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Evidence

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EVIDENCE

I. Relevancy

Lindsey v. City of Greenville[1] was an action for crop damage allegedly sustained when waters were released from the defendant city's dam and reservoir. At the trial, the defendant sought unsuccessfully to introduce photographs and expert testimony to show flooding conditions in watersheds adjacent to that in which defendant's dam and plaintiff's property were located. On appeal the court affirmed since there was no testimony to show that rainfall in the adjacent watersheds entered defendant's reservoir or in any way affected the flooding of plaintiff's crop.

II. Parol Evidence Rule

In *Commercial Credit Corp. v. Nelson Motors, Inc.*[2] the plaintiff finance corporation sought to recover certain sums allegedly due it under a written contract whereby the defendant automobile dealer had assigned installment contracts to the plaintiff at a discount. In its answer, the defendant alleged that the losses sustained by Commercial were caused by the latter's failure to use reasonable care and diligence in collecting the balances due on the accounts it had purchased. The answer also set up a counterclaim for losses incurred by Nelson resulting from the same alleged omissions of duty. The circuit judge struck the defense and counterclaim as sham and frivolous holding that the rights of the parties were controlled by the terms of the written contract which did not impose any obligation on Commercial with respect to the collection of the assigned accounts. The court reversed on the ground that "under the terms of the contract in the light of surrounding circumstances, including the relationship of the parties and their past dealings, it is, to say the least, fairly arguable that Commercial was impliedly obligated to pursue the collection of the accounts with reasonable and customary diligence."[3] The court further held, in accord with the general rule, that where there is nothing in the writing affecting an essential element of the contract, evidence of prior dealings between the parties to supply such element would in-

1. 247 S.C. 232, 146 S.E.2d 863 (1966).
2. 247 S.C. 360, 147 S.E.2d 481 (1966).
3. *Id.* at 369, 147 S.E.2d at 485. For a discussion of the court's reasoning see this case surveyed elsewhere under the heading *Contracts.*

volve no contradiction of the writing and would not violate the parol evidence rule.[4]

III. Hearsay

In *Johnson v. Finney*,[5] an action by a pedestrian to recover for injuries sustained when struck by an automobile, the trial judge excluded a question put to the highway patrolman who participated in the investigation of the collision as to whether he was able to locate an "eye witness" to the accident. The court held that there was no error as the answer would obviously have been hearsay unless the patrolman had been present and had seen an eye witness looking at it.

IV. Waiver of Objection to Admissibility of Evidence

Grain Dealers Mut. Ins. Co. v. Julian[6] is a case in which the controlling issue was the question of ownership of an automobile. The trial judge admitted testimony concerning an alleged bill of sale over the defendant's objection that the bill of sale was the best evidence. On appeal, the court did not need to consider the question of whether secondary evidence of the contents of the bill of sale was admissible, since the defendant's counsel, during cross-examination of the seller, examined the seller regarding the bill of sale without reserving his objection. It is well settled in South Carolina that, in such a case, the objection to the testimony is waived.[7]

V. Party Bound by His Own Witness' Adverse Testimony

In *Orider v. Infinger Transp. Co.*[8] the court applied the general rule that a party to an action is bound by the testimony of his own witnesses which is favorable to the adverse party where he does not prove the facts to be contrary to the testimony of such witnesses.[9] This was an action to recover damages allegedly

4. Soulios v. Mills Novelty Co., 198 S.C. 355, 17 S.E.2d 869 (1941); Chatfield-Woods Co. v. Harley, 124 S.C. 280, 117 S.E. 539 (1923).

5. 246 S.C. 366, 143 S.E.2d 722 (1965).

6. 247 S.C. 89, 145 S.E.2d 685 (1965).

7. Gary v. Jordan, 236 S.C. 144, 113 S.E.2d 730 (1960); Richardson v. Register, 227 S.C. 81, 87 S.E.2d 40 (1955); Robinson v. Blakely, 4 Rich. 586 (1851).

8. 248 S.C. 10, 148 S.E.2d 732 (1966).

