South Carolina Law Review

Volume 24 | Issue 4 Article 8

1972

# Evidence

Brenton D. Jeffcoat

# EVIDENCE

## I. FORMAL ASPECTS

### A. *Technicalities Devoid of Discernable Merit*

> Another shortcoming is *over-emphasis* on the *technique* of legal rules in detail, with corresponding under-emphasis on policies, reasons, and principles. This is a difficult thing to describe to those who do not sense it without description; but it is very marked. It is the kind of thing that is like the dead bark on the outside of a tree, in contrast to the living, growing inner core. Too much of our law is dead bark .... The treatment tends to become mechanical. Reasons are lost from sight.[1]

#### 1. Unintentional Waiver of Objection by Cross-Examination

In *State v. Hoffman,*[2] the defendant appealed his conviction under the state's Blue Light Law.[3] In separate action, the town of St. Matthews had charged Hoffman with driving too fast for conditions and creating excessive noise. Hoffman was acquitted of those offenses in the Municipal Court of the Town of St. Matthews.[4] At trial on the charge of failure to stop on a patrolman's signal, the prosecutor presented St. Matthews Police Officer Collin Haynes whose signal Hoffman had allegedly disregarded. Haynes testified that he used his signal devices to stop Hoffman because he had observed the defendant and others driving too fast and making excessive noise.[5] Defense counsel promptly objected to such testimony. Just as promptly the judge replied: "This is merely background and I overrule the objection."[6] While cross-examining Haynes the defense counsel apparently attempted to prove that Hoffman and his companions could not have been speeding. This examination proved unproductive except to constitute a waiver of the original objection. Defense counsel had not uttered the required phrase to indicate that he still objected to the admission of testimony concerning other offenses.

1. I WIGMORE, EVIDENCE §8a (3d ed. 1940).
2. 257 S.C. 461, 186 S.E.2d 421 (1972).
3. S.C. CODE ANN. §46-359 (Cum. Supp. 1971).
4. 257 S.C. at 465, 186 S.E.2d at 423.
5. *Id.* at 467, 186 S.E.2d at 423.
6. Record at 15, State v. Hoffman, 257 S.C. 461, 186 S.E.2d 421.

When testimony is admitted over the objection of one party who later cross-examines the witness on the matter subject to the objection, without asking leave of the court to save the objection, the South Carolina Supreme Court holds that the objection has been waived.[7] The court justifies this rule with the statement that ". . . if any error had been committed in the admission of the testimony, it had been cured."[8] Of course, if when the witness is cross-examined the attorney takes care to preserve his objection, he will not lose it. The court never has explained exactly how this request keeps the original error from being cured, much less why the absence of this request automatically cures the error. Where the court first discovered this rule is unknown. Indeed, as early as 1900 in *Horres v. Berkley Chemical Co.*,[9] and again in 1926 in *Green v. Shaw*,[10] the South Carolina court had adopted a position which seems exactly the reverse of the current one. After examining the earlier South Carolina cases, not including *Horres*, and determining that they were not in point, the court in *Green* reasoned:

> The appellant having done all in his power, by proper and timely objection, to exclude the objectionable testimony, elicited on cross-examination of the same witness a repetition of the same testimony that had been given on direct examination. Without making the testimony elicited the testimony of the cross-examining party, cross-examination may serve a number of useful purposes in the trial of a case, such as, for instance, testing the credibility of the witness or combatting the effect of the testimony upon the minds of the jury. And we are unable to see why a litigant who has duly objected to the admission of incompetent testimony should be required to choose between foregoing the opportunity to accomplish such legitimate purposes through cross-examination of the testifying witness and waiving his right of appeal based on the court's error in admitting the testimony.[11]

---

7. State v. Hoffman, 257 S.C. 461, 186 S.E.2d 421 (1972), State v. Anderson, 252 S.C. 650, 169 S.E.2d 706 (1969), State v. Motley, 251 S.C. 268, 164 S.E.2d 569 (1968), State v. Jenkins, 249 S.C. 570, 155 S.E.2d 624 (1967), State v. Smith, 245 S.C. 59, 138 S.E.2d 705 (1964), State v. Young, 243 S.C. 193, 133 S.E.2d 210 (1963), State v. Bass, 242 S.C. 193, 130 S.E.2d 481 (1963), State v. Puckett, 237 S.C. 369, 117 S.E.2d 369 (1960), State v. Cavers, 236 S.C. 305, 114 S.E.2d 401 (1960).

8. State v. Hoffman, 257 S.C. at 471, 186 S.E.2d at 426.

9. 57 S.C. 189, 35 S.E. 500 (1900).

10. 136 S.C. 56, 134 S.E. 226 (1926).

11. *Id.* at 64-65, 134 S.E. at 228.

