discovery was mutual. Such mutual discovery in an eminent domain proceeding was undertaken and upheld in *Corbett Motor Supply, Inc. v. City of Orlando*.¹³⁸ Thus the rule of mutuality of discovery seems firmly established in the area of eminent domain.

In *Surf Drugs v. Vermette*¹³⁹ the court further defined the scope of the work product exception from discovery. The Supreme Court of Florida held that a deponent may be required to respond with names and addresses of persons having relevant information and to state generally what that information is.

The criminal law field also yielded a decision defining the scope of discovery of an attorney's work product. In *State v. Gillespie*,¹⁴⁰ permissible discovery by the defense was held to include the prosecution's work product if the work product is actually evidence and not merely summaries or condensations of evidence.

F. Immunity from Prosecution

Florida Statutes section 932.29 (1969) allows the grant of immunity from prosecution for the purpose of gaining evidence for the prosecution of other offenders. During the period under survey, the Supreme Court of Florida overruled a line of cases which held that section 932.29 could protect witnesses from loss of employment or a government license.¹⁴¹ In *Headley v. Baron*,¹⁴² the court held that the statute covered only immunity from prosecution and did protect against a police captain's suspension from employment. Following this decision, the District Court of Appeal, Fourth District, held that the grant of immunity does not prevent a real estate board from revoking a witness' real estate license.¹⁴³

G. Informers

The identity of an informer who furnishes information about the commission of a crime is generally privileged.¹⁴⁴ This privilege is undoubtedly based on the practical view that without it, few, if any, informers would come forward. An exception to this privilege was recognized

137. *Pinellas County v. Carlson*, 242 So.2d 714 (Fla. 1971).

138. 245 So.2d 93 (Fla. 4th Dist. 1971).

139. 236 So.2d 108 (Fla. 1970). See also FLA. R. CIV. P. 1.280(b).

140. 227 So.2d 550 (Fla. 2d Dist. 1969). See also FLA. R. CRIM. P. 1.220.

141. *State Bd. of Architecture v. Seymour*, 62 So.2d 1 (Fla. 1952); *Hotel & Restaurant Comm'n v. Zucker*, 116 So.2d 642 (Fla. 3d Dist. 1959); *State Beverage Dept. v. Zucker*, 116 So.2d 640 (Fla. 3d Dist. 1959).

142. 228 So.2d 281 (Fla. 1969). But see *Englander v. State*, 246 So.2d 746 (Fla. 1971) (waiver of immunity by county official under charter that provides that failure to waive immunity results in loss of job is deemed to be an involuntary waiver).

143. *Roose v. Florida Real Estate Comm'n*, 239 So.2d 510 (Fla. 4th Dist. 1970).

144. *Treverrow v. State*, 194 So.2d 250 (Fla. 1967); *Garcia v. State*, 110 So.2d 709 (Fla. 2d Dist. 1959).

in *Monserate v. State*.¹⁴⁵ In that case, dealing with the sale and possession of dangerous drugs, the defendant took the stand and directly denied having drugs. Since the informer had been with a police detective at the time of the alleged sale, the court ordered that the informer's name be produced. Therefore, the rule of this case would seem to be limited to situations where an informer is present during a transaction which results in a fact particularly in issue.

H. *Witness Lists*

The exchange of witness lists is provided for by the Florida Rules of Criminal Procedure.¹⁴⁶ In a case which apparently also involved "creative" plaintiff selection,¹⁴⁷ a codefendant pled guilty, and the state then sought to offer him as a witness at the defendant's trial. An objection was made on the basis that the codefendant was not on the proposed witness list furnished by the state. The codefendant's plea came after the exchange of witness lists, and it was held that he should be permitted to testify. The court also mentioned that the defense knew of the codefendant's plea on the morning of the trial and had ample time to depose or interview him.¹⁴⁸

I. *"The Rule"*

The effect of invoking the rule on sequestering witnesses¹⁴⁹ has generally been to exclude witnesses from the courtroom while other witnesses are testifying. It has been suggested that the rule does not apply to parties or parents of minor parties.¹⁵⁰ In *Pieze v. State*,¹⁵¹ however, the defense unqualifiedly invoked the rule. This invocation was held to be a waiver of the right to call witnesses still in the courtroom, including the mother of the nineteen-year-old defendant.

J. *Self-Incrimination*

A conflict had existed between the district courts of appeal of Florida on the question of whether a party in a divorce action could invoke the privilege against self-incrimination and still maintain a suit for divorce. The District Court of Appeal, Third District, had answered the question in the affirmative¹⁵² while the District Court of Appeal, Second

145. 232 So.2d 444 (Fla. 3d Dist. 1970).

146. The exchange of witness lists and the sanctions for failure to exchange lists are covered by the Florida Rules of Criminal Procedure. See FLA. R. CRIM. P. 1.220; FLA. STAT. § 906.29 (1969).

147. *Miranda v. State*, 237 So.2d 228 (Fla. 3d Dist. 1970).

148. The decision seems to assume that hasty preparation is the norm, and its logical result might be to encourage it. Query—could the defense really have gotten "same day service" on such a deposition?

149. See *Robinson v. State*, 80 Fla. 736, 87 So. 61 (1920).

150. C. ALLOWAY, *FLORIDA EVIDENCE CASEBOOK* pt. II, 9 (1971).

151. 243 So.2d 442 (Fla. 3d Dist. 1971).

152. *Simkins v. Simkins*, 219 So.2d 724 (Fla. 3d Dist. 1969), *cert. dismissed*, 225 So.2d 916 (Fla. 1969).

District, had answered in the negative.¹⁵³ On review, the Supreme Court of Florida upheld the view of the second district.¹⁵⁴ Now a spouse who invokes the privilege against self-incrimination will have his complaint dismissed. This decision of the supreme court has been followed¹⁵⁵ in a case arising under the old "fault based" divorce statute, but the problem probably will disappear from the divorce area with the advent of "no fault" divorce. The rule seems applicable to other situations, however, and it appears that a plaintiff or defendant who invokes the privilege against self-incrimination may still have his claim or counterclaim dismissed.

K. Insurance

Since the decision of *Shingleton v. Bussey*,¹⁵⁶ which permitted direct action against an insurance carrier and *Beta Eta House Corp. v. Gregory*¹⁵⁷ which permitted severance for separate trials, the problem of the admissibility of insurance limits has been a continuing feature of the Southern Reporter Advance Sheets. Before *Shingleton* and *Beta Eta*, it was comparatively well settled that such evidence was inadmissible and that its admission constituted reversible error.¹⁵⁸ In fact, *Beta Eta* intimated that its admission would still be error.¹⁵⁹ Cases decided since *Shingleton* and *Beta Eta*, indicate that these rules regarding the mention of insurance are still in force. However, in *Sutton v. Gomez*,¹⁶⁰ an inquiry of a venireman on voir dire about interest in insurers elicited a defense motion for a mistrial. The motion was held properly denied, and the grant of a new trial on this basis was reversed.

In *Vilford v. Jenkins*,¹⁶¹ the court held that *Shingleton* gives the plaintiff the right to discover the name of the defendant's malpractice carrier. In *Porto v. Khan*,¹⁶² the district court refused to review on certiorari the grant of a mistrial for the mention of insurance. Although the decision could be explained on procedural grounds, it appears to have substantive overtones. In *Futch v. Josey*,¹⁶³ the District Court of Appeal, Second District, held that the admission of insurance policy limits is

153. *Minor v. Minor*, 232 So.2d 746 (Fla. 2d Dist. 1970).

154. *Minor v. Minor*, 240 So.2d 301 (Fla. 1970).

155. *Simonet v. Simonet*, 241 So.2d 720 (Fla. 4th Dist. 1970). See Fla. Laws 1971, ch. 71-241, amending FLA. STAT. §§ 61.011, 61.021, 61.031, 61.061, 61.071, 61.08, 61.09, 61.10, 61.11, 61.12, 61.13, 61.14, 61.16, 61.17, 61.18, 61.19 (1969); adding FLA. STAT. §§ 61.043, 61.044, 61.052; repealing FLA. STAT. §§ 61.041, 61.042, 61.051, 61.15 (1969).

156. 223 So.2d 713 (Fla. 1969).

157. 230 So.2d 495 (Fla. 1st Dist. 1970), *aff'd*, 237 So.2d 163 (Fla. 1970).

158. *Carls Markets, Inc. v. Meyer*, 69 So.2d 789 (Fla. 1953).

159. At least the district court opinion so stated. See note 157 *supra*.

160. 234 So.2d 725 (Fla. 2d Dist. 1970).

161. 240 So.2d 68 (Fla. 2d Dist. 1970).

162. 242 So.2d 174 (Fla. 1st Dist. 1970).

163. 247 So.2d 491 (Fla. 3d Dist. 1971). *Millitello v. Guest*, 248 So.2d 662 (Fla. 2d Dist. 1971) seems to hold the same thing. Subsequent to the submission of this survey two cases have been decided indicating that the error may be harmless. *Stecher v. Pomeroy*, 253 So.2d 421 (Fla. 1971); *Josey v. Futch*, 254 So.2d 786 (Fla. 1971).

reversible error. In light of the previous decisions, it appears that direct action against an insurer in Florida operates as a device to promote discovery, and that the mention of insurance at a trial on the merits may still be an invitation to a mistrial.

L. Identification of Persons

Identification of persons and bodies seems to present unique problems closely related to competency and privileges. It has been recognized that the identification of a body by a near relative is not a preferred means of proving identity at trial.¹⁶⁴ One decision, while citing with approval the doctrine that it is prejudicial to allow members of a decedent's family to identify the deceased at trial, also held that the state need not demonstrate to the court that no other witnesses, save members of the family, are available before allowing a family member to make the identification.¹⁶⁵ A related case held that it was not error to allow the mother of a rape prosecutrix to present evidence showing "outcry."¹⁶⁶ *Abram v. State* seems to go the farthest in this direction.¹⁶⁷ In *Abram* the defense had offered to stipulate to the identity of a decedent. The victim was identified by a brother and the refusal to stipulate was upheld. The court mentioned that the prosecution could not be deprived of the "legitimate moral force" of its evidence. This holding seems at variance with the previous rule on family member identifications and seems particularly deleterious when identity is not actually at issue.

