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Evidence

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EVIDENCE

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INTRODUCTION

With the exception of relevancy, which will be given emphasis in this article, no area of the law of evidence received outstandingly significant treatment by the Florida courts during the period of this *Survey*. Most of the new material would come under the heading of an explanation of previous law. It will be noted that the particular rules governing expert witnesses and opinion evidence continued to expand — with no special significance, except possibly in their quantity.

EXPERT WITNESSES AND OPINION EVIDENCE

The frequent use of expert witnesses has led to a case by case listing of what is and what is not a proper subject of expert testimony, the test usually being phrased in terms of whether the subject is without the common knowledge of the average juror. Many of the other cases involve a scrutiny of the means by which the expert arrived at his opinion.

An expert on lottery organizations, who was present at a raid that led to the arrest of the defendant, was allowed to give his opinion as to what was occurring (a lottery), although it was an ultimate fact.[1] The nature of a lottery operation is not known to the average juror. For the same reason it was error to exclude expert testimony as to the average person's reaction time and distance required to stop a given vehicle at a given speed under given conditions of road surface.[2] Also, a juror "is not competent to determine whether a disputed signature or writing was made by the same person whose admittedly genuine signature or writing is in evidence, without the aid of skilled or expert testimony."[3] A highway patrolman's testimony as to the point of impact in an accident was held to be inadmissible, but the court's decision was unclear as to whether it was because the patrolman was not an expert or because his testimony invaded the province of the jury.[4]

It was reversible error to admit the testimony of a naval commander, qualified as an expert, who gave an opinion that a car was traveling at a certain rate of speed, basing his opinion on a formula for the computation

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1. Diecidue v. State, 119 So.2d 803 (Fla. App. 1960), *rev'd on other grounds*, 131 So.2d 7 (Fla. 1961).
2. Mathews v. Carlson, 130 So.2d 625 (Fla. App. 1961).
3. Clark v. State, 114 So.2d 197, 203 (Fla. App. 1959).
4. Mills v. Redwing Carriers, Inc., 127 So.2d 453 (Fla. App. 1961).

of the velocity of a projectile at the instant of launch. This opinion was not only based on speculative facts, but it omitted factors relevant to an accurate calculation, thereby rendering the testimony doubly valueless.[5] An expert's testimony concerning the speed of a car in a negligence action "may be based, in part at least, upon the results of tests or experiments made by him," but will be disallowed if not "made under conditions substantially similar to those which prevailed at the time of the accident."[6] Whether substantial similarity exists is to be left to the discretion of the trial court. When no opinion as to speed in miles per hour was given, testimony that a bus was driven "faster than usual," without showing its usual rate of speed or how fast it was going, does not furnish a basis for finding that an improper speed was used, and therefore is inadmissible.[7]

The "depth rule," which "is predicated on various factors, including one which gives a value to each foot of a lot from front to rear based on its percentage in relation to the value of the entire lot,"[8] is considered to be a reliable method in reaching an opinion on the value of condemned property, and thus may be used by expert witnesses. In *Florida Power Corp. v. Wenzel*[9] the trial court's refusal to allow the testimony of the condemnor's expert witnesses on the value of the land in question was reversed on two grounds: first, because the court of appeal considered that the experts *were* qualified and second, because the effect was to "strip [the condemnor] of any expert testimony on the market value of the property interests taken."[10] An owner of property, though not qualified as an expert, may testify as to its value, since he is familiar with its uses and purposes. But ownership of property by a corporation does not automatically qualify its officers to give testimony on the property's value. It must be shown that a particular officer has sufficient knowledge about the property to qualify him to testify.[11] By implication then, "sufficient knowledge" would be that degree of knowledge about a particular piece of property that an individual owner would have.

