1-1-1963

Evidence

Maynard Jackson

EVIDENCE

M. H. J.

69¢

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TWO SUBJECT NOTEBOOK

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NAME

ADDRESS

EVIDENCE

MR. JOHNSON

Fall, 1963

MAYNARD HOLBROOK JACKSON
NORTH CAROLINA COLLEGE, SCHOOL OF LAW

EVIDENCE

Final Examination

Mr. M. E. Johnson January 22, 1964

1. 9:00

H and W brought separate civil actions, consolidated for trial, growing out of a collision between a Dodge owned and operated by H in which his wife, W, was a passenger along with their son, S, and a Volvo owned and operated by defendant. The husband's action was to recover for personal injuries and damage to his car. The wife's action was to recover for her personal injuries.

The investigating patrolman testified that the defendant was charged with failing to yield the right of way and pleaded guilty before a justice of the peace. In a subsequent action for personal injuries to S, recorded statements of witnesses made in the trial of the first actions by H and W were admitted in behalf of S.

Discuss the admissibility of the evidence offered in each case and give reasons for or against admission as the case may be.

2. 9:30 Check This

Doe was a filling station operator at a popular crossroad in Durham County. On the night of August 31, robbers held up an automobile shortly after it had left Doe's station. Investigation convinced the police that Doe was privy to the robbery, and had been giving tips to the robbers when motorists who had plenty of money stopped to fill up. Doe was charged as accomplice when the robbers were put on trial. Doe took the stand and denied everything. The prosecution then called several residents of Durham County who testified that Doe was reputed to be a planner of hold-ups over objections of Doe's attorney.

Was this evidence admissible? Give reasons for your answer.

3. 10:00

A and B were laborers on the farm of D now deceased. In an effort to collect from D's estate for services rendered D during the year before his death, A and B filed separate actions which were consolidated for trial by consent of all parties. During the trial A and B were allowed over objections to testify to what services each saw the other perform for the deceased, and to declarations of the deceased made to the other in hearing of the witness as to rate of pay.

Was this evidence admissible against the dead man? Explain.

4. 10:30

D in a criminal action was charged and convicted of murder. After taking the stand in his own behalf and denying the charge, the state offered evidence that the defendant had a bad character, especially for truth and veracity, and had been in the toils of the law before. "The Court charged the jury that when the defendant took the stand, he put his character in issue and that same could be used against him as substantive evidence."

Was this charge correct? Explain.

5. 11:00

P suffered a head injury in an automobile accident and sued D, the owner and driver of the car, for damages for personal injuries. At the trial, W, a by-stander, testified that he was the first one to arrive at the scene of the accident; that the car had not been moved, and based on the skid marks, the road conditions, etc., the car was traveling at least 70 miles per hour when the brakes were applied.

The plaintiff alleged that as a result of injuries to his head a portion of bone had to be removed. An expert witness testified that the crack in the plaintiff's skull was filled with soft fibrous tissue. Another expert testified for the defendant that the hole was filled with callus, a hard bony substance. The plaintiff requested the Court to permit the jury to examine the head by placing their fingers on the place where the bone was removed and compare the hardness with other portions of the skull.

Defendant objected to the testimony of the layman and to the examination by the jury. material relevant

How would you rule on these objections and why?

6. 11:30

In a personal injury action, a doctor who had not been sworn was permitted to thrust a pin into the right side of plaintiff's face and her right arm and leg to demonstrate complete paralysis of her right side; then the plaintiff was asked to walk across the room and plaintiff made a pitiful attempt at locomotion.

Defendant objected to this evidence as being prejudicial and untrustworthy.

Were these demonstrations proper? Explain your answer.

7. 12:00

Wife left property to her husband. Opponents of the will claimed undue influences on the part of the husband. The husband attempted to prove that he and his wife got along well and that he was the natural object of her bounty. Testimony was offered that husband had made a will leaving all his property to the wife. Competence relevance state of mind

Was this testimony admissible? Explain.

8. 12:30 - finis!

Action by A against D for damage to A's automobile, caused by D's car making a forbidden left turn at a crossing of the boulevard. A's testimony was that his car was stationary, and that he had stopped just as the red light was turning yellow. D's counsel in arguing says, "A's testimony cannot be true for at the boulevard there is no intermediate yellow light--only red and green lights." There was no evidence offered of this fact.

May the Court take judicial notice? Explain. - "May take" type

CASE BOOK:
EVIDENCE, CASES AND MATERIALS,
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20 SEPT. 63 (first class)

Evidence – Rules of procedure to establish facts.

References

Check each juris. For N.C. law, see Stansbury. Generally, see Wigmore.

If, upon objecting in ct., the judge calls for the reason and you are unable to give same, it would not be reversible error if the judge overrules you.

Evid. is a procedural course. Therefore, a fed. ct. would not be bound to follow the procedural law of the situs (need follow only the substantive law of the situs per Erie v. Tompkins).

* JUDICIAL NOTICE *

See U.R.E., p. 844. Must Know. See U.R.E., rule 9 (Jud. Notice), p. 846.

* See 57 Harv. L.R. 269 re J/N. Required!

In early English law, any interested party could not testify. Exceptions arose later (e.g., Dead Man's Rule).

Test:
Whether the matter under consideration is "so notoriously true as to be incapable of dispute among reasonable men" 57 Harv. L.R. at 273; Commissioners v. Prudden & Co., 180 N.C. 496, 105 S.E. 7 (1920)

Personal test. is weak due to faltering memories.

J/N is one method of getting facts over w/o necessity of proof.

Three types of J/N:

(1.) Ct. SHALL take J/N of a fact so notoriously known that it is beyond dispute.

(2.) Ct. MAY take J/N if requested and if it is advised. available to prove same. A matter of gen. knowledge of such proof is available.

J/N ON APPEAL — ORIGINAL J/N

[Appellate Ct. may take J/N of what trial Ct. could notice or did notice. But, appellate court may take J/N of something in the first instance, too.

The U.R.E. distinguish here between SHALL and MAY types.

J/N played a big part in the school segregation cases (Brown v. Bd. of Education).

Cts. will T/N all statutes as being the law, laws of other states and Martin's private publications of laws, the C.L. of other states, et al.

As a practical matter don't rely on any difference between "shall" and "may" types. Present proof always and then request T/N.

Town ordinances are not subject of T/N.

Seasons, distances, and county seats are subjects, also, of T/N.

Assignment:
Read into Real Proof, p. 63.
Daily assignment:
20 packs.

Outside Reading: 57 Harv. L. R. 269 JUDICIAL NOTICE

"If the trier of fact is the judge, he must be assumed to have a fund of gen. info., consisting of both generalized knowl. & knowl. of spec. facts, and the capacity to relate it to what he has perceived during the proceeding, as well as the ability to draw reas. deductions from the combination by using the ordinary processes of thought. That fund of gen. info. must be at least as great as that of all reas. well-informed persons in the community. ... If the trier is the jury much the same assumption must be made; and if the jury's fund of info. is smaller it can be supplemented by the judge.

There is an assumption re the equipment and capacity of the trier of fact which may be expressed in terms of J/N by saying that the ct, including both judge and jury, must take J/N of what everyone knows.

and uses in the ord. process of reasoning about everyday affairs.

"... A party cannot be permitted to present moot questions or procure an erroneous finding by the device of denying the indisputable." (at p. 279).

Quaere: Can matters jud. noticed be disputed? = Conflict here. Wigmore says, yes. - Sup. Ct. of Errors of Conn. says, no. Better rule seems to be that a trial Court can properly reject evid. of a matter held by the appellate court to be a proper subject of judicial notice. So, Wigmore's theory is rejected by this writer where the matter is properly w/in the field of judicial notice.

REQUIREMENTS: Matters may be judicially noticed on:

(1) The matter is so notorious as not to be the subject of dispute among reasonable men; or

(2) the matter is capable of immediate & accurate determination by resort to readily accessible sources of

Hoyt v. Russell, 117 U.S. 401, 6 S. Ct. 881 (p. 15 cbk.) (1886) — The ct. should have known judicially whether the laws of the terr., wh it was bound and appointed to expound, were in operation w/ reference to a subject brought before it in the regular course of procedure.

Supp. to guide (the courts') judgment may be obtained by resort to orig. documents in the public archives or to books of history or science, or to any other proper source.

It is sufi for the reversal of the judg. that the ct. required proof of a fact of wh it was bound to take judicial notice. 144/639

indisputable accuracy.

23 SEPT. 63

(Re blood tests, see M. Johnson's paper in library, done Summer of 1963.)

N.C. Rule: (J/N)

What is a matter of common knowledge to all should be matters w/in the knowledge of ct. and of wh it can take J/N. Justice does not require the ct. to be more ignorant than the rest of mankind. Harrison, 156 N.C. 435, 72 S.E. 454 (1911); State v. Vick, 213 N.C. 235 (or 233), 195 S.E. 779 (1938); Wigmore, Sec. 2580. (2d ed.).

Never leave it to the ct. to take J/N of its own motion. Always request same: will make a difference depending on "shall" or "may" take type of J/N. See 144 N.C. 639.

180 N.C. 496 - mentions matters wh the ct. erred in not jud. noticing (probably "shall take" type).

* In failure of a ct. even of its own motion, to T/N "shall take" type of matter = reversible error.

144 N.C. 639, Harper Furn. Co. v. The Express Co. — in connection w/ Hoyt v. Russell, p. 15.

* (A.) SPECIFIC PROPOSITIONS *

VARCOE v. LEE (p. 18)

Re Mission St. in San Francisco being a biz district.

"An appellate ct. can properly take T/N of any matter of wh the ct. of orig. juris. may properly take notice". (see cbk. p. 20).

Re matters of common know., J/N says y is no need of formally offering evid. of those things, because practically everyone knows them in advance, & y can be no question about them.

* Requirements: (see p. 20 cbk.)
(1.) Of common & gen. know.
(2.) Practically indisputable.
(3.) That this know. exists in the juris.

See 153/457; 172/827 (N.C. cases).

Assign: J/N & more.

T/N is a judicial short cut, a doing away, in the case of evid., with the formal necessity for evid., because y is no real necessity for it. So far as matters of common knowledge are concerned, it is saying y is no need of formally offering evid. of those things, because practically everyone knows them in advance, and y can be no question about them. i.e., the reason for the requirement is consistent w/ the reason and purpose of the rule, wh is to obviate the formal necessity for proof when the matter does not require proof.

p

(B) Gen. Propositions

49-7
8-50.1

25 Sept. 63

A ct. may take J/N of blood grouping tests which show the exclusion of paternity.

