South Carolina Law Review

Volume 7 | Issue 1 Article 13

Fall 1954

Evidence

Edgar L. Morris

EVIDENCE

EDGAR L. MORRIS*

There were no significant departures by our Supreme Court from well established concepts in the field of evidence. Only sixteen cases worthy of note are discussed here, all of which merely indicate tendencies of our Court in applying principles which may foreshadow probable applications in future cases. No legislation adopted by the General Assembly was of importance in the field of Evidence.

Admission

Bolen v. Smith[1] held that the act of a property owner, who had listed property for sale with a real estate broker, in paying the usual commissions to the broker did not constitute an admission of liability to sell and convey in an action for specific performance. The Court said that from the fact that the seller may have been liable to the broker for services rendered, it does not necessarily follow that the same broker had authority to bind the seller.

Admissibility

In *State v. Gantt*,[2] certain prosecution witnesses had been permitted to testify, without objection by defendants, as to bullet wounds on the body of the deceased, and it was held that raising the question of admissibility comes too late when urged before the Supreme Court on appeal as a basis for reversal. The indictment charged the appellants with having used a pistol and a blunt instrument in causing the death, and it cannot be said that the defendants were not apprised of the evidence which would be offered by the prosecution. *Vigilantibus non dormientibus leges subveniunt.*

The offense of storing and keeping illegal liquor involves the idea of continuity of habit, and it was held in *State v. Center*,[3] that testimony of former violations, if not too remote in

*B.S. in C.E., 1933, Clemson College; LL.B., 1938, Georgetown University; member South Carolina, District of Columbia, and U. S. Supreme Court Bars; Richland County, South Carolina and American Bar Association.

1. 223 S.C. 39, 74 S.E. 2d 42 (1953).
2. 223 S.C. 431, 76 S.E. 2d 674 (1953).
3. 223 S.C. 485, 76 S.E. 2d 669 (1953).

point of time, is admissible against a defendant on trial for unlawful storing if the testimony tends to establish continuity of habit, which is a necessary element of the crime of storing.

In *Newton v. Batson*,[4] which involved a suit by a property owner in a subdivision to restrain the defendant from using an adjoining lot in any manner inconsistent with its use as a park or beautified area, the defendant objected to testimony regarding the representations of real estate agents basing his objections on the Parol Evidence Rule. The Court said that while this rule is universally followed, it has no application to the case at bar, for the reason that the testimony as to the representations of the real estate agents is simply some evidence of the intentions of the developers of the subdivision. Testimony, as to representations of real estate agents who were named on a recorded plat as agents, is competent to show what was meant by unconventional symbols and markings on the plat.

State v. Anderson[5] involved the admissibility of a written statement given to investigating officers by the defendant before the enactment of a statute,[6] which provides, generally, that whenever any officer shall take a written statement in any investigation, he shall give a copy thereof to the person making the statement and take his receipt therefor, and that unless the requirements of the statute have been observed, the statement shall not be admissible in evidence. In this case, the written statement involved was given to the officer five months before the enactment of the statute, and although the prosecution took place well after the adoption of the statute, it was held to be admissible even though the defendant did not receive a copy. The Court reviewed some earlier decisions in this area:

> It is not the function of the court to pass upon the weight of evidence, but to determine its sufficiency to support the verdict. *State v. Brown*, 205 S. C. 514, 32 S. E. 2d 825. If there be any evidence which tends to prove the fact in issue, or which reasonably conduces to its conclusion as a logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to

4. 223 S.C. 545, 77 S.E. 2d 212 (1953).
5. 224 S.C. 419, 79 S.E. 2d 455 (1954).
6. S. C. ACTS AND JOINT RESOLUTIONS 1952, No. 794, p. 1978, 47 ST. AT LARGE, p. 1977 (1952). [CODE OF LAWS OF SOUTH CAROLINA 1952, §§ 1-64, 26-7.1, 26-7.2.]

