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## Evidence

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## EVIDENCE

LEWIS L. COSOR\*

Without fear of contradiction, let us begin by saying that the field of evidence has not suffered any violent upheaval in Florida during the period covered by this survey. Indeed, it would appear that the principles are, for the most part, so firmly entrenched that they are rarely challenged, let alone altered. We shall divide this article into two sections—the Supreme Court and the Legislature.

### THE SUPREME COURT

The Supreme Court of this state has had little opportunity to deal with the principles of evidence, aside from the rulings in most cases that the evidence does or does not support the judgment. These decisions, of course, deal with particular fact situations and no purpose would be served by reviewing them here. Also on the list of subjects which we will not cover in this article are those points of evidence within the sphere of constitutional law such as the privilege against self-incrimination and illegal searches and seizures.

The matters which the court has been called upon to discuss are judicial notice, witnesses, written and demonstrative evidence, evidence of separate crimes, circumstantial evidence, parol evidence, presumptions, and privileges. We shall discuss them in that order.

*Judicial notice.*—There have been numerous decisions on the specific matters of which the court will take judicial notice.<sup>1</sup> We will not attempt to discuss or enumerate them. Instead, let us examine the principles

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1. *Bessett v. Hackett*, 66 So.2d 694 (Fla. 1953); *Gate City Garage v. Jacksonville*, 66 So.2d 653 (Fla. 1953); *Campbell v. Jacksonville Kennel Club*, 66 So.2d 495 (Fla. 1953); *In re Rouse*, 66 So.2d 42 (Fla. 1953); *Sinclair Refining Co. v. Watson*, 65 So.2d 732 (Fla. 1953); *Smith v. State*, 65 So.2d 303 (Fla. 1953); *Ball v. Jones*, 65 So.2d 3 (Fla. 1953); *McCorquodale v. Keyton*, 63 So.2d 906 (Fla. 1953); *Everett v. Gillespie*, 63 So.2d 903 (Fla. 1953); *Daly v. Stokell*, 63 So.2d 644 (Fla. 1953); *Miami Retreat Foundation v. Ervin*, 62 So.2d 748 (Fla. 1952); *State v. County of Sarasota*, 62 So.2d 708 (Fla. 1953); *Overman v. State Board of Control*, 62 So.2d 696 (Fla. 1952); *Moore v. Boyd*, 62 So.2d 427 (Fla. 1952); *Rodi v. Florida Greyhound Lines*, 62 So.2d 355 (Fla. 1952); *American Airmotive Corp. v. Moore*, 62 So.2d 37 (Fla. 1952); *Horton v. Louisville & N. R. R.*, 61 So.2d 406 (Fla. 1952); *Budget Commission of Pinellas County v. Blocher*, 60 So.2d 193 (Fla. 1952); *King v. Griner*, 60 So.2d 177 (Fla. 1952); *State v. Board of Control*, 60 So.2d 162 (Fla. 1952); *Andrews v. Narber*, 59 So.2d 869 (Fla. 1952); *Breau v. Whitmore*, 59 So.2d 748 (Fla. 1952); *White v. Johnson*, 59 So.2d 532 (Fla. 1952); *Quality Courts United v. Jones*, 59 So.2d 20 (Fla. 1952); *Miami Paper Co. v. Johnston*, 58 So.2d 869 (Fla. 1952); *Fenske v. Coddington*, 57 So.2d 452 (Fla. 1952); *Gillette v. Tampa*, 57 So.2d 27 (Fla. 1952); *Rosche v. Hollywood*, 55 So.2d 909 (Fla. 1952); *Palm Beach v. West Palm Beach*, 55 So.2d 566 (Fla. 1951); *Rice v. Arnold*, 54 So.2d 114 (Fla. 1951); *Miami Shores Village v. Bessemer Properties*, 54 So.2d 108 (Fla. 1951); *Loftin v. Miami*, 53 So.2d 654 (Fla. 1951); *Hotchkiss v. Martin*, 52 So.2d 113 (Fla. 1951).

followed by the court in determining which matters shall be judicially noticed. The basic premise is, "What every one knows the Court is presumed to know."<sup>2</sup> In *Makos v. Prince*,<sup>3</sup> the court pointed out that "the established rule in respect to judicial notice is that it should be exercised with great caution. The matter judicially noticed must be of common and general knowledge. Moreover, it must be authoritatively settled and free from doubt or uncertainty."<sup>4</sup> In the same case, the court went on to point out that, when a matter is judicially noticed, it is taken as true without the necessity of proof, but this does not preclude the opposing party from disproving the matter.

