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Evidence

Richard Touby

EVIDENCE

RICHARD TOUBY*

Within the period covered by this survey, the Supreme Court had occasion to pass upon many evidence problems. However, in most instances, unfortunately, the alleged evidentiary error was not the primary consideration of either the appellant or the court. Consequently, the appellant and the court did not direct their attention to these matters with the degree of thoroughness that was given the substantive problems. Accordingly, the product in a few instances, is not commensurate with its other efforts. As did my predecessor, I omit, "Those points of evidence within the sphere of constitutional law, such as the privilege against self-incrimination and illegal searches and seizures." The legislature did nothing of note in the evidence field.

Judicial Notice

Very little of interest in this field occurred during the period covered; however, it may be well to note the subjects concerning which the Supreme Court of Florida took judicial notice.

The court took judicial notice: that motorists now traverse the highways at all times of the day and night;[1] of its own records in other proceedings;[2] of the limitations inherent in the use of the voting machine so far as the amount of printed matter thereon is concerned;[3] that almost every automobile is equipped with a rear view window, stop lights and other devices to enable the driver to see following vehicles;[4] that constant use of steps, although properly constructed of proper material, will cause such steps to become slick and smooth;[5] that a lot in a subdivision near a cemetery would not be as readily resalable as one not adjoining a cemetery;[6] that the millions of automobiles produced and sold in this country and placed on its highways have created a condition that makes safe, adequate highways the very first order of business of the various states and their political subdivisions;[7] that in Dade County the volume of divorce cases heard by the Circuit Court is tremendous, and that in a large proportion of these cases the custody and support of children is involved;[8] that in many municipal and county buildings space is leased or concessions are granted to private individuals for the sale of food,

*Associate Professor, University of Miami School of Law.

1. Keeley v. Keeley, 75 So.2d 191 (Fla. 1954); Atlantic Coast Line Ry. v. Johnson, 74 So.2d 689 (Fla. 1954).
2. Keeley v. Keeley, *supra* note 1.
3. Hill v. Milander, 72 So.2d 796 (Fla. 1954).
4. Clark v. Sumner, 72 So.2d 375 (Fla. 1954).
5. Bucholtz v. Jacksonville, 72 So.2d 52 (Fla. 1954).
6. Jones v. Trawick, 75 So.2d 785 (Fla. 1954).
7. Southern Bell Tel. & Tel. Co. v. State, 75 So.2d 796 (Fla. 1954).
8. *In re* Rouse, 66 So.2d 42 (Fla. 1953).

etc.;[9] of the distance traveled per second by an automobile traveling at a specified speed per hour.[10]

The Supreme Court refused to take judicial notice that atrophy of a person's arm could not have occurred due to a treatment used to maintain muscle tone thereafter;[11] that the body of a person who meets death by drowning will not float until sufficient time has elapsed for decomposition to have set in.[12] The court observed, in the case of *Forbes v. Bushnell Steel Const. Co.*,[13] that even where the trial judge had personal knowledge of all the facts upon which its decree was based, personal knowledge alone is not a sufficient predicate for the entry of a final decree, and when questioned on appeal cannot be upheld.

The court in two cases[14] made interpretations of the Uniform Judicial Notice of Foreign Law Act.[15]

Burden of Proof

In the year 1898, Professor James Bradley Thayer, generally recognized as the first to effectively bring to light the dual notion of the burden of proof, said, "He would do a great service to our law who should thoroughly discriminate and set forth the whole doctrine of the burden of proof."[16] Our Supreme Court generally is not disturbed by this dual notion and continues to employ the term *burden of proof* without a great deal of discrimination.

The Supreme Court reiterated the oft and correctly stated principle that the burden of establishing a right of recovery by a preponderance of the evidence is upon the plaintiff.[17] Of course, here the court was considering the burden of proof in the sense of the burden of persuasion of the trier of fact. *Chaachou v. Chaachou*[18] was a suit for divorce, suit money, counsel fees and alimony, both temporary and permanent. The relief sought was based upon allegations of a common-law marriage. The case was before the Supreme Court on a petition for certiorari seeking to quash an order holding that a common-law marriage was not sufficiently established to warrant alimony, suit money and attorneys' fees *pendente lite*.

