

Fall 1957

Evidence

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Recommended Citation

Charles H. Randall Jr., Evidence, 10 S.C.L.R. 35. (1957).

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EVIDENCE

CHARLES H. RANDALL, JR.*

No cases arose in the field of evidence during the period of this survey in which the Supreme Court was required to evolve new doctrine, but several of the cases involve interesting application of settled principles. Analysis of the Records on Appeal and the briefs indicate that in many of these cases the evidence points were not seriously raised, but were thrown into the case on appeal as make-weights, and were not adequately briefed to the Court. The law of evidence is complicated and highly technical. Yet in many of these cases the only aid afforded by Counsel to the Court was the quotation of a passage from *Corpus Juris* or *American Jurisprudence*.¹ Properly used, these are valuable research tools; they are not intended as a substitute for lawyer-like thinking and research. The Court has a right to expect Counsel to provide at least any statutes and South Carolina cases bearing on a question raised on appeal. Beyond that, if the materials are available, and if counsel wish serious consideration by the Court of an evidence question, I would think that a minimum of aid to judicial decision would include the treatment of the problem in Wigmore's masterful treatise² and in McCormick's excellent one-volume handbook.³ These works supply historical

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1. On the inadequacy of citations of passages from legal encyclopediae without going behind the text to the authorities on which it is based, note the incisive comment of Chief Justice Stukes in *Floyd v. Lake City*, — S. C. —, 99 S. E. 2d 181:

Appellant cites *City of Tuscaloosa v. Fair* (Ala. 1936), 232 Ala. 129, 167 So. 276, in support of its contention that the ordinance here absolved it from liability, But the quoted statement was only dictum, as no prohibitory ordinance was involved in that case

It is interesting to note that in 25 Am. Jur. Highways, Section 407, pp. 702, 703, *Tuscaloosa v. Fair*, supra, is the only decision cited as authority for the statement that: "Conversely, there is no such duty or liability where the use of such a strip for the purpose of travel is unlawfully prohibited." And also, that the case under discussion is the only one cited as authority for the statement in 63 C. J. S. Municipal Corporations, Section 794 b(1), p. 107, that: "However, a city may prohibit walking on a parkway or grassplot, and, when it does so, it is not liable for injuries caused by a defect therein." Thus may dictum, unsupported by authority, assume the appearance of precedent.

2. WIGMORE, TREATISE ON EVIDENCE, 10 Vols. (3d ed. 1940).

3. MCCORMICK, HANDBOOK ON EVIDENCE (1956).

perspective and analysis of underlying principles, and point out leading judicial decisions from other jurisdictions. I would add, when it becomes available, Judge Whaley's handbook on South Carolina evidence.⁴ The Uniform Rules of Evidence, if they deal with the problem, might also be cited to the Court; they represent the best current thinking and command a national respect.⁵ Lacking the help that the above materials would give, the Court cannot but give inadequate consideration to any difficult problem in evidence. Perhaps none of the cases covered by this survey required such complete treatment, and the decisions do indicate the sound common-sense approach that usually characterizes decisions of the Supreme Court of South Carolina in the field of evidence.

Two statutes enacted in the past year deserve note herein. One Act permits the photographing and preserving of business records and the destruction of the originals, and provides that the photographic copies may be admitted in evidence in Courts in cases where the originals would have been admissible if offered.⁶ The other Act, that creating the Judicial Council,⁷ will have no immediate effect on the law of evidence, but provides an organization which can in time survey the rules of evidence in this State and make suggestions if deemed advisable.

Privilege—Attorney and Client

Twitty v. Harrison,⁸ was an action to foreclose a mortgage of real estate. The defendant Harrison pleaded payment to one Samuel Want, an attorney, who allegedly was the agent of the plaintiff, authorized to receive such payments. The

4. This Handbook will be published by the SOUTH CAROLINA LAW QUARTERLY, probably within the current year. Judge Whaley was County Judge of Richland County Court between 1917 and 1934, and taught the law of evidence among other subjects at the University of South Carolina between 1934 and 1956. He is presently serving the Law School as a Consultant in procedural law.