In N.C., under G.S. 49-7 and 8-50.1, the D may require that the mother and child take the tests. In N.C., the results can be used only if paternity is excluded thereby. But, if paternity is not excluded, the results of the test are inadmissible.

The majority of states say that the ct. must take J/N of exclusion and the jury cannot disregard same. See Jordan v. Mace, (p.27), 27 N.C.L.R. 456 re blood tests.

Fed. Rule 43(a). - re J/N. Will be taken of matters that would be taken in the courts of the situs states. Seems to be an exception to Erie v. Tompkins.

J/Noticed matters:

(1.) Admin. regulations (shall type).
(2.) Airplanes, autos.

(C.) PERSONAL KNOWLEDGE

(1.) JUDGE.

"The Ct. (JUDGE) has no right, irrespective of the testimony of witnesses, to deter. a fact based upon its own knowledge." The judge may use only his judicial knowledge and only if that satisfies the other requirements of J/N.

(2.) JURY

JURORS have a right to consider things which they know as a matter of common knowledge along w/ the facts proven upon the trial. Same, though such facts have not been proven during the trial.

(3.) State & cty. boundaries.
(4.) Biz customs.
(5.) Census reports.
(6.) Counties.
(7.) courts of a state.
(8.) Econ. & Social conds.
(9.) Elections.
(10.) Farming practices.
(11.) Foreign law - must be called to Ct's attention.
(12.) Geographical facts.
(13.) Govt. matters.
(14.) Matters affecting health.
(15.) Historical facts.
(16.) Human nature & functions.
(17.) Judges of state cts.
(18.) Municipalities.
(19.) Public documents.

Some of these are "shall" and some are may. Read chap. 8 of G.S. of N.C.

(20.) Railroads and shipping facilities.
(21.) Terms of Ct.
(22.) Water courses.

N.C. seems to say that it will take J/N even in crim. cases. State v. Baldwin, 226/295; 321/17, State v. Daniels; 213/235, State v. Vick.

Check personal know. of Judge & Jury

(D.) Procedural Problems

(1) EFFECT OF J/N

State v. Lawrence (p. 36)

A three-year old car may not be worth $500 and it would be error to J/N that it would be.

Criminal Law

The gen. rule is that a Ct. will not take J/N in criminal cases

* (SEC. 2) JUDICIAL NOTICE OF LAW *

[Mentioned Lutz case, p. 45.]

See 261 F. 2d 945.

Ct. will usually presume that foreign law is the same as dom. law unless shown otherwise. For law must be pleaded and proved.

See U.R.E. 9 p. 9 bk. for summary; Wigmore (3d ed.) 25-55 + 25-65.

Assign. - Chap. 2

26 SEPT. 63

[Chap. II] REAL EVIDENCE

DEFINITION

R/E - that evid. offered by producing the thing itself in court rather than having one testify about it.

Inflammatory Real Evidence

Our R/E would serve no real purpose if presented, and would only serve to inflame the minds of the jurors, it should not be allowed. If allowed, it would be reversible error only if a clear abuse of discretion by the judge could be shown.

Examples:

(1.) Weapons (2.) liquor (3) Narcotics
(4.) clothing (5.) Leather goods (6.) Persons
(5.) VIEW OF PREMISES OR SCENE

(SEC. 1.) CONDS. OF ADMISSIBILITY

(A.) ABILITY OF TRIER TO ACQUIRE KNOWLEDGE

McAndrews v. Leonard (p. 65)

Jury allowed to feel spot in skull of P to detch. whether it was as hard as the rest of the skull. That required no scientific knowledge.

State v. Johnson (p. 67)

Quaere: Can child be shown to the jury to prove that this committed stat. rape ?? = Held, yes.

Three views on demonstrating babies:

1. Yes always.
2. Yes, if baby is a certain age.
3. No always.

Sec. 99 + 119 of Stansbury says that in N.C. the child may be exhibited to the jury.

The People v. Gonzalez (p. 73)

Layman may testify re what stains may look like, e.g., as here, whether a stain is blood.

But today, this rule should not be allowed because of the ease of chemical analysis and the greater degree of reliability of same.

Mantua v. Lazarus (p. 76)

Held, once the parties agree that the premises had not changed since the time of the infraction, it would be proper to allow the jury a view.

2 Views of jury view:
(1.) It = new evid.
(2.) It merely explains the previous testimony and ≠ new evid. MAJORITY VIEW.

Assign: Begin p. 79

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27 SEPT. 63

Schnoor v. McKenzie (p. 79)

AGE

When age is in issue, the jury may take into consideration the appearance of the person as seen in Ct. ... It is hardly necessary to add that in the case of conflicting testimony, a court or jury may consider the appearance of the person whose age is in question in connection w/ other evid.

The question of credibility of witnesses is for the jury.

Experience teaches us that corporal appearances are approximately an index of the AGE of their bearer, particularly for the marked extremes of old age and youth. In every case, such evid

should be accepted and weighed for what it may be worth in each case. In particular, the OUTWARD PHY. appearance of an alleged minor may be considered in judging his AGE.

See 93 N.C. 628 - D chgd. w/ rape. D stated on stand that he had said right after arrest that he was innocent, but that was objected to and excluded as self-serving and improper. Defense offered evid. that he was 14; State said he was 17; D's mother's stmt. of D's age was confusing. So, jury was allowed to decide, and they found he was over 14, thereby making D eligible for electrocution.

BIRTH CERTIFICATE

In the absence of rebutting evid., the birth certif. will conclusively estab. age.

(B.) THE LOGICAL CONDITIONS

(1.) IDENTIFICATION

This really deals w/ relevancy.

You Must show a logical connection between the real evid. offered and the instant case, charge or D being tried.

State v. Forest (p. 81)

Two steers in truck, but jury was not told or shown that they (or either one) were connected w/ the case. i.e., there was no identification. "W/o some such proof of the identity of the steer in the truck he was not admissible in evid.

GENERAL RULE

"... When a claim or offer involves impliedly or expressly any element of personal connection w/ a corporal object, that connection must be made to appear, like the other elements, else the whole fails in effect."

(2.) Relevancy

DEFINITION

evid. is relevant if it has any logical tendency however slight, to prove any material fact in issue. The evid. must be such as to ~~prove~~ support a reas. inference of a fact in issue. (Beard the standard of "reasonableness.")

63/335 Stansbury, 77-81

People v. Adamson (p. 87)

GENERAL RULE

To be admissible, evid. must tend to prove a material issue in the light of human experience.

Held, "although the presence of the stocking tops in D's room was not by itself sufficient to identify D as the criminal, it = a logical link in the chain of evidence."

Evid. that tends to throw light on a fact in dispute may be admitted.

PROBATIVE VALUE

The weight to be given such evid. will be determ. by the jury.

RULE: PREJUDICIAL EVIDENCE

"Moreover, except in rare cases of abuse, demonstrative evidence that tends to prove a material issue or clarify the circumstances of the crime is admissible despite its prejudicial tendency."

30 SEPT. 63

(C) THE PRACTICAL CONDITIONS

U.R.E. 45 DISCRETION OF JUDGE TO EXCLUDE ADMISS. EVID.-

Except as in these rules otherwise provided, the Judge may in his discretion exclude evid. if he finds that its probative value is substantially outweighed by the risk that its admission will (a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury, or (c) unfairly & harmfully surprise a party who has not had reas. opportunity to anticipate that such evid. would be offered.

KNOW RULE 45 (U.R.E.), p. 90.

People v. Cavanaugh (p. 90)

Relevant evidence is not necessarily inadmissible because of its tendency to prejudice the jury.

Prosecution offered photos of decomposed, maggot-infested body, and two fingers were preserved and offered for proof of fingerprints.

Held, Even though "the use of this evidence, like the use of the irrelevant evid. of other non-violent crimes, in the manner and extent to wh it was done, was improper and erroneous", there was no

"miscarriage of justice" w/in the meaning of the Calif. constitution. Where two strong dissents, and the result would have been otherwise in juris. w/o that constitutional proviso.

It has been held that clothing pierced by bullets which entered the deceased's body is always admissible, even if merely cumulative of detailed oral testimony. Barbour v. State, 262 Ala. 297, 78 So. 2d 328 (1954).

(Sec. 2.) DEMEANOR

(A.) ON THE WITNESS STAND

May always be considered by jury, but may not be commented on by judge except in fed. cts. See Ga. Horse Ins. Co. v. Campbell, 102 Ga. 106, 108, 29 S.E. 148, 149 (1897). But, in fed. cts. the judge may not distort

it or add to it, and he must make it clear to the jury that all matters of fact are submitted to their determination.

(B.) OFF THE WITNESS STAND

Demeanor in the courtroom may be commented upon to the jury. The witness was necessarily subject to the observation of the jury.

The jury may consider the witness's demeanor in the courtroom off the witness stand even if no comment thereon is made.

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2 OCT. 63

Demeanor of counsel is T.I., too. There are certain things he may not do; he cannot turn the trial into a "side-show." Atty. cannot argue what the governor or parole board can do.

* (Section 3.) Demonstrations *

Demonstrative evid. supports testimonial evid., and D/E cannot stand by itself.

Lampa v. Hakola (p. 97)

P's atty. had him give demonstration of alleged inability to bend his neck and back due to accident, but P kept making audible comments ("It hurts"; "I can't stand it!", etc.). Held, it was error to permit this demonstration of "subjective symptoms." It's natural tendency was to excite the sympathy, and perhaps the prejudice, of the jury, and on account thereof increase the amt. of dams. See n. 13, p. 99 cbk. Also, n. 15, p. 99 cbk.

"If such exam. in the presence of the jury would expose ghastly wounds, hideous deformities, or would elicit cries of pain by the P, or indue pitiful attempts at locomotion, or otherwise would

Friedler v. Hekeler, 96 Conn. 29, 112 A. 651 (1921) - "the phy. demonstration before the jury of alleged muscular limitations is permissible w/in the limits of sound judicial discretion. When the demonstration amounts only to the use of the injured party as an exhibit to demonstrate or display some relevant fact or cond. already testified to, whose existence or nonexistence is apparent on inspection, no oath is required. But, on the demonstration is carried to the point of using the injured party as a witness to prove the truth of a material + disputed fact by inarticulate muscular contractions instead of by words, it ought to be conducted under the sanction of an oath."

dramatize P's injuries in a manner calculated to inflame the minds of the jury, then such demonstration becomes prejudicial and improper." Happy v. Walz, 244 S.W. 2d 380, 383 (Mo. App. 1951).