The court noted that this holding was not in conflict either with earlier South Carolina cases or with the majority rule.[12]

There was no procedural condition stated by the court in *Green* as a requirement for preservation of an original objection. Nor does it appear that the attorney for the aggrieved party in *Green* had requested the court to save his objection during cross-examination. Furthermore, in *Green* the court quoted with approval the following:

> When testimony has been admitted and an exception noted, counsel may deem it necessary to cross examine the witness on the subject; and, if it is simply a cross-examination, he ought not be deprived of his exception, provided the record shows he does not intend thereby to waive it, *and that ought to be inferred when it is strictly cross-examination.*[13]

What grounds are left for maintaining that the court really meant that if an attorney uttered a bye your leave his objection would not be waived? Neither *Green* nor *Horres* has been explicitly overruled, probably as a result of the failure of counsel to notify the court of its precedent. This, however, does not explain why the court never gave any reasons for the rule applied in *Hoffman.*

2. Right of Prosecution to Allege Without Possibility of Rebuttal Other Offenses by Defendant

*State v. Hoffman*[14] also stands for the proposition that where evidence of other offenses by the defendant has been erroneously admitted, the defendant may not rebut that evidence by proof of his acquittal of those charges. After the testimony by Officer Haynes that the defendant and others had been driving too fast and making excessive noise, defense counsel attempted to place before the jury evidence of Hoffman's acquittal of those offenses. On appeal the Supreme Court of South Carolina agreed with the trial court rulings barring such testimony because "[t]he State never offered any testimony that the appellant had been charged with any violation of the ordinances of the Town of St. Mat-

12. *Id.* at 65, 134 S.E. at 228; I WIGMORE, EVIDENCE §18 (3rd ed. 1940); MCCORMICK, EVIDENCE §52 (2d ed. 1972); 5A MOORE, FEDERAL PRACTICE ¶46.04 (1971).

13. 136 S.C. at 68, 134 S.E. at 229; *quoting from* United Ry. and Electric Co. v. Corbin, 109 Md. 442, 455, 72 A. 606, 610 (1909) (emphasis added).

14. 257 S.C. 461, 186 S.E.2d 421 (1972).

thews."[15] While this is true, it still seems clear that Officer Haynes was allowed to testify about offenses. Narrowly interpreting the language of the court it could be concluded that: When testimony about other offenses has been admitted, so long as the political entity which makes the formal charges is not identified, proof of acquittal may not be offered in rebuttal. That it should make any difference to the jury what body makes the formal charges does not seem logical. Consequently it must be assumed that when evidence of other offenses is admitted it may not be rebutted by showing an acquittal. It is this interpretation which gave rise to Justice Bussey's dissent.[16]

South Carolina adheres to the generally accepted rule that evidence of the commission of another crime by the accused is inadmissible with certain justifiable exceptions.[17] Evidence of those offenses is admissible even though the defendant was acquitted.[18] "Most courts following that rule hold that where proof of another offense has been admitted, the defendant is entitled to prove his acquittal.[19] If in *Hoffman* it was error to admit the testimony about other offenses that error could have been effectively cured by admission of acquittal from the charges arising from those offenses.

### *B. Technical Rulings*

#### Limitations on Cross-Examination of a Witness Ruled Hostile on Direct

The prosecution in *State v. Hoffman* called as one of its witnesses Harry Truman Burns, who was with Hoffman when the violation occurred. During examination it became evident that Mr. Burns had consulted with Hoffman's attorney. The court ruled that Mr. Burns was hostile to the state and permitted the prosecution the use of leading questions. When defense counsel later sought to use leading questions in examining Burns, the prosecution objected and was sustained because Burns was, in effect, a witness for the de-

15. *Id.* at 472, 186 S.E.2d at 426.

16. *Id.* at 474, 186 S.E.2d at 427.

17. State v. Thompson, 230 S.C. 473, 476, 96 S.E.2d 471, 472 (1957) and authority there cited.

18. Annot., 86 A.L.R.2d 1132, 1135 (1962).

19. *Id.*

fense.[20] On appeal the South Carolina Supreme Court first noted that the range and extent of cross-examination is within the discretion of the trial judge.[21] The court then held that since leading questions are permitted on cross-examination because of the presumed hostility of the witness, when it appears that the witness is in fact sympathetic with the examiner's goals, a limitation on the use of leading questions is within the permissible discretion of the trial court.[22] This was, apparently, a question of novel impression in South Carolina and the rule adopted by the court is in keeping with that recommended or adopted elsewhere.[23]

## II. IMPEACHMENT

### *Testimony of a Witness may not be Impeached by Contradicting Statements on Collateral Matters*

When Central Electric Power Co-operative sought to condemn land for an easement, an agreement was reached with the condemnee about the location of that easement. In proceedings to fix the damages, the condemnee was questioned about his agreement with the power company.[24] After objection by his own counsel the condemnee replied, testifying that he had made no agreement with the company. A subsequent witness for the power company contradicted this testimony, again over the objection of counsel. Original plans by the power company called for the easement to run diagonally across the condemnee's five hundred acre tract. The agreement to route the power lines around the perimeter of the property was apparently a concession to the condemnee. At no time during the trial, however, did the condemnor assert that running the lines as originally planned would have resulted in less total damage to the condemnee's property. Since the parties stipulated that the best use of the land was for residential subdivision, the court agreed with the condemnee

20. Record at 68, State v. Hoffman, 257 S.C. 461, 186 S.E.2d 421 (1972).

21. 267 S.C. at 470, 186 S.E.2d at 425.

