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Evidence

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EVIDENCE

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In this year's Survey the subject has been divided between Civil and Criminal Evidence, this note will be concerned with the civil aspects of the subject only.

Our Supreme Court has followed established and well-understood precedents which accounts for the paucity of material available for review here. No legislation of any significance in this field was adopted by the General Assembly which would merit notice here.

Inference

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.

The failure to call witnesses in *Hicklin, et al. v. Jeff Hunt Machinery Company,*[1] was discussed by our Supreme Court. It appears that the action was brought against the repairer of heavy machinery for automobile passenger's wrongful death when a pulley or sheave fell from the machine being transported and entered an oncoming automobile striking the decedent. From a judgment for the plaintiff, defendant appealed. The court properly pointed out that the witnesses who could have shed most light on the condition of the pulley and the cotter pin holding it were not called. The unexplained failure of the appellant to call these witnesses during the trial warrants the inference that their testimony, if presented, would have been unfavorable to its theory of the cause of the accident.[2]

> It is well settled that negligence may be established by circumstantial evidence as well as direct evidence, and that in a civil case the law does not require proof to a certainty. *Eickhoff v. Beard-Laney, Inc.,* 199 S.C. 500, 20 S.E. 2d 153, 141 A.L.R. 1010. We think the circumstances reasonably warrant the inference either that the cotter pin was not in place when

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1. 85 S.E. 2d 739 (S.C. 1955).
2. Wingate v. Postal Telegraph & Cable Co., 204 S.C. 520, 30 S.E. 2d 307 (1944); Robinson v. Duke Power Co., 213 S.C. 185, 48 S.E. 2d 808 (1948); Padgett v. Southern Railway Co., 216 S.C. 487, 58 S.E. 2d 895 (1950).

the machine left the shop or was in a defective condition and should not have been used. Negligence in causing the fall of the sheave could be based on either fact.

Another case involving the non-production of a witness under different circumstances may tend to clarify the application of the rule that ". . . where a party fails to produce the testimony of an available witness on a material issue in the cause, it may be inferred that the testimony of such a witness, if presented, would be adverse."[3]

In the case of *Johnson v. Windham, et al.*,[4] which involved an action against a remainderman and a life tenant for specific performance of an alleged written contract for the sale of realty, it appeared that the owner of the life tenancy was not shown by the testimony to have had any knowledge of the contract purporting to sell her interest. The court said that since there was no scintilla of evidence that she was advised or privy to the contract, it followed that her failure to testify would not support the inference that her testimony would be adverse to her position at the trial. In other words, to support an inference, a foundation must be established which would compel as a logical conclusion the inference sought.

In *Turner v. Wilson, et al.*,[5] the question of inference was involved. It appeared that the plaintiff became ill of food poisoning allegedly caused by eating an unwholesome sandwich manufactured by the defendant and brought an action for damages. The court said that the mere fact that the plaintiff became ill after eating the sandwich did not necessarily show that it was unwholesome. The plaintiff ate other food at the same time. However, it was pointed out that the only item eaten in common by many others at different locations who likewise suffered food poisoning on the same night were those who ate the same kind of sandwich as plaintiff, all of these sandwiches being manufactured by the defendant. From these circumstances it could be reasonably concluded that the deviled egg sandwiches were unwholesome. "When under the same conditions, several persons who have eaten the same food become similarly ill an inference may be warranted that the food which all had eaten was unwholesome and was the cause of their illness."[6] Testimony of this character was given weighty consideration in *Hollis v. Armour & Co.*[7] and *Boylston v. Armour & Co.*[8]

3. *Ex parte* Hernlen, 156 S.C. 181, 153 S.E. 133, 69 A.L.R. 443 (1930).
4. 224 S.C. 502, 80 S.E. 2d 234 (1954).
5. 86 S.E. 2d 867 (S.C. 1955).
6. Johnson v. Kanavos, 296 Mass. 373, 6 N.E. 2d 434, 436 (1937).
7. 190 S.C. 170, 2 S.E. 2d 681 (1939).
8. 196 S.C. 1, 12 S. E. 2d 34 (1940).

The court, in discussing the different locations of the consumers of the sandwiches, went into the question of circumstantial evidence, which is of interest here.

> If all of those becoming ill had worked in the same mill, it might be plausibly argued that the unwholesome condition of the food could with equal likelihood be the result of external causes operating thereon after the sandwiches had left defendant's control. But they worked at different mills, in one of which there was a different retailer. It would be rather singular if these sandwiches were improperly handled and cared for in all three mills on the same night. Then, too, there is no evidence that any of the mill employees had previously been made ill from eating sandwiches. Although the question is a close one, we think the circumstances are strong enough to show a reasonable probability that this food was unwholesome when sold by defendant. Under our rule of circumstantial evidence, this is sufficient.[9]

In *Odom v. Weathersbee, et al.*,[10] the court said:

> In civil actions the law does not require proof to a certainty, but it is enough if the evidence is sufficient to satisfy the mind and conscience of the court and the jury of the reasonable probability of the truth of the allegations. *Steele v. Atlantic Coast Line R. Co.*, 103 S.C. 102, 87 S.E. 639.