(Sec. 4.) EXPERIMENTS

(p. 101) Erway - Carlton Apartments Inc. v. Hatterick Hotel locks taken to locksmith outside of ct. and away from jury.

Experiments w/in ct. -

"Allowing real or demonstrative evid. to be introduced in ct. rests largely w/in the discretion of the trial court... It is admissible for experiments to be made from such real or demonstrative evid. in the presence of the jury."

Experiments w/o ct. -

"It is also w/in the discretion of the court to admit in evid. experiments conducted out of presence of the court and jury provided said

experiments are made under circumstances substantially the same as those existing at the time of the occurrence or non-occurrence of the alleged fact."

Issue: did the ct. err in allowing real or demonstrative exhibits to be taken from presence of the ct. and jury and ~~tampered~~ changed? HELD yes.

PERJURY CASES

The testimony of a victim must be corroborated to be effective. Otherwise, it cannot be taken as true. THIS APPLIES TO PERJURY CASES. Corroboration must be by at least two witnesses.

3 OCT. 63

(SEC. 5) (A.) REPRODUCTIONS OF EVENT + OF EVID. OF THE EVENT

PHOTOGRAPHS

Correctness of photographic exhibit may be testified to by any person familiar w/ subject matter of photo or has personal first hand knowl. of the facts.

RULE OF EVIDENCE

They (photos) are not evid. per se. They must be supported by, or support, testimonial evidence.

GENUINENESS + ACCURACY

Although photographer need not testify that the photo is genuine and accurate, it is advisable that he do so.

AUTHENTICATION OF X-RAYS

X-Rays must be authenticated to the effect that they accurately picture what they are represented to picture.

Kuhal v. State (p. 104)

"As a gen. rule photographs are inadmissible in evid. only when they are verified or authenticated by some other evid. ⊛ Photographs are generally inadmiss. as orig. or substantive evid.

they must be sponsored by a witness or witnesses whose testimony they serve to explain and illustrate.

(B.) X-RAY PHOTOGRAPHS

Two authentication requirements:

(1.) It must be shown that the picture offered is actually a picture of the object or part of the body of wh it is claimed to be a picture.

(2.) It must be shown by oates. evid. that the picture is accurate, in the sense that it conforms to the standard of accuracy of X-Ray pictures generally.

(C.) MOTION PICTURES

U.S. v. Moran (p. 111)

Rule of Procedure: Prejudice

Unless failure of defense counsel to see the motion picture in advance deprived appellant (D) of an opportunity to make a valid objection to the exhibit, he was not prejudiced. No such objection

could have been made here. The film was admissible to show D's demeanor when testifying before the sub-committee. (This action was for perjury under fed. statute.)

* Defense counsel has right to see exhibits before intro. to allow him timely objection.

(D.) SOUND RECORDINGS

Wright v. State (p. 112)

Requirements

(1) In gen., where the accuracy of the machine in producing the recording, and the (2) accuracy of the recording being estab., together w/ a (3) showing as to the voluntary character of the stmt., there can be no question as to the admissibility of a recorded stmt., in so far as the stmt. is (4) material to the issues of a case.

Rules: AUDIBILITY

(1) If the recording is inaudible in those portions likely to contain stmts. material to the issues, the recording

should be rejected if it is the only evidence offered as to the stmt.

(2) If the parties who were present when the recording was made are available and testify as to the stmts. made, the recording, even tho' inaudible in parts, should be admitted as corroborative of the test. of the witness or witnesses testifying to the stmt.

(3) If the recording contains illegal evid. it should be rejected unless such illegal portions can be erased from the tape, or kept from the jury by stopping and starting the playing instrument. Ord. instructions to disregard would be inadequate.

* (SECTION 6) DOCUMENTS *

(A.) AUTHENTICATION

~~A~~ Can be certified copies of public documents and records used. The custodian of same certifies the copy.

* REPLY DOCTRINE -*

A letter or telegram received in due course

of mail, purporting to be a reply to a letter or tele previously sent by receiver ~~—~~ is prima facie genuine and admissible w/o authentication.

* ANCIENT DOCUMENTS RULE *

If a document is ① 30 or more years old ② produced from ~~the~~ natural custody and ③ free of suspicion it is admissible w/o further authentication.

["NATURAL custody" means that it would be found in a place or circumstance natural to that type or value of document.]

3 OCT. 63

Keegan v Green Giant Co. (p. 121)

"A writing purporting to be of a certain authorship cannot go to the jury as possibly genuine, merely on the strength of this purport; it must be some evidence of the genuineness."

Copies of public documents (and records), properly certified by

their custodian, were competent evidence upo the production of the originals.

Methods of Authenticating Writings

(1.) Admissions of authenticity - by, or on behalf of, the litigant v. whom the document is to be offered in evidence.

Pre-trial hearings offer an excellent opportunity to clear away muck disputes re documentary authentication.

(2.) Testimony by the Asserted Writer.

An acknowledgment of the asserted writer's signature may serve to establish the authenticity of a document. Acknowledgment = (e.g.) notarization by notary public. His seal must be on it, and it may be rebutted for fraud or some other reasons.

(3.) Testimony By a Person Who Saw the Writing Executed - not a formal attesting witness.

(4.) Circumstantial Evid. of Authenticity

(a.) REPLY DOCTRINE

Whelton v. Daly (p. 128)

[For good stmt. of this doctrine, see p. 131 bk.]

N.C. follows Wigmore on this doctrine.

Effect of Notary's Seal

The majority view seems to be that the notary's seal will prima facie authenticate any instrument. And so of acknowledgments certified by a foreign notary.

Authority of Signing Agent

If the reply comes from one who purports to sign as agent for the person addressed, the authority of the agent is presumed.

(b.) ANCIENT DOCUMENTS RULE

Harbor v. The Home Bank & Trust Co. (p. 132)

G.S. 31-18.1 - on witnesses to will are not available; you may still probate will by proving authenticity of the signatures of the attesting witnesses. Admissible to prove truth of the recitals in the document.

A will executed, as this was, more than thirty years before it is offered in evidence, is, when produced from the proper custody and otherwise free from suspicion, entitled to the benefit of the same presumptions as an

ancient deed, to wit: fact of execution and genuineness, making it admissible as evid. of the truth of the recitals contained in them.

Church Records

A church record is not a public record. Thus, certified copies are inadmissible.

7 OCT. 63

(5.) OPINION EVIDENCE

(a.) Lay Witnesses

Both lay & expert wits. may testify to their opinions re authorship or genuineness of writings, subject to proof of their proper qualification to do so. In the case of lay wits. the qualification calls for reas. familiarity w/ the handwriting of the person whose authorship of the contested document is at issue. The lay wit. is not permitted to fortify the opinion to wh he testifies by physical comparison in court of the contested writing w/ genuine standards. But, it has been held that he may refresh his recollection by scrutinizing genuine standards.

The trial judge has considerable free discretion to admit or exclude lay handwriting testimony.

May only express opinion from familiarity w/ the thing. May not give opinion based on comparison. The jurors may do that. The jurors could not do that at C.L., but they can under modern law. (Check this out, M.—Johnson not sure.)

(b.) Expert Witnesses

The expert handwriting wit. may in the course of his testimony, as well as before taking the stand, buttress his views by comparing the disputed document with or photographic copies of genuine standards. And he may use an enlarged drawing of the disputed writing in order to explain his conclusion to the jury.

May make a comparison and draw opinion therefrom. But, the standard of comparison must be first authenticated, and a

lay witness may help to authenticate it.

Quaere: How must you frame a question concerning opinion as to mental capacity of a decedent to execute a will? = See Stansbury on Evidence.

Y are strict rules of evidentiary procedure wh require that certain types of questions be asked a certain way.

*C. of Kl. v. Spalding (p. 138)

The whole doctrine of comparison presumes the genuineness of the standards.

The jury should not be required, nor should they be permitted, to make comparisons of disputed standards, and to settle for themselves the collateral question of the genuineness of the standards, which might often be more difficult than the main question of the genuineness of the writing in question.

The true rule is, that when a writing in issue is claimed on the one hand and denied upon the other to be the

G.S. 8-40
Gooding v. Cobb
194 N.C. 403
Stansbury §197+199

writing of a particular person, any other writing of that person's may be admitted in evid. for the mere purpose of comparison w/ the writing in dispute, whether the latter is susceptible of or supported by direct proof or not; but before any such writing shall be admissible for such purpose, its genuineness must be found as a preliminary fact by the presiding judge, upon clear and undoubted evidence.

* (B) BEST EVIDENCE RULE *

"For the purpose of proving the content of a writing, the orig. writing itself is regarded as the primary (best) evid., and secondary evid. is inadmissible unless failure to offer the orig. is satis. explained."

Copy v. Duplicate

Copy = made from orig. by copying same.

Duplicate = made at the same time as orig. eg., Carbon copies: Known as "duplicate originals"

Gray v. State (p. 144)

Investigator testified as to D's confession even tho' the " was written down. This was error, but the D lost because D declined to use the written confession when final-

by intro. even though D had adequate recourse via objections, etc.
(See p. 146.)

The reason for the rule that secondary evid. shall not be substituted for evid. of a higher nature wh the case admits of is that an attempt to submit the inferior for the highest implies that the higher would give a different aspect to the case of the party introducing the lesser. The ground of the rule is the suspicion of fraud.

Rules of Evidence ⊗ On de declaration was put into writing by the witness as soon as made and signed by the declarant, such writing must be produced or accounted for. Its place cannot be supplied by the witness narrating what the declarant said before it was reduced to writing. But on de declaration has been repeated at different times,

and at one time informally written down, oral evid. will be rec'd of the independent declaration.

9 OCT. 63

General Rule Evidence

Evid. inadmiss. for one purpose may be admiss. for another. See In re Will of Duke, 241 N.C. 344, 349, 85 S.E. 2d 332, 335-36 (1955).