Regardless of who makes the identification, some predicate establishing that the witness knew the identity of a decedent is essential. Thus, in *Terzado v. State*,¹⁶⁸ the court held that testimony concerning the identity of a decedent had to be predicated upon some showing that the witness saw or recognized the body or identified the deceased by other means. For purposes of identification, testimony which merely states the name of the victim was held insufficient. *Murphy v. State*¹⁶⁹ goes further and holds that identification of a victim requires more of a predicate than a simple statement that the witness had knowledge of the deceased's identity. Some of the additional requirements may be gleaned from *Ricks v. State*,¹⁷⁰ where the court held that the predicate for identification of a patient by a physician could be proved by circumstantial evidence. The court stated that: "[i]dentity may be shown by other facts and circumstances."¹⁷¹

164. *Ashmore v. State*, 214 So.2d 67 (Fla. 1st Dist. 1968); *Hathaway v. State*, 100 So.2d 662 (Fla. 3d Dist. 1958).

165. *Furr v. State*, 229 So.2d 269 (Fla. 2d Dist. 1970).

166. *Roundtree v. State*, 229 So.2d 281 (Fla. 1st Dist. 1970), *appeal dismissed*, 242 So.2d 136 (Fla. 1970).

167. 242 So.2d 215 (Fla. 1st Dist. 1971), *cert. denied*, 245 So.2d 870 (Fla. 1971). On stipulations generally, see *Arrington v. State*, 233 So.2d 634 (Fla. 1970).

168. 232 So.2d 232 (Fla. 4th Dist. 1970).

169. 240 So.2d 854 (Fla. 4th Dist. 1970).

170. 242 So.2d 763 (Fla. 3d Dist. 1971).

171. *Id.* at 765.

VI. RELEVANCY AND MATERIALITY

A. *Materiality*

Although the distinction between relevancy and materiality is often hard to draw, certain problems more clearly fall into one category rather than the other. McCormick defines materiality in a negative manner.

If the evidence is offered to prove a proposition which is not a matter in issue nor probative of a matter in issue, the evidence is properly said to be immaterial.¹⁷²

The matters in issue are generally defined by the pleadings.¹⁷³ Therefore, what is material is generally determined by what can be proven under a given set of pleadings. In addition, the fact that an issue may be tried with the consent of the parties does not automatically make that issue material. In *Worth Insurance Co. v. Gammons*,¹⁷⁴ the trial court struck the defendant's affirmative defense of lack of consent required by the insurance policy. Nevertheless, evidence of the consent came in. This evidence was held to be "irrelevant and immaterial" because it did not create an issue tried with the express or implied consent of the parties.¹⁷⁵

In *Lisbon Holding & Investment Co. v. Village Apartments Inc.*,¹⁷⁶ evidence of latent defects in the property which was the subject of the suit was held to have been properly excluded when no allegation of fraud was made with respect to the quality or condition of the premises. The court also noted that the plaintiff had made an inspection of the property which would tend to be inconsistent with any allegation of fraud.

In a slightly different vein, evidence of the vicious nature of the victim of a murder was held properly excluded until the defendant made some showing of self-defense.¹⁷⁷

Evidence of the profits of a closely held corporation was admitted in a tort action commenced by one of the owners. Apparently, the evidence was held harmless because the corporation's loss of earnings was not a part of the plaintiff's damage claim.¹⁷⁸ If the corporation's earnings were not a part of the damage claimed, it would seem that the evidence was immaterial.

B. *Relevancy*

1. GENERALLY

Relevance, according to McCormick, "is probative worth."¹⁷⁹ Logically then, something which tends to prove a proposition which is at

172. C. McCORMICK, LAW OF EVIDENCE § 152, at 315 (1954). See also *Simon v. Simon*, 235 So.2d 540 (Fla. 3d Dist. 1970).

173. C. McCORMICK, LAW OF EVIDENCE § 152, at 315 (1954).

174. 228 So.2d 127 (Fla. 1st Dist. 1969).

175. See FLA. R. CIV. P. 1.190(a).

176. 237 So.2d 197 (Fla. 3d Dist. 1970).

177. *Williams v. State*, 238 So.2d 137 (Fla. 1st Dist. 1970).

178. *Inter-American Transp. Equip. Co. v. Frank*, 227 So.2d 699 (Fla. 3d Dist. 1969).

179. C. McCORMICK, LAW OF EVIDENCE § 151, at 314 (1954).

issue under the pleadings, *i.e.*, materiality, might still be irrelevant if it does not prove the proposition well enough. Perhaps the best example of such evidence was the statement by a doctor that a certain person's breath smelled of alcohol.¹⁸⁰ The evidence was held insufficient to prove intoxication because the doctor admitted that "one beer smells like twenty."¹⁸¹ However, that evidence, though material, was irrelevant since it tended to prove intoxication, but not well enough to be relevant.

Many other evidence rulings do not fit neatly into either the relevancy or materiality category. For convenience, they have been grouped under "general relevancy," but the reader with a pedantic bent is urged to attempt to distinguish between relevancy and materiality. A case which reflects this blurred distinction is *City of Miami v. City of Coral Gables*.¹⁸² There, evidence of the amount of pollutants from other sources was not admitted in a suit to enjoin the operation of a city incinerator. On remand, after finding that the incinerator constituted a nuisance, the trial court refused a proffer of a plan to abate the nuisance.¹⁸³ On appeal a second time, the District Court of Appeal, Third District, stated that "[t]he proposed evidence and proffer did not tend to abate the nuisance and it was appropriate for the trial court to deny same."¹⁸⁴

In *Brevard County v. Jacks*,¹⁸⁵ it was held error to exclude a photograph of a sign which stated: "Swim at Your Own Risk." The photograph was said to be relevant to prove compliance with the defendant's duty to warn of a dangerous condition. In another action, the pleadings initially admitted ownership of a motor vehicle, but a subsequent amendment sought to make an issue of ownership. The trial court had refused a proffer of a title certificate, but the cause was remanded for a "full day in court."¹⁸⁶ In another case, notes found on the person of a defendant which were written by a decedent were admitted over the defendant's objection.¹⁸⁷ The rationale for admission was that "circumstances cloaked the note with sufficient relevancy to support its entry for the purpose described [to show] what the [defendant] had on his person at the time of arrest."¹⁸⁸ Here the relationship seems tenuous if it was, in fact, the only reason militating toward admission of the notes.

In *Dixon v. State*,¹⁸⁹ alibi evidence was held to be admissible for jury consideration even though it fell "short of complete proof of absolute impossibility of the accused's presence at the alleged time and place of

180. *Rivers v. Conger Life Ins. Co.*, 229 So.2d 625 (Fla. 4th Dist. 1969).

181. *Id.* at 628.

182. 233 So.2d 7 (Fla. 3d Dist. 1970).

183. *See City of Miami v. City of Coral Gables*, 240 So.2d 499 (Fla. 3d Dist. 1970).

184. *Id.* at 500. Query—how can evidence abate a nuisance?

185. 238 So.2d 156 (Fla. 4th Dist. 1970).

186. *Skroh v. Newby*, 237 So.2d 548, 552 (Fla. 1st Dist. 1970).

187. *Williams v. State*, 228 So.2d 377 (Fla. 1969).

188. *Id.* at 379.

189. 227 So.2d 740 (Fla. 4th Dist. 1969).

the act."¹⁹⁰ In so holding, the District Court of Appeal, Fourth District, rejected a jury instruction which provided that "[t]he proof of an alibi, to be sufficient, must include and cover the entire time when the presence of an accused was required to commit the offense charged."¹⁹¹

In *Grissom v. State*,¹⁹² a psychiatrist's testimony which supported a mental attitude of the defendant which was insufficient to meet the *McNaughton* test of insanity¹⁹³ was held to have been properly excluded. But in *Megill v. State*,¹⁹⁴ a prosecutor's references to the child of a meretricious relationship were held proper because they were relevant to the issue and the element of premeditation in a prosecution for first degree murder.

It is clearly proper to move to strike irrelevant testimony.¹⁹⁵ In *Harris v. State*,¹⁹⁶ the defendant in a first degree murder prosecution had his entire testimony stricken since the testimony did not relate to the commission of the crime and, in fact, pertained to matters unrelated to the crime charged.

2. SIMILAR OCCURRENCES AND HABIT

In what appears to be a case of first impression in Florida, the District Court of Appeal, Fourth District, has held that evidence of prior claims is not admissible when it is irrelevant to the particular claim being litigated. In *Zabner v. Howard Johnson's, Inc.*,¹⁹⁷ the defendant unsuccessfully sought to introduce evidence of fifteen previous claims by the plaintiff (nine of which were for personal injury) to show that the plaintiff was "litigious." This rejection of unrelated claims comports with the general rule rejecting such evidence.¹⁹⁸ In *Williams v. State*,¹⁹⁹ however, a robbery victim was permitted to testify that he had been robbed three or four times in a two year period. The ruling seems questionable and highly prejudicial. The only thing such evidence might prove was that the witness was an expert victim. Clearly, the harmful nature of the testimony would outweigh any probative value that it might have had.²⁰⁰

In the area of tax assessments, it has been held that each year's tax assessment must rest on its own bottom, and therefore, a subsequent year's tax assessment is inadmissible in an action challenging a prior year's assessment.²⁰¹

190. *Id.* at 743.

191. *Id.* at 741.

192. 237 So.2d 57 (Fla. 3d Dist. 1970).

193. For a discussion of the *McNaughton* rule and its effectiveness in Florida, see *Campbell v. State*, 227 So.2d 873 (Fla. 1969), *cert. dismissed*, 400 U.S. 801 (1970).

194. 231 So.2d 539 (Fla. 3d Dist. 1970).

195. *Platt v. Rowand*, 54 Fla. 327, 45 So. 32 (1907).

196. 236 So.2d 135 (Fla. 1st Dist. 1970).

197. 227 So.2d 543 (Fla. 4th Dist. 1969).

198. C. McCORMICK, *LAW OF EVIDENCE* § 163 (1954).

199. 235 So.2d 13 (Fla. 1st Dist. 1970).

200. *See Harris v. State*, 183 So.2d 291 (Fla. 2d Dist. 1966).

201. *Hect v. Dade County*, 234 So.2d 709 (Fla. 3d Dist. 1970).