> it, the case should be submitted to the jury. *State v. Smith,* 220 S. C. 224, 67 S. E. 2d 82. The question of whether such evidence meets the burden of establishing the guilt of the accused beyond a reasonable doubt is for the determination of the jury, as the triers of the facts, under appropriate instructions by the court. *State v. Roddy,* 126 S. C. 499, 120 S. E. 359.

Burden of Proof

Woodle v. Brown[7] was an action to recover commissions allegedly due under a contract, and it was held that the fact that an injury might have occurred in any one of several ways did not preclude recovery if the evidence tends to sustain the reasonable probability that the injury occurred in the way on which the plaintiff relied. In a civil case, the law does not require proof to a certainty. The Court cited, with approval, *Lancaster v. South Carolina Power Company,*[8] wherein it was said:

> The jury has the especial prerogative to decide the facts, if the evidence tends to sustain the reasonable probability of the manner or way relied upon by the plaintiff even if the injury might have occurred in one of a dozen ways. The law does not require proof of a certainty in a civil suit. . . .

In this case the Court stated that the motion for a non-suit and directed verdict were properly overruled as it was necessary for the purpose of these motions to consider the evidence in the light most favorable to the plaintiff,[9] and under the scintilla rule which prevails in South Carolina, if there is a scintilla of evidence, which is any material evidence that if true would tend to establish the issue in the mind of a reasonable juror, the case should be submitted to the jury for its determination.[10]

The case of *Moore v. Evans*[11] was an action for wrongful death which resulted from a collision occurring when the automobile driven by the decedent and a truck-trailer owned by the defendant met on a narrow bridge, the Court holding that

7. 223 S.C. 204, 74 S.E. 2d 914 (1953).
8. 181 S.C. 244, 186 S.E. 911 (1936).
9. Citing Cox v. McGraham, 211 S.C. 378, 45 S.E. 2d 595 (1947).
10. Citing among other cases, Taylor v. Atlantic Coast Line Railway Co., 78 S.C. 552, 59 S.E. 641 (1907).
11. 223 S.C. 288, 75 S.E. 2d 598 (1953).

evidence of the operation of the truck in violation of statutory provisions against excessive speed and travelling on the wrong side of the highway warranted submission of the issues to the jury as to causative negligence and wilfulness, and the resulting actual and punitive damages. The Court in this case differentiated between criminal and civil law applications of circumstantial evidence quoting from *Leek v. New South Express Lines*:[12]

> The rule of criminal law that where circumstantial evidence is relied upon, the facts proved must be such as to preclude every other hypothesis but the guilt of the accused, does not apply in civil cases. In civil actions every other reasonable conclusion need not be excluded; proof of circumstances warranting a given inference is sufficient in such cases. Annotation, 97 Am. St. Rep. 802. The right to recover on circumstantial evidence for death resulting from another's negligence depends upon the reasonable and logical connection such proof establishes between the death and the negligent act alleged to have caused it. It is incumbent upon the plaintiff, in the absence of direct evidence, to show the existence of such circumstances as would justify the inference that the injury which caused the death was due to the wrongful act of the defendant, and not leave the question to mere speculation or conjecture. The facts and circumstances shown should be reckoned with in the light of ordinary experience and such conclusions deduced therefrom as common sense dictates.

A more recent authority upon the sufficiency of circumstantial evidence in civil actions is *Hopkins v. Derst Baking Co.*,[13] wherein the circumstantial evidence which tended to prove liability overcame, in the view of the jury, the conflicting testimony of the truck driver as in this case.

