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Evidence

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EVIDENCE

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Our Supreme Court continued to follow well accepted precedents in the field of Evidence without any significant departures. The General Assembly did not adopt any legislation noteworthy under this title.

Inference

In the last issue of the *South Carolina Law Quarterly* under this subject we discussed the case of *Hicklin v. Jeff Hunt Machinery Company*[1] as illustrative of the principle that in the trial of a case it is to be expected that the litigants will produce all evidence at their disposal or under their control to sustain their respective positions. Failure to produce such evidence gives rise to the inference that if produced, it would be adverse to the theory of their contention. In further amplification of this point we present below two cases which further illustrate and clarify the principle.

Matthews v. National Fidelity Insurance Company[2] was concerned with an action to recover under the provisions of an accidental death policy. The insurance set up as a defense the non-payment of premium. From judgment for the plaintiff the company appealed. The evidence disclosed that the assured had submitted a claim under the policy for damages, and he had reached an understanding with the company agent that proceeds of the claim were to be used to pay the premium. Subsequently the assured was killed, and the company denied liability. At the conclusion of all the testimony, appellant moved for a directed verdict on the grounds that there was no showing that the premium had been paid; that there was an "absence of any reasonable right of the respondent to realize on any agreement previously reached with reference to the deduction of the premium from the benefits due under a prior policy"; and that there was no showing that written notice of the death of the insured had been filed as required under the policy. The motion was overruled, and the court on its own motion directed a verdict for respondent for the face amount of the policy less the amount of the premium. Motion for a

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1. 226 S.C. 484, 85 S.E. 2d 739 (1955).
2. 228 S.C. 124, 89 S.E. 2d 95 (1955).

new trial was made upon substantially the same grounds stated above and was denied; hence, this appeal. The respondent testified in some detail concerning discussions with the agent for the company as to the payment of the premium. It appeared that the agent had agreed to the delay in payment. The important point here was the fact that the appellant's agent was present and heard the testimony but was not placed upon the stand to deny the testimony of both the beneficiary and the respondent as to the agreement with him. This fact "raises the inference that had his testimony been presented it would have been unfavorable to appellant", citing *Robinson v. Duke Power Co.*[3]

South Orange Trust Company v. Luther E. Conner[4] was an action by a trust company to recover, as an innocent purchaser for value, on a note signed by defendants and secured by a mortgage on defendants' property. The master to whom the matter was referred found that the trust company was not a bona fide holder for value, and that no valid note and mortgage existed, but he recommended judgment for the trust company for the amount of money received and work actually completed. The master's report was confirmed, and judgment was accordingly entered. The trust company appealed. The evidence disclosed that the defendants were illiterate; that the notes were submitted to them but that none of the named witnesses were actually present at the signing; that the note was later assigned to plaintiff trust company, and though the purported banker was present in court he was not called as a witness to contradict testimony of defendants to the effect that he was agent of trust company; and that the trust company was not an innocent purchaser for value.

In commenting on the presence of the purported banker, the court said, "He heard respondent testify to the facts as heretofore related, to the effect that all documents at the time of signing were in blank; that approximately one week after the signing of the contract he had changed the amount . . . ; that he had been introduced as Sinclair's banker; and that none of the persons whose names appeared as witnesses to the mortgage were present at the time of the signing; yet he was not offered as a witness by appellant to contradict such testimony. The inference is therefore raised that had Kearney's testimony been presented it would have been unfavorable to appellant." *Robinson v. Duke Power Co., supra,* and *Matthews v. National Fidelity Insurance Company, supra,* were cited.

3. 213 S.C. 185, 48 S.E. 2d 808 (1948).
4. 228 S.C. 218, 89 S.E. 2d 372 (1955).

Another point of interest here was concerned with the court's review of the findings by the master. The court cited with approval *Carolina Savings Bank v. Ellis*,[5] as follows:

> If the proceeding be wholly equitable, the rule is that this court "will not disturb the findings of the master concurred in by the circuit judge, unless such conclusions are against the clear preponderance of the evidence; . . . it is incumbent upon the appellant to convince this court that the circuit judge was in error in the conclusions reached by him on the facts."
>
> We hold that the conclusions reached by the master and the circuit judge are not against the clear preponderance of the evidence, and further hold that there was abundant supporting evidence to justify the conclusions reached. If the proceeding be considered as one in equity with a legal aspect as to the findings of fact, the rule in law cases may be said to apply. That rule is that, if the issue be legal, conclusions of fact as found by the master and approved by the circuit judge are not subject to review by this court.