5. The Uniform Rules of Evidence were drafted by the National Conference of Commissioners on Uniform State Laws, and approved by the National Conference in 1953. They have also been approved by the American Bar Association.

6. Bill No. 165 of Acts & Joint Resolutions, Adv. Sheets No. 4, p. 179. It would seem that the only effect of the Act is to obviate the necessity of satisfying the so-called Best Evidence Rule; that is to say, the Act does not liberalize the rules in South Carolina on admissibility of records made in the ordinary course of business. The Act is substantially the same as the uniform Photographic Copies of Business and Public Records as Evidence Act, approved by the National Conference in 1949.

7. Bill No. 41 of Acts & Joint Resolutions, Adv. Sheets No. 2, p. 43.

8. 230 S. C. 174, 94 S. E. 2d 879 (1956).

facts were as follows. On December 31, 1952, Harrison executed his promissory note for \$2,500 and the mortgage, to Darlington County Bank & Trust Co., of which Mr. Want was President. This transaction took place in Mr. Want's office. Payment was to be made by ten quarterly payments of \$250.00 each, with interest at 6% also payable quarterly, and with the right in the obligor to pay the whole of the outstanding indebtedness on any installment date. On February 3, 1953, the note and the mortgage were assigned by the Bank to Mrs. Twitty,⁹ plaintiff herein, without recourse, and she thereafter had physical possession of the note and mortgage. Apparently not until February 15, 1954, after Mr. Want's death, did Mrs. Twitty advise Harrison of the assignment, and the assignment was not recorded until February 12, 1954. On September 25, 1953, however, Harrison had made a final payment to Mr. Want of the principal balance of the note and accrued interest, in the total amount of \$2,030. Previous payments had been remitted by Mr. Want to Mrs. Twitty; the \$2,030 final payment was admittedly never so remitted.

The defense took the position that Want had actual authority¹⁰ to receive payments on behalf of Mrs. Twitty, and on cross-examination of Mrs. Twitty examined her as to some 36 mortgages and other business transactions which Mr. Want had handled for her between 1935 and 1952. Objection was raised to this line of questioning on the grounds that the communications involved were privileged within the attorney-client relationship, and that the matter was irrelevant. Circuit Judge Lewis permitted the questioning insofar as it bore on the relation developing between the parties, but did not permit questioning as to the details of the other transactions. Verdict and judgment for the defendant were affirmed by the Supreme Court, Mr. Justice Taylor saying:¹¹

. . . . Objection to such testimony was upon the ground that these transactions were privileged communications;

9. Apparently part of the consideration for the note was the cancellation of a prior mortgage which Mrs. Twitty held on the same property. 230 S. C. at 178, 94 S. E. 2d at 881. This fact did not seem to Court or counsel to be important in the decision.

10. As distinguished from apparent authority. It was clear that Harrison had no prior knowledge of the transactions introduced to show the authority of Mr. Want, and hence no case could be made showing apparent authority. The Court points out that on the issue of actual authority, Harrison's lack of knowledge of these transactions is irrelevant.

11. 230 S. C. at 183, 94 S. E. 2d at 884.

and it was, we think, properly overruled for two reasons:

- (1) The testimony was offered not for the purpose of proving the details of the transactions, but to prove the relationship of Mr. Want to Mrs. Twitty in them; and
- (2) Mr. Want's handling of such collections was not a matter peculiarly within the province of an attorney at law, and consequently was not within the rule of privilege. 58 Am. Jur., Witnesses, Section 480, page 268. See also *Branden & Nethers v. Gowing*, 7 Rich. 459, 41 S. C. L. 459.