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9. Gate City Garage v. Jacksonville, 66 So.2d 653 (Fla. 1953).
10. Bessett v. Harkett, 66 So.2d 694 (Fla. 1953).
11. Roberts v. Wofford Beach Hotel, 67 So.2d 670 (Fla. 1953). The court observed that judicial notice of scientific facts must be restricted to matters of universal notoriety and general understanding.
12. Voelker v. Combined Ins. Co. of Am., 73 So.2d 403 (Fla. 1954).
13. 76 So.2d 268 (Fla. 1954).
14. Kingston v. Quimby, 80 So.2d 455 (Fla. 1955); Lanigan v. Lanigan, 78 So.2d 92 (Fla. 1955) (The court observed that a party intending to take advantage of the provisions of the act has the obligation of giving reasonable notice of that intention to adverse parties either in the pleadings or otherwise).
15. Fla. Stat. § 92.031 (1953).
16. Thayer, *A Preliminary Treatise of Evidence at Common Law* (1898).
17. Voelker v. Combined Ins. Co. of Am., *supra* note 12.
18. Chaachou v. Chaachou, 73 So.2d 830 (Fla. 1954).

The court reaffirmed the statement in *Fincher v. Fincher*[19] that "Nothing said herein shall be taken as abrogating or modifying the time honored rule that when a prima facie case has been established the *burden of proof* thereafter shifts to the defendant." (Emphasis added.) The court apparently was considering the burden of proof in the sense of going forward with the evidence since the burden of persuasion does not shift. If the court was employing the term *prima facie case* in its usually accepted sense, it would be incorrect to state that when a prima facie case has been established, the burden of going forward with the evidence shifts. Ordinarily, the term "prima facie case," is restricted to the situation where the trier of fact is permitted to make a finding of fact but the court does not grant a peremptory ruling for either party.[20]

In re Colson's Estate[21] also involved an alleged common-law marriage. The court made the following observation: "The burden of proof was not upon Viola Colson except to establish a prima facie case. Then the burden of proof shifted. He who asserts the illegality of a marriage must assume the burden of proving his assertion." It is not quite clear whether the court considered the establishment of a marriage as a matter different and apart from the legality of a marriage. The court apparently when it employs the term "burden of proof" is considering it in its "burden of persuasion" sense, and, in that event, if legality or illegality is an issue apart from marriage, then it is not accurate to speak of the burden of proof or the burden of persuasion as having shifted, but rather it must be said that the burden of persuasion is initially cast upon the party seeking to assert illegality.

In re Klinger's Estate[22] involved an application for a widow's allowance, based upon an alleged common-law marriage. On appeal, the widow claimed that she had made out a prima facie case and that the burden of proof had shifted to the party contesting her right to the widow's allowance; also that the burden of proof was not upon her to establish by a preponderance of the evidence that she was the common-law wife of the deceased. The court observed that, "Although, she was not required, by a preponderance of the evidence, to prove that she was the wife of John Klinger, the record fails to reveal even a prima facie case of present assent or a marriage by repute and habitation." The writer is completely at a loss to explain this language by the court. Apparently the burden of persuasion of establishing a common-law marriage or a marriage of any kind, is not cast upon the alleged widow in a petition for widow's allowance, but rather is cast upon those opposing its establishment which, in itself, appears improper. However, if the burden of persuasion is not

19. 55 So.2d 800 (Fla. 1952).
20. See McCormick, *Charges on Presumption and the Burden of Proof*, 5 N.C.L. REV. 291 (1927).
21. 72 So.2d 57 (Fla. 1954).
22. 73 So.2d 50 (Fla. 1954).

cast upon the widow, why then is the burden of going forward with the evidence cast upon her to establish a prima facie case? We wonder if the court approved of the alleged widow's position that the burden was cast upon her only to establish a prima facie case and then the burden of persuasion shifted? If so, the Supreme Court of Florida is adopting a rule which is not of general application in any state.