An interesting problem was presented in *City of Coral Gables v. Brasher*,[12] in which the city's doctor testified that a police officer's heart condition was not service incurred and the police officer's doctor testified that it was so incurred. The court held that the city had not rebutted the statutory presumption that the injury was service incurred, since hopelessly

5. Le Fevre v. Baer, 113 So.2d 390 (Fla. App. 1959).
6. Huff v. Belcastro, 127 So.2d 476, 479 (Fla. App. 1961).
7. Blackman v. Miami Transit Co., 125 So.2d 128 (Fla. App. 1960).
8. Jacksonville Expressway Authority v. Milford, 115 So.2d 778, 782 (Fla. App. 1959).
9. 113 So.2d 747 (Fla. App. 1959).
10. *Id.* at 751.
11. Salvage & Surplus, Inc. v. Weintraub, 131 So.2d 515 (Fla. App. 1961).
12. 132 So.2d 442 (Fla. App. 1961).

conflicting expert testimony is considered balanced — as if none at all had been given on the issue.

On the question of whether a will was forged, it was within the province of the trial judge to accept the testimony of the attorney who drew the will and his secretary, both of whom testified that they saw the deceased sign the will, over the testimony of a handwriting expert who testified that the will was forged.[13]

PRIVILEGE

The trial court may compel the disclosure of the identity of an informer only if his identity is material. In a prosecution for the unlawful possession of moonshine whiskey, the court pointed out that the informer was not a participant in the crime (as he might be, for example, in a prosecution for the *sale* of moonshine). The court was of the opinion that his identity was not material, and the state's privilege to withhold the identity of persons who furnish information relating to violations of the law had to be recognized.[14]

IMPEACHMENT

In *Minton v. State*[15] the defendant's counsel made a pre-trial motion to inspect the grand jury proceedings, his intent being to prepare his defense. The motion was denied. On appeal, the supreme court held that the Florida statute authorizing the disclosure of grand jury testimony[16] only applies to pre-trial inspection of testimony upon which a charge of perjury or subornation of perjury is based—and the testimony cannot be inspected in order to prepare a defense.[17] A second point raised on appeal was the denial, during cross-examination of a witness, of the defendant's oral motion for permission to inspect the grand jury testimony of the witness for the purpose of laying a foundation for impeachment. The court held that, except in perjury cases,

> something more than a . . . speculation that a witness's testimony at the trial is inconsistent with that given before the grand jury must be made to appear in order to hold a trial judge in error for refusing to lift the veil of secrecy from the grand jury proceedings.[18]

The defendant's main contention was that the trial judge had a duty to read the grand jury testimony of the witness in question in order to ascertain whether or not the ends of justice required him to allow the defense counsel to inspect it before further cross-examination of the witness. In upholding

13. *In re* Grant's Estate, 123 So.2d 560 (Fla. App. 1960).
14. State v. Hardy, 114 So 2d 344 (Fla. App. 1959).
15. 113 So.2d 361 (Fla. 1959).
16. FLA. STAT. § 905.27 (1961).
17. Minton v. State, 113 So.2d 361, 363 (Fla. 1959).
18. *Id.* at 365.

the trial court's refusal to do so, the court stated that many reasons favoring secrecy of grand jury testimony (protection of the jurors, promotion of complete freedom of disclosure, etc.) must be weighed against the necessity for disclosure. The defense counsel's speculation that the witness might be testifying differently at the trial was not enough to overcome the need for secrecy. The trial judge cannot be required to stop the proceedings and read grand jury testimony every time counsel asks him to. The court offered no clear criterion of when the trial judge should do this, but it pointed out that many federal courts follow this procedure and quoted[19] the opinion of Judge Sobeloff in *Pittsburgh Plate Glass Co. v. United States*,[20] which extensively discusses the problem. The net conclusion is that much is left to the discretion of the trial court judge, a "sufficient reason" and "proper predicate" being his concise guidelines.

In *Hoyt v. State*[21] the defendant was being tried for the murder of her husband. The defense was that their marital relationship so affected the defendant's state of mind that she was not criminally responsible for her acts. Testimony concerning her staying out late with another man was admitted over the defendant's objection that it attacked her character, which had not been made an issue. The appellate court upheld the admission on the grounds that, since the defense was directed toward the defendant's state of mind, "evidence of other events vitally affecting the marital relation, and bearing upon her alleged state of mind, was properly admitted in impeachment."[22]

Section 317.17[23] of the Florida Statutes provides that no "accident reports" made by persons in accidents shall be used in any trial arising out of the accident and that the reports shall be without prejudice to the person so reporting. The defendant (in a negligence action) had given a report to one officer at the scene of the accident and a similar one to another officer, at the police station, in relation to possible criminal charges. The testimony of the second officer about the report was admitted to impeach the defendant's testimony at the trial. The court of appeal reversed and remanded for a new trial, holding that both types of report came within the prohibition of section 317.17, despite the fact that the second report was not part of an "accident report."[24]