In *Railway Express Agency, Inc. v. Fulmer*,²⁰² evidence of a history of prior accidents in a certain warehouse was rejected because the details of the different accidents lacked substantial similarity. The accidents had occurred on various conveyors in the defendant's building, and the difference in conveyors was held sufficient to make the evidence inadmissible. This ruling seems to follow the well accepted general rule of *Jacksonville T. K. W. Ry. v. Peninsular Land, Transportation & Manufacturing Co.*²⁰³ Therein the court recognized that:

Former fires by the same engine are admissible as evidence tending to prove its defective condition or construction or improper management; and those put out by other engines are excluded²⁰⁴

In *White v. Seaboard C.L. R.R.*,²⁰⁵ a plaintiff proffered a survey of the average speeds at which a number of vehicles crossed the tracks of a defendant railroad to show the defendant's knowledge of the need for a signal. The evidence was held to have been properly excluded as irrelevant because the plaintiff was under a duty to stop at the railroad crossing.

In an action for damages for breach of a contract to sell real estate, a second deposit receipt agreement was proffered as reflecting on the value of the property at the time of the breach. The trial court rejected the proffer. On appeal, however, it was held that the agreement should have been admitted.²⁰⁶

A pivotal question in *General Motors Acceptance Corp. v. American Liberty Insurance Co.*²⁰⁷ was whether an insurance binder had been mailed. The agent testified that binders were always mailed, but had no recollection of a particular binder being posted. A secretary testified to substantially the same facts. In refusing to allow the admission of this type of evidence, the District Court of Appeal, First District, adopted the majority rule. The court cited the following language from *American Jurisprudence* (Second Series): "Evidence of the general habits of a person is not admissible for the purpose of showing his conduct upon a specific occasion."²⁰⁸

3. UNCHARGED CRIMES

The rules governing the admissibility of evidence of crimes other than the one with which a defendant is charged were stated in *Williams v. State*.²⁰⁹ Prior to *Williams*, exclusion had been the general rule. After

202. 227 So.2d 870 (Fla. 1969).

203. 27 Fla. 1, 9 So. 661 (1891).

204. *Id.* at 104, 9 So. at 676.

205. 227 So.2d 227 (Fla. 2d Dist. 1969).

206. *Stupner v. Cacace*, 231 So.2d 525 (Fla. 3d Dist. 1970).

207. 238 So.2d 450 (Fla. 1st Dist. 1970).

208. *Id.* at 453, quoting 29 AM. JUR. 2d *Evidence* § 303, at 349 (1969).

209. 110 So.2d 654 (Fla. 1959), *cert. denied*, 361 U.S. 847 (1959) [hereinafter cited as *Williams*].

Williams, admissibility became the rule in Florida and exclusion the exception. During the period of this survey, more than twenty cases were reported in which evidence of collateral crimes was admitted by the trial court. Despite comments such as, "[w]e look, however, with jaundiced legal eye at subsequently committed extraneous offenses,"²¹⁰ and "[g]reat diligence is required to save from extinction the rule regarding propensity [to commit crime as a basis for admitting evidence of other crimes],"²¹¹ prosecutors seem more and more inclined to introduce such evidence, and the courts seem less and less inclined to hold it inadmissible.

During the survey period, a variety of means were used to demonstrate that a defendant had committed other crimes. In *Randall v. State*,²¹² a prosecution for buying, receiving, or concealing stolen property, evidence of a theft of money orders was introduced. The state introduced two witnesses to prove the separate offense, a store owner who testified that certain money orders had been stolen, and a detective who testified that he found the money orders in the defendant's truck after arresting him on an unspecified charge. Since this evidence was inadequate to gain a conviction in a trial for theft of the money orders, the District Court of Appeal, Third District, held it inadmissible in the prosecution for receiving stolen goods. The court found it irrelevant and without probative value.

It is clear, however, that evidence of a collateral crime need not be sufficient to prove the defendant guilty of that collateral crime to be admissible at a later trial.

In *Crosby v. State*,²¹³ the principal crime charged was possession of "moonshine" and possession of distilling apparatus. A state beverage agent testified that he had arrested the defendant six years previously for operating the same type of still. The remoteness of the arrest was argued but the court held that remoteness alone is an insufficient ground for exclusion of the evidence of a collateral crime. In *Mims v. State*,²¹⁴ evidence of an attempted crime came in under the *Williams* rule. The defendant was charged with rape, and evidence that the defendant had accosted another woman in a manner similar to the crime charged was admitted even though the earlier attempt had failed.

In *Saxon v. State*,²¹⁵ a medical examiner, while testifying to the cause of an infant's death, gratuitously offered evidence that buggery had been committed on the infant. It was conceded that the abuse could not be linked to the defendant. In holding the evidence irrelevant, the District Court of Appeal, Fourth District, stated that: "[P]roof of . . . commission [of independent crimes] and of the connection of the accused on

210. *Christie v. State*, 246 So.2d 605, 608 (Fla. 2d Dist. 1971).

211. *Franklin v. State*, 229 So. 2d 892, 895 (Fla. 3d Dist. 1970).

212. 239 So.2d 81 (Fla. 2d Dist. 1970).

213. 237 So.2d 286 (Fla. 2d Dist. 1970).

214. 241 So.2d 715 (Fla. 1st Dist. 1970).

215. 225 So.2d 925 (Fla. 4th Dist. 1969).

trial therewith, must be not 'vague and uncertain', but clear and convincing."²¹⁶

The *Williams* rule has been applied to situations other than attempts at trial to prove collateral crimes. The rule has also been applied to admit a statement which contained references to another crime when there was some evidence that the previous crime had been committed.²¹⁷ Additionally, the rule has been applied to "non-crimes." In *Anthony v. State*,²¹⁸ the defendant was charged with manslaughter as a result of driving while intoxicated. On cross-examination of the defendant the state elicited evidence that the defendant had been previously hospitalized for alcoholism and "for her nerves." The hospitalizations had occurred two and one half to three years previously; thus the evidence was held inadmissible as being too remote.

Frequently the connection between the principal crime and the collateral crime is tenuous. In two connected cases, a single defendant was charged with rape and murder.²¹⁹ In the rape prosecution evidence of the murder came in to prove the defendant's identity. The crimes were connected by a circle of clothing, palm prints, a gun, and an identification by an eyewitness. Evidence of the alleged rape also was admitted in the subsequent murder prosecution where identity was not in issue. The facts, briefly stated, showed that shortly after commission of the rape the victim heard a gunshot. The accused was linked to a shooting in the same neighborhood at about the same time and the jury was allowed to use this collateral evidence to infer that the defendant had committed the rape. Another case involving a similarly tenuous link to a principal crime was *Bryant v. State*.²²⁰ In *Bryant*, evidence of a robbery committed within five days of the charge of murder was admitted. The robbery had several features similar to those involved in the alleged murder, and the robbery was committed in the same neighborhood.

In *Bogan v. State*,²²¹ a case involving two gas station robberies, evidence of the first robbery was admitted at the felony murder prosecution arising from the second robbery to prove a plan or scheme of criminality and an intent to commit a criminal act (an element of felony murder). On the other hand, evidence of other robberies which proves nothing save the propensity of an accused to commit robbery has been held inadmissible.²²²

216. *Id.* at 926, quoting *Wrather v. State*, 179 Tenn. 666, 678, 169 S.W.2d 854, 858 (1943).

217. *Dempsey v. State*, 238 So.2d 446 (Fla. 3d Dist. 1970), *cert. denied*, 240 So.2d 646 (Fla. 1970).

218. 246 So.2d 600 (Fla. 2d Dist. 1971), *cert. denied*, 249 So.2d 441 (Fla. 1971).

219. *Williams v. State*, 247 So.2d 425 (Fla. 1971) (rape); *Williams v. State*, 249 So.2d 743 (Fla. 2d Dist. 1971) (murder).

220. 235 So.2d 721 (Fla. 1970).

221. 226 So.2d 110 (Fla. 2d Dist. 1969).

222. *Franklin v. State*, 229 So.2d 892 (Fla. 3d Dist. 1970).

Perhaps *Wingate v. State*²²³ is the least defensible of the uncharged offense rulings. In *Wingate*, evidence of uncharged robberies for which the defendant had been tried and acquitted were held admissible. Additionally, evidence of the defendant's escape from a hospital prison ward was admitted. The admission of escape evidence was held erroneous but harmless, but evidence of crimes which the defendant had been acquitted of was held to be admissible as showing a "definite and ascertainable modus operandi."²²⁴ Logically, if relevancy is the test for admissibility of evidence, this evidence should have been held inadmissible since another jury had already determined that the defendant did not commit the other crimes. Also, it could be argued that the state is collaterally estopped from reopening the issue of the prior crimes. Nevertheless, the rule remains that evidence of other crimes does not become inadmissible even when the defendant has been acquitted of the other crime.²²⁵

In addition, evidence of a collateral crime committed after the principal crime is admissible at the trial of the principal crime. Thus, evidence relating to the commission of another crime later on the same day,²²⁶ the following morning²²⁷ and as long as three months after²²⁸ the principal crime have been held to be admissible.

The District Court of Appeal, Third District, has recently ruled on the shifting of the burden of proof in collateral crime situations.²²⁹ The court stated that the burden lies initially with the defendant to show a reason for exclusion. Then, if the defendant offers an objection, the burden shifts to the state to demonstrate the relevancy of the collateral crime. It has also been held that a comment on a collateral crime, if erroneously admitted, can be cured with a cautionary instruction.²³⁰ Procedurally, it should be noted that areas exist in which collateral crimes must be proven. One of these areas is a prosecution under a recidivist statute.²³¹

An additional limitation on the admissibility of collateral crimes is the requirement that the collateral crimes must remain an "incident" of the principal trial and are not to become a "feature" of the trial.²³² Florida courts have thus adopted what can be referred to as the "bulk rule." In many cases, appellate courts have looked to the number of witnesses and the percentage of trial testimony involved in introducing the evidence of a collateral crime for a guide in deciding the admissibility. In *Green*

223. 232 So.2d 44 (Fla. 3d Dist. 1970), *cert. denied*, 400 U.S. 994 (1971).

224. *Id.* at 44.

225. See also *Blackburn v. State*, 208 So.2d 625 (Fla. 3d Dist. 1968).

226. *Baker v. State*, 241 So.2d 683 (Fla. 1970).

227. *Christinie v. State*, 246 So.2d 605 (Fla. 2d Dist. 1971).

228. *Headrick v. State*, 240 So.2d 203 (Fla. 2d Dist. 1970).

229. *Franklin v. State*, 229 So.2d 892 (Fla. 3d Dist. 1970).

230. *Rivers v. State*, 226 So.2d 337 (Fla. 1969).