Inference

The case, *Barnwell v. Elliott*,[14] discusses a problem which has proved rather troublesome to the Bar,—that is, the doctrine of *res ipsa loquitur* and inferences. Our Supreme Court has repeatedly stated that the doctrine of *res ipsa loquitur* is not the law in South Carolina. This case involved serious in-

12. 192 S.C. 527, 7 S.E. 2d 459 (1940).
13. 221 S.C. 497, 71 S.E. 2d 407 (1952).
14. 80 S.E. 2d 748 (S.C. 1954).

jury to an unskilled negro worker who was loading lumber on a truck when a heavy piece of lumber fell from a nearby stack or pile behind him, striking one of his legs. The defendants entered a general denial to the complaint pleading, in addition, contributory negligence and assumption of risk. On the trial of the case, timely motions were made for a nonsuit and a directed verdict. Both motions were refused and the jury found for the plaintiff, whereupon the Trial Judge set aside the verdict and entered judgment *non obstante verdicto* for the defendants on the ground that the plaintiff had failed to establish negligence. The sole question presented on appeal was whether there was any testimony reasonably warranting an inference of negligence on the part of the defendants in one or more of the specifications alleged in the complaint. The Court in reversing the trial court cited the language of the Trial Judge in granting the motion *non obstante verdicto*:

> All we have is that the piece fell.

He further stated:

> In the instant case to say that the mere fact that the timber fell is evidence of an unsafe place provided by the master would be to apply the rule of *res ipsa loquitur*, to indulge in surmise and conjecture.

The Supreme Court said that if the question of negligence had to be determined solely from the testimony of the appellant, who was unable to state the cause of the timber falling, the conclusion of the Trial Judge would be correct.[15] But in determining the question of negligence, all of the testimony must be considered:

> We have held in numerous cases that, even though a nonsuit should have been granted at the conclusion of the plaintiff's testimony, yet, if the deficiency of evidence was supplied either on direct or cross examination of the defendant's witnesses, neither a nonsuit nor a directed verdict could be granted at the conclusion of all the testimony. Eargle v. Sumter Lighting Co., 110 S. C. 560, 96 S. E. 909, 911.

15. Citing Watson v. Charleston Stevedoring Co., 141 S.C. 355, 139 S.E. 778 (1927); Jackson v. Brock, 160 S.C. 471, 159 S.E. 22 (1930); Weston v. Hillyer, 160 S.C. 541, 159 S.E. 390 (1930); Culbreth v. Taylor-Colquitt Co., 168 S.C. 153, 167 S.E. 148 (1932).

The Court went on to say:

> It is elementary that negligence may be established by circumstantial evidence. *Thornton v. Seaboard Air Line Ry. Co.*, 98 S. C. 348, 82 S. E. 433; *Watson v. Coxe Bros. Lumber Co.*, 203 S. C. 125, 26 S. E. 2d 401. And in considering the sufficiency of such evidence, 'the facts and circumstances shown should be reckoned with in the light of ordinary experience and such conclusions deduced therefrom as common sense dictates.' *Leek v. New South Lines*, 192 S. C. 527, 7 S. E. 2d 459, 462. *The fact that the doctrine of res ipsa loquitur is not applied in this jurisdiction does not mean that negligence may not be established by circumstantial evidence as well as direct evidence. Eickhoff v. Beard-Laney, Inc.*, 199 S. C. 500, 20 S. E. 2d 153, 141 A. L. R. 1010. It is also important to bear in mind that the fact that an injury may have been caused in one of two or more ways does not preclude recovery, 'if the facts and circumstances in evidence warrant a reasonable inference that it was caused in any way alleged in the complaint for which the master would be liable.' *Steele v. Atlantic Coast Line R. R. Co.*, 103 S. C. 102, 87 S. E. 639, 643. (Emphasis added.)

In *State v. Vereen*,[16] the defendant was convicted of larceny and privily stealing from the person of the prosecuting witness who had fallen asleep in the defendant's taxicab. The investigating peace officers testified that the defendant told them that the crime was committed in the county where the indictment was found, and the Court held under these facts that it was not necessary in a criminal case for the prosecution to prove venue affirmatively if there is sufficient evidence from which venue can be inferred.