Both grounds of the Court's decision on this issue represent the prevailing view. On the privilege question, the existence of the lawyer-client relationship and the scope or object of the employment are generally held not to be privileged.¹² Further, it seems clear that in the instant case Want was not acting solely in the role of an attorney, if at all. He was himself a party to the business transactions in many of the other cases, as he was in the instant case. ". . . where one consults an attorney not as a lawyer but as a friend or as a business adviser or negotiator, . . . the consultation is not professional nor the statement privileged."¹³ The trial court might also have found that the statements were not intended by Mrs. Twitty to be privileged.¹⁴

Relevance—Res Inter Alios Acta

The offered evidence in the *Twitty* case, *supra*, concerned some 36 business transactions which Mr. Want had handled for Mrs. Twitty, in dealings with other persons. Counsel wished to show that these transactions showed the nature of the agency relationship between Want and Mrs. Twitty, to permit an inference that Want had the same authority in the transaction concerned in the case before the Court. The argument that evidence concerning these transactions was not relevant was raised but not strongly pressed by counsel for the plaintiff, either at the trial or on appeal. The argument seems to be without merit. Clearly, the other transactions between Mrs. Twitty and Want were logically relevant to

12. The qualifications of this statement and exceptions to the rule are set forth in McCORMICK, EVIDENCE, § 94, p. 188 (1956), and are not here applicable. In *Sachs v. Title Ins. & Trust Co.*, 305 Ky. 153, 202 S. W. 2d 384 (1947), an attorney was permitted to testify as to his authority to act for his client. McCORMICK, EVIDENCE, n. 6, p. 189 (1956).

13. *Id.* § 92, p. 184, 185.

14. *Id.* § 96, p. 190.

show the course of dealing between them. The doctrine of *res inter alios acta* should not apply where the evidence is offered only to show the dealing between Want and Mrs. Twitty, and not to show the details of the transactions with other persons which Want was carrying out on behalf of Mrs. Twitty.¹⁵

Relevance—Relation to Substantive Law

Johnston v. Farmers and Merchants Bank,¹⁶ is a case illustrative of the fundamental proposition that admissibility of evidence depends on the substantive law governing the case. Plaintiff obtained various loans from defendant, beginning November 20, 1946. The last renewal note was apparently dated January 31, 1952. Following the execution of this note, plaintiff brought an action for an accounting, cancellation of the last renewal note and judgment for overpayment made on all the loans. Defendant counter-claimed for judgment on the final note and foreclosure of its security. The Special Referee hearing the case ruled that plaintiff was absolutely bound by his last renewal note and could not offer evidence to vary the effect thereof. The proffered evidence was in respect to various payments which plaintiff contended were unaccounted for by defendant. The Referee's report, affirmed by the Circuit Judge, was reversed and remanded by the Supreme Court. Defendant is the original payee and not a holder in due course, and hence absence or failure of consideration for the note can be shown.¹⁷ The position of the Supreme Court seems clearly correct. The renewal note could hardly be termed an integration of the entire dealings between the parties so as to invoke the parol evidence rule. Hence

15. 2 WIGMORE, *op. cit. supra* note 2, §§ 376, 377. In § 376, Wigmore states the general requirements for this sort of proof as follows:

. . . . In general, where a habit of conduct is to be evidenced by specific instances, there is no reason why they should not be resorted to for that purpose. The only conditions . . . , are (a) that they should be numerous enough to base an inference of systematic conduct, and (b) that they should have occurred under substantially similar circumstances, so as to be naturally accountable for by a system only, and not as casual recurrences. As to the first condition, convenience requires that the discretion of the Trial Court should control, in order to avoid the objections of Unfair Surprise and Confusion of Issues. . . .

16. 229 S. C. 603, 93 S. E. 2d 916 (1956).

17. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 8-845 provides:

Absence or failure of consideration is a matter of defense against any person not a holder in due course and partial failure of consideration is a defense *pro tanto* whether the failure is an ascertained and liquidated amount or otherwise.

admissibility is governed by the substantive law of bills and notes.