In *H. I. Holding Co. v. Dade County*[25] it was held that it is within the trial court's discretion to decide how far cross-examination can go in an

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19. *Id.* at 367.
20. 260 F.2d. 397, 404 (4th Cir. 1958).
21. 119 So.2d 691 (Fla. 1959), *aff'd*, 368 U.S. 57 (1961).
22. *Id.* at 696.
23. FLA. STAT. § 317.17 (1961).
24. Nash Miami Motors, Inc. v. Ellsworth, 129 So.2d 704, 706 (Fla. App. 1961).
25. 129 So.2d 693 (Fla. App. 1961).

attempt to establish bias. Here, the court upheld the disallowance of the condemnee's question as to how much an expert witness received from the county for his services.

COMPETENCY

Section 90.07[26] of the Florida Statutes provides that a conviction of perjury makes one incompetent to testify. In *Gordon v. State*[27] it was held that those who have pleaded guilty to a perjury charge, but have not yet been adjudged guilty, may testify. The question of competency also arose in *Ferrer v. State*,[28] in which the court stated that the trial judge did not abuse his discretion in finding a child competent to testify when she stated that she thought something would happen to her if she "told . . . a story" after promising to tell "nothing but the truth."[29]

AIDS TO MEMORY

Under certain circumstances a witness may refresh his memory by referring to notes made by another person. In *Chaudoin v. State*[30] the allowance of this practice was approved on the grounds that the witness was present when the notes were made, personally supervised the activity to which the notes related, had personal knowledge of and was familiar with the contents of the notes at the time they were made, and the notes were original entries made by a person under the supervision of the witness contemporaneously with the finding of the facts set forth in the notes.

HEARSAY

In an automobile negligence case it was held that not all hospital records connected with a patient's case are admissible as "hospital records."[31] The records in question were entitled "progress notes" and "consultation notes." Apparently, the court was impressed with the unofficial appearance of these records in holding that their hearsay content made them inadmissible. In *Fendrick v. Faeges*[32] the defendant attempted to introduce a statement made to an employee of his attorney by the hospitalized plaintiff. The inadmissibility of this evidence as an "admission against interest" was upheld on the grounds that section 92.33[33] of the Florida Statutes had not been complied with. This section makes a statement like the one

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26. FLA. STAT. § 90.07 (1961).
27. 119 So.2d 753 (Fla. App. 1960).
28. 117 So.2d 529 (Fla. App. 1960).
29. *Id.* at 530.
30. 118 So.2d 569 (Fla. App. 1960).
31. Chilton v. Dockstader, 126 So.2d 281 (Fla. App. 1961).
32. 117 So.2d 858 (Fla. App. 1960).
33. FLA. STAT. § 92.33 (1961).

involved here inadmissible until it is shown that a copy was furnished to the person making the statement.[34]

The condemnor's estimate of just compensation, as contained in the declaration of taking, is not a declaration against interest that would preclude the condemnor from relying upon evidence of a value less than that originally estimated.[35]

In a murder trial a witness testified that just prior to the shooting, the deceased stated that the defendant had been drinking and was waving a pistol around.[36] When these statements were made, the deceased and the witness were outside a house and the defendant was inside. The deceased and the defendant had had a conversation which was heard by the witness, but at no time did the witness see the defendant, nor did he recognize the defendant's voice. The court stated that the identification of the person inside the house as the defendant was sufficient in that the deceased had referred to him by name. It was held that the statements made by the deceased were admissible as part of the "res gestae" and were not hearsay. Although the court used the unfortunate phrase, "res gestae," it clarified somewhat the reasons for allowing the introduction of this evidence by going on to say that such statements are admissible if they "have a relevant bearing," "throw light upon the motives and intention of the parties," and are contemporaneous with the act in issue, so as to preclude the presumption of premeditation.[37] Despite this clarification by the court, "res gestae" seems to this writer to be an extremely vague criterion of admissibility. Under this rule, it is difficult to ascertain whether the evidence is admissible because it is not hearsay or because it comes under an exception to the hearsay rule.