9. Elrod v. All, 243 S.C. 425, 134 S.E.2d 410 (1964); Porter v. Hardee, 241 S.C. 474, 129 S.E.2d 131 (1963); Rakestraw v. Allstate Ins. Co., 238 S.C. 217, 119 S.E.2d 746 (1961).

caused by the negligence of the defendant, its agents and servants. The court held that the trial court had erroneously refused the defendant's motions for a directed verdict and for judgment n.o.v. An examination of the testimony of all the plaintiff's witnesses, other than one Boswell, did not show any acts of commission or omission on the part of defendant or its agents or servants to prove or raise an inference of negligence or willfulness. Boswell, the defendant's assistant manager, was called by the plaintiff as one of his witnesses. The testimony of Boswell exonerated the defendant of any actionable negligence or willfulness, and the court held that "the record fails to show the facts to be other than this witness testified and, having called him as a witness, the respondent was bound by his testimony."[10]

VI. COMPETENCY

A. *Evidence of Prior Conviction*

In *State v. Millings*[11] the defendant, who had been convicted of manslaughter in the lower court, appealed on the ground that the trial judge erred in admitting testimony elicited from the defendant on cross-examination that he had been convicted of auto theft in 1944 and receiving stolen goods in 1946 since such evidence was highly prejudicial.[12] The court affirmed, holding that "evidence of prior convictions of crimes involving moral terpitude may be introduced into evidence on the issue of credibility of a witness."[13] This is in accord with the well settled rule that "when [the defendant] elected to testify in his own behalf he assumed the same role as any other witness, subjecting himself to the duties and liabilities of witnesses generally, and by the mere act of becoming a witness he placed his reputation for truth and veracity in issue, thereby making it permissible to show any of his past transactions tending to affect his credibility. . . ."[14] The court has also stated that

10. Crider v. Infinger Transp. Co., 248 S.C. 10, 17, 148 S.E.2d 732, 735 (1966).

11. 247 S.C. 52, 145 S.E.2d 422 (1965).

12. After a discussion of the principle issue, the court observed that an objection in the terms no more specific than "highly prejudicial" is too general, citing Griswold v. Texas Co., 163 S.C. 156, 161 S.E. 409 (1930).

13. State v. Millings, 247 S.C. 52, 53, 145 S.E.2d 422, 423 (1948).

14. State v. Van Williams, 212 S.C. 110, 114, 46 S.E.2d 665, 667 (1948). *Accord,* State v. Chasteen, 231 S.C. 141, 97 S.E.2d 517 (1957); State v. Robertson, 26 S.C. 117, 1 S.E. 443 (1887).

"there can be no doubt that proof that a witness has committed larceny tends to affect his credibility."[15]

B. *Dead Man Statute*

The court in *Long v. Conroy*[16] had occasion to determine the applicability of section 24-402[17] of the South Carolina Code known as the Dead Man Statute. This was an action brought by the testator's executors against his widow and, after her death, continued against her executors to determine the ownership of certain bonds in the possession of the wife at the time of her husband's death. At the trial, the testator's executor filed a disclaimer to any executor's commissions on the bonds in question and was allowed, over the objection of the defendant's counsel, to testify as to certain transactions and communications had by the witness with the testator and the testator's widow which were material to the proof of plaintiff's case. On appeal the court applied the test of *Norris v. Clinkscales*[18] finding that the witness fell within a disqualified class since he was a party to the action. The court also found that his testimony partook of at least two of the disqualifying characteristics (it was in regard to a transaction or communication between the witness and a dead person and against a party defending the action as executor of a deceased person) but not the third since a good faith disclaimer filed by the witness eliminated any present or previous interest of his that could be affected by the litigation.[19] Since the testimony did not partake of all the disqualifying characteristics in addition to falling within at least one of the disqualified classes, it was admissible.[20]

15. State v. Van Williams, *supra* note 14, at 114, 46 S.E.2d at 667.
16. 246 S.C. 225, 143 S.E.2d 459 (1965).
17. S.C. CODE ANN. § 26-402 (1962). This section provides in part:
    [N]o party to an action or proceeding . . . shall be examined in regard to any transaction between such witness and a person at the time of such examination deceased . . . against a party . . . defending the action as executor . . . of such deceased person . . . when such examination or any judgment or determination in such action or proceeding can in any manner affect the interest of such witness or the interest previously owned or represented by him.
18. Norris v. Clinkscales, 47 S.C. 488, 25 S.E. 797 (1896).
19. *Accord, Ex Parte* Newton, 183 S.C. 379, 191 S.E. 59 (1937).
20. Norris v. Clinkscales, 47 S.C. 488, 25 S.E. 797 (1896).

VII. OPINION EVIDENCE

A. *Property Valuation*

In *Bagwell v. Transcontinental Gas Pipe Line Corp.*,[21] a condemnation proceeding, the trial judge refused to allow the plaintiff's witness to express an opinion as to the value of the property where the witness testified that he operated a filling station near the plaintiff's property and could see a portion of the property from his station. The supreme court affirmed. The witness's testimony did not come within the exceptions to the general rule that the opinions of witnesses are not competent evidence since no attempt was made to qualify the witness as an expert on the appraisal of real estate and there was no showing that as a non-expert he was particularly familiar with the property sought to be condemned.[22]

