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Evidence

Stanley H. Kuperstein

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EVIDENCE*

STANLEY H. KUPERSTEIN**

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I. LIE DETECTOR TESTS

A. *Admission by a Party*

In the majority of states, including Florida, the results of a polygraph test are not admissible as evidence and upon objection are excluded.¹ However, an admission made by a party to a polygraph operator during the administration of the test may be admitted into evidence. In *Johnson v. State*,² the prosecution called a polygraph operator as a witness. He testified that during the examination the defendant told him he was not involved in the attempted rape. When the polygraph operator told the defendant that he thought he was lying, the defendant recanted and admitted that he was at the scene of the assault. On cross-examination, and in the presence of the jury, the witness testified that the above conversation

* The decisions surveyed in this article have been reported in volumes 160 through 200 of the Southern Reporter, Second Series.

** Digest Editor, *University of Miami Law Review* and Student Instructor for Freshman Research and Writing.

1. *Kaminski v. State*, 63 So.2d 399 (Fla. 1952).

2. 166 So.2d 798 (Fla. 2d Dist. 1964).

occurred during the administration of a police-requested polygraph examination. The defendant later took the stand and denied any part in the crime. On appeal the defendant urged that the admission of any result of a polygraph test, whether offered directly or by implication, was reversible error. The court upheld the introduction of the witness' testimony, even though the jury was aware that he was a polygraph operator as a result of the state's direct examination. It is not reversible error if the jury learns that a lie detector test has been taken as long as there are "no inferences as to the result," or "any inferences that might be raised as to the result are not prejudicial."³

B. *Stipulation by Parties*

An exception to the general rule excluding the results of polygraph tests was made in *State v. Brown*.⁴ The lower court, entertaining some doubt as to the guilt of the defendant, considered such tests on a motion for a new trial after the prosecution and defense attorneys agreed that the results of the tests could be so used by the court. After two tests were conducted, the court ordered a third test. The motion for a new trial was granted and the state appealed. The Second District Court of Appeal cited with approval *State v. Valdez*,⁵ a recent Arizona case which held that lie detector tests are admissible on stipulation by the parties. The court in *Valdez* stated that, although there is still room for improvement in perfecting lie detector tests as a means to determine credibility, they have reached such a stage that their "results are probative enough to warrant admissibility upon stipulation"⁶ and they may be considered by a jury. Finding no substantial difference between that situation and the present one, the Florida court upheld the trial judge's ruling. In so doing, Florida joins a minority of states which allow results of lie detector tests after agreement. It should be noted that in the instant case the results were not considered by a jury, as was done in *Valdez*, and the trial judge ordered the last test on his own motion.

II. EXAMINATION

A. *Redirect*

Generally, on redirect examination the party calling the witness may examine him as to matters "which tend to qualify, limit or explain testimony" drawn out on cross-examination.⁷ A problem arises when on cross-examination a witness' credibility has been impeached because of a

3. *Id.* at 805.

4. 177 So.2d 532 (Fla. 2d Dist. 1965).

5. 91 Ariz. 274, 371 P.2d 894 (1962).

6. *Id.* at 900. Among the objections to the use of lie detector tests are the tendency of both judges and juries to treat the results of such tests as conclusive, the dissimilarity of test procedures, and the inability of the jury to evaluate the polygraph operator's opinion.

7. C. McCORMICK, EVIDENCE § 32 (1954).

possible interest in the litigation. In order to explain away this impeaching testimony, normally incompetent evidence must be drawn from the witness on redirect. In *City of Coral Gables v. Jordan*,⁸ the plaintiff sued for the death of a motor scooter passenger. The defendant cross-examined the driver of the scooter as to the investigation that the driver had made of accident. The questions tended to imply that the witness had an interest in the suit. The trial judge ruled that since the defendant opened the door, the plaintiff, on redirect, could question the witness as to his settlement with the defendant in order to rebut the inference that the witness was interested in the suit. On appeal, the court held that the redirect examination of the witness with respect to the settlement was inadmissible. The disclosure of a settlement between the defendant and the driver-witness completely negated the defendant's claim that the witness caused the accident and violated the policy of Florida in excluding evidence of a settlement.⁹ A dissenting judge would have allowed the redirect to stand because by inference the cross-examination affected the witness' credibility:

[W]hile disclosure of a settlement is normally incompetent such disclosure would be subordinate to the party's right to rehabilitate the witness, and the adversary is restricted to a request for an appropriate limiting instruction.¹⁰

B. *Administrative Proceedings*

In *Hargis v. Florida Real Estate Commission*,¹¹ the Commission called as an adverse witness the person whose license was in issue. The court stated that the mere calling of such a person to testify as an adverse witness in an administrative proceeding did not per se violate his right against self-incrimination. Had the proceedings been a criminal case or had the petitioner been "criminally accused," then the calling of the petitioner to testify against himself would have automatically violated his constitutional and statutory privileges.¹² In no sense were the proceedings before the Commission a criminal case as the petitioner was not charged with any crime.¹³

III. REFRESHING THE MEMORY

A memorandum which merely stimulates the memory of a witness need not be introduced into evidence since the testimony of the witness is independent of the stimulus. In such a case, what constitutes the stimulus

8. 186 So.2d 60 (Fla. 3d Dist. 1966).

9. The court also based its decision on the fact that the plaintiff was not prejudiced on cross-examination, since as a result of the direct examination conducted by the plaintiff, the jury already knew that the witness was involved in the accident.

10. *City of Coral Gables v. Jordan*, 186 So.2d 60, 65 (Fla. 3d Dist. 1966).

11. 174 So.2d 419 (Fla. 2d Dist. 1965).

12. FLA. CONST. DECL. OF RIGHTS § 12; FLA. STAT. § 918.09 (1965).

13. *Ahern v. Florida Real Estate Comm'n*; 149 Fla. 706, 6 So.2d 857 (1942).

is immaterial as the testimony of the witness is based only on his independent recollection.¹⁴ In *King v. Califane*,¹⁵ a police officer made out an accident report at the scene. The report was filed at the police station and later the officer made a verbatim copy in his notebook. While testifying as a defense witness, the police officer was refused permission to refresh his memory by using his notebook. The appellate court, without going into why the trial court refused permission, held that the officer should have been allowed to use his notes to "spur" his independent recollection even though the notes were not the original ones. It appears that the appellate court further complicated a relatively simple case by discussing whether or not the notes were original or copies since that issue is immaterial when the notes are merely used to stimulate the memory of a witness.¹⁶

IV. OPINION AND EXPERT TESTIMONY

A. *Expert Witness*

In determining whether or not the witness is qualified to testify as an expert, the court will look to the specialized knowledge he possesses in the area in which he is to testify. This knowledge may be acquired either through study of the area under recognized authorities or by experience.¹⁷ The education of an expert need not be a formal education and home study of recognized authorities will suffice.¹⁸ In *Santana Marine Service, Inc., v. McHale*¹⁹ the plaintiff gave his expert opinion as to why a lifting device broke and damaged his boat. The court found that since the plaintiff had six years of experience in making, installing, and designing lifting devices and "had done considerable home study of recognized scientific treatises in the field," he was qualified as an expert to give his opinion.²⁰

The manner in which an expert witness arrives at an opinion does not go to his competency to testify unless the method is completely improper.²¹ In a condemnation proceeding the appraiser used the capitalization of a lease as the method of evaluating a parcel of land. The court upheld the overruling of an objection to the expert's competency stating that his reliance on this new method would only go to the weight given his testimony by the jury.²²

B. *Hypothetical Questions*

Generally, when an expert witness is asked a hypothetical question, all evidence disclosed at the trial up to that point should be included in

14. *Volusia County Bank v. Bigelow*, 45 Fla. 638, 33 So. 704 (1903).

15. 183 So.2d 719 (Fla. 1st Dist. 1966).

16. *Volusia County Bank v. Bigelow*, 45 Fla. 638, 33 So. 704 (1903).

17. *Upchurch v. Barnes*, 197 So.2d 26 (Fla. 4th Dist. 1967).

18. *Santana Marine Serv., Inc. v. McHale*, 346 F.2d 147 (5th Cir. 1965).

19. *Id.*

20. *Id.* at 148.

21. *Rochelle v. State Road Dep't*, 196 So.2d 477 (Fla. 2d Dist. 1967).