Although the general rule is that the court will not take judicial notice of municipal ordinances,<sup>5</sup> where, through the negligence of the municipality, an ordinance is lost, "The city will not be heard to question its contents on the sole ground that the original ordinance, presumably in the city records, actually cannot be found. It will, on the contrary, be considered to have become victim of the doctrine of estoppel."<sup>6</sup>

*Witnesses.*—In the one decision<sup>7</sup> which opened up a new area in the field of evidence, the Supreme Court was called upon to interpret Common Law Rule 37 which had never before been ruled upon by either the Florida Supreme Court or by the federal courts. This rule provides that a party may call an adverse party as his witness and that he may use leading questions and impeach or contradict him as if he had been called by the adverse party. The court held that this right is not limited to cases in which the adverse party is not called as a witness in his own behalf, however,

. . . when the adverse party testifies and is cross-examined by opposing counsel, if the adverse party is again called, the examination must be limited to matters brought out in chief, matters alleged in the complaint or which were developed at trial, and were unknown at the time of the examination in chief or to matters essential to lay a predicate for impeachment. If the examination is to relate to new matters, the party making the request must make the adverse party his own witness.<sup>8</sup>

As has been pointed out by almost every court in the Anglo-Saxon system of law, the right to cross-examine is an absolute right as opposed to a privilege.<sup>9</sup> On the other hand, the right to recall a witness is

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2. *White v. Johnson*, 59 So.2d 532, 533 (Fla. 1952); *Fenske v. Coddington*, 57 So.2d 452 (Fla. 1952).

3. 64 So.2d 670 (Fla. 1953).

4. *Id.* at 673.

5. *Miami Shores Village v. Bessemer Properties*, 54 So.2d 108 (Fla. 1951).

6. *Crystal River v. Williams*, 61 So.2d 382, 383 (Fla. 1952).

7. *Loftin v. Morgenstern*, 60 So.2d 732 (Fla. 1952).

8. *Id.* at 733.

9. *Coco v. State*, 62 So.2d 892 (Fla. 1953).

not an absolute one but is a matter within the discretion of the trial court.<sup>10</sup> Where this discretion is abused by not allowing a defendant in a criminal prosecution to recall one of the state's witnesses where it is obvious that the ends of justice would be better served by so doing, the trial court has committed reversible error.<sup>11</sup>

When an alleged accomplice takes the stand against the defendant in a criminal action, the Supreme Court has said that the duty to receive such evidence with caution "devolves upon the jury as well as the presiding judge."<sup>12</sup> Such testimony, though, even when uncorroborated, may be sufficient to sustain a conviction.<sup>13</sup> This is based on the principle that the Supreme Court cannot substitute its judgment for that of the jury as to the credibility of witnesses.<sup>14</sup>

When the defendant takes the stand as a witness in his own behalf he may be impeached just as any other witness.<sup>15</sup> This extends to the introduction of the defendant's confession in evidence on rebuttal by the state.<sup>16</sup>

In *Kaminski v. State*,<sup>17</sup> the trial court had allowed the state, in an attempt to rehabilitate a witness, to ask the witness whether he had taken a lie detector test prior to testifying. The Supreme Court said that the trial judge had "committed as egregious an error as if he had admitted the results of the test . . . ."<sup>18</sup>

Although an officer, testifying in a criminal prosecution, may state what he did pursuant to information received by him, he may not relate the information itself since that constitutes hearsay.<sup>19</sup>

A witness's testimony may not be corroborated by his own prior consistent statement, although "such a statement may become relevant if an attempt is made to show a recent fabrication."<sup>20</sup>

Where there is no testimony as to a purported will being a forgery except that of handwriting experts, that is sufficient to establish the forgery.<sup>21</sup>

*Written and demonstrative evidence.*—As a general rule, of course, blood-stained clothing<sup>22</sup> and gory photographs of the body<sup>23</sup> are not

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10. *Hahn v. State*, 58 So.2d 188 (Fla. 1952).

11. *Ibid.*

12. *Padgett v. State*, 53 So.2d 106, 109 (Fla. 1951).

13. *Land v. State*, 59 So.2d 370 (Fla. 1952).

14. *Ibid.*

15. *Story v. State*, 53 So.2d 920 (Fla. 1951).

