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Evidence

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EVIDENCE

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A. Relevancy

The preservation of continuity is the only reason for an evidence article this year. None of the decisions in the field had any substantial significance in the development or the clarification of the law of evidence.

The decision which came closest to a debatable point was *State v. Solomon.*[1] The trial court had excluded testimony offered by the defendant to the effect that on the day he was arrested for violating the South Carolina Blue Laws other merchants in Charleston were similarly in violation of the statute and were not prosecuted. The South Carolina Supreme Court held that this ruling was correct in that the proferred testimony "had no bearing on defendant's guilt and was irrelevant. One cannot excuse his unlawful conduct by showing that someone else equally guilty had not been prosecuted."[2]

This broad statement is unquestionably correct, but there have been cases where a grossly arbitrary pattern of criminal law enforcement, particularly when based upon racial or religious differences, has been considered by the courts as a proper foundation for constitutional complaints.[3] Indeed, it appears that a Pennsylvania trial court in 1960 reversed a blue law conviction upon a showing that the police, because of a shortage of funds and personnel, enforced the law only against the larger business concerns. This purposeful discrimination was held to deny equal protection to the accused.[4]

The court in the *Solomon* case might then have been in some difficulty on the evidence question if the defendant had been in a position to make any strong showing of a discriminatory enforcement policy by the police. He was not, however. The proferred testimony was taken by the trial court out of the presence of the jury and showed merely that there were others

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1. 245 S.C. 550, 141 S.E.2d 818 (1965).

2. *Id.* at 574, 141 S.E.2d at 831.

3. Yick Wo v. Hopkins, 118 U.S. 356 (1886); People v. Harris, 182 Cal. App.2d 837, 343 P.2d 765 (1960); People v. Darcy, 59 Cal.App.2d 342, 139 P.2d 118 (1943).

4. Bargain City v. Dilworth, 29 U.S.L. WEEK 2002 (Pa. C.P., June 10, 1960).

in the community who were violating the law without being arrested. Such a showing could probably be made in every misdemeanor trial. As Mr. Justice Lewis said, "There was a total absence of testimony to show an arbitrary and purposeful discrimination in the administration of the statute necessary to sustain the claim."[5]

B. Parol Evidence Rule

In *Profitt v. Sitton*[6] the court made a normal application of the parol evidence rule excluding testimony of a real estate broker as to his interpretation of a written contract between the plaintiff and the defendant for the sale of a residential subdivision in respect to whether a water line was to be conveyed. In *Shelley v. Shelley*[7] the court held that the parol evidence rule was not violated by the introduction of evidence to explain a testator's probable intention as to the location of the dividing line between lands devised to his two sons. There was an obvious ambiguity in the language of the will, to such an extent in fact that the line which the master and the trial court had found (ostensibly without considering "extrinsic evidence") to be the correct one to separate the "northern part" of the tract from the "southern part" ran largely north to south rather than east to west.

C. Hearsay

In *State v. Swilling*[8] the accused in a murder case maintained that the lower court erred in admitting testimony to the effect that he had been drunk and had been in an altercation with the deceased on the day preceding the fatal shooting. As his verbal expressions bore upon his threatening attitude toward the deceased and his drunkenness was part of the whole picture, the court held the testimony to have been properly admitted. Specific objection was made to one of these witnesses having quoted him as saying, "I'm going to get a gun and somebody will be dead over the weekend."[9] The court held that if this had been merely a general threat to the peace of the community it would not

5. 245 S.C. 550, 574, 141 S.E.2d 818, 831 (1965).
6. 244 S.C. 206, 136 S.E.2d 257 (1964).
7. 244 S.C. 598, 137 S.E.2d 851 (1964).
8. 246 S.C. 144, 142 S.E.2d 864 (1965).
9. *Id.* at 149, 142 S.E.2d at 867.

have been admissible, but there was other evidence in the record which would permit the jury to infer that the threat referred specifically to the deceased.

D. Hypothetical Questions

In *Greer v. Greenville County*[10] the court refused to consider whether a hypothetical question asked a doctor in a workmen's compensation case was admissable. The hypothetical question allegedly assumed facts not in the record and omitted facts in the record. The court refused to consider the question on the ground that the question had not been objected to at the hearing.

E. Out of Court Tests

In *Williams v. Pendleton Mfg. Co.*[11] the court held that the trial judge, in a water pollution case, had properly excluded testimony offered by the defendant as to the results of a test of the creek water made approximately a year prior to the alleged poisoning of the plaintiff's cattle. There must be, the court said correctly, a showing by the proponent of such evidence that the conditions under which the test was made were substantially similar to the conditions existing at the time of the occurrence at issue.

F. Presumption as Evidence

Two decisions by the United States District Court sitting in South Carolina should be noted. Both opinions were by Judge Hemphill. In the first of them, *Owens v. Durham Life Ins. Co.*,[12] he correctly applied South Carolina law[13] in holding that the so-called "presumption against suicide" is not evidence to be weighed by the fact finder against direct proof of suicide. In the second, *Small Business Administration v. Barron*,[14] South Carolina law was not involved since the proceeding was one to enforce subpoenas duces tecum issued by the Small Business Administration in the course of its investigation of certain

10. 245 S.C. 442, 141 S.E.2d 91 (1965).
11. 244 S.C. 228, 136 S.E.2d 291 (1964).
12. 240 F. Supp. 294 (E.D.S.C. 1965).
13. Coleman v. Palmetto State Life Ins. Co., 241 S.C. 384, 128 S.E.2d 699 (1962); McMillan v. General Am. Life Ins. Co., 194 S.C. 146, 9 S.E.2d 502 (1940).
14. 240 F. Supp. 434 (W.D.S.C. 1965).

operations in South Carolina and the issuance of which was specifically authorized by an act of Congress. One of the respondents was a lawyer and maintained before Judge Hemphill that the production of his books and those of the small business concerns which he represented would violate the attorney-client privilege. The court ordered the enforcement of the subpoenas against the lawyer, saying that "it is, of course, fundamental to the proper assertion of the privilege that the material sought was itself in the original instance privileged material."[15] The material sought to be subpoenaed did not embrace any memoranda of legal advice from the lawyer to his client but consisted merely of ordinary financial records of the lawyer and the client which the lawyer happened to have in his possession. If the law were otherwise, of course, any person could insulate his records from governmental scrutiny by simply turning them over to his lawyer.

15. *Id.* at 448.