231. *Johnson v. State*, 229 So.2d 13 (Fla. 4th Dist. 1969).

232. *Williams v. State*, 117 So.2d 473 (Fla. 1960).

v. State,²³³ error was found where five of a total of eight witnesses testified about a collateral crime. However, in most of the "bulk rule" decisions, courts have looked to the number of pages of transcript as the telling factor. In *Fivecoat v. State*,²³⁴ testimony about a collateral crime consumed only seven pages of a 230 page transcript, and only one witness of thirteen testified to the collateral crime. Consequently, the evidence was held to have been properly admitted. In *Hines v. State*,²³⁵ testimony of a deaf mute given through an interpreter and relating to a collateral rape was admitted by the trial court. The testimony was held admissible, largely because it consumed only five of several hundred pages in a trial transcript. Finally, in *Keel v. State*,²³⁶ evidence of other robberies encompassed only fourteen pages of the transcript as opposed to fifty pages which dealt with the principal crime. There, the evidence was held admissible.

Even though the courts should "recognize the increased degree of sophistication and intelligence which the modern jury possesses for [the] assessment of evidence . . . and the arguments of counsel,"²³⁷ the *Keel* decision and a number of others seem indefensible. The current trend of decisions appears to allow proof of collateral crimes as long as the reviewing court can be convinced that the defendant is a "bad guy."²³⁸

VII. HEARSAY

A. Generally

Hearsay evidence is testimony in court or written evidence, of a statement made out of court, such statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out of court assertion.²³⁹

Definitions of hearsay are usually filled with exceptions. During the survey period, no attempts were made by the Florida courts to define hearsay. The general approach to the problems presented by the hearsay rule seems to be, "I know hearsay when I see it and this is hearsay." For

233. 228 So.2d 397 (Fla. 2d Dist. 1969). The court also noted that the state failed to tie the collateral crime to the principal crime. The state had promised to tie in the collateral crime with testimony of a ballistics expert to be called later in the trial. When called, the expert gave essentially negative testimony. Thus, the holding can be explained on this ground.

234. 244 So.2d 188 (Fla. 2d Dist. 1971).

235. 243 So.2d 434 (Fla. 2d Dist. 1971).

236. 243 So.2d 630 (Fla. 4th Dist. 1971) [hereinafter cited as *Keel*]. The author prefers Cross' dissent to the majority opinion as an exposition of what the rule in this area should be. *Id.* at 632.

237. *Wingate v. State*, 232 So.2d 44, 46 (Fla. 3d Dist. 1970), *cert. denied*, 400 U.S. 994 (1971).

238. As to the "bad guy" theory of criminal law, see Judge Mann's opinion in *Smith v. State*, 239 So.2d 284 (Fla. 2d Dist. 1970), *rev'd*, 249 So.2d 16 (Fla. 1970).

239. C. McCORMICK, *LAW OF EVIDENCE* § 225, at 460 (1954).

example, in *Hallihan v. State*,²⁴⁰ psychological testing reports made by psychologists for the use and benefit of psychiatrists in formulating a diagnosis "were clearly hearsay."²⁴¹ Yet it seems clear that these reports were not being offered to prove the truth of any particular proposition, but merely as an index of the mental condition of the person being examined. On the other hand, in *Collins v. State*,²⁴² the defendant's responses to the *Miranda* warnings were held to have been properly included in a hypothetical question to an expert witness. The statements were said to reveal the "state of mind of the appellant at the time made, as it might bear on the question of his sanity."²⁴³ The two cases seem basically irreconcilable. The fact that the speaker in *Hallihan* was not available for examination is apparently not a distinguishing factor. In *DeLaine v. State*,²⁴⁴ a photograph with the words "the victim" on the obverse was admitted, and the admission was held not to be reversible error.

Most rulings during the survey period seem to revolve around a few definite categories of hearsay exceptions which will be discussed below. However, certain decisions defy compartmentalization, and they will be treated here as a body.

In a recent opinion, hearsay concerning a deceased donor's statements made at or about the time of a certain transaction was held admissible to prove donative intent.²⁴⁵ On the other hand, testimony by a woman attempting to prove a common law marriage by using a decedent's words to show an intent to contract marriage was held inadmissible and properly stricken. In both of these cases, the statements appear to relate to the operative fact in issue, and therefore, should have been held admissible as nonhearsay.²⁴⁶

Conduct which may have been intended to articulate a belief presents additional problems with the hearsay prohibition.²⁴⁷ In *Tollett v. State*,²⁴⁸ evidence seeking to establish the consent of one party to having a telephone conversation recorded²⁴⁹ was given by a police officer who testified to the party's words and conduct. The testimony was held not to be hearsay because the officer was "not testifying as to what Davis had said, but as to the conduct of Davis."²⁵⁰ Conversely, in *John-*

240. 226 So.2d 412 (Fla. 1st Dist. 1969) [hereinafter cited as *Hallihan*].

241. *Id.* at 413.

242. 227 So.2d 538 (Fla. 3d Dist. 1969).

243. *Id.* at 539.

244. 230 So.2d 168 (Fla. 2d Dist. 1970).

245. *Sullivan v. American Tel. & Tel. Co.*, 230 So.2d 18 (Fla. 4th Dist. 1969).

246. See C. McCORMICK, LAW OF EVIDENCE § 228 (1954); 6 J. WIGMORE, EVIDENCE § 1770 (3d ed. 1940); Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 YALE L.J. 229 (1922).

247. See C. McCORMICK, LAW OF EVIDENCE § 229 (1954).

248. 244 So.2d 458 (Fla. 4th Dist. 1971).

249. See FLA. STAT. § 822.10 (1969); *Barber v. State*, 172 So.2d 857 (Fla. 1st Dist. 1965).

250. *Tollett v. State*, 244 So.2d 458, 461 (Fla. 4th Dist. 1971). This author believes that Judge Rawls' dissent states a better view.

son v. State,²⁵¹ the act of pointing out a defendant was treated as hearsay and held inadmissible in the absence of an applicable exception to the hearsay rule.

The enforcement of the *Miranda* requirements took on hearsay dimensions in two recent cases even though hearsay was not made the basis of either decision. In *Long v. State*,²⁵² an officer testified to hearing another officer read a "Miranda card" to the defendant. The other officer did not testify, and the card was not introduced. The District Court of Appeal, Third District, reversed on the ground that the requirements of *Miranda* had not been met. Yet, in *Thompson v. State*,²⁵³ the officer read the "Miranda card" into the record after testifying that he had advised the defendant of his rights from the card. In contrast, an assistant head cashier of a bank has been allowed to testify to the actions of other bank employees in searching for a certain account.²⁵⁴

Where title to realty was at issue, certain statements by a plaintiff's grantor, made at a city council meeting, were proffered.²⁵⁵ The statements related to the retention of a disputed parcel by the grantor. The court rejected the statements on two grounds: (1) the statements were found to be self-serving, and (2) the statements failed to meet the hearsay exception for "practical construction of a deed by the parties"²⁵⁶ because the statements were made prior to plaintiff's possession.

A rather esoteric hearsay problem was raised in *Brown v. State*.²⁵⁷ In *Brown*, the state asked a defense witness whether he knew if a certain prosecution witness was the father of the defendant. A hearsay objection was raised and overruled at trial, and on appeal, the objection was held to have been properly overruled. The lack of harmful error also played a part in the court's decision. In reaching its decision, the court did not consider the hearsay exception for "statements and reputation as to pedigree and family history."²⁵⁸ In any event, that particular exception would appear to have been inapplicable in this situation.

Finally, in *Pyle v. Washington County School Board*,²⁵⁹ the school board had before it certain statements about risqué remarks allegedly made by a band director in class. The reviewing court apparently felt that the statements were competent evidence although no mention of their possible hearsay character appears in the opinion.

B. Business Records

Records of transactions made in the ordinary course of business are admissible under a Business Records Act exception to the hearsay

251. 249 So.2d 452 (Fla. 4th Dist. 1971).

252. 231 So.2d 33 (Fla. 3d Dist. 1970).

253. 235 So.2d 354 (Fla. 3d Dist. 1970), *cert. denied*, 239 So.2d 828 (Fla. 1970).

254. *Clark v. State*, 229 So.2d 877 (Fla. 2d Dist. 1969).

255. *Drake v. City of Fort Lauderdale*, 227 So.2d 709 (Fla. 4th Dist. 1969).

256. *Cf. Harrison v. State*, 94 Fla. 937, 114 So. 515 (1927).

257. 230 So.2d 177 (Fla. 2d Dist. 1970) [hereinafter cited as *Brown*].

258. C. McCORMICK, *LAW OF EVIDENCE* § 297 (1954).

259. 238 So.2d 121 (Fla. 1st Dist. 1970).

rule if otherwise competent.²⁶⁰ It has been held that summaries of records may be admitted under this exception to the hearsay rule. In *Safe-T-Lawn, Inc. v. Agricultural Engineering Association*,²⁶¹ summaries "made from other records of the defendant which were not produced or introduced into evidence"²⁶² were admitted under the Business Records Act. The decision looks incorrect unless the summaries themselves were made in the ordinary course of business. Otherwise, the summaries would seem inadmissible under the rule of *Smith v. Frisch's Big Boy, Inc.*²⁶³ It has also been expressly held that business entries made a week to ten days after a transaction were not admissible under the Business Records exception to the hearsay rule, but were "merely a collection of personal notations,"²⁶⁴ since they were not contemporaneous with the transactions nor made in the regular course of business. This same rationale should apply to foreclose admission of the summaries in *Safe-T-Lawn*.

Two cases during the survey period rejected the application of the business records exception to intramural accident reports. In *Dusine v. Golden Shores Convalescent Center, Inc.*,²⁶⁵ a head nurse who had not witnessed a certain accident made out an accident report concerning the mishap. At trial, the report was denied the benefit of the business record exception, and its admission was held to be within the trial court's discretion because the report contained hearsay. In *Bowen v. Seaward Dredging Corp.*,²⁶⁶ a similar report was also rejected since it contained hearsay, but did not meet the requisites of any hearsay exception. A closely related case held warranty claims forms admissible under the statute. In *Haynes v. International Harvester Co.*,²⁶⁷ forms used by an equipment dealer to submit requests for "warranty credit" to the manufacturer were held to be business records, and therefore, within the scope of discovery. Furthermore, the court found that the forms were neither statements made in anticipation of a claim nor work product.