22. *Id.*

23. 3 WIGMORE, EVIDENCE §773 (Chadbourn rev; 1970). MODEL CODE OF EVDENCE rule 105(g) (1942); *Proposed Rules of Evidence for the United States District Courts and Magistrates* rule 6-11(c) (Preliminary Draft 1969). *See generally* Annot., 38 A.L.R.2d 952 (1954).

24. Central Electric Power Co-operative, Inc. v. Brown, 258 S.C. 148, 151, 187 S.E.2d 509, 510 (1972).

that running the lines around the perimeter of the property actually minimized the damages.[25] Unless the power company could prove that relocating the line effected greater damage to the property, the agreement to relocate was immaterial to the issue of damages. Allowing impeachment of the condemnee's testimony on this collateral matter was reversible error.[26]

## III. COMPETENCY OF WITNESSES

### *Agnostics and Atheists May Not Be Competent Witnesses in South Carolina*

The only question of witness competency presented to the court for this survey period was in *State v. Pitts*,[27] in which a witness was challenged on the basis of his agnosticism. Since the challenge was made incorrectly the court chose to rule on the procedure rather than the substance of the challenge. The court may have felt that there was no real question involved, but since it chose not to say so some doubt remains.[28] The basis of appellant's question lies in three cases, *State v. Abercrombie*,[29] *State v. Belton*[30] and *Jones v. Harris*.[31] Since *Belton* and *Abercrombie* dealt with the competency of youths, the real question may have been their ability to comprehend the nature of the sworn oath. *Jones*, however, had announced a position with respect to an adult requiring as a minimum that he believe in the existence of some power by which he would be punished if he testified falsely.[32] The reasoning seems sound enough—he who does not believe that his lies will be punished is under little pressure not to lie.[33] Since no announcement to the contrary was made by the court in *Pitts*, it may still be that agnostics and atheists would not be regarded as competent witnesses in South Carolina.

Although it has been asserted that such a result would be against the intent of the United States Constitution,[34] the

25. *Id.* at 152-153, 187 S.E.2d at 511.

26. *Id.* at 153, 187 S.E.2d at 511.

27. 256 S.C. 420, 182 S.E.2d 738 (1971).

28. Note, *The Requirement of a Religious Belief for Competency of a Witness*, 11 S.C.L.Q. 548 (1959).

29. 130 S.C. 358, 126 S.E. 142 (1925).

30. 24 S.C. 185 (1885).

31. 1 Strob. 160 (S.C. 1846).

32. *Id.* at 163.

33. 6 WIGMORE, EVIDENCE §1816 (3rd ed. 1940).

34. J. DREHER, A GUIDE TO EVIDENCE LAW IN SOUTH CAROLINA 25 (1967).

question has not been ruled on by the Supreme Court. Furthermore the Court's rulings on the interrelationships of "religion" and the state do not necessarily imply that a state could not require of its witnesses what the *Jones* case says South Carolina does require. *Gillette v. U.S.*[35] and *U.S. v. Seeger*[36] uphold the validity of the conscientious objector's laws which require the demonstration of a belief for qualification of objector status. In *Seeger* the Court gave the following "test":

> [D]oes the claimed belief occupy the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption?[37]

The state, then, may require some ordered belief for certain purposes. In *Gillette* the Court attempted to explain how this could be done without violating the establishment clause of the first amendment.

> [T]he Establishment Clause stands at least for the proposition that when government activities touch on the religious sphere, they must be secular in purpose, evenhanded in operation, and neutral in primary impact.[38]

Whether in this context the administration of an oath requiring a belief in some set of principles that should insure veracity in the oath giving witness is a valid secular purpose is a question which can be argued, regardless of the merit of the argument. Even if the South Carolina court in *Pitts* had no intention of implying that agnostics and atheists were not competent witnesses, having said nothing, it has left open a ground for appeal on this issue.

## IV. RELEVANCY

### *Materiality but One Element of Relevancy*

*Carolina Power and Light Co. v. Copeland*[39] illuminates the proposition that not all material evidence is relevant. In seeking a determination of land values for awarding damages in condemnation proceedings any legal use of the land is material. A brief hypothetical illustrates this:

35. 401 U.S. 437 (1971).
36. 380 U.S. 163 (1965).
37. *Id.* at 184.
38. 401 U.S. at 450.
39. 258 S.C. 206, 188 S.E.2d 188 (1972).