*Directed Verdict—Necessity for Expert Witness—
Res Ipsa Loquitur*

In *Bessinger v. DeLoach*,¹⁸ plaintiff sued defendant dentist for injuries resulting from burns to her mouth allegedly caused by a substance applied to a denture made by defendant for her and which he was fitting to her mouth. Plaintiff alleged that the dentist left the substance in her mouth for a longer period than was necessary, and that he failed to remove the substance when she complained that she was being burned. The answer alleged due care, and that the defendant had used methods and procedures standard in the dental profession. At the end of all the evidence, a directed verdict in favor of the defendant was granted; the Supreme Court reversed and remanded for a new trial. In an opinion by Chief Justice Stukes, the Court found evidence in the record to support a finding that the dentist failed to exercise due care. Plaintiff's daughter testified that when she inquired of defendant as to the cause of the injury, he told her "he must have left it (the denture substance) in too long is the only thing he knew, he neglected going back to her and must have left it in too long."¹⁹ Plaintiff testified that the substance was in her mouth about fifteen minutes; defendant said five to ten minutes. A fellow dentist testifying as an expert witness for defendant said that his practice was to set a time clock for seven or eight minutes when using such a substance, and would check the patient before the expiration of such time to make sure that the substance wasn't burning the patient. The Court held that this evidence was enough to send to the jury the issue of negligence, without resort to the doctrine of *res ipsa loquitur*.

The Court reiterated²⁰ previous holdings that *res ipsa loquitur* is not accepted doctrine in this State, but that negligence may be found by circumstantial evidence. This is sound

18. 230 S. C. 1, 94 S. E. 2d 3 (1956).

19. 230 S. C. at 5, 94 S. E. 2d at 5. Analytically this statement is hearsay, of course, but admissible under the Admissions exception to the hearsay rule. A case directly in point is *Peterson v. Richards*, 73 Utah 59, 272 Pac. 229 (1928).

20. *Eikoff v. Beard-Laney, Inc.*, 199 S. C. 500, 20 S. E. 2d 153, 141 A. L. R. 1010 (1941).

doctrine and its occasional restatement is wise.²¹ The Court also rejected the contention of the defendant that plaintiff could not present a case showing negligence without at least one expert witness testifying on her behalf that defendant's methods fell below those customary in the dental profession. Such a requirement, the Court points out, is not necessary where the issue is not whether the methods used by the defendant were professional methods, but whether those methods were applied with due care under all the circumstances.²²

Hearsay—Admissions—Business Records

*Watson v. Little*²³ was an action for partition of property owned as tenants in common, and for an accounting of rents and profits during defendant's possession and use of the property. The Master to whom equitable issues were referred found that defendant, Lila Watson Little, was entitled to only \$1,525.23 as a credit for repairs and improvements during her possession; testimony for defendant showed expenditures of \$7,350.50. There was admitted in evidence a ledger sheet from the business records of Little Bros., a partnership composed of two sons of the defendant, J. W. and George Little. The partnership had for many years conducted its business on a part of the property involved, rented by them from their mother. During this period, they collected the rents from the tenants and made repairs on the property, charging their own rent collected by them against the repairs. The two brothers became involved in litigation between themselves, and in that litigation, to which Mrs. Little apparently never became a party of record, an order was issued that Little Brothers were indebted to her in a sum determined in accordance with Exhibit A introduced in evidence in that litigation. This Exhibit was a ledger sheet showing among other things the amount of repairs made on the property by Little Brothers. The Court in the instant case held this ledger sheet admissible against Mrs. Little, to evidence the amount of repairs, and the sheet showed only \$1,525.23 had been expended for

21. PROSSER, TORTS 291-310 (1941). Prosser says the doctrine "has been the source of so much confusion in the courts that the use of the phrase itself has become a definite obstacle to any clear thought, and might better be discarded entirely." *Id.* at 293. See also PROSSER, TORTS 199-217 (2d ed. 1955).