16. *Ibid.*

17. 63 So.2d 339 (Fla. 1952).

18. *Id.* at 340.

19. *Collins v. State*, 65 So.2d 61 (Fla. 1953).

20. *Van Callon v. State*, 50 So.2d 882, 884 (Fla. 1951).

21. *Mauldin v. Reel*, 56 So.2d 918 (Fla. 1951).

22. *North v. State*, 65 So.2d 77 (Fla. 1953).

23. *Thomas v. State*, 59 So.2d 517 (Fla. 1952).

admissible in a homicide prosecution. However, when they serve some purpose such as tending to corroborate the defendant's testimony<sup>24</sup> or to show size of deceased when there has been conflict over this question,<sup>25</sup> they may be admitted at the discretion of the trial judge. It must be shown, in the case of the clothing, that due care has been taken to insure the fact that it is in substantially the same condition as at the time of death.<sup>26</sup>

When a defendant in a criminal prosecution questions a witness about the subject matter of written or demonstrative evidence, he will not be heard to object to the introduction into evidence of such matters.<sup>27</sup>

Where a contract is in the possession of a party in the courtroom, and that party testifies to some of the provisions thereof, it is error to deny the adverse party's motion to introduce said contract into evidence, the rules regarding notice having no applicability in this situation.<sup>28</sup>

It is ordinarily improper to permit the introduction of exhibits during cross-examination.<sup>29</sup>

An unsigned typewritten letter can be admitted into evidence if competent evidence is introduced properly connecting it with a person as being his actual letter.<sup>30</sup> Where the envelope is handwritten in the person's own hand, that is sufficient corroborative evidence.<sup>31</sup>

In order to introduce a confession or an admission in a criminal prosecution, the state must first prove corpus delicti.<sup>32</sup>

*Evidence of separate crimes.*—As is widely known, the general rule in regard to evidence of separate crimes from that for which the defendant is being tried, is that it is inadmissible, even if the crime is of a similar type.<sup>33</sup> This type of evidence is admissible, however, when it tends to show motive or intent.<sup>34</sup> When the prosecutor, on cross-examination, questions the defendant about crimes with which he had no connection, he commits prejudicial and reversible error.<sup>35</sup>

When, in a replevin suit, the defendant introduced the record of a fourteen year old conviction of the plaintiff in an effort to affect his credibility as a witness, the Supreme Court held that there was no justification for the introduction of the evidence where the plaintiff, on cross-examination, had not denied the conviction.<sup>36</sup>

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24. *Ibid.*

25. See note 22 *supra*.

26. *Ibid.*

27. *Nedd v. State*, 66 So.2d 498 (Fla. 1953).

28. *Nottingham v. Schulhof*, 61 So.2d 912 (Fla. 1952).

29. *Padgett v. State*, 53 So.2d 106 (Fla. 1951).

30. *Silva v. Exchange Nat. Bank of Tampa*, 56 So.2d 332 (Fla. 1951).

31. *Ibid.*

32. *Lopez v. State*, 66 So.2d 807 (Fla. 1953).

33. See note 29 *supra*; see also *Smith v. State*, 54 So.2d 37 (Fla. 1951).

34. *Zalla v. State*, 61 So.2d 649; *Smith v. State*, 59 So.2d 625 (Fla. 1952).

35. *Thomas v. State*, 59 So.2d 517 (Fla. 1952).

36. *Watson v. Campbell*, 55 So.2d 541 (Fla. 1951).

*Circumstantial evidence.*—The court, in setting the requirements for a conviction based on circumstantial evidence, said that such evidence must point unerringly to guilt beyond reasonable doubt;<sup>37</sup> that it “. . . must not only be consistent with the defendant's guilt, but must also be inconsistent with any reasonable theory or hypothesis of his innocence.”<sup>38</sup> “(I)t takes something more than proof of suspicious circumstances to sustain a conviction for crime.”<sup>39</sup> In a civil action, the requirement is that all reasonable inferences deducible from the circumstantial evidence must overcome all contrary reasonable inferences.<sup>40</sup>

*Parol evidence.*—Extrinsic evidence is admissible to clear up ambiguities in a contract, but is not admissible when a contract is clear and unambiguous.<sup>41</sup> There is an ambiguity only when a word or phrase is of uncertain meaning and may be properly understood in more than one way.<sup>42</sup> The extrinsic evidence is admissible only to clarify or elucidate, not to alter.<sup>43</sup>

