South Carolina Law Review

Volume 11 | Issue 1 Article 11

Fall 1958

Evidence

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EVIDENCE

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Evidence questions of more than usual interest and difficulty were presented to the Supreme Court of South Carolina during the period covered by this Survey. Discussion herein must be of a summary nature, but some of the problems deserve more fully detailed treatment in students' casenotes in in the future.

Hearsay — Declaration Against Penal Interest

McClain v. Anderson Free Press[1] is one of the most interesting cases in the law of evidence to be decided by the Court in many years, if only because three carefully considered opinions were handed down. McClain, plaintiff in the action for libel, had been sheriff of Anderson County for eight years and was running for re-election. One Frank Martin, who had a "wide-spread reputation for dealing in illegal liquor," had made statements over a period of time to several persons, including his brother, Dr. T. W. Martin, that he had no fear of being arrested by the local authorities because he was paying protection. To one witness he allegedly had said, "I pay him (McClain) $25.00 a week myself to let me alone."[2] Frank Martin committed suicide on May 16, 1956. On May 31, 1956, defendant newspaper printed an article, twelve days before the primary election for sheriff, containing a statement by Dr. Martin that his brother "boldly and repeatedly boasted to me that he was paying protection and immunity." On the day before the primary, the newspaper republished a portion of the article, under the headline "Charges of Corruption Unanswered by McClain." McClain was defeated in the election, and shortly thereafter brought this action. Defendant newspaper pleaded truth as an affirmative defense, and offered as witnesses several persons to whom the deceased, Frank Martin, had made statements to the general effect as quoted above. The trial judge, Honorable J. Henry Johnson, Circuit Judge, admitted the evidence, but after a verdict for defendant and on motion for new trial, reversed himself, ruling that the testimony was hearsay and inadmissible.

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1. 232 S. C. 448, 102 S. E. 2d 750 (1958).
2. Transcript of Record, p. 8, f. 29; 102 S. E. 2d 750, 753.

The Supreme Court affirmed, Mr. Justice Moss writing an opinion, in which Mr. Justice Taylor concurred. Mr. Justice Oxner and Chief Justice Stukes concurred in the result on the evidence point,[3] Justice Oxner filing this opinion. Mr. Justice Legge dissented. The opinion of Mr. Justice Moss points out the undeniable fact that in the majority of jurisdictions in this country the "declaration against interest" exception to the hearsay rule is confined to declarations against "proprietary or pecuniary interest," and does not embrace declarations against penal interest. However, prior to the instant case, Judge Whaley in his Handbook[4] had read the 1850 decision of *Coleman and Lipscomb v. Frazier*[5] as placing South Carolina firmly in the minority, recognizing declarations against penal interest as admissible. Justice Moss disposed of the *Coleman* case by reducing to dicta the statements of the Court in that case on declarations against penal interest; it seems clear, however, that the *Coleman* remarks were not dicta but a joint holding.[6] Having disposed of *Coleman,* Mr. Justice Moss then adopts the majority view without discussion of its wisdom. His opinion indicates, however, that he might be troubled by the applicability of a contrary ruling to the admissibility in a criminal prosecution of a hearsay confession by a person not in court that he committed the crime with which the defendant is charged, the problem of the dictum in the *Sussex Peerage Case*[7] and the holding of *Donnelly v. United States.*[8]

Mr. Justice Legge's scholarly dissent points out first that the *Coleman* decision was clearly a joint holding; "neither ruling is *obiter*; nor is the ruling on one ground less authoritative than that on another."[9] The Justice then argues that the rule of the *Coleman* decision is a sound rule, stating, "It is

3. Error was also found by the trial judge in his instructions on the law of libel as applied to the facts. The Chief Justice agreed with the dissent of Mr. Justice Legge on this point.

4. Whaley, *Handbook on South Carolina Evidence,* 4A S. C. L. Q. (Supplement) 130 (1957).

5. 4 Rich. Law 146, 53 Am. Dec. 727 (1850).

6. The statements in that case were not only against the penal interest of the declarant, but were made in the presence of the defendant, who received the statements as true and acted upon them. Mr. Justice Moss in the instant case argues that the latter constituted an adoptive admission and was the real holding of the Coleman case.

7. 11 Cl. & F. 109 (1844).

8. 228 U. S. 243 (1913), a 6-3 decision with Mr. Justice Holmes writing the dissent.