The plaintiff's admission, in a deposition, that it was her "impression" that one of two defendants was not responsible for the accident in question did not bar her recovery against that defendant because her "impression" was not based on observation (she was struck from behind), but rather was a conclusion.[38]

MORTALITY TABLES

Standard mortality tables are admissible even though the injured plaintiff, due to a particular physical condition, has a much shorter life expectancy than the average person. In *City of Tampa v. Johnson*[39] tables showing a normal life expectancy of 28.18 years were admissible, despite medical evi-

34. Fendrick v. Faeges, 117 So.2d 858 (Fla. App. 1960).
35. Jacksonville Expressway Authority v. Bennett, 124 So.2d 307 (Fla. App. 1960), *modified*, 131 So.2d 740 (Fla. 1961).
36. Washington v. State, 118 So.2d 650 (Fla. App. 1960).
37. *Id.* at 653.
38. Pfeiffer v. Shonfeld, 128 So.2d 6 (Fla. App. 1961).
39. 114 So.2d 807 (Fla. App. 1959).

dence that the plaintiff's probable life expectancy was from two to three and a half years. The court stated that the plaintiff's particular condition affects the weight of the mortality table evidence and not its admissibility. The tables are not binding on the jury and are only one of many factors to be considered. The same was true in another case,[40] in which the court approved of instructions which advised the jurors to consider the tables along with other evidence and their personal experience in trying to ascertain the period they felt the plaintiff would live.[41]

RELEVANCY

In the evidence section of a prior *Survey*,[42] the author pointed out that the Florida Supreme Court had, in the case of *Williams v. State*,[43]

> approached the problem of the admissibility of . . . *other crime evidence* in terms of a rule of *admissibility* rather than a rule of *exclusion.* The court took the position that the proper approach was not to consider the admissibility of the evidence on the basis of an exception to the rule excluding such evidence, but rather that the problem was a basic one of relevancy and concluded that 'the proper rule simply is that *relevant evidence* will not be excluded *merely* because it relates to similar facts which point to the commission of a separate crime.'[44]

During the period of the present *Survey*, the supreme court had several occasions to apply this test of the admissibility of other crime evidence. In *Mackiewicz v. State*[45] the court upheld the admission of evidence of the defendant's prior robbery of another hotel and his cell-mate's testimony which included a reference to the prior robbery. The court quoted the *Williams* case, saying that "the test of admissibility is relevancy. The test of inadmissibility is a lack of relevancy."[46] The court did not mention a balance between logical relevancy and undue prejudice that might arise through the introduction of evidence of other crimes. Relevancy was the sole criterion. Although this test alone would seem to allow the introduction of evidence that would have been held inadmissible before the *Williams* case, the court put limits on free admissibility by saying that the evidence was relevant because it tended to show the defendant's *motive.* This brings the court's approach closer to that which existed before the *Williams* case

40. Butler v. Borowsky, 120 So.2d 656 (Fla. App. 1960).
41. *Id.* at 659.
42. Touby, *Evidence, Fourth Survey of Fla. Law,* 14 U. MIAMI L. REV. 319 (1959).
43. 110 So.2d 654 (Fla. 1959).
44. Touby, *supra* note 42, at 323.
45. 114 So.2d 684 (Fla. 1959).
46. *Id.* at 688.

— a general rule of exclusion, with exceptions (when the other crime evidence tends to prove motive, scheme, etc.) allowing the evidence to be introduced.

Next, in another *Williams* case,[47] the supreme court did balance logical relevancy and undue prejudice when it held that evidence of a subsequent crime was relevant, but that the state went too far and introduction of testimony concerning the later crime "transcended the bounds of relevancy to the charge being tried, and made the later offense a feature instead of an incident."[48] But, in a third case, in which the defendant was being tried for shooting a police officer who was pursuing him after a burglary, the supreme court upheld the allowance of evidence that the defendant had escaped from a prison camp a year before, since it was relevant to the showing of a motive for shooting the police officer.[49] The court stated that the first *Williams* case had discarded the exclusion-exception rule and cited *Mackiewicz* for the proposition that "any fact relevant to prove a fact in issue is admissible [except those which are used only to point up bad character or criminal propensities]."[50]