Definition

Writing - every means of recording upon a tangible thing, any form of communication or representation including pictures, sounds or symbols. (e.g., tombstones)

Secondary evid inadmiss. on the B/E was intentionally destroyed.

If is an inclination to refuse the use of secondary evid. by the party responsible for destruction of the orig. unless he can show that the destroying was done in ord. course of biz or otherwise w/o culpability.

Fed. Union Surety Co. v. Indiana Lumber & Mfg. Co. (p. 150)

On three (3) slips were printed by a single mechanical impression, all three are deemed "original writings" and are equally admissible.

Accepted excuses for failure to produce the B/E:

(1.) Voluminous documents and multitudinous documents. A summary by a reputable person in the field may be accepted by the ct. in its discretion.

(2.) When a writing is "collateral" to the main issue, the B/E Rule is often said to be inapplicable.

(3.) Adequate admissions of contents by the opponent.

(4.) Or. orig. is lost or destroyed by opposition.

(5.) Failure by opposition to produce on notice.

Quaere: Is a photostat a copy? =

Incriminating Documents

People v. Gibson (p. 156)

Held, (McKnight v. U.S., 115 Fed. 972) it was a violation of the immunity guaranteed by the Fifth Amend. to the Fed. Const. to permit the demand to be made upon a D in a crim. case in the presence of the jury to produce a

paper containing incriminating evid. v. him.

Same: in poss. of Accused

Where an incriminating document appears prima facie to be in the poss. of the accused, the prosecution may give secondary evid. of its contents w/o previous notice calling upon the D to produce the orig.; and this rule is not restricted to papers wh are the immediate subject of the indictment.

The error was held Corrected by the instruction.

Held, the Mc Knight Rule is to be followed, but it does not apply here due to court's instruction to the jury to disregard the whole matter.

Baroda State Bank v. Peck (p. 161)

Preferred Secondary Evidence — This Ct. (Mich.) followed the English rule; i.e. there are no degrees of secondary evid. The orig. having been lost, the copy and the oral evid. of the contents are both secondary

evid. and equally so.

Majority Rule

The American Rule (majority): a copy of a lost paper is the NEXT BEST evid., and if it is available, parol evid. is inadmiss.

(CHAP. III.) * TESTIMONIAL PROOF *

You want to estab. position and gen. ability to observe of an eye witness.

Competency of witness must be established. e.g., Age (is a child witness old enough to testify? At what age? What factors influence courts discretion?).

10 OCT. 63

Assign - Read top. 200.

* (SECTION I.) COMPETENCY *

(A.) SPECIFIC DISQUALIFICATIONS

A privilege differs from a disqualification in that a disqualification cannot be waived by the person against whom it operates; whereas a person may waive his privilege not to testify.

G.S. 8-56 & 57 - H & W privileges.
G.S. 8-52 - privileges of lawyers. lawyer - client relationship. But, the "client" must satisfy requirements of client; must have gone far enough to satisfy definition of client.

Today, in England, the only grounds of general incompetency appear to be those of natural inability, i.e., extreme youth, or mental incapacity or disorder.

(Re

Q are privileged communications between doctor and client.

(a.) Interest

G.S. 8-49 - interest of witnesses. Now anyone may testify regardless of interest if he is otherwise qualified, except one interested in a will.

(b.) "DEAD MAN RULE"

In some states, infidels are incompetent due to non-effect of oath on them (us?).

206 N.C. 80
120 N.C. 463

G.S. 8-51 - "Dead Man Stat." A wit. cannot testify re transactions between himself and a decedent or witness has an interest. See Stansbury on "D.M. Stats."; 206 N.C. 80; 120 N.C. 463.

Only Nebraska says that Negroes are incompetent. See Neb. stats. 20-1201. But, double-check this.

Lunatics are incompetent.

Moral depravity not valid reason for exclusion of such witness. "May go to weight of testimony in minds of the jury."

11 OCT. 63

(B) THE OATH

(Re infidels, see Wigmore.)

If v. one's religious belief disallows swearing, one can "affirm."

Hill v. Skinner (p. 182)

Infant Witnesses

4 yr. old kid (P) testified re dog bite.

(Oath) TEST:

A person can qualify as par as taking the oath so long as he is able to appreciate the sanctity of the oath.

The judge can question the person re his appreciation of the oath and the consequences of violating the oath.

REQUISITE ABILITIES OF WITNESSES

Every witness must be able to:

1. Observe
2. Recollect
3. Relate

Test of Compet. of Infant Witnesses

The essential test of the competency of an infant witness is his comprehension of the obligation to tell the truth and his intellectual capacity of observation, recollection & communication.

Discretion of Court

The competency of a child of mental immaturity to testify as a witness lies in the discretion of trial judge, and a reviewing court will not disturb the ruling thereon unless there is clear abuse of discretion.

(c.) Ability to Observe

Gladden v. State (Ala.) (p. 186)

Sheriff said that driver of car meeting him on highway was drunk, even though sheriff only saw him for a few fleeting moments.

"It appears to be the rule in this juris. that on it is proper to permit non-expert opinion evid., the witness may state his opinion w/o first detailing the facts on which he based such opinion, on the matter testified about is not of a complex nature. Intoxication is such a matter."

All testimony must be based on a witness' observation of the matter about wh he is testifying.

Attacking testimony due to lack of observation by witness:

Or, in a proper case, a non-expert is permitted to give opinion evid., and cross-examination discloses that his opportunity for observation was insufficient to afford any reas. basis for the conclusion expressed, his opinion testimony should be excluded on motion. Or, however, an opportunity for observation is shown, even though slight, a witness should be considered competent to testify as to what he did observe. The weight of such testimony is for the jury.

U.R.E. 19 – "The judge may reject the testimony of a witness that he perceived a matter if he finds that no trier of fact could reas. believe that the witness did perceive the matter."

(D.) ABILITY TO REMEMBER

Hollaris v. Jankowski (p. 188)
(Atty. for P should have taken deposition of P-child at time of the accident.)

P was not incompetent solely because of his age (8 yrs.), but P had no independent recollection of the facts and circumstances surrounding the accident; thus P was incompetent.

Incredible Testimony

Testimony is incredible when it is so extraordinarily in conflict w/ probability, or so utterly hostile to reason and intelligence, as to become so nearly impossible that it ought not to be believed by the trier of the facts.

14 OCT. 63

(E.) Ability to Relate

Schneiderman v. Interstate Transit Lines, Inc. (p. 191)

Holding

"The standard by wh the competency of the witness may be ascertained is to deter. whether the witness has the capacity to observe, recollect & communicate. If he has, he is competent and his mental deficiency is considered only in so

for as it affects the weight to be given his testimony.

Special Actions

In actions for seduction, perjury, treason et al, there must be more than one prosecuting witness (in N.C. - one witness and some corroborating evid.); otherwise, the jury cannot find D guilty.

Rex v. Jurie (p. 196)

Conviction here quashed. Aunt of prosecuting witness (the victim of rape) had to interpret for the rapee who was deaf and dumb. The aunt was obviously prejudiced against the D, and D was no way to effect cross-examination. — Ct. held the aunt was an interested person and even the prosecuting atty. agreed D was error.

If the interpreter had been an unbiased, disinterested person, it may have been okay.

(Section 2.) * Preparation of Witnesses *

Caveat: Should always hear test. of your witness before trial.

The line between ethical and unethical prep. of wit. is thin and you should always be careful.

(Section 3.) * Form of Examination *

(A.) Leading Questions - Narrative

A leading question is one which suggests the answer desired.

Leading questions can always be asked on cross-examination, and may be asked of hostile witnesses.

Misleading questions: "When did you stop beating your wife?" - Improper.

* (B.) Present Knowledge - Refreshing *

You may use certain questions (even leading questions) and even memoranda to refresh a

witness' present recollection, and the witness' test. = the quid. - PRESENT RECOLLECTION REFRESHED
Wit. has no recollection, but has the facts recorded, the record = the quid. - Past Recollection Recorded.

16 OCT. 63

24 N.C. 78; 172 N.C. 520 — opinions as to mental cond.

Re tort cases, two schools of thought re negotiating:
(1.) File action immediately + then negotiate.
(2.) Negotiate first and file action only after negotiations break down.

Advantages to "school #1" —
(1.) You're the atty. of record and entitled to fee and subject to discharge only upon showing of cause.
(2.) Puts pressure on Ins. Co. to make quick settlement + better settlement.
(3.) You avoid getting caught by the Stat. of Limns.

Advantages of #2 -

(1.) Dealing w/ an adjuster who is not an atty. and a co. atty. once brought in, has the duty to save the co. money. The co. atty. is more difficult to deal w/.

(2.) Adjuster is concerned w/ his good co. record of quickly disposing of these claims.

(3.) Co. concerned w/saving atty's. fees.

(C.) OPINIONS

(1.) Lay Witnesses

State v. Garner (p. 215)

"Old gen. rule is that a lay wit. may testify only to facts and not to opinions or conclusions. But lay wits. are frequently permitted to use so-called "short hand" descriptions, in reality opinions, in presenting to the Ct. their impression of the general phy. cond. of a person." ... "This Ct. has held it proper in a

Lay Opinions re General Physical Condition

personal injury case to permit laymen, who were ultimately acquainted w/ the P prior to her injury and observed her cond. thereafter, to testify that her health and general phy. cond. had materially changed for the worse."

Sanity Presumption of Continuity

Two presumptions re sanity and insanity:
(1.) A person is presumed sane until proved & declared (by Ct.) to be insane.
(2.) ~~Sanity~~ Insanity is presumed to continue until proof and declaration of sanity is estab.

17 OCT. 63

(2.) EXPERT WITNESSES

Procedure –
(1.) Must qualify wit. as an expert.
(a.) Academic training
(b.) Experience

If opponent presents an acknowledged expert, it is better to stipulate his expertise rather than

have opposing counsel go thru all of his qualifications and further impress the jury.

hypothetical questions

If expert cannot testify of his own knowledge and experience as to the instant case, you must use hypothetical questions in order to get the expert's opinion.

State v. David (p. 225)

One expert was basing his opinion on the opinion of another expert w/o there being used hypothetical questions.

Here two theories then on expert opinion evid. may be presented to the jury:

(a.) Then test. of the wit. based on his personal know. or observation; and

(b.) then test. of the wit. based on a hypo. question addressed to him, in wh the pertinent facts are assumed to be true, or rather assumed to be so, found by the jury.