In *Troy Cemetery Association v. Davis*,[17] it was held that in civil actions every other reasonable conclusion need not be excluded; proof of circumstances warranting a given inference is sufficient in such cases.[18]

McLauchlin v. Gressette[19] involved an action for specific performance of an alleged oral contract to devise realty to a

16. 223 S.C. 34, 74 S.E. 2d 223 (1953).
17. 223 S.C. 305, 75 S.E. 2d 458 (1953).
18. Citing with approval, Brown v. Brown, 215 S.C. 502, 56 S.E. 2d 330, 15 A.L.R. 2d 163 (1949).
19. 224 S.C. 296, 79 S.E. 2d 149 (1953).

nephew and his wife, if they would live in testatrix' home and take care of her in her old age. The plaintiff relied upon testimony as to statements made by testatrix during and before the period of performance, and it was held that this testimony was competent and not merely self-serving declarations of interested parties within the meaning of Section 26-402,[20] in that to disqualify a witness under the state, the test is that his interest may be affected by "the direct legal operation and effect of the judgment."

The case of *Thompson v. South Carolina State Highway Department*[21] included, among other matters, a consideration of the testimony of a State Highway Patrol Officer who testified as to the speed of an automobile which he did not see in motion, and the Court said that under those circumstances the patrolman was no more qualified to judge the speed of such a car than the average man sitting on the jury.

Hearsay

State v. Pearson[22] involved the prosecution of the defendant as a second offender for operating a motor vehicle while under the influence of intoxicating liquor. The defendant objected to the introduction of a report made by a magistrate pursuant to a statutory requirement of a record of defendant's prior conviction of the same offense. The Court said that it is generally held that where a public official is required by law to make a certificate or written statement as to some matter or fact pertaining to and as a part of his official duty, such writing is competent evidence of the matter or fact therein recited, and is an accepted exception to the Hearsay Rule.

In *State v. Robinson*,[23] the defendant was convicted of conspiracy to defraud the State by sale, delivery and giving to certain individuals, about to take the state teacher's examination, answers to questions contained in the examination. It was shown that the prosecuting witness had made two inconsistent sworn statements, and the prosecution, in an effort to corroborate one of the statements, called a third party who testified as to a conversation that he had with the prosecuting witness when only the two persons were present. The testi-

20. CODE OF LAWS OF SOUTH CAROLINA 1952.
21. 224 S.C. 296, 79 S.E. 2d 160 (1953).
22. 223 S.C. 377, 76 S.E. 2d 151 (1953).
23. 223 S.C. 314, 75 S.E. 2d 465 (1953).

mony of such a third party was held to be pure hearsay and therefore not admissible.

Cannon v. Motors Insurance Corporation[24] was an action by a used car dealer in claim and delivery for possession of an automobile against the insurance company asserting title by virtue of a bill of sale from the alleged owner to whom the insurance company had paid the proceeds of an insurance policy covering loss of the car by theft. It appeared that an attempt was made to permit the custodian of the manufacturer's records to testify by deposition as to what the records contained. Objection was made that this testimony was hearsay. It appeared that the records were compiled from manufacturer's production tags sent to the office. At no time were the records themselves offered in evidence. It was held that this deposition did not come under any of the exceptions to the Hearsay Rule, and the testimony deposition was not admissible in that the testimony of the witness was based on the entries and not the entries themselves.[25]

Judicial Notice

Rhode v. Ray Waits Motors, Inc.[26] involved an action to recover damages for the alleged wrongful taking from the plaintiff of an automobile which she claimed to have purchased from defendant. It appeared that the plaintiff procured a third person to purchase for her a car from the defendant, and that the third person gave the defendant a worthless check. While the case went off on another point, the Court said, in passing, that it would take judicial notice of the fact that, as a general rule, the practice of the automobile trade (as far as new cars are concerned) to refuse to make a sale to enable someone else to make a resale is a practice very generally followed.

24. 224 S.C. 368, 79 S.E. 2d 369 (1953).
25. Citing Moore v. Postal Telegraph-Cable, 202 S.C. 225, 24 S.E. 2d 361 (1943); Seaboard Air Line Ry. Co. v. Railroad Commissioners, 86 S.C. 91, 67 S.E. 1069 (1910); Coosaw Mining Co. v. Carolina Mining Co., 75 F. 860 (4th Cir. 1896).
26. 223 S.C. 160, 74 S.E. 2d 823 (1953).