22. *Id.* at 479.

the hypothet.²³ However, in *Ramos v. State*,²⁴ an expert in lottery operations was asked a hypothetical question based on his past experiences on the vice squad and the activities he observed as part of a special surveillance team assigned to the defendant, rather than all of the evidence disclosed at the trial up to that point. The court nevertheless overruled the objection to the question and stated that the witness' testimony disclosed sufficient knowledge of the facts to enable him to reach "a reasonably accurate conclusion."²⁵

C. *Opinions Based on Reports of Others*

A medical doctor, who is consulted in a case for the purpose of later testifying in court, cannot give an opinion as to the *cause* of the injuries where the basis for the opinion would be solely what the patient told him.²⁶ Such medical testimony is considered unreliable. The patient may not tell the physician the complete truth since the patient is not interested in receiving any medical treatment from his "testifying physician."²⁷ When the medical witness' opinion is based partly on information supplied by the patient and partly from a personal examination, the opinion is still admissible. The fact that the patient supplied part of the medical history goes only to the weight given the expert's opinion and not to its admissibility.²⁸

V. IMPEACHMENT

The majority rule in the United States is that a party cannot impeach his own witness by the use of evidence to prove his bad character, but he may impeach him by a showing of prior inconsistent or contradictory statements. Under Florida Statutes, section 90.09, however, the witness must "prove adverse" before such evidence can be introduced. The problem arises as to what constitutes adversity, since the courts' definitions have fluctuated from "hostile" to "unfavorable."²⁹ In *Johnson v. State*,³⁰ the court interpreted "adverse" as meaning "giving evidence that is prejudicial to the party producing the witness."³¹

In *Johnson*, a second degree murder case, the state called a witness and later the defendant called the same witness. On cross-examination, the state attempted to impeach the witness as to matters brought out on the state's cross-examination. The court held that even though the witness

23. C. McCORMICK, EVIDENCE § 14 (1954); *but see* *Baker v. State*, 30 Fla. 41, 11 So. 492 (1892).

24. 165 So.2d 237 (Fla. 2d Dist. 1964).

25. *Id.* at 238.

26. *Troj v. Smith*, 199 So.2d 285 (Fla. 2d Dist. 1967).

27. *Id.*

28. *Raydel, Ltd. v. Medcalfe*, 162 So.2d 910 (Fla. 3d Dist. 1964), *rev'd on other grounds*, *Raydel, Ltd. v. Medcalfe*, 178 So.2d 569 (Fla. 1965).

29. *Johnson v. State*, 178 So.2d 724, 728 (Fla. 2d Dist. 1965).

30. *Id.*

31. *Id.* at 728.

was still the state's witness, the state could impeach him by the use of inconsistent statements since the witness' testimony was prejudicial to the state. The court did note that the witness, when testifying for the defendant, was not, strictly speaking, the state's witness. However, the state had "avouched for his credibility, and will not be allowed to impeach him"³² except as allowed by statute.

VI. COMPETENCY

Although by statute a wife is competent to testify against her husband in a criminal action,³³ neither may disclose confidential or privileged communication which has occurred between them. In a second degree murder case, the husband, just after the shooting, said to his wife, "I have killed the wrong man."³⁴ Since the statement was a privileged communication and in addition would clearly negate the husband's defense that the shooting was accidental, the appellate court held that it was harmful error to admit this statement into evidence over the defendant's objection. The statutory provisions that make the wife competent to testify against her husband do not require her to give testimony which is considered privileged or confidential.

In *Silverman v. Turner*,³⁵ the problem arose as to whether an attorney can be required to divulge the source of a loan furnished to his client for the purpose of posting a supersedeas bond. The attorney stated that one of the conditions of the loan was that the identity of the lender, another client of the attorney, remain secret. The court held that the attorney-client privilege was not applicable where, as here, the attorney "acts in any other capacity than as an attorney, such as a depository, or as a trustee" and the subject matter in question does not "relate to the subject matter of the attorney's employment."³⁶

VII. RELEVANCY

A. *Character of the Accused*

In a criminal case, the prosecution introduced over twenty separate crimes which the defendant was alleged to have committed. In the great majority of these, the defendant was alleged to have stolen files from offices and to have ransomed the property for money. In the case being tried the defendant was charged with extortion by threatening to blow up a store unless he was paid a sum of money. The modus operandi in the prior crimes was sufficiently different from that in the instant case to negate relevancy on the basis of similarity. Therefore, since the sole

32. *Id.* at 729.

