South Carolina Law Review

Volume 17
Issue 1 *1963-1964 Survey Issue*

Article 12

1964

Evidence

James F. Dreher
University of South Carolina School of Law

EVIDENCE

JAMES F. DREHER*

This was a sparse year in the development of the law of evidence. The South Carolina Supreme Court, which in recent years has seemed to welcome the opportunity to clarify some of the hazy concepts which abound in the field,[1] had to confine itself this year to confirming the obvious. During the period under review, not a single evidence question was presented to the court which justified more than the briefest consideration.

Typical of the ease with which the evidence points were ruled upon is the holding in *Mulkey v. United States Fid. & Guar. Co.*[2] that the "proof of loss" submitted by an insured to his fire insurer was admissible in the subsequent law suit to prove compliance with the provisions of the policy but could not be considered for the factual statements which it contained.

Two questions in the field of expert testimony were also easily disposed of. In *Conner v. Farmers & Merchants' Bank*[3] a masonry contractor had testified in a suit by a tenant against her landlord for personal injuries allegedly caused by negligent repair of the premises that in his expert opinion the mortar between the bricks in the floor of the apartment had been improperly mixed. The defendant maintained that this testimony was irrelevant because the witness's examination was not made until a year after the plaintiff was injured, but the court held that there was no showing that his ability to determine the basic constituency of the mortar was affected by the lapse of time. In *Glenn v. Dunean Mills*[4] it was held that an expert's opinion, expressed in reply to a hypothetical question, that the plaintiff's intestate could not have been killed by an over-exposure to freon in an industrial operation was not conclusive of the issue because the hypothetical question had not taken into consideration all of the physical aspects of the occurrence.[5]

* Lecturer in Law, University of South Carolina.

1. For example, the exception to the hearsay rule for testimony at a former trial rationalized so clearly in Gaines v. Thomas, 241 S.C. 412, 128 S.E.2d 692 (1962), and the much needed holding in Watson v. Wall, 239 S.C. 109, 121 S.E.2d 427 (1961), that no out-of-court assertion is hearsay unless it is offered to prove the truth of the matter stated.

2. 243 S.C. 121, 132 S.E.2d 278 (1963).

3. 243 S.C. 132, 132 S.E.2d 385 (1963).

4. 242 S.C. 535, 131 S.E.2d 696 (1963).

5. It should be noted that the admissability of the testimony was not in issue. It is generally held that the facts put to an expert witness in a hypothetical

The perennial problem of how to treat evidence which is admissible for one purpose but likely to be used by the jury for an incompetent purpose was raised in *Knight v. Johnson*,[6] but not in a very serious aspect. The plaintiff in an automobile collision case was said by a police officer to have driven away from the town of Simpsonville in a "fast manner," to have appeared angry and upset, and to have stated that he was taking his son to a doctor and "no one could stop him." His counsel argued that the scene of the accident was two miles away and his conduct at Simpsonville could not be of any probative value on the question of how he was driving when he and the defendant collided. The court held that was correct, but that the testimony of the policeman was competent to show the "motive and purpose" of the plaintiff on the entire trip.

In *State v. Hyder*[7] one of the police witnesses testified that he had climbed a tree and observed through binoculars the defendant working a liquor still about two hundred yards away. To refute this, the defendant's brother testified that he had climbed the tallest tree he could find in the vicinity of the policeman's tree and found that it was impossible to recognize people at the still site with binoculars. The binoculars which the brother had used were offered in evidence. The policeman then took the stand again to introduce a pair of binoculars which he said were identical to those he had used. The defendant objected to the admission of the exhibit.

Without actually discussing the relevancy of the evidence, the South Carolina Supreme Court affirmed because it was unable to see how the defendant could have been prejudiced by the exhibit. Counsel argued that it was possible that the glasses originally used by the police officer could have been defective in some way, but the court said there is no evidence of this and that the condition of the glasses could have easily been explored on cross-examination. The court added that the record did not show that any experiment was performed with the glasses at the scene where they had been used. This was very likely right but one would hate to bet that the jury did not look out of their court house window at a person two hundred yards away with both pairs of glasses.

---

question do not have to be uncontradicted, it being sufficient if they are supported by some evidence in the record. MCCORMICK, EVIDENCE § 14 (1954).