22. The Court adopted the reasoning of *Evans v. Roberts*, 172 Iowa 653, 154 N. W. 923 (1915).

23. 229 S. C. 486, 93 S. E. 2d 645 (1956).

repairs. In affirming the admission of this evidence, Acting Associate Justice Greneker said for the Court:²⁴

It was alleged in the complaint of the Little Brothers litigation that the ledger sheet, Exhibit A, reflected the correct status of the account between the defendant herein and Little Brothers. It must be kept in mind that J. W. Little, a party to this litigation, was the same person who testified in the present cause on behalf of the defendant. The defendant also testified. Both were testifying as to what the defendant was claiming for repairs, the very question involved in this appeal. Therefore, we think it was perfectly proper that these two witnesses be examined as to any statements made in writing or otherwise which they made or upon which they had acted or received benefit therefrom.

Defendant cites 20 A. J. (American Jurisprudence) 1077 which sets forth the general rule that a person's books of account cannot be used as evidence upon issues between third persons. Entries in such books as to such third persons are *res inter alios acta* and cannot be used against persons not parties to them.

With this general rule we agree, but this same authority also holds that on issues between third parties books of account may be used to contradict, corroborate or explain other evidence, and entries in the books of a third person not a party to the action but a witness therein are admissible in evidence for the purpose of impeaching him.

Analytically the evidence is hearsay, since the ledger sheets comprise out-of-court statements offered for the truth of the matter stated therein. The relevant inquiry therefore is whether the records fall within any recognized exception to the hearsay rule. It seems that they can qualify as Admissions of the defendant herself,²⁵ and if permitted in evidence under this exception to the hearsay rule, they come in without the limitations which the Court suggests above. If admissible on this ground, then no inquiry as to the Account Book (generally called Business Records, in the modern cases) exception to the hearsay rule is necessary.²⁶

24. 229 S. C. at 494, 93 S. E. 2d at 649.

25. MCCORMICK, EVIDENCE § 246, p. 525; § 281, p. 596 (1956).

26. This is indicated in the very paragraph of American Jurisprudence cited by the Court, as well as in MCCORMICK, at p. 596.

*Relevancy—Hearsay—Verdict in Prior Case Not
Involving Same Parties*

In *Jackson v. Banks Construction Co.*,²⁷ plaintiff sued to recover damages for personal injuries. On August 10, 1955, defendant's agent ran the automobile he was driving off a road and into a ditch. Plaintiff, a passenger therein, was allegedly subjected to "severe and permanent injuries," and brought an action alleging "negligence and recklessness." Defendant's answer, paragraph 9, alleged that on September 15, 1953, plaintiff had been "involved in a motor vehicle collision in the City of Charleston wherein she claimed to have sustained personal injuries resulting in severe headaches and pains," and that in an action commenced November 3, 1953, she recovered a verdict and judgment of \$29,000.00 against one Solomon for these injuries. Further, paragraph 9 stated, "the alleged unbearable pain and suffering resulting to the plaintiff from the collision on which the instant action is based are in large part attributable to her alleged injuries sustained in the earlier accident, for which she had already received a verdict in the neighborhood of \$29,000.00." On plaintiff's motion to strike this paragraph as irrelevant, the court refused to strike the entire paragraph, but ruled that all allegations with reference to the previous action be eliminated. In affirming, the Supreme Court, by Mr. Justice Oxner, said:²⁸

It must be conceded, and the Court below evidently so concluded, that appellant (defendant) is entitled to show fully the nature and extent of the injuries received by respondent in the previous accident. (Citing and discussing *Morrissey v. Connecticut Valley St. Ry. Co.*, 233 Mass. 554, 124 N. E. 435, and *Jones v. St. John*, Tex. Civ. App., 178 S. W. 2d 181, 183.) . . .