In *Lane v. Mims*[6] the question involved was the ownership of land as determinative of a question of trespass. From a jury verdict, plaintiff appealed, alleging that the only reasonable inference from the evidence established his title. The court pointed out that the evidence was at best inclusive and that a proper jury question was presented as to which of the litigants had the better title from the common source.

Another point of interest involved the exception by appellant to the opposing attorney's use of a pencil sketch map to illustrate his contentions while arguing to the jury, such sketch not having been put in evidence. It was carefully explained to the jury that the sketch was not in evidence and was used only for the purpose of illustrating the contention of counsel as to what the evidence showed. The court said, "No one would question the right of counsel to have made a similar sketch on a blackboard in the presence of the jury. In view of the explanation which was given, I see no substantial difference and no possibility of prejudice to the rights of the plaintiff."

Impeachment

McMillan, Adm. v. Ridges[7] was an action for the wrongful death of a two year old boy who was struck by a truck. The trial Judge

5. 174 S.C. 69, 176 S.E. 355 (1930).
6. 228 S.C. 331, 90 S.E. 2d 207 (1955).
7. 229 S.C. 76, 91 S.E. 2d 883 (1956).

entered judgment on the verdict in favor of defendants and denied plaintiff's motion for a new trial, whereupon plaintiff appealed. The appellant argued that it was error to permit impeachment of a witness by the use of a prior statement which was not in evidence and which he had signed when he had not been advised of the circumstances of making the prior conflicting statement, and further that it was error to permit cross-examination of the witness as to the statement which was not in evidence. The court said that the questions were so closely allied that it would consider them together.

The witness did not deny having made the statement, but admitted having done so. Without objection, the witness testified that he had talked to "a man" about the accident and that it had been "put down". The witness admitted the conflicts and explained them as being due to fear at the time. This explanation was properly admissible for consideration by the jury. *State v. Center*,[8] (concurring opinion).

The court stated that apparently the appellant confused the contradiction of a witness by the introduction in evidence of a prior written or oral statement, which is in conflict with his testimony and which he denies, and the cross-examination of a witness in order to test his credibility. For the former, ordinarily a foundation must be laid and the witness put on notice of the time and place of the former conflicting statement, and the person to whom it was made, in order to render it competent to be admitted in evidence.[9]

In this case it was unnecessary to offer the statement in evidence since the witness admitted having made it. "The purpose in calling a witness' attention to his prior inconsistent statements before offering them in evidence to impeach him is to give him an opportunity to admit or deny them, or to explain them. If he admits that he made the statements in question, there is no necessity for proving them and they are not admissible in evidence."[10]

The cross-examination of a witness to test his credibility is largely within the discretion of the trial Judge and there was no prejudicial error in the exercise of it in this case. "Considerable latitude is allowed in the cross-examination of a witness (always within the control and direction of the presiding judge) to test the accuracy of his memory, his bias, prejudice, interest, or credibility. In doing so the witness

8. 205 S. C. 42, 30 S.E. 2d 760 (1943).

9. State v. White, 15 S.C. 381 (1881); State v. Henderson, 52 S.C. 470, 30 S.E. 477 (1898); Lusk v. State Highway Dept., 181 S.C. 101, 186 S.E. 786 (1935); Shumpert v. Service Life & Health Ins. Co., 220 S.C. 401, 68 S.E. 2d 340 (1951); 58 AM. JUR., Witnesses, §§ 775, 776.

10. 58 AM. JUR., Witnesses, § 780; see also State v. Rowell, 75 S.C. 494, 56 S.E. 23 (1905).

may be asked questions in reference to irrelevant matter, or in reference to prior statements contradictory of his testimony, or in reference to statements as to relevant matter not contradictory of his testimony. It does not follow, however, that the witness may be impeached by contradictory witnesses to the same extent that the interrogation may be permitted."[11]

Anderson v. Elliott[12] involved an action by a wagon driver for personal injuries and property damages received when a motorist collided with a mule and wagon. The jury awarded plaintiff $4,000, and defendant appealed, alleging that the verdict was excessive and the result of caprice, passion or prejudice on the part of the jury, which would entitle him to a new trial.