9. McClain v. Anderson Free Press, 232 S. C. 448, 469, 102 S. E. 2d 750, 761 (1958).

difficult to perceive sound reason for excluding a declaration against penal interest while admitting one against pecuniary interest." The leading modern text writers support this view,[10] as do some respected judicial pronouncements,[11] as Justice Legge points out.[12]

The concurring justices seek middle ground by upholding the admissibility of declarations against penal interest, but refusing to apply that doctrine to a declaration which implicates not only the declarant but a third party as well, as here. Mr. Justice Oxner reasons: "Closely analagous is the doctrine of admissions and confessions which permit such statement to be considered only against the person making it."[13] Also closely analagous would seem to be the cases governing admissibility of statements of present intent by a declarant. Statements indicating an intention to perform future acts with a third person have been admitted in evidence by many courts,[14] but where the statements concern past acts involving a third person, they have been excluded.[15]

Dead Man's Statute — Writings of the Deceased On the Subject at Issue

In *Harris v. Berry*,[16] in a proceeding contesting the validity of her husband's will on the grounds of undue influence and lack of capacity, plaintiff, wife of deceased, objected to the admission in evidence of certain letters written by deceased to various members of his family and beneficiaries of the will. The trial judge excluded the letters under the Dead Man's Statute.[17] On appeal, this ruling was held error, in an opinion by Mr. Justice Legge. The Court said:[18]

10. MCCORMICK, EVIDENCE §§ 1476 *et seq.* (1954); 5 WIGMORE, EVIDENCE §§ 1476-1477 (3d ed. 1940).

11. Sutter v. Easterly, 354 Mo. 282, 189 S. W. 2d 284, 162 A. L. R. 437 (1945); *cf.* People v. Lettrick, 413 Ill. 172, 108 N. E. 2d 488 (1952). Just as significant of changing judicial attitude toward declarations against interest are such cases as Weber v. Chicago etc. Ry., 175 Iowa 358, 151 N. W. 852, L. R. A. 1918A 626 (1915), in which the concept of declarations against "pecuniary and proprietary interest" is stretched to embrace situations like that in the instant case. None of the opinions deal with the argument that the declarations herein might have been against pecuniary interest because they subject the declarant to possible liability in a libel action.

12. McClain v. Anderson Free Press, 232 S. C. 448, 470, 102 S. E. 2d 750, 761 (1958).

13. *Id.*, 232 S. C. 448, 467, 102 S. E. 2d 750, 760 (1958).

14. Mutual Life Ins. Co. v. Hillmon, 145 U. S. 285 (1892).

15. Shepard v. United States, 290 U. S. 96 (1933).

16. 231 S. C. 201, 98 S. E. 2d 251 (1957).

17. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 26-402.

18. Harris v. Berry, 231 S. C. 201, 207-208, 98 S. E. 2d 251, 254 (1957).

> There can be no doubt that, had any of the letters in question been lost, the witness could not have testified, over objection, to its contents. In such case she would have been clearly barred by the statute, *Boozer v. Teague*, 27 S. C. 348, 3 S. E. 551. . . .
>
> The precise question appears not to have been passed upon in this jurisdiction or in any of the cases in other jurisdictions to which our attention has been directed; but we are clearly of the opinion that under the facts of the present case the letters were not within the prohibition of Section 26-402. Having been identified as before stated, no testimony by the interested witness was needed to prove their contents. They would have spoken for themselves.

Assuming that the statute applies in wills contests, the distinction the Court makes between writings and oral communications has merit. As Justice Legge points out, the ban of the statute "is directed against the witness, not the 'transaction or communication,'" and the statute is to be strictly construed.[19] This being so, the documents themselves are admissible if a proper foundation can be laid. But as the Court says: "The witnesses testified, without objection, to their receipt and that the handwriting was that of the decedent; the letters were marked for identification; and counsel for the proponent then offered them in evidence."[20] Only then was objection interposed. But counsel did not challenge their relevance, nor raise a genuine issue of authenticity of the writings. In other words, the "transaction or communication" with the deceased, barred by the statute, was the receipt of the letters and not the letters themselves. Once the receipt and identification are offered without objection, the statute has been waived; *Stark v. Hopson*[21] is early and unchallenged authority that objection must be timely. Once in evidence, the letters speak for themselves. If this be strained reasoning, the words of Jeremy Bentham are sufficient in justification:[22]

> Exceptions, self-contradictions, spring up everywhere under their feet; exceptions, and, as far as they extend, all reasonable. Reasonable, and why? Because, the rule

19. *Ibid.*
20. *Id.* at 207, 98 S. E. 2d 251, 254 (1957).
21. 22 S. C. 42 (1884).
22. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE (1827), quoted in 2 WIGMORE, EVIDENCE 687, 688 (3d ed. 1940).

itself being fundamentally absurd, everything must be reasonable which goes to narrow its extent.