Whether these decisions will make any substantive difference in the kind of evidence that can be introduced is difficult to evaluate, for the courts have continued to use the language of the exclusion-exception rule, saying that particular evidence (which would have been admissible before because it was an exception to the exclusion-of-other-crime-evidence rule) is now admissible because it is "relevant." For example, the First District Court of Appeal held that evidence of a conspiracy to commit other burglaries was admissible in a trial for murder committed during a burglary because it was relevant — relevant because it tended to show a common scheme or plan.[51] On the other hand, the Third District Court of Appeal held that in an arson trial, evidence that the defendant set fifteen other fires was not relevant and was used to "inflame" the jurors.[52] The court was careful to point out that the evidence was not excluded because it related to similar crimes, but because it was inadmissible due to the lack of relevancy. It is submitted that this is a strange way of balancing logical relevancy and undue prejudice — excluding prejudical evidence that is obviously relevant by calling it "irrelevant."

A further indication of the Florida courts' refusal to set up clear guide lines for trial courts to use in balancing prejudice against relevancy is found in two cases involving the admissibility of photographs of the murder victim. In one case the court stated, "when photographs are otherwise relevant they will not be held incompetent merely because they tend to prejudice the

47. Williams v. State, 117 So.2d 473 (Fla. 1960).
48. *Id.* at 475.
49. Johnson v. State, 130 So.2d 599 (Fla. 1961).
50. *Id.* at 600.
51. Griffin v. State, 124 So.2d 38 (Fla. App. 1960).
52. Hooper v. State, 115 So.2d 769 (Fla. App. 1959).

jury."[53] One might surmise that another court would hold the same photograph not "otherwise relevant" if it thought the effect would be to inflame the jurors. In the second case the court said, "the fact that the scene presented is one which would likely arouse the passion and prejudice of the jury does not render them inadmissible,"[54] but they should be admitted with great caution.

In an unrelated area, it was held that original court files of other cases may be introduced into evidence if relevant, but the practice should be discouraged.[55]

In a negligence action involving a fall in a supermarket, the plaintiff introduced the affidavit of an employee of the market containing a statement that sometimes the bagboys would let loose pieces of lettuce fall to the floor. The court pointed out that the affidavit was not relevant to the issue of negligence since it did not show that the dangerous condition existed at the time of the accident.[56]

BEST EVIDENCE RULE

No matter how convincing the proof is that a carbon copy is an exact duplicate of the original letter, the proper predicate for admission of the carbon copy is to serve notice for the production of the original. If this is not done, the carbon copy is inadmissible.[57]

INFERENCE UPON AN INFERENCE

The problem of the rule against constructing "an inference upon an inference" was again presented to the Florida courts during the period of this *Survey*. The court in *Nielsen v. City of Sarasota*[58] stated the general rule that in a civil case, a fact may be established by circumstantial evidence (*e.g.*, an inference of negligence), but a further inference (*e.g.*, proximate cause) cannot be constructed upon the first one unless the first one "was established to the exclusion of all other reasonable inferences."[59] (The court also pointed out that the "criminal rule permits proof of guilt by circumstantial evidence provided the circumstantial evidence points to guilt to the exclusion of every reasonable hypothesis of innocence."[60]) In another case, the court of appeal reversed a verdict for the plaintiff, saying that the trial court should have granted the defendant's motion for a directed verdict.

53. Leach v. State, 132 So.2d 329, 331 (Fla. 1961).
54. Brooks v. State, 117 So.2d 482, 486 (Fla. 1960).
55. City of Coral Gables v. Brasher, 132 So.2d 442 (Fla. App. 1961).
56. Food Fair Stores, Inc. v. Trusell, 131 So.2d 730 (Fla. 1961).
57. Green v. Hood, 120 So.2d 223 (Fla. App. 1960).
58. 117 So.2d 731 (Fla. 1960).
59. *Id.* at 733.
60. *Ibid.*

The jury had to infer that the defendant was negligent in providing an inadequate ladder (the court held that this inference was not established to the exclusion of all other reasonable inferences) and then infer that this negligence was the proximate cause of the plaintiff's fall.[61]