We agree with the Court below that the amount recovered by respondent in the previous action is irrelevant. Apart from the fact that the verdict in that case doubtless involved various other elements of damages besides future pain and suffering, it is immaterial whether in that action she was adequately or inadequately compensated or, in fact, whether she recovered at all. Suppose she had been unsuccessful, could respondent have

27. 229 S. C. 461, 93 S. E. 2d 604 (1956).

28. 229 S. C. at 464, 93 S. E. 2d at 606.

shown that fact on the trial of the instant case? We think not. . . .

In order to avoid any misunderstanding, it should be stated that it does not necessarily follow from what has been said that appellant will be precluded at the trial from referring to the previous litigation. This depends on circumstances which we cannot now anticipate. It may then develop that the claims made by respondent in the previous action are relevant.

This is a wise resolution of an intricate problem. The only evidence relating to the previous trial which the Supreme Court definitely excludes is the verdict therein; this should be excluded as hearsay, as well as for the reasons which the Court gives above. The scope of this survey does not permit of full discussion of the problems involved in admissibility of other evidence concerning the earlier trial. It will here suffice to point out a few considerations governing the decision. Defendant is not offering the evidence merely to show a propensity on plaintiff's part to bring personal injury suits, to permit an inference of lack of merit in the instant suit.²⁹ He says that the very injuries claimed by plaintiff in this case were those claimed by her in the earlier case. If defendant can prove the underlying facts here, the evidence is highly relevant. Then the question is whether its usefulness is outweighed by the prejudice which it might arouse in the jury. Furthermore, parts of the pleadings and testimony of the plaintiff in the earlier case might be admissible under the admissions exception to the hearsay rule. Finally, defendant might be permitted to cross-examine plaintiff concerning the previous case, even if not permitted to introduce the evidence on direct examination.³⁰

Hearsay—Scope of Cross-Examination—Prejudicial Testimony

*Schreiberg v. Southern Coatings & Chemical Co.*³¹ involved several interesting procedure and evidence questions. The action was for damages alleged cutting and removing timber which was excluded from plaintiff's timber deed to defendant. Plaintiff's deed to defendant Southern granted the right to cut pine timber of twelve inches and upward stump diameter, to-

29. McCORMICK, EVIDENCE § 156, p. 325; § 163, p. 344.

30. *Id.* § 163.

31. 231 S. C. 69, 97 S. E. 2d 214 (1957).

gether with such small timber and trees as would be usefully removed in cutting, removing or handling the deeded timber. Defendant's answer alleged that he sold a portion of the timber to codefendant Overton Mfg. Co., and that any timber removed in excess of that deeded was cut by Overton without authority or consent of Southern. Plaintiff's demurrer to this defense was overruled, plaintiff not appealing this ruling. The Circuit Court after evidence granted nonsuit as to both defendants. The Supreme Court affirmed this ruling as to Southern,³² but reversed as to Overton; there was evidence to support a verdict against the latter.

Plaintiff offered evidence that Overton had submitted a bid for the timber offered for sale by plaintiff, the Overton bid being based on pine stump diameter of ten inches. This bid had been rejected and that of Southern, based on twelve inch diameter, accepted. The Supreme Court held that it was error to exclude this evidence; it showed Overton's desire, and hence was relevant to show intention of Overton to cut timber of ten inches diameter. It was also relevant on plaintiff's issue of punitive damages, as showing wilfulness. This ruling is sound.³³

Plaintiff also offered a letter from Southern to plaintiff, which said that the cutting had been completed, and which acknowledged receipt of plaintiff's complaint of undercutting; the trial court excluded this document. The Supreme Court said:³⁴

. . . . Southern Coatings is now out of the case perforce the nonsuit, which we affirm as to it. As to the remaining defendant, Overton, the letter would be hearsay, and inadmissible.

Presumably there is no issue in the case as to defendant receiving notice from plaintiff of a claim of undercutting; on such an issue the letter would not be hearsay. On an issue as to whether timber was actually cut in violation of the agreement, the letter is clearly hearsay. It would appear equally clear that it was inadmissible hearsay even were Southern still in the case, since it seems to contain no admission of fact by Southern concerning excess cutting.