33. FLA. STAT. § 90.04 (1965); FLA. STAT. § 932.31 (1965).

34. *Cox v. State*, 192 So.2d 11 (Fla. 3d Dist. 1966).

35. 188 So.2d 354 (Fla. 3d Dist. 1966).

36. *Id.* at 355.

relevancy of the prior crimes was to show bad character, it was reversible error to admit such evidence.³⁷

B. *Prior Conduct as Evidence of Character*

Where a plea of self-defense is involved, in order to prove the decedent's reputation for violence so as to explain the defendant's acts, it must first be established that the defendant knew of the decedent's reputation.³⁸ However, when testimony is sought to be elicited as to the violent and dangerous character of the decedent so as to explain or give meaning to the conduct of the deceased at the time of the killing³⁹ no prior knowledge of the defendant is necessary. In *Cole v. State*,⁴⁰ just before the defendant killed the decedent, the decedent held a knife in his hand and slapped the defendant's face. At the trial, the defendant pled self-defense. The trial court refused to allow testimony which showed that the decedent was a violent person since the defendant had no prior knowledge of his past character. On appeal, the conviction was reversed with instructions to allow the witness' testimony. Since the evidence was uncontradicted as to the events leading up to the shooting, the testimony of the witness regarding the decedent's violent character was admissible "to explain or give meaning . . . to the conduct of the deceased."⁴¹

C. *Other Accidents or Injuries*

In *Schild Bantum Company v. Greif*,⁴² a personal injury case, the plaintiff testified that for the past two years her health had been perfect. The defendant sought to admit into evidence the fact that the plaintiff had been injured in an accident a few years previously and had been given a twenty-five per cent permanent partial disability award in a Kentucky workmen's compensation proceeding. Furthermore, some months before the present accident the plaintiff had asked for a reopening of her case. This prior accident became relevant because of a conflict in medical testimony as to the disability in the present case. The trial court denied the defendant's request. The appellate court reversed the case and ordered a new trial on the issue of damages holding that the jury should have been apprised of the prior accident and of the plaintiff's condition prior to awarding her a money judgment.

D. *Tax Returns*

In *Fryd Construction Corporation v. Freeman*,⁴³ the defendant was allowed to inspect the plaintiff's federal income tax returns for the past

37. *Steppe v. State*, 193 So.2d 617 (Fla. 3d Dist. 1967).

38. *Freeman v. State*, 97 So.2d 633 (Fla. 3d Dist. 1957).

39. *Garner v. State*, 28 Fla. 113, 9 So. 835 (1891).

40. 193 So.2d 47 (Fla. 1st Dist. 1966).

41. *Id.* at 50.

42. 161 So.2d 266 (Fla. 3d Dist. 1964).

43. 191 So.2d 487 (Fla. 3d Dist. 1966).

three years, since the returns were relevant to the claim for damages. Under Rule 1.28 of the Florida Rules of Civil Procedure, a party may inspect items which are not privileged. Since copies of income tax returns are not considered privileged in Florida they may be used in state court actions.⁴⁴ However, the examination of the tax returns must be made in such a way "that their confidential nature may be reasonably protected."⁴⁵

VIII. HEARSAY

A. *Res Gestae*

A hearsay statement can be admitted into evidence under the *res gestae* exception. The requirements are that the statement must be made by a party or a witness to the transaction; that the statement must be made at the time of or shortly after the event; and that the statement must not be relating back to a past event in the form of a narrative statement.⁴⁶ In *State v. Williams*⁴⁷ some five to eight minutes after the witness heard some shots, she went into a store and found the victim sitting up with a gun in his hand. When the witness asked what had happened, the victim answered that there had been an attempted robbery and that he had been shot. The District Court of Appeal, Second District⁴⁸ held that the statement was not a *res gestae* exception because it was not *part* of the robbery or the assault on the deceased. The statement was a narrative of past events and would still have been a narrative even if the witness had not asked her questions. The Supreme Court of Florida reversed that part of the district court opinion holding the testimony inadmissible.⁴⁹ The court reasoned that since the response of the decedent was a direct reply to, "and a natural emanation or outgrowth of, the question of what had happened . . . [and] so logical a comment as to exclude the idea of design or deliberation; and it was substantially contemporaneous with the offense"⁵⁰ the district court of appeal erred in disturbing the trial court's determination that the statement was part of the *res gestae*.