It has been previously established that hospital records are admissible under the business records exception.²⁶⁸ This ruling was applied in *Brevard County v. Jacks*²⁶⁹ with the qualification that not every document in a hospital regarding a particular patient qualifies as a business record.

260. FLA. STAT. § 92.36 (1969).

261. 235 So.2d 25 (Fla. 3d Dist. 1970) [hereinafter cited as *Safe-T-Lawn*].

262. *Id.* at 26.

263. 208 So.2d 310 (Fla. 2d Dist. 1968). See also C. ALLOWAY, FLORIDA EVIDENCE CASEBOOK pt. II, 34 (1971); Conrad, *Hearsay Exceptions—Business Records*, in FLORIDA BAR CONTINUING LEGAL EDUCATION, EVIDENCE IN FLORIDA § 12.5 (1971).

264. E.Z.E., Inc. v. Jackson, 235 So.2d 337, 339 (Fla. 4th Dist. 1970).

265. 249 So.2d 40 (Fla. 2d Dist. 1971).

266. 242 So.2d 151 (Fla. 3d Dist. 1970).

267. 227 So.2d 51 (Fla. 2d Dist. 1969).

268. Stettler v. Huggins, 134 So.2d 534 (Fla. 3d Dist. 1961).

269. 238 So.2d 156 (Fla. 4th Dist. 1970). In this case, evidence of hospital treatment of epilepsy which arose out of a swimming accident was admitted.

Business records were involved in two other cases decided during the survey period, even though no mention was made of the applicable statute. In *Thompson v. State*,²⁷⁰ retail price tags were admitted to prove the value of merchandise stolen in a grand larceny prosecution. In an action against an insurance agency for the negligent failure to secure insurance, the court refused to admit a letter from another agency through which a defendant agency had sought to secure insurance.²⁷¹ It was unclear who sought to introduce the letter and for what purpose, but the ground for rejection was a lack of privity which prevented the statements from becoming binding on the parties. An argument could have been made for admission on the basis of the business records statute but the facts are not sufficiently clear to determine whether the argument would have been tenable.

C. Admissions and Declarations Against Interest

In *DeLong v. Williams*,²⁷² the defense counsel in an automobile collision case read testimony to the jury which had been given by a plaintiff in support of a previous workmen's compensation claim for a similar injury. The testimony was held to be a permissible admission against interest, but was rejected because of the particular form of proof employed.²⁷³ In another automobile accident case,²⁷⁴ a plaintiff's comment made at the scene of the accident to the effect that the defendant was blameless was admitted as an admission. The contemporaneous nature of the statement suggests that it might also have been admissible as an excited utterance.²⁷⁵

The declaration against interest exception has also been applied in the criminal law field. In *Grant v. State*,²⁷⁶ a statement by the defendant to a companion was held admissible. The companion reported that: "Eddie (appellant) said that there goes the man who he robbed his store that Thursday night and so he said the man recognized him and he recognized the man because he had glasses on."²⁷⁷ The statement was clearly of a hearsay nature, but the exception for admissions by a party provided a basis for its admission. In addition, an admission made in a "jocular manner" has been held admissible. The fact that the admission was made in such a manner was held to go to weight of the evidence rather than to its admissibility.²⁷⁸

270. 249 So.2d 51 (Fla. 3d Dist. 1971).

271. *Murray M. Sheldon, Inc. v. Azif*, 230 So.2d 504 (Fla. 3d Dist. 1970).

272. 232 So.2d 246 (Fla. 4th Dist. 1970).

273. See section VII, D, *infra*.

274. *Lowe v. Shearer*, 239 So.2d 86 (Fla. 4th Dist. 1970), *cert. denied*, 240 So.2d 813 (Fla. 1970).

275. See *Custer v. State*, 159 Fla. 574, 34 So.2d 100 (1948); C. McCORMICK, LAW OF EVIDENCE § 272 (1954).

276. 240 So.2d 169 (Fla. 1st Dist. 1970).

277. *Id.* at 170.

278. *Anderson v. State*, 241 So.2d 390 (Fla. 1970).

Only one instance of an attempt to admit a declaration against interest appeared during the survey period. Normally, admissions are made by parties to the action or their privies, while declarations are made by non-parties.²⁷⁹ *Diamond v. State*²⁸⁰ presented an interesting twist. There, the petitioner sought a new trial on the ground of newly discovered evidence. The fresh evidence proffered was a statement by the driver of the car in which the defendant had been arrested for possession of marijuana. The statement, made to the arresting officer shortly after the arrest, was to the effect that the defendant did not know that contraband was in the car until the driver told him to throw it out after the police had commenced pursuit. The court held that the statement was non-admissible hearsay, and therefore not newly discovered evidence sufficient to sustain a motion for a new trial. It has been suggested that Florida has apparently taken no position on whether a declaration against a penal interest is admissible,²⁸¹ but the majority view seems to be that a monetary or proprietary interest is required and that a mere penal interest will not suffice.²⁸²

Finally, it should be noted that vicarious admissions can come in to bind parties in privity with the speaker. Thus, in *Thee v. Manor Pines Convalescent Center*,²⁸³ the statement of a person in a nurse's uniform that "milk got spilled but we mopped it up" came in to bind the nursing home.

D. Presence of the Defendant

There has been quite a bit of loose language in Florida decisions concerning statements made in the presence of a criminal defendant. Courts have admitted these statements for a variety of reasons, but there still appears to be no Florida case holding a statement admissible on this ground alone. The statements in the cases have supposedly resulted from confusion with the rules regarding admissions adopted by silence.²⁸⁴ If this is the basis of the exceptions, problems of constitutional magnitude would be presented if such statements were admitted solely on the basis of this exception.²⁸⁵ During the period of this survey this exception has been discussed in at least four cases. In *Harrolle v. State*,²⁸⁶ a state witness was cross-examined regarding statements made by a decedent about the defendant. The question was directed to a

279. C. McCORMICK, LAW OF EVIDENCE § 254 (1954).

280. 233 So.2d 418 (Fla. 4th Dist. 1970).

281. See C. ALLOWAY, FLORIDA EVIDENCE CASEBOOK pt. II, 78 (1971). But see *Atlantic C.L. R.R. v. Crosby*, 53 Fla. 400, 43 So. 318 (1907).

282. 5 J. WIGMORE, EVIDENCE §§ 1476-77 (3d ed. 1940 and Supp. 1970).

283. 235 So.2d 64 (Fla. 4th Dist. 1970).

284. Conrad, *The Hearsay Rule*, in FLORIDA BAR CONTINUING LEGAL EDUCATION, EVIDENCE IN FLORIDA § 5.2 (1971).

285. Compare *Miranda v. Arizona*, 348 U.S. 436 n.37 (1966) with *Harris v. New York*, 91 S. Ct. 643 (1971), noted in 25 U. MIAMI L. REV. 531 (1971). See also *Young v. State*, 234 So.2d 341 (Fla. 1970).

286. 235 So.2d 44 (Fla. 3d Dist. 1970).

statement by the deceased telling the defendant to keep off the deceased's property. The statement was held inadmissible as not being within the only hearsay exception discussed, *i.e.*, statements made in the presence of the defendant. It seems, however, that the statement might be admissible as a statement of the declarant's present state of mind.²⁸⁷ In *Wilkerson v. State*,²⁸⁸ statements made by a codefendant about the defendant were held inadmissible because they were not made within the presence of the defendant. Again, the ruling might have overlooked a possible ground for admitting the statement under the co-conspiracy exception.²⁸⁹

During the survey period, the District Court of Appeal, Fourth District, became the champion of a rational approach to this particular exception. In *Johnson v. State*,²⁹⁰ the act of pointing out an accused in his conscious presence was held inadmissible in a subsequent prosecution. The court specifically rejected the argument that this conduct hearsay was admissible because it transpired in the defendant's presence and stated that: "any concept that an otherwise inadmissible hearsay declaration is made admissible merely because it was stated in the presence of a party is erroneous."²⁹¹ This statement was probably an outgrowth of the Fourth District's decision in *Wakeman v. State*.²⁹² There, the evidence in question was a witness' statement to a police officer allegedly quoting a shooting victim as having stated that the defendant shot him. Initially, the statement was held admissible as a part of the *res gestae*, but on rehearing, the court retreated from that conclusion and limited its application to the particular facts of the case. The statement in *Wakeman* was made in the presence of the defendant and not denied. The court stated that as a general rule such statements are admissible, but since the defendant had been battered, intoxicated, and probably incapable of denying anything in that particular case, the statement would be inadmissible. Curiously enough, the statement was admitted as a part of the *res gestae*. However, in the process, *res gestae* was discussed as being approximately equal to the exception for excited utterances, and the "presence of the defendant" exception was approximately equated with adoptive admissions. If these views persist, at least some measure of rationality and predictability will be brought to this particular hearsay exception.²⁹³

287. See C. McCORMICK, LAW OF EVIDENCE § 268 (1954).

288. 232 So.2d 217 (Fla. 2d Dist. 1970).

289. See *Carbo v. United States*, 314 F.2d 718 (9th Cir. 1963); *Farnell v. State*, 214 So.2d 753 (Fla. 2d Dist. 1968).

290. 249 So.2d 452 (Fla. 4th Dist. 1971).

291. *Id.* at 455. Although undoubtedly correct when applied to the facts of this case, it is submitted that the statement goes too far. See *Sullivan v. McMillian*, 26 Fla. 543, 8 So. 450 (1890) and C. McCORMICK, LAW OF EVIDENCE § 247 (1954).

292. 237 So.2d 61 (Fla. 4th Dist. 1970), *cert. dismissed*, 243 So.2d 419 (Fla. 1971) [hereinafter cited as *Wakeman*].

293. But see note 285 *supra* and accompanying text.

E. Testimony Taken in a Former Proceeding

In *DeLong v. Williams*,²⁹⁴ testimony from a previous workmen's compensation action was read to the jury in an automobile collision case. The plaintiff's claims were for similar injuries. The reading of the transcript was held erroneous because the transcript was not properly authenticated by a sponsor. Apparently, the sponsor that the court had in mind was the court reporter who had transcribed the previous testimony. The presence of such a sponsor, however, is not an absolute requirement. In *Richardson v. State*,²⁹⁵ a state witness was permitted to recall a deceased witness' testimony at a preliminary hearing where no court reporter had been present, and no record of the hearing had been made. The witness had been cross-examined at the hearing, which militated toward admitting the recollection.