³². On the ground that by plaintiff's failure to appeal, the decision of the trial court that the answer stated a defense became the law of the case.

³³. The governing considerations are set out in McCORMICK, EVIDENCE §§ 151, 152, pp. 314-321 (1956).

³⁴. 97 S. E. 2d at 216.

On cross-examination, one of the plaintiffs was asked by defendant's counsel about the prior existence of a liquor still on their property, which questioning the Court permitted over objection. The Supreme Court held that this was error; the testimony had no relevance to any issue in the case, and was highly prejudicial. The only legitimate use of the testimony would be for impeachment; such cross-examination should be limited to crimes affecting credibility.³⁵ As Chief Justice Stukes said:³⁶

. . . . Here there is no contention that the witness was engaged in the operation of the still or had any guilty knowledge of its existence on his property, much less that he had been indicted in connection with it.

Parol Evidence Rule

One issue raised by the pleadings in *Heath Springs Light & Power Co. v. Lynches River Cooperative*,³⁷ was an allegation that the cooperative utility breached a non-competition agreement with the private utility by selling power to certain customers. The private utility had entered an agreement with the cooperative to sell it a certain power transmission line. One term of this agreement contained a promise by the cooperative not to sell power from this line without the written consent of the Grantor. This agreement was not to become effective until the approval of the Administrator of the Rural Electrification Administration, a Federal agency, had been received. The Administrator refused approval because of the non-competition clause. The utilities then entered an amended agreement which contained a clause in which the cooperative agreed not to sell to customers "now or hereafter receiving electric service from seller in the area immediately contiguous to said line without the written consent of seller" This agreement also never became effective because the Administrator's consent was withheld. Finally, on December 31, 1943, an agreement was executed and be-

35. Citing *Gantt v. Columbia Coca-Cola Bottling Co.*, 204 S. C. 374, 29 S. E. 2d 488 (1944). McCORMICK, EVIDENCE, § 42, p. 88 (1956), points out that this is the minority view. Wigmore is characteristically blunt in stating the reasons behind the minority rule. The American bar is not to be trusted as is the English to exercise a wise discretion in cross-examination; the American trial courts in many jurisdictions have been so denuded of traditional judicial power that they are not to be trusted to keep counsel within the bounds of propriety in cross-examination. WIGMORE, EVIDENCE §§ 983, 987 (3rd ed. 1940).

36. 97 S. E. 2d at 217.

37. 231 S. C. 34, 97 S. E. 2d 79 (1957).

came effective, this agreement containing no non-competition clause. Plaintiff, the private utility, brought suit to enjoin sales by the cooperative in the area. Plaintiff offered evidence that the parties had reached a gentlemen's parol agreement that defendant would not compete. The Circuit Judge, J. Henry Johnson, held that this evidence was barred by the parol evidence rule, saying:³⁸

. . . . There is no fraud alleged or attempted to be proven by the plaintiff. This is not a suit to vacate, modify or reform the deed or agreement and the defendant is bound by the terms of the written instrument. The Supreme Court of South Carolina has invariably followed the rule that parol evidence is not admissible to vary or contradict the terms of a written contract and parol reservations or exceptions made either at or before the making of a deed are merged therein and cannot be allowed to alter or modify its legal effect. (Citing cases.)

This opinion was adopted by the Supreme Court.

A case stating the same principles is *Butler v. Schilletter*,³⁹ in which Circuit Judge, Judge Bellinger, granted a motion to strike paragraphs of defendant's answer which would vary and alter the terms of the written contract involved. The Supreme Court *per curiam* affirmed this ruling, finding that the contract was clear and unambiguous and that no question of reformation had been raised. The decree of the Court was modified in other respects not here applicable and remanded. *McJunkin Corp. v. City of Orangeburg*⁴⁰ also involved a routine application of the parol evidence rule.