The court held that it was limited in its review of a verdict for alleged excessiveness to a determination of whether *under the evidence in the case* the verdict of the jury was "so shockingly excessive as to manifestly show that the jury was actuated by passion, partiality, prejudice or corruption." *Mock v. Atlantic Coast Line Railroad Co.*[13]

The court further said, "It has been repeatedly held that the assessment of unliquidated damages must rest in the sound discretion of the jury, controlled by the discretionary power of the trial Judge. A determination of the amount to be awarded for personal injury and the resulting pain and suffering cannot be determined from evidence of value, for there is no market value on such items. The facts of each case determine the value to be placed on such elements of damage."

The appellant next charged error in the refusal of the trial Judge to refuse permission to use the testimony of the respondent and another witness given in a previous trial involving the same accident, to be used in cross-examination of these witnesses to contradict and impeach their testimony in the present case, which would ordinarily constitute error.[14] The court said, "Error, however, to be reversible must be material and prejudicial to the substantial rights of the appellant. The exercise of the right to cross-examine a witness as to previous statements made, for the purpose of contradiction, must be

11. State v. Thompson, 118 S.C. 191, 110 S.E. 133, 134 (1921).
12. Anderson v. Elliott, 228 S.C. 371, 90 S.E. 2d 367 (1955).
13. 227 S.C. 245, 87 S.E. 2d 830, 839 (1955), (concurring opinion of Justice Legge). See also: Vernon v. Atlantic Coast Line Railroad Co., 221 S.C. 376, 70 S.E. 2d 862 (1952). Bowers v. Charleston & W. C. Ry. Co., 210 S.C. 367, 376, 42 S.E. 2d 705 (1947).
14. Lineberger v. City of Greenville, 178 S.C. 47, 182 S.E. 101 (1935); Awtrey v. Wood, 113 S.C. 309, 101 S.E. 920 (1919).

founded on the existence and showing of a material variance between statements made on the two occasions. For without such showing of variance in the statements or testimony it could not form the basis of a contradiction . . . A careful examination of the testimony of the witnesses given at the prior trial with that in the present case reveals no material variance in their testimony, and, under such circumstances, the ruling of the trial Judge resulted in no prejudice to the appellant."

Expert Witnesses

Smith v. Hardy[15] was an action against the owner and driver of a truck by an administrator for the wrongful death of automobile passengers in a collision with the truck. A photographer was permitted to testify as to photographs made before and after the vehicles were removed from the scene, and also as to knowledge gained from personal examination of the vehicles involved. The photographer was asked a question as to the condition of the mechanism of the vehicles which was objected to. The photographer did not answer the question but went on to testify as to matters within his knowledge, which was held to be proper. The case cited by appellants, *i. e., Huggins v. Broome,*[16] is easily distinguishable from the situation in this case in that the photographer in that case took the photographs several days after the wreck, and it was held that he could not give an opinion as to the markings on the highway and what made them.

The next question related to the testimony of a "traffic engineer" who prepared a "plan sheet" based upon information derived solely from a later examination of the locus and a study of certain photographs presented by appellants. The objection to this testimony was sustained, citing *Huggins v. Broome, supra.* The court in a colloquy with counsel pointed out that they were not going to allow theoretical evidence to be used to destroy eye-witness testimony.

The appellants next sought to introduce data as to "thinking and braking time", as extracted from a driver's handbook, in an effort to show the delay in response by the driver of the automobile. This was objected to and the objection was sustained. The court in reviewing the exclusion stated that no evidence or witnesses were offered to qualify this type of evidence, and that the court could not take judicial notice of the exact reaction time or of the precise distance in which a given motor vehicle traveling at a particular speed on a particular road can be stopped, although it was common knowledge that

15. 228 S.C. 112, 88 S.E. 2d 865 (1956).
16. 189 S.C. 15, 199 S.E. 903 (1937).

some interval necessarily elapses before the impulse to apply automobile brakes can be made effective.[17]

An action to recover disability benefits under insurance policies was the subject of *Mallinger v. New York Life Insurance Company*.[18] The trial Judge directed a verdict for plaintiff, and defendant appealed. The judgment was reversed and remanded for a new trial, the Supreme Court pointing out that the comparison of the plaintiff's income before and after the injury was a jury question.