> Askew, the owner of an undeveloped 400 acre tract of land, decided to sell. He advertised his land as suitable for commercial or residential purposes. Askew received offers from a residential developer, a specialist in industrial properties, an eccentric Nimrod, and a pulpwood company. Since their offer exceeded all others by at least $4,000, Askew sold his property to the pulpwood company.

Any one of the offers would have been material in attempting to prove the value of the land for the use to which the offeror would have put it. The highest and best use must have been for growing trees, however, for that is the use which elicited the highest offer.

The condemnee should be awarded damages equal to 1) the value of the land actually taken based upon its value for its best use, plus 2) any special damages caused by the presence of the thing for which land was condemned.[40] In order to prove his damages the condemnee must first answer these two questions: 1) What use is to be asserted as a basis for valuation? 2) What is the value of this land for that use? Like Askew in the hypothetical, the landowner may assert any use as a resolution of his first question. The answer to the second question is where most problems arise in land condemnation cases. In *Copeland* the court said:

> A landowner is entitled to just compensation for the property taken as of the date of condemnation. Obviously, the potential which a parcel of land has for bringing about profits from skillful use and business-like development is one of the factors which determines market value. Accordingly, it is always appropriate for witnesses to testify concerning the potential highest and best use of property taken.[41]

Too often, a landowner will attempt to prove, as did Copeland, the value for his land as if it were already developed for the asserted use. Valuation for undeveloped land, however, must be based on what someone would pay to buy that land for the asserted use.[42] Copeland's witnesses having asserted that his undeveloped property was best suited for use as a rural residential community, then testified as to damages based on a per lot price in the non-existing community.[43] This testimony did not serve to prove the actual damages to the property in its then existing state.

40. *Id.* at 217, 188 S.E.2d at 193.

41. *Id.* at 214-215, 188 S.E.2d at 192.

42. *Id.* at 216, 188 S.E.2d at 192, citing 27 AM. JUR. *Eminent Domain* §280 (1966).

43. 258 S.C. at 216, 188 S.E.2d at 193.

Evidence is that by which a stated or unstated proposition is either proved or given support as a viable proposition. In order to meet the first half of a two part test for relevancy, the proposition sought to be furthered or supported by the evidence to be offered must be material to something in issue between the opponents. The second part of the test is whether indeed the evidence does advance or support the proposition.[44] Applying the test to the instant case, it can be posited that Copeland had a material proposition available: The property is best suited for use as rural homesites and for such use a developer of rural homesites would pay x dollars per acre. As has been noted, however, Copeland's witnesses testified to the value of the land on a per lot basis. The proposition which that testimony would have supported is as follows: The land has been developed to the point that it may now be sold in lots to rural homebuilders, and as such a rural homebuilder would pay x dollars per lot. Since the land was not so developed this proposition could not have been material to anything at issue between the parties and testimony so admitted was consequently irrelevant. From the size of the verdict rendered it was obvious that the jury used Copeland's erroneously admitted irrelevant testimony in arriving at his damages. The court therefore granted the appellant power company a new trial.[45]

## V. WRITINGS

*Parol Evidence*

In *Allen-Parker Co. v. Lollis*[46] the defendant in a claim and delivery action alleged fraud in the making of the contract. Judgment was for the defendant after testimony about the making of the contract was allowed over plaintiff's objections. The South Carolina Supreme Court affirmed the judgment reiterating its holding that parol evidence is admissible to show fraud at the inception of a contract.[47]

## VI. HEARSAY

In *Marsh Plywood Corp. v. South Carolina State Highway Dept.*,[48] the court ruled that the erroneous admission of

44. MCCORMICK, EVIDENCE §185 (2nd ed. 1972).
45. 258 S.C. at 218, 188 S.E.2d at 193.
46. 257 S.C. 266, 185 S.E.2d 739 (1971).
47. *Id.* at 273, 185 S.E.2d at 742.
48. 258 S.C. 119, 187 S.E.2d 515 (1972).

hearsay did not constitute prejudice so great as to require a new trial when the subject of the hearsay was substantiated by the party claiming error. Plaintiff suffered damages from highway construction which interfered with his contractual right to the removal of timber from land within a specified time. To establish damages, plaintiff's witness testified on the basis of reports made by a forester at the time the contract was entered. The defendant produced an expert, another forester, who made estimates on the basis of his observations. These estimates of damages were remarkably similar to those given in the hearsay testimony. Since the appellant could show no prejudice resulting from the testimony there was not justification for a new trial.[49]

BRENTON DEWITT JEFFCOAT

49. *Id.* at 124, 187 S.E.2d at 517.