On the second doctor's test. was based on that of the

Holding

first doctor, and on no hypo questions were used, this took from the province of the trier of fact the duty and right to determine what the facts are and whether the testimony of doctor #1 was true and reliable and, therefore, factual.

Caveat!!

Whenever questioning an opinion wit., you must first ask whether the wit. has an opinion satis. to himself.

Een v. Consolidated Freightways (p. 222)

Issue: whether the point of collision upon the highway is properly the subject of expert test. by a wit. who personally observed the scene of the collision soon after its occurrence and who had had many years' experience in the investigation of automobile accidents.

Held, "on the inference or conclusion to be drawn is not so obvious that it can be said that the jurors were as equally competent to reach

it as one skilled thru long experience, then the opinion of one who is so skilled is not only admissible, but may be of aid to the jurors."

General Practicioners of Medicine

A gen. practicioner of medicine is not disqualified as an expert in any field of medicine, but a showing that he is not a specialist in the field in question will weaken his test.

(Mentioned tests of insanity.)

Read notes pp. 231-239 carefully.

18 OCT. 63

Ruth v. Fenckel (p. 239)

HELD: "On ... the cross-examiner directs the attention of the expert wit. to the contents of treatises expressing an opinion at variance w/ the opinion of the wit., and does so, not to prove the contrary opinion but merely to call into question the weight to be attached by the fact finder to the opinion of the wit. the law of this State (N.J.)

Use of Recognized Treatises to Discredit Experts Opinion

allows such use of the treatise even if not relied upon by the wit. in arriving at his opinion, provided the wit. admits that the treatise is a recognized and standard authority on the subject."

21 OCT. 63

In wills cases, mental capacity is not a pure question of fact, but is a question of law also.

F.R.C.P. 16 - [PRE-TRIAL AGREEMENTS]

N.Y.C. uses neutral experts on a regular basis.

(D.) * SCOPE OF CROSS-EXAMINATION *

Courts vary here.

* Generally, X- exam. is ltd. to matters brought out on direct examination. If otherwise, the X- examiner would get in his evid. before the close of the opponent's case, and that is unfair to the opponent because it tends to confuse the jury.

This rule seems to

233 N.C. 723, In re Will of Tatum - re opinions.

"Do you have an opinion satis to yourself re whether (the testator) possessed sufi mental capacity on (date) to know what prop. he had, who his relatives were, what claims they had upon him, & whether (the testator) understood the nature and effect of disposition of his prop. by will?"

→ Thats the proper way to ask the question. - See this for rule.

If one goes beyond the limits of X-exam., one has made that wit. his own and may not impeach the witness's testimony.

Better not to cross-examine a wit. unless you disbelieve him because the only effect would be to allow the jury to hear again what the wit. has said on direct.

The manner and extent of the cross-exam. lies largely within the discretion of the trial judge.

relax on the wit. being X-examined is a party litigant.

Finch v. Weiner (p. 249)

"Particularly on, as here, a wit. is called by one party for exam. as to some particular or formal point only, the adversary is not entitled to examine him generally or to draw out facts having no connection with the direct testimony and tending to establish a substantive claim or defense of the X-examiner, but should be confined to the subject testified to in chief."

Kline v. Kachmar (p. 252)

Held, the scope of X-exam. is within the trial judge's discretion and his rulings will be reversed only upon a clear showing of abuse of that discretion and consequent harm to the appellant.

On a D is called by the P as for X-exam. it is proper for the court to deny the witness' counsel permission to examine him at that time as to matters designed to introduce his main defense. The wit. may of course be examined as to anything growing out of or

le proper scope of X-exam., in order to reverse, it must be an extreme case in wh discretion has been abused and in wh it is apparent that the party has been injured.

related to the matters inquired about in his X-exam by the P.

It is a sound exercise of trial discretion for the judge to restrict the scope of examination so as to keep the presentation of evid. in proper sequence. — To permit a party to lead out new matter constituting his own case, under the guise of a X-exam., is disorderly and often unfair to the opposite party.

A judg. will not be rsd. because of the exclusion of evid. ord. substantially the same is subsequently admitted.

* (E.) REDIRECT AND RECROSS EXAMINATION

Order of examinations:

(1.) Direct
(2.) Cross
(3.) REDIRECT
(4.) RECROSS

Johnson v. Minihan (p. 259)

Settlements

Generally, any settlements made out of ct. are inadmissible on the question of liability. Reason: the courts favor settlements.

Hearsay is inadmissible to prove

the truth of the matter asserted.

23 OCT. 63

Scope of Re-Direct: Rule of Law

"The rule is well estab. that after a wit. has been X-exam., the party calling him may by redirect exam. afford the witness opportunity to make full explanation of the matters made the subject of X-exam. so as to rebut the discrediting effect of his testimony on X-exam. and correct any wrong impression wh may have been created."
Johnson v. Minihan, 355 Mo. 1208, 200 S.W. 2d 334 (1947).

State v. McSlory (p. 265)

Generally Re-X-exam is ltd. to new matters brought out on re-direct examination.

"A wit. once examined cannot be re-examined as to the same matter w/o leave of the ct., but he may be re-exam. as to any NEW MATTER upon wh he has been examined by the adverse party."

RE-CROSS EXAM.

"The court may stop the production of further evid. upon a certain point when the evid. upon it is

already so full as to preclude a reas. doubt."

* (SECTION 4.) CREDIBILITY *

(A.) ACCREDITING

Gen. Rule

It is generally held improper to bolster the cred. of a wit. before his cred. has been impeached.

Exam. of one's own wit. w/ respect to bias in favor of the adverse party has not been permitted. But such cases usually are based on the rule v. impeaching one's own wit. rather than on the rule v. accrediting an unimpeached witness.

(B.) DISCREDITING

(1.) Own Witness

HOSTILE WITNESS

Or one calls a wit. as a hostile wit., he's not bound by that witness's testimony.

Gen. Rule

The gen. rule is that one cannot discredit one's own

witness.

Johnson v. B. & O. R.R. (p. 269)

P would have been non-suited if she had not called D because D was the only wit.

Held, since P had no choice but to call D, Hall, P was not bound by what D said.

At C.L., on computation was a practice, the gen. rule was evolved and strictly applied. But, here the facts don't justify the application of the gen. rules.

NOTE!

P's counsel could have called D as a hostile wit. and thereby avoided the instant problem.

Judge has to pass on the hostility of a witness.

The gen. rule is ltd. to basically three cases:

(1.) The calling of witnesses to impeach the general character of the witness.

(2.) the proof of prior contradictory statts. by him.
(3.) a contradiction of the wit. by another on the only effect is to impeach and not to give any material evidence upon any issue in the case.

But all cases concur in the right of a party to contradict his own wit. by calling witnesses to prove a fact (material to the issue) to be otherwise than as sworn to by him, even when the necessary effect is to impeach him.

Refreshing Recollection: Exception to Gen. Rule

The restrictive rule respecting impeachment by a party of his own wit. does not forbid efforts to refresh the recollection of the wit. or to induce him to correct or explain his testimony.

Where law requires calling witness: Exception to General Rule

When a rule of law requires a litigant to call a specified wit. to testify on an issue — as, for instance, an attesting wit. to prove due execution in the contest of an alleged will — impeachment of cred.

(Read 30 pages.)

has long been permitted.

24 OCT. 63

(2.) Opponent's Witness

In 189 N.C. 327, State v. Dickinson, sets up N.C. position well.

PRACTICAL CAVEAT

If your wit. has a crim. record, it is of less impact on the jury and generally better to bring out that fact on direct exam.

Can object to questions which unnecessarily degrades and embarasses the witness.

(a.) Bias, Interest and Corruption

These are things that can be used to impeach the credibility of a witness.

State v. Elijah (p. 280)

Wit. had had relations w/ the prosecutrix in this action for carnal knowledge of a female.

It was error to exclude testimony and questions about that

224 N.C. 329 - re crim. Record

witness's bias against D and his general interest.

You cannot, in civil actions, attack specific character traits or defects, but you may attack a witness's general character, 146 N.C. 602, re credibility, i.e.

"X-exam. is an agency for the development of truth in judicial inquiries. It's chief purpose is to enable the trier of fact to deter. what evid. is credible and what is not. For that purpose it is T.F. to show the relation of the witness to the cause and the parties, his bias or interest or any other fact which may bear on his truthfulness."

BIAS: "It is permissible under the rule to show the illicit and other relations of the wit. w/ the victim of the crime for wh D is being prosecuted. On the same principle illicit relations between the witness and D may be shown. Not only the relationship existing at the time the crime was committed, but such a relationship afterwards may be

* Civil Actions *
But, on the character of a party is directly involved (e.g. libel, slander, seduction), you may query re specific or gen. character.

* Crim. Actions *
Proof of good character = substantive evidence. Once introduced, State may show bad character.
If D, however, does not put his character into evid., State can show bad character only for the purpose of impeaching credibility of the D; and that must be re gen. character.

shown. It is esp. important to permit the relationship to be shown between the alleged victim of the crime and a witness whose testimony is given to corroborate her version.

The bias, state of mind and feelings of a witness upon whose testimony in part the issue is to be determined is not a collateral or immaterial matter.

Cross-examination to show the bias, prejudice, interest or disposition of the witness to tell the truth is a matter of right, the exercise of which is indispensable to show the truth. The denial of the right is prejudicial and error.

Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his test. and his cred. to a test, so that the jury cannot fairly appraise them.

"But, altho' a question as to the extent to which the cross-exam. may extend is to be determ. by a view to the discretion of the trial judge, nevertheless, if the latter has excluded testimony which would clearly show bias on the part of a wit., it is error and may be ground for a new trial."

The presentation showing bias, interest and/or corruption may be by extrinsic testimony as well as X-exam. of the primary witness.

(b.) PRIOR CONVICTIONS

PEOPLE v. BUFORD (p. 289)

Gen. Rule

The conventional method of proving conviction for purposes of witness impeachment by ~~exemplified~~ transcript of the record.

The conviction of an infamous crime in either case is allowed to be shown for no other purpose than to affect the credibility of the witness. Such record is not introduced, and cannot be considered, for the purpose of proving guilt, but only for the purpose of discrediting him as a witness. Proof of such conviction need not, therefore, be made beyond a reasonable doubt before such evid. may be considered on the question of credibility.