However, a more sweeping justification for the holding might be made, challenging the apparent assumption of the Court that if the communication had been oral, or had the letters been lost, testimony would have been inadmissible. The purpose of the Dead Man's Statute purportedly is to protect the estate of the deceased against claims founded on alleged transactions, usually of a contractual nature, with the deceased. Here we have no threat of diminution of the estate; the dispute is entirely within the estate. It is doubtful that in this class of litigation the statute should have application, and the majority of the courts in this country support this view.[23]

Real Evidence — Laying a Foundation for Admission

Benton v. Pellum[24] is a decision that deserves careful study by every law enforcement agency in the State, and by lawyers as well. In an action for negligence against the driver of a car brought by a guest passenger, the defense raised was that the driver of the other car involved in the collision was the negligent party, and was highly intoxicated at the time of the accident. To prove intoxication, defendant offered in evidence the result of a blood analysis of samples of blood taken from himself and from the other driver; the trial judge excluded this report on the ground that a proper foundation had not been laid. To lay the foundation, defendant offered as witnesses the technologist who drew the blood samples, the superintendent of the hospital which sent the specimens out to the Medical College for analysis, and the chemist who made the tests. The technologist testified that he took the blood samples at about 12:30 a.m., December 25th (the accident occurred at 11:00 p.m. the night before), placed each sample in a vial labeled with the name of the person whose blood was taken, and that these vials were wrapped for mailing to the Medical College at Charleston, along with a request that a test be made. He testified that in accordance with customary practice he placed the package on the desk of the Superintendent of his hospital (the Colleton County Hospital). The

23. Cases are collected in Notes, 115 A. L. R. 1425 and 173 A. L. R. 1282 (no South Carolina cases cited). The problem of admissibility of parol evidence of revocation of a will is analagous.
24. 232 S. C. 26, 100 S. E. 2d 534 (1957).

Superintendent then testified that it was likely that he mailed the package that day but he had no specific knowledge that he did. The chemist at the Medical College testified that his secretary places specimens received in the mail for analysis on his desk, and that on December 27th he found a package on his desk containing two samples bearing the names of the defendant and the other driver, which samples he tested and found that the samples containing the name of the other driver indicated a person who was highly intoxicated at the time the sample was taken. The Supreme Court, in an opinion by Mr. Justice Oxner, affirmed the exclusion of the report based on an analysis of these samples, stating as follows:[25]

> . . . While proof need not negative all possibility of tampering, *People v. Riser*, 47 Cal. (2d) 566, 305 P. (2d) 1, it is generally held that the party offering such specimen is required to establish, at least as far as practicable, a complete chain of evidence, tracing possession from the time the specimen is taken from the human body to the final custodian by whom it is analyzed. (citing cases) . . . .
>
> We do not think the proof here is sufficient to show continuity in the chain of custody. There is no evidence that the technologist who drew the samples sealed the vials or otherwise took any precautions against tampering. He wrapped them and placed the package on the desk of the superintendent. Just how long it remained there or by whom removed, we do not know. Neither is it definitely shown that the package was mailed at Walterboro. It is true that several of the witnesses referred to its being mailed but this was necessarily either a mere conclusion based on hearsay or an inference from the customary method of handling these specimens. The record does not disclose who had possession of the package from the early morning of December 25th until the chemist at the Medical College opened it on December 27th. There is no testimony by whom the package was received at the Medical College. This missing link could have probably been supplied by the chemist's secretary who was not offered as a witness. There was no effort at the trial to produce the vials, the labels, or the request for a blood analysis so as to determine whether or not the

25. 232 S. C. 26, 33-34, 100 S. E. 2d 534, 537-538.

technologist could identify them as those he wrapped for mailing.

The following cases support the exclusion of this testimony: *Rodgers v. Commonwealth, supra,* 197 Va. 527, 90 S. E. (2d) 257; *Brown v. State,* 156 Tex. Cr. R. 144, 240 S. W. (2d) 310; *Nichols v. McCoy,* Cal. App., 235 P. (2d) 412; *Novak v. District of Columbia,* 82 U. S. App., D. C., 95, 160 F. (2d) 588; *People v. Sansalone,* 208 Misc. 491, 146 N. Y. S. (2d) 359.[26]