VIII. JUDICIAL NOTICE

"The doctrine of Judicial Notice allows courts, both trial and appellate, to take cognizance of certain facts without formal proof."²⁹⁶ During the period under survey, the courts have judicially noticed: (1) That municipal courts used suspended sentences to great advantage;²⁹⁷ (2) that riots occurred in Miami during the 1968 Republican convention;²⁹⁸ (3) that Florida's 1200 mile coastline is constantly changing;²⁹⁹ (4) that the human gestation period is nine months;³⁰⁰ (5) that the owner of a credit card tends to safeguard it against theft;³⁰¹ (6) the distance between Thomasville, Georgia and Monticello, Florida;³⁰² and (7) that the construction of a limited access highway and interchange increased the value of remaining land fifty fold.³⁰³ On the other hand, judicial notice has been denied to municipal ordinances,³⁰⁴ and to the

294. 232 So.2d 246 (Fla. 4th Dist. 1970).

295. 247 So.2d 296 (Fla. 1971).

296. Tjoflat, *Judicial Notice; Presumptions; Burden of Proof*, in FLORIDA BAR CONTINUING LEGAL EDUCATION EVIDENCE IN FLORIDA § 2.1 (1971).

297. *State ex rel Johnson v. Vizzini*, 227 So.2d 205 (Fla. 1969).

298. *Wong v. City of Miami*, 229 So.2d 659 (Fla. 3d Dist. 1969), *aff'd*, 232 So.2d 132 (Fla. 1970).

299. *Kirk v. Kennedy*, 231 So.2d 246 (Fla. 2d Dist. 1970).

300. *Smith v. Wise*, 234 So.2d 145 (Fla. 3d Dist. 1970), *cert. denied*, 238 So.2d 422 (Fla. 1970).

301. *Schuster v. State*, 235 So.2d 30 (Fla. 3d Dist. 1970). But query: Isn't the reasonable man careless once in a while in failing to safeguard his credit cards? Also, interestingly enough, the facts of the instant case do not bear out what the court judicially noticed.

302. *General Guaranty Ins. Co. v. Broxsie*, 239 So.2d 595 (Fla. 1st Dist. 1970). At least this appears to be what the court was judicially noticing. The court's statement was that: "The Court judicially knows that Thomasville, Georgia is 30 miles north of Pauline Parker's home which is located in the vicinity of Monticello, Florida." *Id.* at 596. Query: Did the court know where Pauline lived, or where Monticello was?

303. *Levit v. State Dept. of Transp.*, 248 So.2d 542 (Fla. 1st Dist. 1971), *cert. denied*, 252 So.2d 802 (Fla. 1971). That there would be an increase in value is probably beyond dispute. But query: Is the fifty fold figure common knowledge?

304. *Applied Research Laboratories v. Homer*, 249 So.2d 732 (Fla. 3d Dist. 1971).

proposition that a certain number of condominium owners is sufficiently large to require a class action.³⁰⁵

Finally, information contained in the Federal Register was judicially noticed³⁰⁶ pursuant to the Uniform Judicial Notice of Foreign Law Act.³⁰⁷

IX. ACCIDENT REPORTS

Reports of traffic accidents made for statistical purposes to the Department of Highway Safety and Motor Vehicles are confidential by statute in Florida.³⁰⁸ Because of this confidentiality, the reports themselves are inadmissible in any litigation arising from the accident.³⁰⁹ Problems continue to arise, however, as to the scope of the accident reports privilege.

First, it is clear that not every report of an accident is entitled to the protection of the statute. For example, intramural accident reports may be discovered and used without reference to the statute.³¹⁰ Second, in *State ex rel Duncan v. Crews*,³¹¹ the court held that a traffic homicide report may be produced for inspection by a defendant in rare cases. Allegations were made that the report was confidential and constituted a part of the prosecution's work product, but the order for its production was not set aside on interlocutory appeal.

In *Mitchell v. State*,³¹² the District Court of Appeal, Second District, held that a blood test taken at a hospital before an accident report was completed was inadmissible. The report had not been completed because the injured party did not have his driver's license in his possession. On appeal, the Supreme Court of Florida reversed³¹³ and held that a blood test taken while a defendant (not under arrest) is in a hospital, before an accident report has been commenced is admissible. The court stated that:

The test for the statutory exclusion . . . is whether the information sought to be excluded was taken by the investigating officer for the purpose of making his accident report and formed a basis for that report.³¹⁴

Apparently, this rule permits the admission of such tests as long as they were not made expressly for the purpose of completing the accident report.

305. *Hendler v. Rogers House Condominium, Inc.*, 234 So.2d 128 (Fla. 4th Dist. 1970).

306. *Freimuth v. State*, 249 So.2d 754 (Fla. 1st Dist. 1971).

307. FLA. STAT. § 92.031 (1969).

308. FLA. STAT. § 317.171 (1969) and FLA. STAT. § 186.08 (1969).

309. *Herbert v. Garner*, 78 So.2d 727 (Fla. 1955).

310. See notes 265 and 266 *supra* and accompanying text.

311. 241 So.2d 754 (Fla. 1st Dist. 1970).

312. 227 So.2d 728 (Fla. 2d Dist. 1969).

313. *State v. Mitchell*, 245 So.2d 618 (Fla. 1971).

314. *Id.* at 623.

X. DEAD MAN'S STATUTE

Evidence of transactions with persons who are deceased at the time of litigation may be excluded under the Dead Man's Statute.³¹⁵ However, the statute has exceptions, three of them were mentioned recently by Florida courts. The first exception was presented in *Sullivan v. American Telephone & Telegraph Co.*,³¹⁶ where hearsay relating to statements of a deceased donor were admitted into evidence to prove donative intent. The case arguably stands for the proposition that a gift is not a transaction within the meaning of the Dead Man's Statute. The holding, however, is bottomed on other grounds.

A second exception was applied in *Tom v. Messinger*.³¹⁷ In *Tom*, an issue arose as to who was driving a car at the time of a multiple death crash. The court held that the Dead Man's Statute did not apply to evidence showing that the decedent had assumed the driving chores before the accident. The court found that the transfer of control was not a transaction within the meaning of the statute.

Finally, in *Olshen v. Robinson*,³¹⁸ the court refused to apply a third exception to the statute for transactions with corporate officers³¹⁹ where the transaction in question involved a corporate officer acting personally and not in his official capacity.

XI. DEMONSTRATIVE EVIDENCE

A. Generally

Demonstrative evidence generally consists of tangible things or representations of tangible things.

Demonstrative evidence stands in contrast with testimonial evidence, where the trier is asked to believe that certain facts are true only because the witness (or the hearsay declarant) states them to be so.³²⁰

Since things do not generally authenticate themselves, the evidence must be identified and authenticated by a witness who will testify that the object has some relevancy to the proceedings.³²¹

A demonstration without the aid of tangible things may also be considered as demonstrative evidence. Thus, in *Spackman v. Laumer*,³²² a schoolboy safety patrolman was allowed to demonstrate to the jury the position of a child as he fell from his bicycle into the path of a

315. FLA. STAT. § 90.05 (1969).

316. 230 So.2d 18 (Fla. 4th Dist. 1970).

317. 235 So.2d 333 (Fla. 2d Dist. 1970), *cert. denied*, 238 So.2d 429 (Fla. 1970) [hereinafter cited as *Tom*].

318. 248 So.2d 534 (Fla. 3d Dist. 1971).

319. *Tharp v. Kitchell*, 151 Fla. 226, 9 So.2d 457 (1942).

320. C. McCORMICK, LAW OF EVIDENCE § 179, at 384 (1954).

321. *Id.* at § 179.

322. 237 So.2d 35 (Fla. 1st Dist. 1970), *cert. denied*, 239 So.2d 830 (Fla. 1970).

car. However, there was no description of the demonstration in the record for the benefit of the reviewing court. Consequently, the practice should be to read a short description of this type of act into the record.

In *Tripi v. State*,³²³ a prosecution for breaking and entering, the defendant raised no objection to the admission of a knife with a broken blade found at the scene. Later, when the broken-off portion of the blade was proffered, the defendant objected that the prosecution had not shown that the fragment had been broken from the knife previously admitted. The knife point was held admissible for comparison "as an item found at the scene" and to be accorded whatever weight the trier of fact might attach thereto. There was an additional objection to the lack of expert qualifications of the item's sponsor, but it would seem that no expertise would be required in this instance.

In another case, *Simmons v. State*,³²⁴ the forgery victim testified that the signature on a credit card charge slip was not his own. He then signed his name in court for a specimen which the jury was allowed to compare with the credit card slip. It was held to be error to allow the signature to be manufactured in court and admitted into evidence.³²⁵

Tangible things which are not relevant and which may be prejudicial can be kept from the jury's view. Thus, in *Caldwell v. State*,³²⁶ a criminal defendant was not allowed to openly display his Bible before the jury. The trial court offered him "a splendid, unused manila envelope" in which to place the Bible if the defendant desired to keep it with him during the trial. Additionally, evidence about tangible things may be suppressed if the things themselves cannot be made available to the opposition. Thus, in *Johnson v. State*,³²⁷ the testimony of a ballistics expert was held to have been improperly admitted when the bullet had been lost by the state. The court reasoned that the loss of the bullet prevented the defendant from achieving effective discovery and cross examination.

B. Photographs

Photographs are admissible when there is a witness who can identify the photograph as a portrayal of relevant facts.³²⁸ In criminal prosecutions the state may have an absolute right to present relevant photographs. In *Williams v. State*,³²⁹ photographs of a murder victim which were neither gory nor inflammatory were admitted. The defendant had offered to stipulate to whatever facts the photographs might reveal, but the state's refusal to stipulate was upheld on appeal.

323. 234 So.2d 15 (Fla. 3d Dist. 1970), *cert. denied*, 238 So.2d 110 (Fla. 1970).

324. 248 So.2d 229 (Fla. 2d Dist. 1971).

325. On the methods of proof of handwriting generally, see C. ALLOWAY, FLORIDA EVIDENCE CASEBOOK pt. II, 27 (1971).

326. 243 So.2d 422 (Fla. 1st Dist. 1971), *appeal dismissed*, 247 So.2d 326 (Fla. 1971).

327. 249 So.2d 470 (Fla. 3d Dist. 1971).

328. C. McCORMICK, LAW OF EVIDENCE § 181 (1954).

329. 228 So.2d 377 (Fla. 1969).