The opinion of the physicians is not conclusive as to total and permanent disability.[19] Such medical testimony "will not be allowed to override the positive evidence that the person claiming total and permanent disability was, at the time covered by the theoretical testimony of the doctor, actually doing his accustomed work in substantially his accustomed way."[20]

Judicial Notice

Richards v. City of Columbia[21] involved the constitutionality of an ordinance of the City of Columbia. The ordinance was held valid and the plaintiffs appealed, alleging numerous errors. One alleged error was the admission in evidence of a United States census report of housing conditions in the City of Columbia in the year 1950, and also charts prepared therefrom by a witness at the trial. The witness was the Director of the Department of City Planning and Executive Secretary to the City Planning Commission, and the census report was the 1950 United States Housing Block Statistics for Columbia. When offered in evidence it was objected to on the ground that it was necessary to have it certified and verified by the head of the Department. Respondents' counsel then asked the court to take judicial notice of the document. The court overruled the objection, but it is not clear from the record whether it was intended that judicial notice be taken of its contents. This is a good illustration of the frequent lack of discrimination in such cases which is noted by Professor Wigmore. The following was cited from his work on Evidence:[22]

17. Muse v. Page, 125 Conn. 219, 4 A. 2d 329 (1939).
18. 227 S.C. 530, 88 S.E. 2d 578 (1955).
19. DuRant v. Aetna Life Insurance Co., 166 S.C. 367, 164 S.E. 881 (1932); Stewart v. Pioneer Pyramid Life Insurance Co., 177 S.C. 132, 180 S.E. 889 (1935); Hickman v. Aetna Life Insurance Co., 166 S. C. 316, 164 S.E. 878 (1931); Kizer v. Sovereign Camp W.O.W., 192 S.C. 465, 7 S.E. 2d 220 (1939).
20. Etters v. Equitable Life Assurance Society, 175 S.C. 142, 178 S.E. 610 (1934).
21. 227 S.C. 538, 88 S.E. 2d 683 (1955).
22. 5 Wigmore, Evidence § 1671, pp. 685 (3d ed. 1940).

> The census is an inquisition of population, manufacturers, agriculture, wealth, and many other classes of sociological data, and is made under an express legislative warrant and authority; it is therefore admissible under the general principle already considered. . . Distinguish the process of judicially noticing a fact, such as the population of a town; thus to dispense with all evidence is a different thing from receiving the census in evidence. The acts of the census officials, in returning the data of population, are commonly said to be judicially notice, though this is almost always a misnomer for their admissibility in evidence.[23]

The courts of our state take judicial notice of population figures which are derived from the Federal Census.[24] "Thus the courts will notice the taking of an official census, the approximate time necessary therefor, and the population as thereby determined whether of nation, state, county or city."[25] In *Meier v. Meier*,[26] the Supreme Court took judicial notice of an order of the Alien Property Custodian published in the Federal Register.

Another ground of alleged error was the admission in evidence of a copy of the substandard housing ordinance which was prepared by the Real Estate Board and submitted to City Council which did not adopt it. This formerly proposed ordinance was admitted as a part of the City's case to show the Council's deliberation and the extent of the information upon which it proceeded before adoption of the ordinance under attack. It was not irrelevant, which was the ground of objection.

The court said, "Statutes may and often do provide that the factual findings of quasi-judicial and administrative agencies shall be affirmed upon appeal to the court, if the findings are supported by evidence. Such is the general rule without the aid of statute. Innumerable examples may be found in our decisions of appeals from awards of workmen's compensation by the Industrial Commission. The applicable statute there provides that the conclusions of the commission 'shall be conclusive and binding as to all questions of fact'. There is therefore nothing novel or objectionable in the quoted provisions of the housing code which governs appeals to the courts."

23. 5 Wigmore, *op. cit. supra* at § 2577.
24. Bland v. City Council of Sumter, 203 S.C. 392, 27 S.E. 2d 498 (1943); Bell v. South Carolina State Highway Dept., 204 S.C. 462, 30 S.E. 2d 65 (1943).
25. 20 Am. Jur., Evidence § 98 (1939).
26. 208 S.C. 520, 38 S.E. 2d 762 (1946).