Also, the court said of inferences:

> It does not follow that because it may appear from the testimony that an injury may have been caused in one of two ways, that the jury may not be allowed to determine in what way it was caused, 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 defendant would be liable. *Worrel v. S. C. Power Co.*, 186 S.C. 306, 195 S.E. 638, 641 (1938).

Statutes

In *Peters v. Double Cola Bottling Co., et al.*,[11] an action was brought for damages allegedly received when plaintiff consumed a portion of soft drink which had been bottled by defendant and which allegedly contained insects and foreign ingredients, it was held

9. See note 1 *supra*.
10. 225 S.C. 253, 81 S.E. 2d 788 (1954).
11. 224 S.C. 437, 79 S.E. 2d 710 (1954).

that it was not essential for the plaintiff to plead the Pure Food and Drug Act,[12] when a reading of the complaint indicated that the action was brought under the terms of that Act as well as under the common law, citing *Gantt v. Columbia Coca-Cola Bottling Co.*[13]

Judicial Notice

In *Thompson v. Brewer*[14] the court said: "We add it is common knowledge that a driver cannot bring his automobile to a stop from a speed of 55 to 60 miles per hour within a distance of 65 feet."

In *Sylvan v. Sylvan Brothers, Inc.*,[15] the court, in denying a business executive's claim for workmen's compensation arising out of a fall while going home with business papers in his pocket, said:

> It is common knowledge that business executives, professional men and white-collar employees generally, and sometimes others, take work home for their convenience; and it is for their convenience. The journey to and fro is not in the course of employment because the main purpose of it is to go home or to return to the place of employment and the journey would be made irrespective of the homework.

In *Joiner v. Fort*[16] the court said that churches are so closely interwoven with our community life that it is to be expected that one or more members of the congregation will enter the building any day during the week — "So predominant is the use of the facilities of a church that evidence is not required to support anticipation of entry, but common knowledge is sufficient upon which to base the necessary foresight." The case involved a suit against a contractor who was doing work in the church and the plaintiff sustained injuries by stepping into an open vent left by defendant. The principle mentioned by the court was in answer to defendant's contention that the plaintiff's use was not a foreseeable contingency.

In a suit by a railroad company to enjoin and set aside an order by the State Public Service Commission requiring a railroad to enlarge a station platform, the court said ". . . it is common knowledge in this State, and a practice well known to this court and no doubt to the Commission, that farmers and buyers frequently place their cotton on railroad company platforms for sampling and temporary storage preliminary to actual shipment."[17]

12. CODE OF LAWS OF SOUTH CAROLINA, 1952 §§ 32-1451 *et seq.*
13. 193 S.C. 51, 7 S.E. 2d 641, 127 A.L.R. 1185 (1940).
14. 225 S.C. 460, 82 S.E. 2d 685 (1954).
15. 225 S.C. 429, 82 S.E. 2d 794 (1954).
16. 226 S.C. 249, 48 S.E. 2d 719 (1954).
17. Atlantic Coast Line Railroad Co. v. The Public Service Commission of South Carolina, *et al.*, 226 S.C. 136, 84 S.E. 2d 132 (1954).

Domicile

The case, *Peoples National Bank of Greenville v. Manos Bros., Inc., et al.*,[18] involved the validity of a divorce granted in the State of Georgia and the legitimacy of certain persons. The question of domicile was also a matter in issue. It was claimed that the husband left the wife and returned to Greece and later, on return to this country, he prosecuted a divorce action in Georgia and allegedly served the wife by a publication. To contest the validity of the divorce and to demonstrate that the husband was never domiciled in Georgia, a deposition of an attorney attesting to the fact that the husband's name did not appear on the tax records of the Georgia County, nor on the voter's list or the special city tax records, was introduced. When the deposition was introduced it was objected to as not being the best evidence in that the original books should be introduced. It was held that the non-existence of an entry in a record book does not require the production of the book for proof.[19] City directories were then introduced to establish the fact that the husband's domicile was in Greenville, South Carolina, during the years in question. The court held that on the issue of domicile a city directory is admissible.[20] In connection with the use of city directories the court went on to hold that a memorandum of their contents would not be admissible if the books were available since the books themselves would be the best evidence of what they contained.

18. 226 S.C. 257, 84 S.E. 2d 857 (1954).
19. 4 WIGMORE, EVIDENCE § 1244(5) (3d ed. 1940). Blair's Foodland v. Shuman's Foodland, 311 Mass. 172, 40 N.E. 2d 303 (1942); Peters v. Adcock, 196 Ga. 118, 26 S.E. 2d 342 (1943); Christoffel v. U. S., 91 App. D.C. 241, 200 F. 2d 734 (1951). *Cf.* Greer v. Equitable Life Assurance Society, 180 S.C. 162, 185 S.E. 68 (1936).
20. 6 WIGMORE, EVIDENCE § 1708 (3d ed. 1940). *In re* Gilbert's Estate, 18 N.J. Misc. 540, 15 A. 2d 111 (1940).