The court was faced with the *whistle-bell train* situation,[23] (where a witness wants to testify that he did *not* hear the bell ring or the whistle blow); and made the generally accepted holding that in order for negative testimony to be sufficient to pass the court, it must be made to appear that the negative statements as to a particular fact were made by persons whose attention was directed to the fact and that they were looking, watching and listening for the fact.

Circumstantial evidence of a fact which is not impossible, though it may be unreasonable, inconsistent or contradictory is sufficient for the jury's consideration in accordance with the above observation.[24] The court properly analyzed the rule dealing with the sufficiency of the evidence to pass the court.

It is suggested that the court's thoughts on the subject of the burden of proof could more easily be conveyed if that term were abandoned and in its stead the terms *burden of persuasion of the trier of fact* and *burden of going forward with the evidence* were employed.

The court, on several occasions, dealt with the problem of the degree of the persuasion of the trier of fact and confirmed its previous view, that a confession should not be received in evidence unless there is at least some prima facie proof of the corpus delecti.[25]

The rule of evidence that positive testimony is entitled to prevail over negative testimony assumes that the witnesses are of equal credibility,[26] and the court reaffirmed its position that uncorroborated testimony is not sufficient to support a decree of divorce.[27]

Voelker v. Combined Ins. Co. of America[28] involved a suit on an insurance policy in which the disputed question of fact was the cause of death of the insured. All of the evidence was circumstantial and the court observed that if the plaintiff is to prevail when circumstantial evidence is relied upon in a civil case, any reasonable inference deducible therefrom, which would authorize recovery, must outweigh each and every contrary reasonable inference.

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23. Loftin v. Kubica, 68 So.2d 390 (Fla. 1953).
24. Caledonian Am. Ins. Co. of N.Y. v. Coe, 76 So.2d 273 (Fla. 1954).
25. McElveen v. State, 72 So.2d 785 (Fla. 1954).
26. Palmquist v. DeBan, 69 So.2d 769 (Fla. 1953).
27. Martin v. Martin, 66 So.2d 268 (Fla. 1953).
28. Voelker v. Combined Ins. Co. of Am., 73 So.2d 403 (Fla. 1954); see also Raybon v. State, 75 So.2d 7 (Fla. 1954).

Presumptions

The court considered the existence of several presumptions, and determined that a presumption exists that the Attorney General properly performs his duty,[29] and that a recent adjudication of insanity creates a presumption of continued insanity.[30] The court, in the *Voelker* case, recognized an exception to the "inference upon an inference" rule where the first inference is sufficiently strong that it may be treated as a proven fact. In a very fine decision written by Justice Sebring, the Supreme Court reaffirmed Florida's position as a rule of law presumption jurisdiction; that is, that the presumption is a rule of law which compels decision in the absence of evidence; thus shifting the burden of going forward with the evidence; and when evidence is presented which rebuts the presumption, the presumption vanishes from the case.[31]

Relevancy

Ordinarily, in a homicide prosecution, in order that a revolver may be introduced as evidence of the identity of the accused, there must be a showing that it was the weapon from which the fatal shots had been fired or that it was found in the possession of the accused or in the vicinity where the crime was committed. If no one sees the accused fire the gun, then failure to show that the bullets removed from the victim's body were fired from the gun in question, would be such a break in the chain of evidence as to render the gun and testimony about it inadmissable.[32]

A city ordinance provided that the mayor maintain a watchman at a railroad crossing, constantly between the hours designated, as being necessary to warn travelers of approaching trains. Evidence that the superintendent of the railroad had been told by the mayor that it was not necessary to "walk a man across" was held not relevant to establish that the railway was not in violation of the ordinance.[33]

The court, in many instances, took the position that evidence of public liability insurance has probative value on the issue of negligence in an automobile collision case but none-the-less excluded the evidence as irrelevant on the theory that it only slightly tends to prove what it is intended to prove, as compared with its prejudicial character. In *Daniel v. Rogers*,[34] the court decided that evidence of no public liability insurance was irrelevant.