6. 244 S.C. 70, 135 S.E.2d 372 (1964).

7. 242 S.C. 372, 131 S.E.2d 96 (1963).

In four cases involving the impeachment of witnesses the court merely announced and applied long established rules: in *Daniel v. Hazel*[8] that a witness's previous plea of guilty to an indictment charging him with a crime of fraud may be brought out on his cross-examination; in *Graham v. Aetna Ins. Co.*[9] that when a witness admits on cross-examination the making of a written statement at variance with his present testimony, the instrument itself is not admissible; in *Gilfillan v. Gilfillan*[10] that a party may not impeach his own witness by producing a previous contradictory statement of the witness except upon a showing of surprise; and in *State v. Morris*[11] that an accused who takes the stand in a murder case may, by way of impeachment, be asked about a previous murder conviction despite the fact that his testimony agrees with the state's in all matters except his motive for the killing.

In *State v. Young*[12] the court applied the settled South Carolina rule that an objection as to the relevancy of testimony is waived when the objector cross-examines on the same matter without specifically reserving the objection.[13]

In *Hodges v. Hodges*[14] the court applied against a wife who claimed her husband got drunk at a family dinner but failed to call as witnesses her relatives who were present, the presumption that if they had been called they would not have corroborated her. The best recent delineation of the type of relationship between party and witness which will give rise to this presumption may be found in *Davis v. Sparks*.[15]

Although the rights of a party are not concluded by statements made against him by one of his witnesses if other witnesses testify to the contrary, *Elrod v. All*[16] recognized that a party's own testimony against himself on a certain point does conclude that point against him.

8. 242 S.C. 443, 131 S.E.2d 260 (1963).
9. 243 S.C. 108, 132 S.E.2d 273 (1963).
10. 242 S.C. 258, 130 S.E.2d 578 (1963).
11. 243 S.C. 225, 133 S.E.2d 744 (1963).
12. 243 S.C. 187, 133 S.E.2d 210 (1963).
13. That this is a minority rule and an unfortunate one see MCCORMICK, EVIDENCE § 55 (1954). Most courts consider that the original objection makes it obvious that counsel would not have gone into the matter at all had he not been forced to by the court's ruling and that he cannot reasonably be considered to have so foolishly waived his objection.
14. 243 S.C. 299, 133 S.E.2d 816 (1963).
15. 235 S.C. 326, 111 S.E.2d 545 (1959).
16. 243 S.C. 425, 134 S.E.2d 410 (1964).

There were two cases decided on the parol evidence rule during the review period. The first of these, *Spencer v. Republic National Life Ins. Co.*,[17] was an action on a group life insurance policy which contained a provision that if an employee was not on active, full-time work when the policy became effective, he would have coverage only from the date when he returned to work. The policy was issued as of February 1, 1961, but not actually delivered to the group employer until a month later. The plaintiff's intestate entered a hospital on January 14, 1961 and died on February 2, 1961. The soliciting agent for the insurer testified that he had represented to the employer that all employees who were covered by another company's policy expiring on January 31 would be similarly covered by his policy which was to take effect the next day. This testimony was objected to by the insurer on the ground that it tended to vary the terms of the written contract. The South Carolina Supreme Court held that the objection had been properly overruled. In the application form there was language indicating the intention of the parties that the policy was to be issued as a replacement of the policy then in effect and the court stated that this was probably enough to justify the admission of parol evidence to clarify the intent hinted at in the writing. It found it unnecessary, however, to decide the point and held that the testimony was clearly admissible to show an estoppel on the part of the insurer to rely on the contract language. The result would seem to be justifiable on either theory.