Admissibility of Secondary Evidence

In *Wynn v. Coney,*[27] Wynn and Brunson, a lumber-selling partnership, sued the partners of Coney-Davis Lumber Co., and Hamptonite Door Mfg. Co., a corporation, for balance due on purchase price of lumber sold and delivered. The evidence of the plaintiffs showed that Hamptonite had been in financial difficulty, its credit was poor, and in order to enable Hamptonite to get stock lumber from Wynn and Brunson, Coney-Davis purchased lumber on its credit from Wynn, and resold the lumber to Hamptonite. Coney-Davis was holder of a lien on the properties of Hamptonite, and acted to keep Hamptonite in business, to protect its own claim against the latter. As lumber was delivered under this agreement, plaintiffs claimed that a tally sheet was prepared, and on Friday of each week this sheet was turned in to Hamptonite to show the amount and price of lumber sold and delivered during that week. Wynn and Brunson kept no records of these transactions otherwise. When Hamptonite failed to pay for all the lumber, Brunson and the attorney for the partnership went to the Hamptonite office, copied from the original records the amounts of lumber shipped and the prices indicated. From this information, plaintiff's attorney prepared an itemized account, which he attached to the verified complaint. Notice to produce the originals was served on Coney-Davis and on Hamptonite, and at the trial, plaintiff offered in evidence this itemized verified statement of account, over defendant's objection that the original tally sheets were the best evidence. Defendant Coney-Davis produced some of the original sales slips, but argued that the rest of them were not in court, but were in the possession of Hamptonite, and that hence the best evidence was not in court. In affirming the ruling of the lower

26. Cases are collected in Annot., 21 A. L. R. 2d 1216 *et seq.*
27. 232 S. C. 346, 102 S. E. 2d 209 (1958).

court holding that the account was admissible in evidence, the Supreme Court said through Mr. Justice Moss:[28]

> We conclude that there was no error on the part of the trial Judge in admitting as evidence the statement attached to the complaint. We reach this conclusion because it appears from the testimony that the original records of the respondents had been delivered to the appellants or to Hamptonite, pursuant to the directions of the appellants. It further appears that proper notice was given to the appellants and Hamptonite to produce these original records. This they failed to do. We think that the respondents had made the necessary preliminary showing of the necessity and propriety of offering secondary evidence of the contents of the records in question.

Relevancy and Prejudice — Testimony That Defendant Insured

McLeod v. Rose[29] involved another troublesome application of the doctrine that evidence that the defendant is insured against liability is "extraneous and highly prejudicial."[30] Plaintiff was struck and injured by defendant's automobile, driven by the latter. Defendant called as a witness a police officer, one McKissick, who testified that he interviewed the plaintiff at the hospital after the accident, and that plaintiff told him then that he didn't think the driver of the car was at fault. On cross-examination, the officer admitted having told plaintiff's counsel that he didn't know anything about the case. Cross-examination continued:[31]

> "Q. Did you make a report of the accident? A. I have the notes, but I think I made an accident report of it, but we can't find it in the office. The notes I had I am unable to locate them, and besides that, the statement I gave, which I saw just now.
>
> "Q. Who did you give that statement to? A. To the insurance adjuster."

The trial court ordered the jury to disregard the testimony as to insurance, but refused to grant the defendant a mistrial. This ruling was affirmed by the Supreme Court in an opinion by Mr. Justice Oxner which stressed the facts that the wit-

28. *Id.* at 354-355, 102 S. E. 2d 209, 213.
29. 231 S. C. 209, 97 S. E. 2d 899 (1957).
30. Wood v. England, 226 S. C. 73, 83 S. E. 2d 644 (1954). Some of the authorities are discussed in Whaley, *op cit.* note 4 *supra*, 67-72.
31. McLeod v. Rose, 231 S. C. 209, 211, 97 S. E. 2d 899, 900 (1957).

ness was defendant's witness, that defendant's counsel indicated before the response that he anticipated the answer,[32] but did not make a formal objection then, and that the plaintiff's counsel had no reason to anticipate the answer given. Thus the Court classifies the case with those recognizing an exception to the rule where the insurance coverage is brought out unintentionally by examining counsel.[33]

Parol Evidence Rule

In *Lundy v. Lititz Mutual Ins. Co.*[34] plaintiff had two fire insurance policies issued by defendant company, No. 551316 on his home and No. 551318 on his store building, both issued to him through defendant White, local agent of defendant company. The house policy covered the period of one year commencing February 10, 1955. On August 4, 1955, the company mailed to the insured a check for $12.69 on which the following notation appeared:[35]

> "By endorsement this check is accepted in full payment of the following account
> "Date Amount
> "Return Premium
> "Lititz Mutual
> "Policy 551316 Cancelled
> "August 5, 1955"