It is improper to ask if a witness was "tried" for a crime if the wit. was ~~not~~ tried for the crime but not convicted. Permissible extrinsic evid. of misconduct as bearing upon the credibility of testimony is typically restricted to proof of conviction for crime. The only ground for disbelieving a witness which such proof affords is the gen. readiness to do evil of which the conviction may be supposed to show.

240 N.C. 517- read! (Re improper innuendoes)

Assign. - Prior inconsistent statements.

(c) PRIOR BAD ACTS

People v. Sorge (p. 294)

A D, like any other wit., may be interrogated upon X-exam. in regard to any vicious or criminal act of his life that has a bearing on his credibility as a wit. It does not matter that the offenses or the acts inquired about are similar in nature and character to the crime for wh the D is standing trial.

If the questions have basis in fact and are asked by the dist. atty. in good faith, they are not rendered improper merely because of their number.

Nor is it improper for a dist. atty. to continue his X-exam. about a specific crime (e.g., abortion, as here) after a D has denied committing it. As long as he acts in good faith, in the hope of inducing the wit. to abandon his negative answers, the prosecutor may question further.

The rule is clear that while a witness' test. regarding collateral matters may not be refuted by the calling of other witnesses or by the production of extrinsic evid.; y is no prohibition v. examining the wit. himself further on the chance that he may change his testimony or his answer.

Since a wit. may be exam. properly w respect to ~~criminal~~ crim. acts that have escaped prosecution, y is no reason why indictment followed by conviction should proscribe inquiry as to what those acts were.

Many juris. do not allow this kind of impeachment. State v. Collins, 246 Iowa 989, 69 N.W.2d 31 (1955).

FED. RULE — The gen. fed. rule is that prior bad acts cannot be used.

CAVEAT !! — X-exam. must be in good faith.

25 OCT. 63

(d.) PRIOR INCONSISTENT STMTS.

If the fact to wh the contradiction applies = a material fact w/in the issue, he may be contradicted by any other inconsistency; but when not material and not w/in the evid. contradicting evid. cannot be introduced (i.e., if it is collateral matter).

(p. 299) Denver City Tramway Co. v. Lomoat

General Rule

Prior inconsistent stmts. may be used to impeach the cred. of a primary witness on the matter is not collateral.

"The proper foundation must be laid by asking the wit. if he made such a stmt., in order to give him full opportunity to understand all of the circumstances so as not to be taken off his guard, and his attention must be directed to the time & place when & on the stmts were made."

"But this rule is to be given a practical application, and it is sufficient if the time, place, person

Orientation of Witness to Time, Place and Person

and substance of the stmt. are designated w/ reas. certainty, so that the wit. will clearly understand the matter & not be misled. If the attention is clearly called to the alleged conversation or stmt., and circumstances are so detailed that there can be no misunderstanding, it will be sufficient, even though time, place and person are not all fully and specifically designated."

TEST OF "COLLATERAL"

The test of whether a fact inquired of in X-exam. is collateral, is this: Would the X-examining party be entitled to prove it as a part of his case, tending to establish his plea.

(2.) REPUTATION FOR VERACITY

State v. Terman (p. 311)

The CHARACTER OF A D in a criminal case is not open to inquiry unless he himself puts it in issue; but when a D in a crim. case takes the witness stand he subjects himself to

cross-examination the same as any other witness, and the state has the right to impeach him as a witness to the extent of proving by witnesses that his general reputation for truth and veracity in the community on he resides is bad.

⊛ Character must be proved, if at all by evid. of reputation!

The locality of the reputation, traditionally the place of residence, is being extended to place place of biz or profession.

⊛ Gen. speaking, it is not permissible to estab. ~~the~~ character wt respect to truth and veracity by extrinsic evid. of particular acts. The effect of this rule is to avoid unfair surprise and undue consumption of time, confusion of issues, and prejudice. Subject to the discretion of the trial judge, however, it may*

*be permissible to pursue such a line of inquiry during X-t ~~exam~~. of the Primary witness.

Newton v. State (p. 315)

"If the purpose of the examiner was to impeach the credibility of the witness by showing that he had been convicted of crime, he should have asked him that question directly, or if he had intended to show that he had in some other case sworn to statements contrary to his test. in the instant case, he could have been asked whether he had made such conflicting statements"

"The obvious purpose was to induce the jury to believe that, as the test. of the witness as given before them had already been discredited by three judges sitting in the same court in another case, that, therefore, they should discredit it in this case, a wholly unwarranted conclusion unsupported by any authority with which we are familiar."

No negative inference from refusal to take the tests.

Truth serum and lie detector test — the results thereof are inadmissible because scientific men are in disagreement that they are accurate and leave no room for doubt. — Refusal to take these tests, or either of them, is not admissible as an inference of guilt nor for any other purpose. — Same for wire-tapping.

28 OCT. 63

* (c.) REHABILITATING *

Rule: PRIOR CONSISTENT STATEMENTS

If wit. has motive to fabricate, you may rehab. by showing prior consistent stmts. made before the motive to fabricate arose.

228 N.C. 85 — N.C. view on prior consistent stmts. See also Stansbury §§ 51 + 52. N.C. seems liberal on this point.

State v. Joe Dawson →

"On the test. of a wit. is challenged and its credibility put at issue by a plea of not guilty and by extensive cross-examination, the admission of a written stmt. made by the wit. prior to trial, in substantial accord w/ her test., for the purpose of corroboration, is w/o error.

When a part of a prior consist. stmt. is used to rehab. a wit. the opposing party has the right to offer any other part or the whole of the stmt. used to rehabilitate the witness.

(1.) MECH. MEANS OF ASSESSING

(1.) The LIE DETECTOR

Gen. Rule

The courts have held that the results of a lie detector test are not admissible to prove either the truth or the falsity of the matter stated.

(2.) TRUTH SERUM

Gen. Rule: NOT ADMISSIBLE

It is generally agreed that the results of narco-interrogation are not sufficiently reliable to be admissible on the issue of the truth of the matter stated.

One defense is that the wit. here is not making a voluntary statement, that he was not speaking voluntarily.

69 Harv. L.R. 683 - X-cel issues re truth serum + polygraph.

* (CHAP. 4) CIRCUMSTANTIAL PROOF *

(SEC. 1) PROOF USED INFERENTIALLY

Inferences are circumstantial proof.

(A.) Gen. Considerations

Smith v. Rapid Transit, Inc. (p. 328)

P sought to have inference found that D's bus caused her accident. D had franchise to operate some buses on Main St., Winthrop, Mass., but other private buses ran the same street. Held, it could not be inferred that, since D had franchise, D's bus had caused P's accident.

Mercer v. Powell, N.Y. Life Ins. Co. v. McNeely 218 N.C. 642 — see this: "last clear chance" (p. 381)

Double - indemnity clause for accidental & violent death.

There can be no inference on an inference. There must be a basic fact which may be circumstantial but not inferential. —

"The cts. do not mean that under no circumstances may an inference be drawn from an inference, but rather that the prior inferences must be established to the exclusion of any other reasonable theory rather than merely by a probability, in order that the last inference of the probability of the ultimate fact may be based thereon. The rule is not based on an application of the exact rules of logic, but upon the pragmatic principle that a certain quantum of proof is arbitrarily required when the ct.

If there be no evid. or if the evid. be so slight as not reas. to warr. the inference of the fact in issue or furnish more than materials for a mere conjecture, the court will not leave the issue to be passed on by the jury.

are asked to take away life, liberty or property.

30 OCT. 63

Regina v. Onufrejczyk, p. 338 * CORPUS DELICTI *

The fact of death may be shown by circumstan. evid. but that C/E must lead to the conclusion of murder to the exclusion of all other conclusions.

Corpus delicti means, first, that a crime has been committed, that is to say, that the man is dead, and that his death has been caused by a crime.

Before the accused can be convicted, the fact of death can be proved by such circumstances as render the commission of the crime morally certain and leave no ground for possible doubt; the C/E should be so cogent and compelling as to convince a jury that upon no rational hypothesis other than murder can the facts be accounted for." REGINA V. ONUFREJCZYK.

The C/E charge is usually put in these terms (in the U.S.): "where the evid. is circum- it

must be such as to exclude every reas. hypothesis other than that of guilt" or even "to exclude to a moral certainty every other inference except guilt."

(B.) CHARACTER

(1.) CRIMINAL CASE

Michelson v. U.S. (p. 346)

Character evid. in crim. cases is SUBSTANTIVE evid. taken by the jury as to innocence or guilt.

To impeach D/E of character, you cannot use specific acts. [N.C. specifically prohibits that. But, N.C. attempts to distinguish between character and reputation for specific acts, the latter allowing questions re specific acts. See 12 N.C.L.R. 372; Stansbury, §115.]

* HABITS — you may put into evid. habits of people and animals.

"The State may not show D's prior trouble w/ the law,

D may show reputation for violence of deceased only. May be done, e.g., upon defense of self-defense.

specific crim. acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime.

Rationale

"The overriding policy excluding such evid. despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

"But this line of inquiry firmly denied to the state is opened to the D because character is relevant in resolving probabilities of guilt. He may introduce affirmative testimony that the general estimate of his character is so favorable that the jury may infer that he would not be likely to commit the offense charged."

(2.) Civil Case

Gen. Rule

May give C/E of character on civil acteon involves moral turpitude (eg. malicious prosecution). But otherwise character evid. would be inadmissible.
See 48 N.C. 164; 162 N.C. 298.

Wilson Lumber Co. v. Atkinson, 162 N.C. 298 - where an action is of a civil nature to set aside an agreement for fraud in its procurement, and the party against whom the fraud is alleged has testified, evid. re his good character is permissible only to corroborate his test. and an instruction that the jury may consider it as substantive evid. on the issue of fraud is erroneous.

31 OCT. 63

(C.) Other Crimes

People v. Formato (p. 366)

Ds convicted of common gambling and conspiracy to keep a gambling estab. People introduced records of conviction for similar crimes a few years before the case at bar to prove "the professional intent" and the "continuity of their participation in gambling."

The convictions are formal adjudications that the Ds committed the acts specified in the certificates of conviction and, as such, they are admissible in evidence in lieu of original proof.

The convictions were admissible, if orig. evid. of the

commission of the prior gambling offenses would have been admissible.