B. *Admission Against Interest*

When a party makes an admission against his interest, the statement can come in as an exception to the hearsay rule.⁵¹ If the party who made the statement is deceased and another person is "claiming under or in succession to the deceased declarant,"⁵² the statement can be introduced

44. *Parker v. Parker*, 182 So.2d 498 (Fla. 4th Dist. 1966).

45. *Fryd Constr. Corp. v. Freeman*, 191 So.2d 487, 489 (Fla. 3d Dist. 1966).

46. *Williams v. State*, 188 So.2d 320 (Fla. 2d Dist. 1966).

47. 198 So.2d 21 (Fla. 1967).

48. *Williams v. State*, 188 So.2d 320 (Fla. 2d Dist. 1966).

49. *State v. Williams*, 198 So.2d 21 (Fla. 1967).

50. *Id.* at 23.

51. C. McCORMICK, EVIDENCE § 253 (1954).

52. 13 FLA. JUR. EVIDENCE § 229 (1957).

against the substituted party. Thus, in *Ritter v. Brengle*, a statement made by the now deceased son of the defendant was admissible against the father when the father was defending an action originally brought against the son.⁵³

In a negligence suit against the City of Miami,⁵⁴ the plaintiff introduced a deposition of the driver of the city's truck. The deposition revealed that the driver knew the brakes had previously failed, although he was not present when it had happened. One of the main issues involved was whether the city knew or should have known that the truck's brakes were defective. The appellate court upheld the admission of the deposition even though the driver's statements were hearsay. The rationale was that since the statement was being offered against the declarant as well as his principal, the city, it came within the admission against interest exception.

In *Boshnack v. World Wide Rent-A-Car, Inc.*,⁵⁵ the plaintiff sued the defendant and one of its employees for injuries caused in an automobile accident. At the trial the plaintiff introduced a certified copy of the employee's plea of guilty in the criminal prosecution which evolved from the accident. The district court of appeal⁵⁶ refused to recognize the guilty plea in the criminal action as an admission against interest in the subsequent civil suit and reversed the judgment for the plaintiff. The court relied on Florida cases⁵⁷ which held that a previous criminal conviction could not be used in a subsequent civil case "to establish the truth of the facts on which it was rendered."⁵⁸ The court stated that it was "unable to comprehend the distinction"⁵⁹ between a criminal conviction and a judgment rendered in a criminal case based on a plea of guilty. The reason given for this rule of inadmissibility was the vast difference in procedure between criminal and civil litigation. The supreme court⁶⁰ reversed the appellate court and, in re-examining previous Florida cases, noted that although a conviction in a criminal prosecution could not be used in a subsequent civil suit to establish the truth of the facts on which it was based, a generally recognized exception did exist when the criminal conviction was based on a guilty plea. The theory is that the prior guilty plea is an admission against interest and can be used in a subsequent civil suit as a declaration that the fact is true.

In *Hines v. Trager Construction Company*,⁶¹ the defendant filed a

53. 185 So.2d 7 (Fla. 2d Dist. 1966).

54. *City of Miami v. Fletcher*, 167 So.2d 638 (Fla. 3d Dist. 1964).

55. 195 So.2d 216 (Fla. 1967).

56. *World Wide Rent-A-Car, Inc. v. Boshnack*, 184 So.2d 467 (Fla. 1st Dist. 1966).

57. *Moseley v. Ewing*, 79 So.2d 776 (Fla. 1955); *Stevens v. Duke*, 42 So.2d 361 (Fla. 1949).

58. *Stevens v. Duke*, 42 So.2d 361, 363 (Fla. 1949).

59. *World Wide Rent-A-Car, Inc. v. Boshnack*, 184 So.2d 467, 469 (Fla. 1st Dist. 1966).

60. *Boshnack v. World Wide Rent-A-Car, Inc.*, 195 So.2d 216 (Fla. 1967).