Affidavits

Goolsby v. Goolsby[27] was concerned with a proceeding on a motion by a former wife to vacate a judgment of divorce upon grounds of her mental incompetence at the time action was commenced and judgment rendered. In support of the motion, former wife sought to introduce the affidavits of two physicians as to her mental condition during the periods in question. This being a proceeding before the master to whom it had been referred, the respondent objected to the introduction of the affidavits on the ground that he had not had an opportunity to cross-examine the affiants. The master sustained the objection, and upon confirmation of the master's report the same was noted as reversible error by appellant.

It should be noted that the court declined to act on the affidavits before it in deciding the motion, but instead referred the matter to the master, because of respondent's insistence on his right to cross-examine the makers of the affidavits. The court referred to the question of deciding an issue on affidavits as a "most unsatisfactory mode of eliciting the truth," citing *Team v. Bryant*.[28]

"Cross-examination follows examination in chief by the party who calls the witness. It behooved the appellant to produce the affiants as witnesses if she wanted the benefit of their testimony, and let them be subject to cross-examination. The latter is a most valuable right. 'It is the law of evidence that when a witness has been examined in chief, the other party has a right to cross-examine him . . . . The power of cross-examination has been justly said to be one of the principal, as it certainly is one of the most efficacious, tests which the law has devised for the discovery of truth.' "[29]

"There was no appeal from the order of reference . . . . [T]herefore the question is, Were the rules of evidence applicable at the reference? Our statutes and decisions leave no doubt that they were and that the affidavits were not admissible over the objections of respondent." South Carolina Code, 1952, § 10-1408, § 10-1409, was cited.

With reference to § 10-1409, the identical language was construed in *Devereaux v. McCrady*,[30] where it was said: "The order must be construed in connection with the law conferring said power upon masters, by which it is seen that, when the accounting is had before the master, he will have the right to decide any objection to the com-

27. 229 S.C. 101, 92 S.E. 2d 57 (1956).
28. 71 S.C. 331, 51 S.E. 148, 149 (1905).
29. State v. McNinch, 12 S.C. 89 (1879).
30. 49 S.C. 423, 27 S.E. 467, 469 (1896).

petency, relevancy, or admissibility of any testimony which may be offered upon such accounting. We do not construe the order as in any manner intending to restrict these powers of the master when the accounting is had before him."

An objection to testimony taken before a master (referee) must be made before him, as it was in this case; it comes too late if first made by exception to his report.[31] The recent case of *Dempsey v. Huskey*[32] is of interest in connection with this point. It appeared that additional evidence was submitted to the court after the reference was closed and the referee had made his report. The court refused to consider it because there had been no opportunity for cross-examination with respect to the proffered additional evidence.

Circumstantial Evidence

The case of *Attaway, Adm. v. One Chevrolet 5-P Truck, etc., and Nix*[33] was a death action. Plaintiff sought damages for alleged wrongful death of a minor because of faulty loading and operation of a truck loaded with furniture. It appeared that the decedent was riding on top of a mattress, and when the truck met an oncoming vehicle, the mattress, with decedent on it, either fell or was blown onto the oncoming vehicle. The driver of the oncoming vehicle was alleged to have stated at the scene of the accident that the truck was coming down the hill so fast that he saw the mattress rise and fall two or three times. The undisputed evidence was that the truck was travelling at a speed of 35-40 miles per hour, and there was no testimony to show that the truck was improperly loaded or overloaded. The court, on motion, granted a nonsuit, saying the fact that the mattress fell or was blown from truck, which was partly loaded with furniture, was, of itself, insufficient to show negligence in loading.