Gen. Rule

This brings us to question of the admissibility of proof of the prior offenses. The elementary rule is that proof of other criminal offenses is not admissible to estab. the guilt of the D of the crime charged.

Exceptions

Proof of similar facts constituting separate and distinct crimes is admissible under an exception to the general rule, not for the purpose of showing specifically that D committed the crime with which he has been charged, but for the purpose of permitting the trier of facts to draw an inference from the evid. showing a general plan or scheme consisting of a series of acts similar to that with which D is chgd., that he did commit the crime with which he is chgd.

Exceptions: when it tends to estab.

1. Motive
2. Intent
3. Absence of mistake or accident.
4. Common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to estab. the others.
5. Identity of the person charged with the commission of the crime on trial.

PREREQUISITE TO ADMISSION

But, in order to be admissible, the evid. of prior offenses must be so related in time, place and circumstance to the offense charged as to have substantial probative value in deter. the guilt of the D. Evidence which is too remote is excluded upon the ground that the probative value is

outweighed by the risk of undue prejudice.

Held, the prior convictions were too remote and failed to show continuity between them and the crime charged such as would be circum. evid. of habitual gambling and common gambling.

State v. Bock (p.374)

On the state has intro. evid. of other crimes to estab. identity, D is entitled to rebut the inference that might be drawn from by showing that the crimes have been committed by someone else. He should also have the right to show that crimes of a similar nature have been committed by some other person when the acts of such other person are so closely connected in point of time and method of operation as to cast doubt upon the identification of D as the person who committed the crime charged against him.

Read the Brooklyn Law Review on "other crimes."

It is the gen. rule that evid. of separate and independent crimes is not admiss. to prove the guilt of a person charged w/ having committed a crime. U are exceptions. Thus, on it is necessare to prove the identity of a person, ~~charged with the crime~~ evid. of other similar crimes of the accused closely connected in time, place, and manner is admissible. Such evid. is also admiss. to show a common system, scheme, or plan embracing the crime charged.

1 Nov. 63

(D.) SIMILAR OCCURRENCES

Dallas Railway & Terminal Co. v. Farnsworth (p. 384)
Tort action for injury occurring as P alighted from D's ~~street~~ car. Evid. was admitted ~~that~~ of three other stops before her's the driver had rushed away and made jerky moves. Held, D/P / affd.

It has been said that evid. of similar transactions or CONDUCT ON OTHER OCCASIONS is not competent to prove the commission of a particular act charged UNLESS THE ACTS ARE CONNECTED IN SOME SPECIAL WAY, INDICATING A RELEVANCY BEYOND MERE SIMILARITY IN CERTAIN PARTICULARS.

(E.) HABIT AND CUSTOM

Baldridge v. Matthews (p. 388)
Tort action for criminal conversation. P alleged that Dand P's wife spent the night together in a hotel. P sought to show that they had baggage and, therefore, intended to stay overnight (trying to show opportunity and disposition). To show that they had baggage, P had hotel clerk to testify that he

did not have D pay before taking the room, and that it was the hotel's custom to have people w/ baggage pay as they leave. — Admissible. J/Pl aff'd. Held, To be admissible the usage must have such regularity to make it probable that it would be carried out in every instance or in most instances. Whether evid. of such usage or habit is admissible to show what occurred in a specific instance depends on the "invariable regularity" of the usage or habit.

(F.) Repairs, Liability Ins., Compromises

Blais v. Flanders Hardware Co. (p. 391)

It is improper to intro. evid. that a D is covered by insurance or that repairs on an injury-causing machine were made subsequent to the injury.

It is unjust to hold that a correction of defects so disclosed, and made to prevent other similar injuries, is evid. that the accident itself was due to negl. The doctrine, so far as it tends to delay or restrain the correction, is inimical to safety. Ord. care is the standard of duty. Between reas. and possible precaution the distance may be wide. a D who has exer. ord. care to avoid injuring others

Should be at liberty to exert extraordinary diligence w/o liab.

4 Nov. 63

Nehring v. Smith (p. 395)

An offer to settle or to pay money is evid. that the party making it admits his liability and is admissible in evid.; but offers to buy one's peace or to compromise for the purpose of averting litigation are quite a different thing, and such an offer should not be given in evid.

However, it must be a controversy between the parties at the time of the alleged offer, for if it is no controversy it is nothing to compromise. Certainly no stmt. or admission will be excluded because of compromise connections unless it appears to have been made as part of and under the motivating influence of compromise negotiations pending or contemplated at the time.

Where it is doubtful whether a stmt. of a litigant is an

admission of liability or an offer of compromise it is proper to submit the question to the jury.

It is well settled that an admission of liab. is not rendered inadmiss. by the fact the jury may incidentally be apprised thereby that D has liability insurance.

(G.) SPOLIATION

def. - A legal maxim bearing chiefly on evid. but also upon the value gen. of the thing destroyed that everything must be to his advantage as to be presumed against the destroyer.

N.C. → Other circumstances giving rise to inferences of guilt:

(1.) flight
(2.) false starts.
(3.) failure to produce evid. - in some states the only inference raised is that the evid. if offered, would be unfavorable to the offeror.
(4.) attempts to bribe jurors.
(5.) fabricated evid.
(6.) unnatural behavior

(7.) attempts to commit suicide

(p. 400) National Life and Acc. Ins. Co. v. Eddings

D moved for D.V. on the ground that P's failure to produce evid. of good health, pursuant to the policy's (ins.) stipulations, raised an inference of bad health.

A mere inference is insufi to carry the burden of proof of the substantive fact!

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6 Nov. 63

(H.) Negative Inferences

In N.C., the weight of this and any evid. is left to the jury.

hypo: If A says he paid, ~~and B says he (A) did not pay~~, and the jury does not believe A, is the inference raised that A did not pay? Usually, no. But as a practical matter, the inference is probably raised. — However, some affirmative evid. would have to be produced for A's opponent to get to the jury.

Failure of a promisor to keep his promise does not infer that at the time he made it he had no intention of keeping it.

Note (4), p. 409 - this would seem to be a reasonable inference. Majority Rule - that inference could not be drawn. Dissent said it could. McCreight v. Davey Tree Expert Co., 191 Minn. 489, 494-5, 254 N.W. 623, 625 (1934).

Silence — (Absence of Complaint)

Can a failure to speak, where ∴ is no duty to speak, be used to raise an inference? e.g., A v. R.R. Co. for drafty coaches and allegedly consequent illness. RR. intro. evid. that none of the other passengers have complained. Can that be done to show that the coaches were not "drafty"? = Silver v. N.Y. Cent. R. Co., ch. 533.

Quaere: "Evid. of no complaint is too remote and should not be admitted unless, in addition to the fact that no complaints were made, ∴ is evid. of circumstances indicating that others were similarly situated + had opportunity for complaining. "The uniform result of silence here apparently (SECTION 2) eleven (11), would not be inconclusive."

General Rule

of a large number of passengers,

FORENSIC ARGUMENT

You may argue anything put into evid. and any reasonable inference that can be drawn therefrom.

In HARVEY v. AUBREY, p. 409, the court held that the

argument involved inferences that could not reasonably be drawn.

The court is not required to point up ~~the~~ any opposing inferences; but, opposing counsel should argue all inferences opposed to inferences raised.

Presumptions — You cannot argue rebutted presumptions. They no longer exist once rebutted!

(*) If evid. is intro. and ltd. to a particular applicability, but reas. inferences other than the purpose for wh the evid was intro. are raised, they may be argued to the jury. — Seems to avoid a judge's ruling that certain evid. be considered by the jury only for certain purposes.

(Note: you should always raise every usual objection and motion. Safety first!)

Robinson v. Penn. R.R. (p. 411)

7 NOV. 63

(81 ALR 2d 861 — See)

Lawyers are not permitted to "testify" through their forensic arguments.

Recrimination has no place in counsel's jury speeches. Esp. is this so when dealing w/ conduct that shows not a mere lapse from propriety in the heat of argument but repeated accusations

against opposing counsel and client and repeated references to matters entirely foreign to the real issues before the jury. The conduct of counsel here was of such nature as to vitiate the entire trial.

"We have never understood it to be the law that flagrantly abusive statements, unsupported by the evid. and introducing matters clearly irrelevant to the jury's deliberation of the issues on the law and evidence, in the absence of an admonition to the jury, are immune from appellate redress simply because no objection to each such statement.

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(CHAPTER 5) * PROCEDURAL CONSIDERATIONS *

(SEC. 1) * BURDENS OF PROOF *

The moving party has the B/P. The B/P does not shift, but once a prima facie case is made out by P, the D has the B/C-F.

But see Yellow Cab Co. v. Adams, 71 Ga. App. 405, 31 S.E. 2d 195 (1944).

It is highly improper for counsel to make themselves unsworn witnesses by testifying to statements of fact which have not been introduced in evidence. However, they may urge the jury to accept as true a proposition which was not established by evid. if it is part of the gen. and common knowl. of laymen, for example, that an automobile will not start unless the ignition is turned on.

Order of Presentation of Arguments

It is the custom and prevailing rule of procedure that the party upon whom the burden of proof rests has the right to open and close the arguments subject to a reas. discretion on the part of the court to regulate the time and manner of presenting the arguments.

8 NOV. 63

The moving party has the B/P throughout the trial.

The B/P never shifts from P, but the B/GF shifts to Donce P makes out a prima facie case.

A motion in arrest of judg. goes to the errors on the face of the record and

(Johnson skipped from p. 419 to p. 431 - but were responsible)

E. Weight of Burden of Persuasion

1. Civil Cases

Sullivan v. Nesbit (p. 431)

Crim. case - B.A.R.D. is the weight.

Weight

Civil case - weight is by the greater weight of the evid.

Held, "It is enough in civil cases that the P should make it appear by a fair preponderance of all the evidence that his affirmative propositions of fact are more probably true than not, and to say that a jury must feel an abiding sense that his

Charge that "jury must feel an abiding sense that P's propositions of fact are true" is too strong in the ordinary civil case.

propositions of fact are true states the rule in a form wh may easily be supposed to require something approaching proof beyond a reasonable doubt."

First Natl. Bank v. Ford (p. 431)

Court required clear and convincing proof.

Civil cases involving moral turpitude frequently require a higher degree of proof than the ord. case.

A man who alleges fraud must clearly and distinctly prove the fraud he alleges, and the proof must be clear and sufi to satisfy the mind and conscience of the existence of fraud.