61. 188 So.2d 826 (Fla. 1st Dist. 1966).

cross-claim against his co-defendant in an attractive nuisance case. Summary judgment was given against Trager on its cross-claim and the co-defendant was dropped from the case. Later the plaintiff sought to introduce against Trager a part of Trager's cross-claim as an admission against interest. The appellate court upheld the objection to the introduction of the pleadings, stating that while pleadings between parties are considered admissions, such pleadings refer only to the final pleadings of the parties. When the co-defendant dropped out of the suit, the cross-claim disappeared as if it had never been made.⁶²

C. *Testimony Taken in a Former Action*

O owned an automobile which was being driven by *D* when it became involved in an accident with *X*'s car. *P*, *D*'s passenger, sued *X*. *X* defended the suits on the grounds that *D* was the cause of the accident. The jury found for *X* and *P* assigned as error the admission of the testimony of an expert witness which was taken at a former trial. In that suit, between the driver and *X*, the expert witness testified on behalf of *X*. The appellee argued that the witness' testimony should be admissible since "it was given upon such an issue that the party-opponent in that case had the same interest and motive in his cross-examination that the present opponent has."⁶³ The appellate court held that it was error to admit the transcript into evidence since under Florida Statutes, section 92.22, which is concerned with evidence used at a former trial, the present party-opponent *P* was not in privity with *D*, the original party-opponent. Privity requires "mutual or successive relationship to the same right."⁶⁴ Since *P*'s right of recovery was in no way dependent upon *D*'s recovery in the former trial, there was no privity existing between *D* and *P*.

IX. JUDICIAL NOTICE

Most of the cases in this area dealt with the problem of whether or not the fact under consideration was one of general knowledge. A few cases, as illustrated below, concerned themselves with the limitations put on the court in judicially noticing facts.

In a breach of contract suit, the court awarded damages to the plaintiff only for work already done. Execution of the award was stayed until two claims of lien were satisfied. Only one of the claims was a part of the record, but the trial judge took judicial notice of the other claim since he had also been the judge in that case. The appellate court struck the requirement that the execution be stayed until satisfaction of the second

62. *Id.* at 830.

63. *Osburn v. Stickel*, 187 So.2d 89, 91 (Fla. 3d Dist. 1966).

64. *Id.*

claim since a court cannot take judicial notice of "a different case pending or disposed of in the same court but outside the record of the case before that court."⁶⁵ The court took a rather narrow view in the instant case, in that the principal of judicial notice would seem to be applicable to records of a prior case in the same court especially where, as here, the presiding judge was the same in both cases. One federal court overcame the needless requirement of formal pleading and proof by declaring that records of a past case were public records and therefore the court could take judicial notice of them.⁶⁶

In a suit to compel compliance with a municipal ordinance, the circuit court declared the ordinance to be unconstitutional. On appeal,⁶⁷ it was held that even though the ordinance was attached to the complaint, it was never properly admitted into evidence and, therefore, it could not be declared unconstitutional. While statutory law may be judicially noticed by the court, municipal ordinances must be proven.⁶⁸

X. ACCIDENT REPORTS

When a police officer arrived on the scene of an accident the defendant regained consciousness and said that she had fainted and thought it would happen again. The defendant sought to exclude this statement on the basis that it was an oral accident report and, therefore, a privileged statement under Florida Statutes, section 317.171. This statute provides that an accident report made by a party to an accident is confidential and cannot be used as evidence in a subsequent case arising out of the accident. The court held that, under the circumstances, the statement was not part of an accident report. Since the statement was "made immediately upon regaining consciousness and while still in a state of shock" it could not be considered a "report to the officer."⁶⁹ Furthermore, the statement was admissible as the hearsay exception of declaration against interest.

In *Cooper v. State*,⁷⁰ the police officer, in the process of making out an accident report, asked the defendant and her husband if he could obtain a blood test of the defendant. The defendant, while in a hospital, agreed to the test which later showed the presence of alcohol in her blood. The results of the test were admitted into evidence and the appellate court held it to be reversible error. The blood test was performed for the purpose of completing the police officer's report and, therefore, the results came within the accident report privilege.

65. *Gann v. Levitt & Sons, Inc.*, 193 So.2d 200, 201 (Fla. 4th Dist. 1966).

66. *Zahn v. Transamerican Corp.*, 162 F.2d 36 (3d Cir. 1947).

67. *Town of Medley v. Caplan*, 191 So.2d 449 (Fla. 3d Dist. 1966).

68. *Id.* at 450.

69. *Goodis v. Finkelstein*, 174 So.2d 600, 603 (Fla. 3d Dist. 1965).

70. 183 So.2d 269 (Fla. 1st Dist. 1966).