Another point of interest in a consideration of the subject was the question of circumstantial evidence. The court said that an issue may be proven by circumstantial evidence, but for such evidence to be sufficient to warrant a finding of fact, it must lead to the conclusion with a reasonable certainty and have sufficient probative value as to constitute a basis for a legal inference and not mere speculation. Such facts and circumstances must be reckoned with in the light of ordinary experience, and the conclusions deduced therefrom by such

31. See Tompkins v. Tompkins, 18 S.C. 1 (1882); Cardwell v. Brewer, 19 S.C. 602 (1883).
32. 224 S.C. 536, 80 S.E. 2d 119 (1954).
33. 228 S.C. 559, 91 S.E. 2d 270 (1956).

as common sense dictates, and not rest upon speculation, surmise, or conjecture.[34]

Johnson, Adm. v. Griffin[35] was an action against a truck driver to recover for the death of a passenger allegedly due to the passenger's falling from the cab and being run over by the truck. The trial Judge entered an order of nonsuit from which plaintiff appealed. It appeared that the decedent was riding in the truck next to the door of the cab which was wired shut and in some manner not disclosed, the decedent fell from the truck and was run over by the truck. The driver picked up decedent's father and rode him with his injured son to the hospital. During this ride decedent told his father that he had fallen out of the truck when it was turning around. There was no other evidence.

Ordinarily in a case of this kind statements by a deceased detailing the circumstances of his injury are incompetent.[36] However, the declarations were apparently admitted on the theory that they were made in the presence of the defendant.

The record did not disclose why deceased was riding in the truck and therefore what degree of care defendant owed him. Attorney for plaintiff argued on the motion for nonsuit that deceased was a "guest" and that the only duty defendant owed the deceased was not to injure him wilfully or by conduct in reckless disregard of his rights.[37] The record refuted the master-servant relationship.

There was no testimony to support the allegation that the truck was being operated at an excessive rate of speed or that the truck was not under control. The only other alleged act of negligence was that the door was unsafe and the defendant failed to warn the deceased of its defective condition. If the door had to be bound with wire, it would certainly be notice to the deceased of its condition.

In Blashfield's *Cyclopedia of Automobile Law and Practice, Permanent Edition*[38] it is stated:

> So, if a guest, with knowledge of the defective condition of the car and appreciation of the hazards involved, voluntarily assents to ride therein, he will be precluded from recovery for injuries

34. Leek v. New South Express Lines, 192 S.C. 527, 7 S.E. 2d 459 (1940). Holland v. Georgia Hardwood Lumber Co., 214 S.C. 195, 51 S.E. 2d 744 (1949).
35. 228 S.C. 526, 90 S.E. 2d 913 (1956).
36. Griffin v. Forrester, 80 S.C. 220, 61 S.E. 389 (1908); Dantzler v. Southern Railway Co., 152 S.C. 287, 149 S.E. 750 (1929); Correll v. City of Spartanburg, 169 S.C. 403, 169 S.E. 84 (1933).
37. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 46-801.
38. Vol. 4, § 2515, pp. 721.

> in an accident resulting from the defects of which he has then been cognizant . . . It is elementary that a person has a duty to use ordinary care to avoid an injury that might otherwise result from the negligence of another.

Where the injured party is dead and the only person in a position to explain the circumstances is the defendant, the court, in passing on a motion for a nonsuit, will take a very liberal view of the testimony.[39] Yet there must be some circumstances, absent here, reasonably warranting an inference of liability.

Judgment Roll

Green v. Green[40] involved an action for divorce on the grounds of physical cruelty and desertion, and also for the custody of a minor child. The husband filed a cross-complaint on the ground of adultery. The matter was referred to the master, and at a hearing, testimony, taken from a judgment roll involving another couple in which the appellant was named as co-respondent, was admitted over the objection of appellant. The master's report was approved by the lower court, granting the husband a divorce and custody of the child. The wife appealed, alleging it to be error to admit the judgment roll of another case.

The court held that the testimony of the judgment roll was incompetent. The adjudication in that case was not binding on appellant, who was not made a party to that proceeding and was never given any opportunity to be heard.[41] Respondent stated in his brief that the judgment roll "was used merely to prove the fact of its rendition and was not used to establish the facts upon which it was rendered." But it was not offered for this limited purpose but generally, and was relied on by the county judge in concluding that appellant had committed adultery with Kanipe. The court added that the judgment roll would not be admissible even for the restricted purpose stated by respondent.