Enclosed in the same envelope was a formal Notice of Cancellation cancelling policy No. 551318 (the store policy). Plaintiff testified that he called White, asking an explanation, and White told him that the cancellation "is on the store and they haven't sent you enough money back;" "the house is all right; you ain't got nothing to worry about."[36] On January 27, 1956, the house was destroyed by fire. At the trial, defendant argued that the notation on the check was clear and unambiguous and invoked the parol evidence rule to exclude oral testimony of the conversations with White. The trial court admitted the evidence, verdict was for plaintiff and the Supreme Court sustained the judgment thereon, saying, by Mr. Justice Oxner:[37]

32. *Id.* at 213: "It seems to be conceded that when plaintiff's counsel asked the question, 'who did you give the statement to:', defendant's counsel, without addressing the court, remarked 'you better look out' ".
33. MCCORMICK, EVIDENCE 356 (1954).
34. 232 S. C. 1, 100 S. E. 2d 544 (1957).
35. 232 S. C. 1, 5, 100 S. E. 2d 544, 545.
36. *Ibid.*, 100 S. E. 2d 544, 546.
37. *Ibid.*, 232 S. C. 1, 9, 100 S. E. 2d 544, 547.

. . . . It is further urged that the statement of White to respondent to the effect that the policy on the store and not on the house was cancelled was incompetent as "an attempt to vary by oral testimony the terms of a clear and unambiguous written instrument (the check)." There is no merit in this contention. Respondent was not seeking to contradict or vary the notation on the check but offered this testimony to explain its acceptance and to rebut the inference of consent or waiver arising from cashing it. See 80 [*sic*] Am. Jur., Evidence, Section 337.

Miscellaneous Rulings

Opinion Evidence. In *Green v. Sparks*,[38] the Court once again[39] held that a witness who had observed skid marks after an accident but had not seen the accident itself could not give his opinion as to the cause of skidding; the subject is not one for expert testimony, being within the ordinary realm of experience, and the witness can present his information as to what he observed without resort to such speculation. In *Avant v. Johnson*[40] the Court applied the recognized rule that opinion testimony of a medical expert is ordinarily not conclusive, where there is creditable contrary testimony in evidence. The action was one to set aside a deed on the grounds of undue influence and lack of capacity. A doctor testified that the grantor, since deceased, at the time of the conveyance exhibited signs of cerebral arteriosclerosis; he did not think that she was competent to make a decision of any kind. A second doctor offered like views, also based upon personal examination of the grantor during the period in which the conveyance had been made. However, the lawyer participating in the conveyance, representing a lender of funds on the security of the transferred property, testified to the care with which he questioned the grantor at that time, and this evidence together with other lay testimony was held sufficient in probative force to permit the jury to credit it notwithstanding the medical testimony.

Judicial Notice. In two cases, the Court took judicial notice, based on common knowledge, of propositions of fact. In

38. 232 S. C. 414, 102 S. E. 2d 435 (1958).
39. Thompson v. South Carolina State Highway Dept., 224 S. C. 338, 79 S. E. 2d 160 (1953).
40. 231 S. C. 119, 97 S. E. 2d 396 (1957).

Roper v. South Carolina Tax Commission[41] the Court noticed that preferred stock has different characteristics from common stock, and presumed that the preferred stock involved in the litigation, stock of a South Carolina corporation, had been issued pursuant to South Carolina law, and had the characteristics set forth in the South Carolina statutes governing issuance of preferred.[42] In *Saxon v. Saxon*[43] the Court noticed that high temperatures increase the danger of blowout of a weak tire, and that weak tires were likely to blow out on a hot day at high speed, especially when driven with a heavy load.

Sufficiency of Evidence. As is usually the case, many of the appeals raised the question of the sufficiency of the evidence to support the verdict or decision of the lower court. These cases are more appropriately discussed under the various headings of substantive law, and cannot be dealt with adequately without a careful analysis of the Record on Appeal. Included in this category are *Floyd v. Town of Lake City*[44] (negligence), *Concrete Mix, Inc. v. James*[45] (goods sold and delivered), and *Bailes v. Southern Ry.*[46] (wrongful death).

41. 231 S. C. 587, 599, 99 S. E. 2d 377, 383 (1957), discussed in this Survey under Taxation.
42. CODE OF LAWS OF SOUTH CAROLINA, 1952 §§ 12-211 *et seq.*
43. 231 S. C. 378, 382, 98 S. E. 2d 803, 805-806 (1957).
44. 231 S. C. 516, 99 S. E. 2d 181 (1957).
45. 231 S. C. 416, 98 S. E. 2d 841 (1957).
46. 231 S. C. 474, 99 S. E. 2d 195 (1957).