XI. DEAD MAN'S STATUTES⁷¹A. *Subject Matter*

A marriage between a woman and her deceased alleged common law husband is a "transaction" within the meaning of the Dead Man's Statute⁷² and her testimony concerning the marriage may be stricken upon proper objection. In one case,⁷³ the alleged common law wife sought to have her testimony admitted under the *ex necessitate rei* exception to the disqualification of interested parties. This doctrine permits the wife's testimony if there is no other way to prove the marriage. The district court of appeal refused to recognize this common law exception because of the long period of time the Dead Man's Statute has been in effect and the lack of any modern cases approving this exception to the statute.⁷⁴

Since the statute only applies when a person is testifying in an action against the estate of a deceased person, it is no bar to the testimony of a plaintiff-wife concerning her common law marriage with her deceased husband in a wrongful death action against the tortfeasor.⁷⁵

In *Mathews v. Mathews*,⁷⁶ an heir was prohibited from testifying as to the identity of a writing, even from documents which were independent of the suit. The decision was based on the fact that the heir derived knowledge of the decedent's handwriting from previously observing the decedent's writing and that this observation was a "transaction" within the meaning of the Dead Man's Statute. However, the court did note that a majority of jurisdictions allow an interested party to give an opinion "as to the handwriting of the decedent, even when on the disputed document itself."⁷⁷

B. *Waiver*

The protection of the Dead Man's Statute can be waived either by failing to object to a person's testimony or by conduct of the parties.⁷⁸ In *Sessions v. Summer*,⁷⁹ the defendant was the executor of an estate which the plaintiff sued for recovery of a loan. The defendant first waived the statute when he failed to object to the introduction of a check which evidenced the loan between plaintiff and the deceased. A second waiver occurred when the defendant cross-examined the plaintiff as to matters

71. See generally Comment, *Evidence: Legislative Reform for the "Dead Man Statute,"* 18 U. FLA. L. REV. 693 (1966).

72. FLA. STAT. § 90.05 (1965).

73. *Estate of Silverman v. Lerner*, 163 So.2d 321 (Fla. 3d Dist. 1964).

74. *Id.* at 323.

75. *Smart v. Foosaner*, 169 So.2d 508 (Fla. 3d Dist. 1964).

76. 177 So.2d 497 (Fla. 2d Dist. 1965).

77. *Id.* at 504.

78. 35 FLA. JUR. *Witnesses* § 123 (1961).

79. 177 So.2d 720 (Fla. 1st Dist. 1965).

not covered on direct. The question concerned communications and transactions the plaintiff had had with the deceased about the loan.

XII. COMMENT BY THE COURT

A trial judge cannot comment on whether the jury should rely on a witness' statements. Such a comment on the veracity of the witness need not amount to an indication that the judge is vouching for the witness. All that is necessary for there to be error is that the court's statement "*could have been so interpreted.*"⁸⁰ In a second degree murder case, the judge, in his charge to the jury, stated that although the defendant was not charged with carrying a pistol without a license, the jury should consider that fact in reaching a verdict. No evidence was introduced on the question of whether or not the defendant had a license for the gun. The jury returned a verdict of guilty. The defendant's conviction was reversed on two grounds, the first being that the comment as to his illegal possession of the gun that killed the deceased suggested that the defendant was not reasonably free from guilt and, therefore, hampered his plea of self-defense.⁸¹ The second ground was that the comment suggested that the defendant was guilty of a collateral crime.⁸²

XIII. LEGISLATION

The 1965 legislature enacted a statute providing for privileged communication between a patient and his psychiatrist.⁸³ In any civil or criminal case, or any administrative or legislative proceeding, the patient or his authorized representative can refuse to disclose, or can prevent a witness' disclosure of, any communication between the patient and the psychiatrist. The statute, however, provides two exceptions to the privilege: (1) Where the court orders a psychiatric examination and informs the patient that such communications will not be privileged; and (2) In a civil or criminal case where the patient puts into evidence his mental condition for purposes of using it as a claim or defense.

Florida Statutes, section 92.36(2) was amended in 1967 to allow into evidence business records kept by means of electronic data processing machines.⁸⁴

80. *Robinson v. State*, 161 So.2d 578 (Fla. 3d Dist. 1964).

81. *Wilson v. State*, 171 So.2d 903, 904 (Fla. 2d Dist. 1965).

82. *Id.*

83. FLA. STAT. § 90.242 (1965).

84. FLA. LAWS 1967, ch. 67-102.