The other case involving the parol evidence rule is *Cooke v. Jennings & Cooke*.[18] Mr. and Mrs. Cooke had signed, along with Mr. and Mrs. Jennings, a lease covering certain business properties at Myrtle Beach. After the Cookes were divorced, she sued him for an accounting of the profits of the business. Upon the testimony of Mr. Cooke and the other parties to the transaction that Mrs. Cooke had no interest at all in the business and had signed the lease agreement purely to give some additional security to the lessor, the master and the circuit judge found for the defendants. The case was appealed on the sole point that the testimony as to the lack of any interest in the business by Mrs. Cooke violated the parol evidence rule and should have been excluded. The South Carolina Supreme Court held that the parol evidence rule does not prevent parties on the same side of a writ-

17. 243 S.C. 317, 133 S.E.2d 826 (1963).
18. 243 S.C. 474, 134 S.E.2d 572 (1964).

ten contract from showing by parol what the agreement was between themselves. The holding is in accordance with the general rule and the authorities cited by the court amply support it. The terms of the contract here ran between the lessor and the lessees. There was no contract language governing the relationship of the lessees, therefore, as to them there was nothing which the parol evidence could to be said to have varied.

In *McDonald v. Berry*,[19] the natural parents of a child that had been adopted by others brought an action against the lawyer who had handled the adoption to require him to disclose the names and addresses of the adoptive parents, the petition indicating a purpose to bring a suit to set aside the adoption. The Richland County Court ordered Mr. Berry to give the information but he appealed instead, and the South Carolina Supreme Court reversed. One of Mr. Berry's contentions was that the adoption matter was entirely within the attorney and client privilege. The court expressed some doubt as to this, saying, with the support of general authorities, that normally the identity of a particular client is not privileged but that an address given by a client to a lawyer in confidence may be. The reversal was on broader grounds, the court saying that in all domestic matters involving children the welfare of the child is the controlling consideration and that the welfare of an adopted child could be completely disrupted if he and his new parents could be sought out and harassed by the parents who had given him away. The court does not hold, of course, that it would never be possible for natural parents who had a meritorious cause of action for the annulment of an adoption to require the disclosure of the whereabouts of the child. It simply says that the vague showing of need for the information made by the petitioner here was not sufficient to justify the disclosure and the social hazards which could flow from it.

The most interesting case reviewed was the United States Court of Appeals, Fourth Circuit, decision in *United States v. Alexander*.[20] This is rather surprising as it involved the usually cut-and-dried rule of "best evidence." The defendant had been convicted in the federal district court at Greenville of removing a government check from a mail box. The Government's case rested solely upon the circumstantial evidence that he had been found with a Social Security check payable to a Mrs. Woodall in his possession a short distance from Mrs. Woodall's mail box, in

19. 243 S.C. 453, 134 S.E.2d 392 (1964).
20. 326 F.2d 736 (4th Cir. 1964).

which, according to her, such a check should have been deposited that morning. The apprehending officer described the check in fair detail, but it was not produced at the trial and no explanation of its unavailability, sufficient to permit secondary evidence, was attempted by the Government. One of the officers had made an effort, while the check was in his possession, to have a Thermofax reproduction of it made but some portions had not reproduced properly and these were claimed to have been added by typewriter. The question before the court of appeals was whether this informally made copy and the general description by the officers of the original check were admissible against a "best evidence" objection.

The court, speaking through Judge Boreman, reversed the conviction. The opinion begins by adopting the clearly expressed view of the evidence experts[21] that the best evidence rule applies only when the *terms* of a document are at issue and that it never bars testimony as to other facts about the document, such as its existence or its identity. It held, however, that the *terms* of this check were materially at issue in the prosecution and that the check had to be produced or its unavailability established before secondary evidence could be admitted.

The argument which the Government presented on the appeal appears at first to be reasonably sound and the defendant's purely technical. If the defendant had been accused of removing a book from the mail box, a general description of the book would have been sufficient, and it could not have been argued that what was written in the book—its terms—were material to the case and required the original book's production. Judge Boreman said, however, and on analysis his conclusion seems more sound, that the exact terms of the check were of crucial importance in the Government's effort to establish by circumstantial evidence that this particular check had been taken from Mrs. Woodall's mailbox. Consider, he says in perhaps his most telling argument, "the effect of a witness's failure to notice, or a reproducing machine's failure to copy, an endorsement on the back of the check. We are convinced that it was for the purpose of avoiding the possibility of such errors as might have occurred here that the best evidence rule was formulated."

When thus scrutinized, the reversal based upon a small point of evidence of what was very likely a just conviction, does not seem so technical after all.

21. 4 WIGMORE, EVIDENCE § 1242 (3RD ED. 1940); MCCORMICK, EVIDENCE § 196 (1954).