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29. Miami Retreat Foundation v. Ervin, 66 So.2d 667 (Fla. 1953).
30. Florida P. & L. Co. v. Robinson, 68 So.2d 406 (Fla. 1953).
31. Leonetti v. Boone, 74 So.2d 551 (Fla. 1954).
32. Coco v. State, 80 So.2d 346 (Fla. 1955).
33. Trabulsy v. Loftin, 76 So.2d 143 (Fla. 1954).
34. 72 So.2d 391 (Fla. 1954).

Pre-Trial Experiments

Evidence of a public opinion poll taken before trial for the purpose of effecting a change of venue was objected to and the objection sustained. This ruling was affirmed by the Supreme Court on the basis that the results of the poll constituted hearsay and that sufficient similarity of conditions was not shown.[35]

Hearsay

Appellant's counsel complained of error in the failure of the court to permit introduction into evidence of prior trial testimony without a showing that the witness was not available. The court observed that the introduction of this evidence was purely in the discretion of the court and there was no showing of abuse of this discretion.[36] It is submitted that this hearsay evidence should not be admissable unless all of the elements of the exception to hearsay rules are present and that it is not within the discretion of the trial court to determine that it is or is not admissible.

In *Williams v. State*,[37] the accused was indicted for murder. The state called a witness who testified that the accused had said that he was going to have satisfaction out of the deceased. The defense on cross-examination, asked the witness if he had so testified at the coroner's inquest. The witness replied that he had not, but that he had then testified that a third person said that he was going to kill the deceased. The defense then sought to prove that the witness had not so testified at the coroner's inquest and that the record of the proceedings there contained no such statement. The court decided that the method employed by the defense was improper, without considering the propriety of admitting this type of evidence as within the hearsay rule.[38]

In *Martin v. Martin*[39] the disputed question of fact appears to be the good faith of an offer of reconciliation by the husband. The trial court admitted the deposition of a witness which showed that the husband had told the deponent that he was anxious to resume living with his wife and was also willing to have his wife's mother remain with them. On appeal, the court decided that this and similar evidence was a violation of the hearsay rule and not entitled to consideration. The evidence was admitted in the trial court over objections by the wife's attorney, (which we assume to have been a proper specific objection and not a general objection). Since good faith appears to be an issue in the case, might not the questioned evidence have been admissible under the exception to the hearsay rule, *i.e.*, declarations expressing a present state of mind or emotion.

35. Irvin v. State, 66 So.2d 288 (Fla. 1953).
36. Abbe v. Abbe, 68 So.2d 565 (Fla. 1953).
37. 74 So.2d 797 (Fla. 1954).
38. State v. Saporen, 205 Minn. 358, 285 N.W. 898 (1939).
39. See note 37 *supra*.

Evidence of fresh report in a rape case by the prosecutrix is admissible into evidence. Even where there is no fresh report but consent is an issue in the case testimony of report, although not part of the *res gestae*, may serve the purpose of rebutting the inference of consent that might have been drawn from silence.[40]

Parol Evidence Rule

Parol evidence is inadmissible to vary the terms of a written contract. A contemporaneous oral agreement cannot affect the terms of a promissory note where the matter contained in the oral testimony is considered in the note.[41] Parol evidence is inadmissible to vary the terms of a ballot.[42] However, when an ambiguity appears in a written instrument, parol evidence is admissible[43] to resolve the ambiguity.[44] Parol evidence is also admissible to establish the fact that a written instrument was not intended to be effective until the happening of a future event.[45]

Privilege

Evidence which is relevant, material and competent in all respects, and may be very helpful to the trier of fact, may be rendered inadmissible on the theory that there are certain things more important than the establishment of the truth of the facts. In the case of *Brown v. May*,[46] the court determined that the privilege with regard to confidential communications between spouses is not terminated by divorce; as is the privilege of not testifying against a spouse.

A statutory privilege has been created prohibiting the admission into evidence, with exception as to identity, of accident reports made to the Department of Public Safety.[47] Persons who may have overheard a driver, or any person involved, making an oral report to a patrolman investigating an accident, may not testify to what they heard, since this would render the statute nugatory.[48] The writer feels that this is a wise decision and should be applied to the situation where there has been an unintentional communication to a third person of a confidential communication between spouses, provided that the spouses have not been negligent in conducting their conversations.