That a photograph may be prejudicial is not in and of itself sufficient grounds for excluding the photograph. In *Furr v. State*,³³⁰ a photograph was admitted to show the position of vehicles after an accident and the position of a decedent's head as he was being removed from the car. The photograph was said to be "relevant to show the circumstances surrounding decedent's death,"³³¹ and because the photograph was in black and white, the blood stains it depicted were not found to be sufficiently inflammatory to require exclusion.

In *Jackson v. State*,³³² two black and white photographs of a murder victim, taken at a morgue shortly after death, were admitted. The prosecution had charged the defendant with stabbing the victim with a knife, and at the time of admission, the photos were the only proof that the victim had actually been stabbed. Likewise, no cause of death had been established at that time. Subsequent testimony was offered to prove these points, and the photographs were held to corroborate this later testimony.³³³

In addition, the sponsor of photographs may be aided by other testimony in establishing a predicate for admitting the picture. In *DeLaine v. State*,³³⁴ photographs were held properly admitted when the photographer testified that he could not remember the date on which they were taken, but a police officer supplied the date at a later point in the trial.

The use of photographs, however, may be abused, and their admissibility is subject to review. In *Young v. State*,³³⁵ twenty-two of forty-five photographs that were admitted into evidence showed the badly decomposed torso of the victim. The admission was held prejudicial because, although some were relevant, there were simply too many of them. In *Saxon v. State*,³³⁶ a medical examiner used photographs to aid his testimony about the cause of death of an infant. The photographs also revealed the commission of a collateral crime, and the witness elaborated on this collateral crime. The admission of the testimony was held to be error because the collateral crime was not sufficiently connected with the defendant, and the photographs would probably be inadmissible on the same ground.

Photographs of the scene of an injury have been held sufficient to raise jury questions as to negligence and contributory negligence.³³⁷ On

330. 229 So.2d 269 (Fla. 2d Dist. 1969).

331. *Id.* at 270.

332. 231 So.2d 839 (Fla. 1st Dist. 1970).

333. If the photographs had been the only proof of these facts the decision would appear reasonable. However, other testimony was available and later admitted on these points, and the case seems to turn largely on order of proof. Query: Would these photographs have been admissible if presented subsequent to other proof of these issues?

334. 230 So.2d 168 (Fla. 2d Dist. 1970).

335. 234 So.2d 341 (Fla. 1970).

336. 225 So.2d 925 (Fla. 4th Dist. 1969).

337. *Bowen v. Seaward Dredging Corp.*, 242 So.2d 151 (Fla. 3d Dist. 1970) [hereinafter cited as *Bowen*].

the other hand, it also has been held that a jury may not draw a conclusion from photographs which is contrary to other competent evidence.³³⁸ Both *Bowen* and *Dybalski* should be read and compared as indications of the proper weight to be accorded photographs in jury deliberations.

C. Motion Pictures

Motion pictures are generally admitted on the same basis as still pictures. However, a greater degree of discretion is often accorded the trial court in admitting them because of their greater consumption of trial time.³³⁹ In *Continental Casualty Co. v. McClure*,³⁴⁰ a claim arose from the discharge of a shotgun due to an allegedly defective safety. Expert testimony concerning the defect and an in-court experiment with the same shotgun were admitted. A motion picture of a car crossing railroad tracks containing a shotgun which was supposedly in the same position as the plaintiff claimed the defective gun was in at the time of discharge was proffered. The film was sponsored by an engineer who used a car in the film similar, but not identical to the plaintiff's. The film was rejected because circumstances in the two instances were not shown to have been comparable. The court noted that variables such as tire pressure and the condition of shock absorbers could have affected the outcome. The film had also been made "ex parte" which was stated to be unacceptable.

In *Baker v. State*,³⁴¹ a re-enactment of the crime on motion picture film was admitted into evidence. The charge was robbery and assault with a hammer, crimes normally capable of vocal explanation. The Supreme Court of Florida held, however, that: "None of the re-enactment film was given to the jury after they retired. In these circumstances, no error has been made to appear."³⁴²

D. Other Audio-Visual Aids

There seems to be a current vogue calling for graphic illustrations of confessions of criminal defendants. This trend probably reached its zenith in *Paramore v. State*.³⁴³ In that case, a videotape of a defendant's confession was held to have been properly admitted. The court also held that it was unnecessary to prove continuity of possession as long as the tape had been established as an accurate reproduction of the events which transpired.³⁴⁴ Additionally, in *Dodd v. State*,³⁴⁵ a recording of a confession made on "a Gray Recording Machine" and later transcribed

338. *Dybalski v. Nichols*, 227 So.2d 510 (Fla. 1st Dist. 1969) [hereinafter cited as *Dybalski*].

339. C. McCORMICK, LAW OF EVIDENCE § 181 (1954).

340. 225 So.2d 590 (Fla. 2d Dist. 1969).

341. 241 So.2d 683 (Fla. 1970).

342. *Id.* at 686.

343. 229 So.2d 855 (Fla. 1969).

344. See also section XI, G, *infra*, relating to chains of custody.

345. 232 So.2d 235 (Fla. 4th Dist. 1970), *cert. discharged*, 241 So.2d 384 (Fla. 1970).

was admitted and played to the jury. There, however, the defendant had specifically requested that the confession be played to the jury.

In *Simpson v. Broward County*,³⁴⁶ the trial court excluded certain sound recordings in a pretrial order. The recordings were of aircraft passing over property above which the plaintiff claimed that an avigational easement had been taken by inverse condemnation. The District Court of Appeal, Fourth District, held that the ruling was not reviewable by certiorari, but that it could be reviewed on appeal from a final judgment in the action. In *Wasley v. State*,³⁴⁷ thirty-five millimeter color slides, as well as eight by ten color photographs, were held to have been properly used by a medical examiner to show injuries suffered by a decedent.

E. Chain of Custody

The previous requirements of the establishment of a chain of custody of demonstrative evidence seem to have been relaxed during the period under survey. In *Paramore v. State*,³⁴⁸ a videotape confession was introduced. The Supreme Court of Florida held that it was unnecessary to prove continuity of possession as long as the videotape was established as an accurate reproduction of the events it purported to depict. Similarly, in *Stunson v. State*,³⁴⁹ marijuana was admitted, even though no chain of custody through "live witnesses" had been established. The District Court of Appeal, Third District, stated that "the test is whether or not there is an indication of probable tampering with the evidence."³⁵⁰ Apparently, at one point, the whereabouts of the evidence could not be explained. Nevertheless, the evidence was admitted. In *Perkins v. State*,³⁵¹ a rape victim's pocketbook, reportedly found in the yard of a defendant's family by the defendant's sister, was admitted. The evidence was held to have been properly admitted,

it being permissible for the State to demonstrate merely that it obtained custody of the exhibit from those persons who had control and free access to premises visited and occupied by the appellant.³⁵²

The District Court of Appeal, First District, in *Collins v. State*,³⁵³ examined magazines attached to a hearing examiner's findings of fact, "presumably being some of the magazines taken from the petitioner's place of business . . ."³⁵⁴ Perhaps the origin of those magazines should

346. 241 So.2d 193 (Fla. 4th Dist. 1970).

347. 244 So.2d 418 (Fla. 1971).

348. 229 So.2d 855 (Fla. 1969).

349. 228 So.2d 294 (Fla. 3d Dist. 1969).

350. *Id.* at 294.

351. 228 So.2d 382 (Fla. 1969).

352. *Id.* at 389.

353. 239 So.2d 613 (Fla. 1st Dist. 1970).

354. *Id.* at 614. Pornography fanciers are urged to see the appendix filed in this case. The

have been demonstrated in some more conclusive manner. Finally, it was held that a failure to list a chain of custody witnesses on a witness list³⁵⁵ does not prevent the trial court from exercising its discretion and allowing them to testify.³⁵⁶

F. Jury Procedures

In the discretion of the trial court, the jury may be taken to view anything relevant to the controversy.³⁵⁷ In an action arising from a railroad crossing collision between a freight train and a fire truck, the District Court of Appeal, First District, held, however, that a juror who takes a view of the scene of an accident on his own time jeopardizes the jury verdict. The court held that the juror's action was not the proper subject of a motion for a new trial, but also hinted that the activity was improper.³⁵⁸

In *State ex rel Pryor v. Smith*,³⁵⁹ four photographs of a murder victim and a deposition of a state witness, none of which had been admitted into evidence, were allowed into the jury room. The entry of this unadmitted evidence was held to be an "impermissible intrusion of the jury's deliberative process. . . ."³⁶⁰ In another case, marking exhibits already admitted into evidence in the presence of a jury after the state had rested its case was held not to be harmful error.³⁶¹

XII. DOCUMENTARY EVIDENCE

A. Generally

The requirements for the admission of writings and evidence concerning writings are unique in many respects. Many of these requirements are statutory. In some instances, the statutory requirements may be waived and the evidence received. Thus, in *Meltsner v. Aetna Casualty & Surety Co.*,³⁶² an insurance policy that had not been countersigned by a local agent as required by statute³⁶³ was admitted when facts demon-

appendix meets at least two of the three elements of the test of *Roth v. United States*, 354 U.S. 476 (1957).

355. FLA. R. CRIM. P. 1.220(e).

356. *Howard v. State*, 239 So.2d 83 (Fla. 1st Dist. 1970).

357. FLA. R. CIV. P. 1.520.

358. The District Court of Appeal, First District, filed four identical opinions to this effect in four different appeals. *Flowers v. Florida E.C. R.R.*, 237 So.2d 803 (Fla. 1st Dist. 1970); *Wood v. Florida E.C. R.R.*, 237 So.2d 801 (Fla. 1st Dist. 1970); *Shad v. Florida E.C. R.R.*, 236 So.2d 477 (Fla. 1st Dist. 1970); and *Snelling v. Florida E.C. R.R.*, 236 So.2d 465 (Fla. 1st Dist. 1970).

359. 239 So.2d 85 (Fla. 1st Dist. 1970), *appeal dismissed*, 241 So.2d 398 (Fla. 1970). See also *Baker v. State*, 241 So.2d 683 (Fla. 1970).

360. *State ex rel. Payor v. Baker*, 239 So.2d 85, 86 (Fla. 1st Dist. 1970), *appeal dismissed*, 241 So.2d 398 (Fla. 1970).

361. *Rodriguez v. State*, 237 So.2d 772 (Fla. 3d Dist. 1970), *cert. denied*, 240 So.2d 644 (Fla. 1970).