Thus, in every case of this nature, the trial judge, in considering the defendant's motion for a directed verdict, must first determine whether the jury must make an inference upon an inference in order to find for the plaintiff, and second, he must decide whether the circumstantial evidence presented has established the first inference to the exclusion of all other reasonable inferences. When he has done this, and has granted the defendant's motion for a directed verdict, he may be reversed by the court of appeal on the grounds that the first inference was not an inference, but rather a fact directly proved, or because the first inference *was* (in the view of the appellate court) established to the exclusion of all other reasonable inferences.[62] This writer foresees great difficulty, both on the trial and appellate levels, in determining how many inferences a jury must make to grant recovery and how an inference may be satisfactorily established. The court in the case last cited further confused this area when it stated that "the negligence is not shown by piling inference upon inference in succession, but rather is indicated, and might be found by a jury, from what may be described as parallel inferences arising under the circumstances."[63]

Negative Testimony

In a case involving the question of whether or not a train whistle had blown at a crossing, the court of appeal held that negative testimony (the plaintiff's witnesses said they did not hear it blow) will not make an issue in the face of positive testimony (that it had been blown).[64] But the supreme court reversed, saying that "if a jury decides that the attention of the witness whose testimony is negative in character, is *actually directed* to the fact or situation, about which he later testifies, regardless of the reason therefor, said jury may consider such negative testimony and accord to it the weight it may deem proper."[65]

Presumptions

When a defendant has been previously adjudicated insane, it is presumed that he remains so until it is shown that his sanity has been restored. In *Johnson v. State*[66] the defendant offered evidence of his prior adjudication

61. McCormick Shipping Corp. v. Warner, 129 So.2d 448 (Fla. App. 1961).
62. Belden v. Lynch, 126 So.2d 578 (Fla. App. 1961).
63. *Id.* at 581.
64. Apalachicola No. R.R. v. Tyus, 114 So.2d 33 (Fla. App. 1959).
65. Tyus v. Apalachicola No. R.R., 130 So.2d 580, 585 (Fla. 1961).
66. 118 So.2d 234 (Fla. App. 1960).

of insanity and also a discharge certificate from the state hospital to which he had been confined. The court stated that while this certificate would be prima facie proof of sanity in a proceeding for restoration to sanity,[67] this presumption does not extend to a criminal proceeding. The fact that the defendant introduced the certificate was immaterial. The certificate was proper evidence for the jury to consider in determining whether the presumption of insanity had been rebutted, but no more.

TIMELY OBJECTION

The established "timely objection" rule was applied by the court in *Raco v. State*,[68] which held that the defendant's acceptance of the trial court's ruling on a cross examination question precluded an attack on the ruling on appeal. In *Ailer v. State*[69] the court noted that this rule applies even when the trial court judge has wrongly failed to intervene, *sua sponte*, in the absence of an objection. But in this case, remarks made by the prosecuting attorney in his closing argument about other crimes of the defendant were "of such character that neither rebuke nor retraction may entirely destroy their sinister influence."[70] Thus, the situation gave rise to an exception to the "timely objection" rule and became grounds for the granting of a new trial.

COMMENT BY THE JUDGE

In *Lassiter v. State*[71] the trial judge was held to have invaded the province of the jury and to have committed prejudical error when he commented that there was no inconsistency between a state witness' testimony at a coroner's inquest and his trial testimony on the issue of the defendant's guilt.

EVIDENCE OF MITIGATING OR AGGRAVATING CIRCUMSTANCES

When a defendant has pleaded guilty and declined a jury trial, the state may introduce evidence of the crime over the defendant's objection that this practice allows the state to prove its case as though the defendant were being tried by a jury on a not guilty plea.[72] When the trial court has discretion as to the penalty to be inflicted on the defendant, either side may introduce evidence to show mitigating *or aggravating* circumstances to aid the court in determining the extent of the sentence to be imposed.[73]

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67. FLA. STAT. § 394.22(16) (1961).
68. 114 So.2d 485 (Fla. App. 1959).
69. 114 So.2d 348 (Fla. App. 1959).
70. *Id.* at 351.
71. 118 So.2d 81 (Fla. App. 1960).
72. Davis v. State, 123 So.2d 703, 709 (Fla. 1960).
73. FLA. STAT. § 921.13 (1961).