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40. Irvin v. State, *supra* note 35.
41. Schwartz v. Zaconick, 68 So.2d 173 (Fla. 1953). The court also observed that an equity court must recognize the parol evidence rule.
42. Burke v. Beaseley, 75 So.2d 7 (Fla. 1954).
43. State v. Harrison, 74 So.2d 371 (Fla. 1954).
44. Bassato v. Denicola, 80 So.2d 353 (Fla. 1955).
45. 76 So.2d 652 (Fla. 1954).
46. Fla. Stat. §§ 317.13, 18 (1953).
47. Herbert v. Garner, 78 So.2d 727 (Fla. 1955).
48. Porter v. Columbia County, 75 So.2d 699 (Fla. 1954).

Opinion

The primary function of witnesses is to describe their observations to the trier of fact. Opinion evidence is admissible only when the trier of fact requires assistance; either because of the nature of the inquiry or because of the inability of witnesses to describe their observations in terms of fact.

Because of the subject matter of the inquiry, a witness may testify as to his opinion of the value of real estate, but one who has not been qualified as an expert may not.[49] For the same reason a police officer, who is qualified as an expert, may give his opinion with regard to speed as deduced from stopping distances, braking distances and skid marks.[50]

Cross-Examination

Impeachment is a proper function of cross-examination. In a rape prosecution,[51] a deputy sheriff was called by the state. The defendant on cross-examination proposed to ask the witness whether it was true that the defendant accused the witness and the sheriff of attempting to murder him. The court held this improper impeachment. Approval of this line of questioning would permit a defendant to make wholly unfounded accusations, and then use them for impeachment at the trial.

The accused in a criminal prosecution[52] testified on direct examination that he was making a "papa-wheel". It then became proper on cross-examination to interrogate him concerning this even though originally it would have been inadmissible. When a document is employed on cross-examination, counsel must permit opposing counsel to examine same.[53]

Competency of Witnesses

A witness who had been adjudged mentally incompetent was permitted to testify since, notwithstanding such adjudication, a person is competent as a witness where it is shown that he had a lucid interval. The appellate court determined that the trial judge could not be said to have committed reversible or prejudicial error from the fact that witness' testimony itself was given in a clear and coherent manner and was evidence of his capacity as a witness.[54] The archaic Dead Man's Statute was considered in two cases, one in which it was considered waived,[55] and one in which the putative grantor of a deed was not precluded from testifying that he did not execute the deed when the named grantee was deceased.[56]

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49. Kerr v. Carraway, 78 So.2d 571 (Fla. 1955).
50. Irvin v. State, 66 So.2d 288 (Fla. 1953).
51. Mortellaro v. State, 72 So.2d 815 (Fla. 1954).
52. Williams v. State, 74 So.2d 797 (Fla. 1954).
53. Florida P. & L. Co. v. Robinson, 68 So.2d 406 (Fla. 1953).
54. *In re.* Colson's Estate, 72 So.2d 57 (Fla. 1953).
55. Security Trust Co. v. Calafonas, 68 So.2d 562 (Fla. 1953).
56. Warren v. State, 74 So.2d 689 (Fla. 1954).

ADMISSION AND EXCLUSION

In the prosecution of an alleged second offender for the purpose of proving a prior conviction, it is improper to introduce into evidence a certified copy of the prior judgment and the testimony of the county judge before whom the prior conviction took place. Instead, the state must introduce the information, plea, jurisdiction of the court, verdict of the jury, judgment and sentence of the court.[57] The failure to object to objectionable evidence constitutes a waiver.[58] The granting of a motion to strike portions of a complaint, as being evidentiary, does not preclude their introduction at the trial if the evidence is proper.[59]

57. Lineberger v. Domino Canning Co., 68 So.2d 357 (Fla. 1953).
58. Boston v. Boston, 67 So.2d 661 (Fla. 1953).
59. McCall v. Sherbill, 68 So.2d 362 (Fla. 1953); Coco v. State, 80 So.2d 346 (Fla. 1955).