Speculative Evidence

Amerson v. F. C. X. Cooperative Service, Inc.[42] involved an action to recover damages allegedly resulting from breach of contract between a farmer and a farm machinery dealer. Defendant appealed

39. Brock v. Carolina Scenic Stages, 219 S.C. 360, 65 S.E. 2d 468 (1951).
40. 228 S.C. 364, 90 S.E. 2d 253 (1955).
41. Hendrick v. Bigger, 209 N.Y. 440, 103 N.E. 763 (1913); Raymond v. Williston, 213 Fed. 525 (1914); Rediker v. Rediker, 35 Cal. 2d 796, 221 P. 2d 1, 20 A.L.R. 1152 (1950).
42. 227 S.C. 520, 88 S.E. 2d 605 (1955).

from a judgment for plaintiff, alleging that error had been committed by permitting evidence to be introduced which was speculative, remote and conjectural. It appears that plaintiff sent his tractor to be repaired and defendant advised that it would be delivered within a stipulated time. It was not possible to deliver the tractor within the time specified, and the plaintiff was not able to work a profitable crop. The plaintiff presented testimony amounting to expressions of opinion from his neighbors, relatives and farmers as to what, in their opinion, plaintiff would have produced, both as to quantity and quality, had farmer had use of his tractor for cultivation of his crop.

A careful consideration of plaintiff's testimony shows that it does not meet the test laid down in *McCown-Clark Co. v. Muldrow.*[43] It nowhere appears what cotton crops were produced on adjoining lands of similar quality worked in the same manner in which respondent would have been able to work his crops had his tractor been promptly repaired, and upon which the season was the same. What the foregoing testimony really amounts to is an expression of opinion of the respondent and some of his neighbors and relatives as to what, in their opinion, would have been produced, both as to the quantity, quality and size of bales, had respondent had the use of his tractor.

The fundamental error in this case lies in the admission of incompetent testimony. With this testimony in, a non-suit or directed verdict was improper, but the motion for a new trial should have been granted.[44]

Jury View

Jacks v. Townsend[45] involved an action arising out of an accident which occurred when plaintiff drove up and over a hill and, in turning abruptly to avoid a collision with defendant's automobile which had been parked on the paved highway just over the crest of the hill, skidded on the wet pavement and struck an embankment. The trial Judge directed a verdict for the defendants, and the plaintiff appealed. It was held that a motion for the direction of a verdict cannot be properly made until all of the testimony for both sides is in.

The plaintiff sought to have the jury view the scene of the accident in order that they could better understand the testimony which was being presented to them. It is not regarded as the taking of evidence.[46] A statement by the attorney that he wished to "introduce

43. 116 S.C. 54, 106 S.E. 771 (1921).
44. Gill v. Ruggles, 97 S.C. 278, 81 S.E. 519 (1914); Townes v. City Council of Augusta, 46 S.C. 15, 23 S.E. 984 (1896); State v. Phillips, 134 S.C. 226, 132 S.E. 610 (1926).
45. 228 S.C. 26, 88 S.E. 2d 776 (1955).
46. Baroody v. Anderson, 195 S.C. 422, 11 S.E. 2d 860 (1940).

into evidence" the scene of the accident, which was some two miles distant, was properly considered by the court as a request for a jury view. Under § 38-302, Code of Laws of South Carolina, 1952, such a request is addressed to the discretion of the Court.[47]

It has been consistently held that a motion for direction of a verdict cannot be properly made until all the testimony on both sides is in.[48] In the case under consideration here the motion was granted upon the close of the plaintiff's case in chief, and without any announcement by defendants that they would offer no evidence. The proper motion, if any, to have been made at that time by the defendants was for a non-suit.[49]

47. Bodie v. Charleston & W. C. Ry. Co., 66 S.C. 302, 44 S.E. 943 (1903); Rodgers v. Hodge, 83 S.C. 569, 65 S.E. 819 (1909).

48. McCown v. Muldrow, 91 S.C. 523, 74 S.E. 386 (1912); Cantor v. Reserve Loan Life Ins. Co., 161 S.C. 198, 159 S.E. 542 (1931); Homestead Bank v. Best, 174 S.C. 522, 178 S.E. 143 (1935); Hunsucker v. State Highway Dept., 182 S.C. 441, 189 S.E. 652 (1937).

49. Dunbar v. Fant, 170 S.C. 414, 170 S.E. 460, 90 A.L.R. 1412 (1933).