362. 233 So.2d 849 (Fla. 3d Dist. 1969).

363. FLA. STAT. § 624.0224(1) (1969).

strated a waiver of this requirement. Similarly, a lack of the formalities required for the recording of an instrument has been held to be no bar to its admissibility. In *Windle v. Sebold*,³⁶⁴ the defendant in a suit on a note proffered a written "satisfaction of mortgage" instrument which recited payment of the note sued upon. Although the statute relating to authentication of disputed writings was complied with,³⁶⁵ the trial court refused to admit the document because there had been no showing of a delivery of the note, or of satisfactory compliance with the formalities required for recordation. The District Court of Appeal, Fourth District, reversed and added that the common law rule that testimony of a subscribing witness must be presented when an attested document is sought to be introduced is not in effect in Florida.³⁶⁶

In *Crowe v. Overland Hauling, Inc.*,³⁶⁷ the plaintiff sought to admit bills for medication. The treating physician testified that he had prescribed the drugs, and the plaintiff identified the pharmacy bills. The trial court denied admission on the ground that the predicate was insufficient since there was no connection between the bills and the injury shown in the absence of the drug names and the physician's name being shown on the bills. On appeal, the District Court of Appeal, Fourth District, held that a prima facie case for admissibility had been made, and that the burden had therefore shifted to the defendant to go forward with evidence of unrelatedness.

B. Best Evidence Rule

The best evidence rule, in its contemporary form, requires the production of an original writing when its contents are sought to be introduced into evidence.³⁶⁸ Among the various exceptions to the rule is the situation where a document is in the possession of an adversary. In *Kirk v. State*,³⁶⁹ it was held that secondary evidence regarding the contents of a writing in the defendant's possession is admissible only if a foundation is laid by giving the defendant reasonable notice to produce the original.

In *Inter-American Transport Equipment Co. v. Frank*,³⁷⁰ the plaintiff's office ledgers were proffered for impeachment purposes. The ledgers were excluded, but on the ground that the scope of impeachment is largely a subject for the exercise of the trial court's discretion. In *Safe-T-Lawn, Inc. v. Agricultural Engineering Association*,³⁷¹ summaries made from other records of the defendant were introduced without mention of the best evidence rule. Finally, in *Town of Palm Beach v. City of*

364. 241 So.2d 165 (Fla. 4th Dist. 1970).

365. FLA. STAT. § 92.38 (1969).

366. See also *Williams v. Keyser*, 11 Fla. 234 (1866).

367. 245 So.2d 654 (Fla. 4th Dist. 1971).

368. C. MCCORMICK, LAW OF EVIDENCE §§ 195-96 (1954).

369. 227 So.2d 40 (Fla. 4th Dist. 1969).

370. 227 So.2d 699 (Fla. 3d Dist. 1969).

371. 235 So.2d 25 (Fla. 3d Dist. 1970).

West Palm Beach,³⁷² the director of the local air and water pollution commission was allowed to testify to the context of the rules of the commission and their effect.

C. Ordinances and Judgments

*Town of Palm Beach v. City of West Palm Beach*³⁷³ may indicate a method of proving the rules of a regulatory commission. In *Arnold v. McGrady*,³⁷⁴ the safety rules of Greyhound Lines, Incorporated were apparently proven in a similar manner. An unpublished opinion of a federal district court was admitted in an apparently similar fashion in *Belcher Towing Co. v. Board of County Commissioners*.³⁷⁵ Finally, in *Riley v. Jackson*,³⁷⁶ the District Court of Appeals, Third District, held that permitting counsel in a traffic accident case to read a municipal ordinance to the jury was not error.

Written evidence of judgments was treated liberally during the survey period. Thus, in *Bryant v. Haarala*,³⁷⁷ the unsworn statement of the clerk of "a criminal court" which showed that the defendant had pleaded guilty to reckless driving was admitted. The court noted that the document was technically insufficient but found its reception to have been harmless error. In another action, an authenticated decree of the Federal District Court for the Northern District of Illinois was admitted to prove the existence and legal effect of a final judgment.³⁷⁸

D. Official Records

In an action in which ownership of a motor vehicle was in issue, it was held to be error to refuse to admit a title certificate for the vehicle.³⁷⁹ Further, in a divorce action, the following records were admitted on the issue of the husband's net worth: (1) tax schedules prepared by counsel; (2) other income schedules of unstated origin; and, (3) a loan application made and signed by the husband.³⁸⁰ In *Nichols v. State*,³⁸¹ the negative fact of a lack of a beverage license was held to have been adequately proven by testimony of a detective and a state beverage agent because they had actual knowledge that the place where the liquor was seized was not a licensed liquor store. Consequently, there was no need to call the custodian of the state records to prove the fact. Finally, the

372. 239 So.2d 835 (Fla. 4th Dist. 1970).

373. *Id.*

374. 239 So.2d 854 (Fla. 3d Dist. 1970).

375. 233 So.2d 456 (Fla. 3d Dist. 1970). The court seemed to believe that such an admission might be error in a jury trial in the absence of a showing that the opinion was binding on a party by either res judicata or collateral estoppel.

376. 246 So.2d 625 (Fla. 3d Dist. 1971).

377. 245 So.2d 644 (Fla. 1st Dist. 1971).

378. *Furnari v. Goodman*, 242 So.2d 503 (Fla. 3d Dist. 1970).

379. *Skroh v. Newby*, 237 So.2d 548 (Fla. 1st Dist. 1970).

380. *Elkins v. Elkins*, 228 So.2d 105 (Fla. 3d Dist. 1969).

381. 231 So.2d 526 (Fla. 2d Dist. 1970).

Florida Attorney General has rendered an opinion stating that the division of driver's licenses may set forth a record of stolen driver's licenses and that such certified record is admissible evidence to prove the fact of theft.³⁸²

XIII. LEGISLATION

The 1970 session of the legislature revised the statutory privilege for communications with psychologists³⁸³ to make this privilege more nearly conform to that granted communications with psychiatrists.³⁸⁴ Regrettably, however, neither the 1970 nor the 1971 session managed to pass a similar privilege for the doctor-patient communication.

Records of carriers were made available to assist in enforcing the Florida Hazardous Substances Law.³⁸⁵ When obtained, these records may not be used against the person furnishing them.³⁸⁶

The 1970 session also enacted a special section controlling the gathering of evidence and the testimony of witnesses in proceedings to investigate bailbondsmen.³⁸⁷

A variety of new privileges for records of various social service type organizations was enacted by the 1971 session of the legislature. The 1971 Mental Health Act (also referred to as The Baker Act) contains a section making the clinical records of patients seeking hospitalization under the Act confidential.³⁸⁸ The Comprehensive Alcoholism Prevention, Control and Treatment Act contains a similar section making the records of persons treated under that act confidential.³⁸⁹ Similarly, a drug abuse law which creates "DATE" centers for treatment of drug offenders also contains a section making the records of these centers confidential.³⁹⁰ The confidentiality of juvenile court records and reports was also recognized in an act relating to the probation and treatment of juveniles.³⁹¹

The Child Abuse Act contains a provision relating to immunity of persons making reports³⁹² as well as a section abrogating the husband-wife, physician-patient (if any), and other privileges, except the attorney-client privilege when they relate to matters of child neglect and abuse.³⁹³

Confidentiality has also been extended to the reports of examinations

382. Fla. Att'y Gen. Op. 071-21 (Feb. 12, 1971).

383. FLA. STAT. § 490.32 (Supp. 1970).

384. FLA. STAT. § 90.242 (1969).

385. FLA. STAT. §§ 501.061-.121 (Supp. 1970).

386. FLA. STAT. § 501.111 (Supp. 1970).

387. FLA. STAT. § 648.48 (Supp. 1970).

388. Fla. Laws 1971, ch. 71-131, § 8, *amending* FLA. STAT. ch. 394 (1969).

389. Fla. Laws 1971, ch. 71-132, § 11.

390. Fla. Laws 1971, ch. 71-222, § 3, *amending* FLA. STAT. § 397.096 (Supp. 1970). *See also* FLA. STAT. § 397.061 (Supp. 1970).

391. Fla. Laws 1971, ch. 71-130, § 7, *amending* FLA. STAT. § 39.12 (1969).

392. Fla. Laws 1971, ch. 71-97, § 1, *amending* FLA. STAT. § 828.041 (1969).

393. Fla. Laws 1971, ch. 71-97, § 1, *amending* FLA. STAT. § 828.041(10) (1969).

of Industrial Savings Banks,³⁹⁴ and the disclosure of evidence and testimony before a grand jury has been proscribed by statute.³⁹⁵

In addition, the immunity statute has been substantially reworded, and in its present form, immunity would seem to be almost automatic in certain situations.³⁹⁶ If the amendment is strictly construed, serious constitutional questions may be raised when the amendment is applied. Curiously enough, a similar immunity provision appears in the Water and Sewer System Regulatory Law.³⁹⁷

Other legislation during the biennium included a mandatory provision in the "no fault" automobile insurance law requiring that a claimant submit to a physical examination and providing for the dissemination of reports of the examination.³⁹⁸ The evidence requirements under the auto theft and "joyriding" statutes have also been codified and amended during the last two sessions of the legislature.³⁹⁹ Finally, perjury as a ground for disqualification of witnesses has been removed by statute.⁴⁰⁰

394. Fla. Laws 1971, ch. 71-200, § 2, *amending* FLA. STAT. ch. 656 (1969).

395. Fla. Laws 1971, ch. 71-66, § 1, *amending* FLA. STAT. § 905.27 (1969).

396. Fla. Laws 1971, ch. 71-99, § 1, *amending* FLA. STAT. § 914.04 (Supp. 1970).

397. Fla. Laws 1971, ch. 71-278, § 1, *amending* FLA. STAT. § 367.161 (1969).

398. Fla. Laws 1971, ch. 71-252, § 7. *See generally* FLA. R. CIV. P. 1.360; *Sibbach v. Wilson & Co., Inc.*, 312 U.S. 1 (1941).

399. FLA. STAT. § 814.05 (Supp. 1970); Fla. Laws 1971, ch. 71-342, *amending* FLA. STAT. § 814.01 (Supp. 1970).

400. Fla. Laws 1971, ch. 71-72, §§ 1-2, *amending* FLA. STAT. § 90.08 (1969); *repealing* FLA. STAT. § 90.07 (1969).