Function of Referee in Ruling on Admissibility of Evidence

Under CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-1409, a Referee has the duty of ruling on the competency, relevancy and admissibility of offered testimony, but must take the testimony whether he thinks it admissible or not, incorporating it not in his report but in an appendix thereto, if he considers it not admissible. *Elrod v. Elrod*,⁴¹ an action for divorce, was referred by consent of the parties to the Probate Judge of Anderson County as Special Referee. Defendant made a mo-

38. 97 S. E. 2d at 83.

39. 230 S. C. 552, 96 S. E. 2d 661 (1957).

40. 238 F. 2d 528 (4th Cir. 1956).

41. 230 S. C. 109, 94 S. E. 2d 237 (1956).

tion to amend her answer by alleging certain facts concerning the behavior of her husband during the marriage. The Circuit Judge denied the motion, but said in his order that most of these facts could be introduced anyway under defendant's general denial. Defendant then made offers of proof at the trial, raising generally the issues that would have been presented under the proposed offered amendment to her answer. The Referee rejected much of this evidence, saying,⁴² "The (Circuit) Judge couldn't rule what could be introduced in my Court—he can't tell me what I shall take and what I shall not take. He is a higher judge, but" The Circuit Judge found that this was error, but attempted to obviate the error by considering all the offers of proof of the attorney for defendant. This was reversed by the Supreme Court, which held that the Referee must take the testimony even if he thinks it inadmissible.

The words of the Statute seem to demand this result. The short answer to the point raised by the Probate Judge is that when he sits as Referee, he is not sitting "in his Court." His function is that of Referee, and he is bound by the statutes governing that function, as would be any lawyer appointed as Referee.

Nonsuit

In *Chastain v. United Insurance Co.*,⁴³ plaintiff Dollye Chastain was induced by defendant's agent, one Jordan, to take out a hospital and sickness benefits policy issued by defendant, an Illinois corporation. The insuring clause of the policy provided benefits "against loss of time on account of sickness contracted during the term of the policy." The policy was issued on January 17, 1955; on February 26, 1955, Dr. Harris, plaintiff's surgeon, performed an operation on her and removed both her breasts. At the trial, Dr. Harris testified on direct examination that this operation was for "a recurrence of a tumor of the left breast and also a recurrence of the right breast and a tumor in it."⁴⁴ "The first time I operated on her for it was on October 10, 1951."⁴⁵ He also testified on cross-examination that the tumors which occasioned the February, 1955, operation were bound to have been there for six, seven or eight months prior to the opera-

42. 230 S. C. at 113, 94 S. E. 2d at 238, Record on Appeal at 68.

43. 230 S. C. 465, 96 S. E. 2d 464 (1957).

44. Transcript of Record, p. 38.

45. *Id.* at 39.

tion. Held, the Trial Court properly granted a nonsuit, since from the surgeon's testimony no other conclusion is possible than that the disease requiring the operation pre-existed the issuance of the policy.⁴⁶

Miscellaneous Evidence Questions

A few decisions involving routine applications of accepted principles may be noted. *Watson v. Little, supra*,⁴⁷ held that in an equity case, findings of fact by a Master, concurred in by the Circuit Judge, would not be upset on appeal unless without evidentiary support or against the clear preponderance of the evidence. The Court found adequate evidentiary support in the Record for the findings of the Master. In *Barnett v. Charleston & Western Carolina Ry. Co.*,⁴⁸ the issue was whether plaintiff was as a matter of law guilty of gross and wilful contributory negligence. The Supreme Court held that the evidence was adequate to support a jury finding for the plaintiff.

46. The Court also found that defendant was within its legal rights under the policy when it refused further payments of premiums. Since counsel agreed that this could not affect claims arising while the policy was admittedly in force, this ruling had no bearing on the point discussed herein.

47. Discussed above under Hearsay, p. —.

48. 230 S. C. 525, 96 S. E. 2d 555 (1957).