*Presumptions.*—One of the most basic presumptions in our system of jurisprudence is that persons will observe the law and the court cannot assume that they will violate it.<sup>44</sup> A natural outgrowth of this presumption is that public officials and agencies will properly discharge their duties.<sup>45</sup>

*Privileges.*—The privilege which most interests the attorney is, naturally, the attorney-client privilege. The confidential relationship between attorney and client is sacred and indispensable to the administration of justice; as such, it cannot lightly be brushed aside.<sup>46</sup> Let us warn attorneys, however, that “no privilege attaches to communications between a client and attorney made before or during the perpetration of a fraud.”<sup>47</sup>

In this state, there is no strong doctor-patient privilege. In *Morrison v. Malmquist*,<sup>48</sup> the Supreme Court held that neither statute,<sup>49</sup> nor the Hippocratic Oath modify the common law and that testimony by a doctor that the plaintiff had some of the same complaints before an accident that he complained of afterwards, was not privileged.

37. See note 32 *supra*.

38. *Head v. State*, 62 So.2d 41, 42 (Fla. 1952).

39. *Lombardo v. State*, 55 So.2d 914 (Fla. 1952); *Scaglione v. State*, 62 So.2d 417 (Fla. 1953).

40. *Jacksonville v. Waldrop*, 63 So.2d 768 (Fla. 1953).

41. *Friedman v. Metal Products Corp.*, 56 So.2d 515 (Fla. 1952); *Smith v. Manatee County*, 56 So.2d 453 (Fla. 1952).

42. *Friedman v. Metal Products Corp.*, 56 So.2d 515 (Fla. 1952).

43. *Ibid.*

44. *Atlantic Coast Line R.R. v. Mack*, 57 So.2d 447 (Fla. 1952).

45. *Miami Retreat Foundation v. Ervin*, 66 So.2d 667 (Fla. 1953); *Florida Nat. Bank of Jacksonville v. Simpson*, 59 So.2d 751 (Fla. 1952); *Hollywood v. Broward County*, 54 So.2d 205 (Fla. 1951).

46. *Seaboard Air Line Ry. v. Timmons*, 61 So.2d 426 (Fla. 1952).

47. *Id.* at 428.

48. 62 So.2d 415 (1953).

49. FLA. STAT. § 458.16 (1951).

In ruling on the "dead man's statute,"<sup>50</sup> the court held that when a party for whose benefit or protection the disqualification of the statute is erected, calls and examines a witness who is incompetent to testify under the provisions of the statute, he waives the witness' incompetency regarding the matters about which he is questioned and renders him competent as a witness against the examining party as to those matters.<sup>51</sup> Where one party to an action testifies to a transaction, he waives the disqualification of the adverse party under the "dead man's statute."<sup>52</sup>

#### THE LEGISLATURE

The 1953 session of the Legislature enacted various statutes dealing with evidence. The majority of these deal with prima facie evidence and presumptions in certain specific situations.<sup>53</sup> Two of these statutes have attracted widespread attention. The statute which provides that possession of explosives without proof of registered purpose is prima facie evidence of an intent to use them for the destruction of life, limb or property,<sup>54</sup> undoubtedly arose from the wave of terroristic bombings which recently swept the state. The other statute, which is already under attack on constitutional grounds makes possession of a federal gambling tax stamp prima facie evidence of violation of the gambling laws of this state.<sup>55</sup>

Another statute allows savings and loan associations to photograph their records and provides for them to have the same weight in evidence as the originals.<sup>56</sup>

Finally, the Legislature, in what must be considered a forward looking piece of legislation, amended the Florida Statute, Section 932.30 to extend to the defendant in a felony trial the right, upon a showing of insolvency, to have the trial court in its discretion, order an expert to appear, make examination, and testify, and have the expenses taxed as costs.<sup>57</sup>

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50. FLA. STAT. § 90.05 (1951).

51. *Embrey v. Southern Gas & Electric Corp.*, 63 So.2d 258 (Fla. 1953).

52. *Mayer v. Mayer*, 54 So.2d 105 (Fla. 1951).

53. Fla. Laws 1953, c. 28239, 28233, 28208, 28170, 28150, 28144, 28093, 28075, 28073, 28057, 28016.

54. Fla. Laws 1953, c. 28144.

55. Fla. Laws 1953, c. 28057.

56. Fla. Laws 1953, c. 28108.

57. Fla. Laws 1953, c. 28202.