B. *Medical Experts*

Kapuschinsky v. United States,[23] decided by the United States District Court sitting in South Carolina, was an action under the Federal Tort Claims Act in which the minor plaintiff claimed she suffered a severe and permanent disabling condition as a direct result of the government's negligence while she was a newborn infant in the United States Naval Hospital, Charleston, South Carolina. The plaintiff's counsel propounded to a medical expert in the field of microbiology a hypothetical question relative to the source or cause of the premature infant plaintiff's infection. The posed question included the facts that the plaintiff was infected with an organism that, according to the hospital pathologist's tests, was sensitive to two antibiotics and that a Wave who had handled the infant was infected by that organism and was shown by identical tests to be sensitive to the same two antibiotics. The defendant's counsel contended that the fact that the Wave had handled the child was not in evidence; therefore, the hypothetical question was objectionable.[24] The court found, however, that there was "contact" between the Wave and the child, so the objection was without

21. 246 S.C. 569, 145 S.E.2d 17 (1965).

22. See Knight v. Sullivan Power Co., 140 S.C. 296, 138 S.E. 818 (1926); Jones v. Fuller, 19 S.C. 66 (1882); 5 NICHOLS, EMINENT DOMAIN, § 18.4 [4] (rev. 3d ed. 1962).

23. 248 F. Supp. 732 (D.S.C. 1966).

24. See State v. King, 158 S.C. 251, 155 S.E. 509 (1929).

merit. The microbiologist's testimony did not involve the issue of degree of skill exercised by members of his profession in Charleston and similar localities, and the court further held that the fact that he was not familiar with medical practices in the Charleston area would not bar his testifying as to medical cause and effect or identity of the organism. The court also stated that "this was not a case in which the expert is giving an opinion founded upon the opinion of another expert. . . ."[25] and that the "similarity of identity of the strains was necessarily grounded upon a consideration of the sensitivity tests."[26] It is a general rule that the opinion of an expert cannot be predicated upon the opinions, inferences and conclusions of other expert or lay witnesses[27] but it may be based upon facts testified to by another expert or upon a *test* made by another expert witness.[28] The evidence in this case as to the identity or method of transmittal of the organism was entirely circumstantial. The court, in line with the South Carolina cases, stated that circumstantial evidence is competent to establish negligence[29] and that the "legal burden of proof on the plaintiff does not become more onerous because the evidence is circumstantial. . . ."[30] The plaintiff placed a local general practitioner on the stand to give expert testimony as to the standard of care required of the hospital in dealing with the plaintiff. The fact that the witness was not a specialist diminished the weight of his testimony,[31] and the court recognized the difficulty which the plaintiff had in obtaining local specialists to testify, taking judicial notice of the "well recognized reluctance of members of the medical profession to testify in cases of this type."[32]

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25. Kapuschinsky v. United States, 248 F. Supp. 732, 741 (D.S.C. 1966).

26. *Ibid.*

27. Ellis v. Kansas City Life Ins. Co., 187 S.C. 334, 197 S.E. 398 (1938). See 20 AM. JUR. *Evidence* § 791 (1939).

28. Smith v. Middlesboro Elec. Co., 164 Ky. 46, 174 S.W. 773 (1915). See 20 AM. JUR. *Evidence* § 791 (1939).

29. *E.g.*, Chaney v. Burgess, 246 S.C. 261, 143 S.E.2d 521 (1965); Horton v. Greyhound Corp., 241 S.C. 430, 128 S.E.2d 776 (1962).

30. Kapuschinsky v. United States, 248 F. Supp. 732, 743 (D.S.C. 1966). See, *e.g.*, Leek v. New So. Express Lines, 192 S.C. 527, 7 S.E.2d 459 (1940).

31. See Annot., 54 A.L.R. 860 (1928).

32. Kupuschinsky v. United States, 248 F. Supp. 732, 744 (D.S.C. 1966). See generally Belli, *An Ancient Theory Still Applied: The Silent Medical Treatment*, 1 VILL. L. REV. 250 (1956).

IX. HARMLESS ERROR

In *South Carolina State Highway Dep't v. Graydon*,[33] a condemnation case, the trial court refused to strike the testimony of a real estate expert called by the landowner that the value of the property taken was 4,365 dollars. The only other evidence on the issue was the testimony of the landowner that the diminution in the value of his property as a result of the condemnation was 5,000 dollars. On appeal, the court did not reach the question of the admissibility of the expert opinion because the usual presumption of prejudice from the admission of incompetent evidence having some probative value[34] does not arise where the testimony complained of was more favorable to the complaining party than the only other evidence upon the issue.

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33. 246 S.C. 509, 144 S.E.2d 484 (1965).
34. See, *e.g.*, Cooper Corp. v. Jeffcoat, 217 S.C. 489, 61 S.E.2d 53 (1950).