Gen. Rule re Weight

Hindel, it can never be improper to call the attention of the jury to the character of the issue, and to remind them that more evidence should be required to estab. grave charges than to estab trifling or indifferent ones.

11 Nov. 63

The B/P in civil cases is on the asserter, and the usual burden is the "preponderance of the evidence."

Civil Cases: Moral Turpitude

In matters re moral turpitude or written instruments of some sorts, the burden is "clear, cogent and convincing," a higher-than-normal burden of proof.

(2.) CRIMINAL CASES

The B/P = "B.A.R.D."

Definition

~~Reasonable~~ "Reas. Doubt" - has been defined thus: "It is that state of the case, which, after the entire comparison and consideration of all the evid., leaves the minds of the jurors in that cond. that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge." (def. of "reas. doubt.")

* (Sec. 2) PRESUMPTIONS *

A Pre. = short-cut to proof. On certain basic facts are proved, the pre. follows.

A pre. of law is really a rule of law (e.g., if you adversely poss. B/A for 20 years, it is presumed as a matter of law that you have a deed to B/A).

Jefferson Standard Life Ins. Co. v. Clemmer (p. 444)

The * PRE. against suicide is not evid. at all, but is a rule of law wh in a case of this kind requires the conclusion, in the event of an unexplained death by violent injury, that the death was not suicidal until credible evid. of self-destruction is offered. When such evid. is offered, whether it be in the course of the P's proof or by the D, the pre. as a rule of law disappears from the case & the trier of facts passes upon the issues in the usual way. When unexplained death by violence is shown, a D who seeks

D often = Ins. Co.

to avoid liability on the ground of suicide has the B/GF w/ the evid. or the ~~evid.~~ issue of suicide will go v. him, but if he offers such evid., the B/ persuading the jury that death resulted from accident independent of suicide and all other causes remains w/ the P, if it rested upon him at the beginning, as in a suit upon an accident insurance policy.

O'Dea v. Amodeo (p. 452)

When you show ~~that~~ a member of the family was driving, it is presumed that that driver had permission and that the family purpose doctrine, therefore, applies.

Carr v. State (p. 458)

Pref. Innocence in a crim. case, of avail only to a D; merely emphasizes the burden which rests upon the State to prove the accused guilty.

The presump. of innocence is rebutted when you offer evid. ~~–~~ to the contrary not the jury believes.

12 S.W.2d 875
275 N.C. 156
193 F.2d 936
120 F.Supp. 27

Presumption of the Validity ~~[illegible]~~ of Marriage –

A second marriage is presumed legitimate. This is a rebuttable pre.

Legis. can create a pre. by statute. So too, can the judiciary create a pre.

Pre. of Legitimacy (G.S. 8-50.1) — it is presumed that a child born during wedlock is the natural issue of the H and W.

20 NOV. 63

PRE. OF LEGITIMACY — strong but not conclusive. The pre. is that a child born during wedlock is the legitimate issue of the husband and wife, the mother of the issue. May be rebutted by proof B.A.R.D. of (1) impotency, (2) non-access, and (3) mulatto child born to white parents (questionable whether converse would apply).

(27 N.C.L.R. 456)

PRE. OF VALIDITY OF MARRIAGE — If y have been two marriages or nothing else appearing, the SECOND marriage is presumed valid. Reason: a person is presumed to follow the law. Can be rebutted. See Williams v. Williams.

This pre. is one supported upon public policy, and upon the innocence of crime, and it is well settled that such presumptions overcome the pre. of continuation of the life of a person even three or four years absent.

(40

(SEC. 3) RELATIONSHIP OF JUDGE TO JURY

In N.C., judge not allowed to comment on weight of the evid, but he may sum up all the evid w/o commenting on it. He is supposed to give equal consideration to both sides.

It is a chance that a Judge can throw you a curve when he charges the jury because by voice inflections, etc., he can sway the jury. The record, however, would only show the words used.

Always lay the groundwork for your appeal.

21 NOV. 63

(A.) Power of Judge to Pass on Preliminary Questions of Fact

(40 Haw. L.R. 392)

Reasons for Judge to pass on questions of admissibility:

(1.) Would confuse jurors.
(2.) Calls on jurors to do legal reasoning which they are not equipped to do.
(3.) Objectionable evid. should be kept away from jury.
(4.) When jury passes on both admiss. and weight, it is confusing to the appellate court as to which point prejudiced the appellant.

Where Judge is Trier of Fact

On the admiss. of evid. is challenged under a Rch. rule & there is a dispute as to a question of fact, the judge shall deter. the fact.

CONFESSIONS

Even if a judge admits a confession, it is still open to jury to deter voluntariness.

Some questions Judge ~~shall~~ pass on:

(1.) competency of a wit.
(2.) Qualification of a wit as expert.
(3.) whether reasons for absence of a wit. would qualify to admit that wit's.

test. in a former trial.

(4.) Confessions – whether they were voluntarily given.

Even relevant evidence may be excluded on some grounds: (e.g.)

(1) Incompetency of wits.
(2) Privileged communications.
(3) Incompetency of Evidence.
  (a.) Hearsay Exclusions.

Privileged Communications –

(1.) Between H + W – however, in bigamy actions W always competent to testify as to validity of or fact of the marriage.

(2.) Between attorney + client – up to Judge to deter. whether the atty-client rel. existed

22 Nov. 63

For handwriting comparisons, the judge must deter. as a Prelim. question of fact, that the allegedly genuine document to which the writing in question is

compared, is genuine in fact.

PRELIMINARY HEARING

Majority Rule v. Minority (Wigmore) Rule

Judge can hear evid. and, per majority rule, the exclusionary rules are applicable. Wigmore (8/1385 (3d ed. 1940) says flatly that the exclusionary rules are not applicable.

Counsel may examine and X-examine in the same manner as in a trial upon the merits.

This is the stage on the State presents its evid. to get an indictment returned. The prelim. hearing applies only to criminal cases. Y are pre-trial conferences in civil actions.

Criminal v. Civil

Competency of Witness to help Determine his Competency

Where the competency of a wit. is challenged, the wit. is generally held competent to testify upon the preliminary issue of his competency.

Any errors made at the prelim hearing can be raised at the ~~hearing~~ trial per se on it will become a part of the record.

* (Sec. 4) Fixed Evaluation of Evidence *

General Rule — Ordinarily, the trier may fix or determ. the weight to be given admitted evid.

* Exceptions: (Fixed evaluation)

(1.) Treason — Direct test. of two or more wits. (33° U.S. 631; art. III, sec. 3 of U.S. Const.; art. II, sec. 5 of N.C. Const.) is required for conviction.

(2.) Perjury — Falsity of stmt. made under oath must be estab. by test. of two independent wits, or one independent wit and corroborating evid. See 323 U.S. 606; 209 N.C. 150.

(3.) Seduction — (223 N.C. 199) G.S. 14-180 requires that the test. of a prom. be corroborated in some way. G.S. 14-43 requires that the abduction of a married woman must be corroborated in some way.

223/199

(4.) Accomplices — In some states, test. of an accomplice must be

PRE

N

PRES. JOHN F. KENNEDY
ASSASSINATED —
NOV. 22, 1963!!!

corroborated. Not so in N.C.
223 N.C. 520.

6. Wills
Two wits. at least required in N.C. Signature of one wit not sufi for valid will. The better practice to ass probate is to always have at least three (3) wits. to a will.

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25 NOV. 63

Test of "Accomplice"

If a person cannot be indicted for the same offense is not an accomplice.

X (SEC. 5) PRESERVING QUESTIONS FOR APPEAL X

Gen. Rule: Objections

Generally, y must be an objection to the admission of evid. timely interposed.

"Plain Error" Rule

However, plain errors that appear on the face of the record, wh show that the accused could not have had a fair trial, will be considered on appeal despite failure to object below.

100

27 NOV. 63

The U.S. Supreme Ct. has decided that a xxx question should be raised at the first opportunity and in the first instance.

Faden v. Estate of Midcap (p. 494)

Dead Man's Rule

Dead Man's Statute - you cannot testify about some transaction wh involved a ~~dec~~ now dead man ~~or~~ the ~~dec~~ suit is interested.

Effect of Failure to Object in Apt Time

But, despite incompetency, failure to object will constitute waiver, and the testimony will be admissible.

Objections to Competency of Witnesses

Objection to the competency of a wit. must be made, if known, before his examination in chief as to the matter on which he is alleged to be incompetent. When the question is put the objection should be made. Failure to object results in waiver.

Gen. speaking, any objection to the competency of the wit. as to a trans-action w/ a deceased or incompetent person is deemed to be waived, if it is not made at the time that the evid. is offered and at the first reasonable opportunity.

45 DEC. 63

Bloodgood v. Lynch, (p. 499)
When evid. is EXCLUDED upon a mere gen. objection, the ruling will be upheld, if any ground in fact existed for the exclusion. It will be assumed in the absence of any request by the opposing party of the court to make the objection definite, that it was understood, and that the ruling was placed upon the right ground. If in such a case a ground of objection be specified, the ruling must be sustained upon that ground unless the evidence excluded was in no aspect of the case competent, or could not be made so.

494

* (Sec. 6.) CONFLICTS *

The law of the forum determines the admiss. of a particular piece of evid. This conclusion follows from the formulae that evid. is a matter of procedure and procedure a matter for the forum.

Caveat: y are some exceptions.

~~(Sec. 6.) CONFLICTS (cont'd)~~

* (Sec. 7.) FREEDOM TO IGNORE THE RULES *

Parties may stipulate almost any fact so long as (1.) it does not violate some rule of "public policy," and (2.) does not involve judicial notice.

6 DEC. 63

SEQUESTRATION OF WITNESSES —

Separation of wits. to avoid their duplication of each other's stories. However, if the ct. grants your motion to sequester your opponent's wits, you may be reas. certain that a motion to sequester your wits. will be granted. — Here, wits. are kept on the outside of the ct. and brought to stand one at a time. — Wm jud. discretion of judge in any kind of case.

Bloodgood case — (p.497)

"The objection here was not a 'mere gen. objection' but was understood to have referred to sec. 270-b of the Penal Law. The exclusion, therefore, = error, since the evid. was competent + admissible against one D.

"Where a specific objection is made on one ground, other possible grounds cannot be considered on appeal." See notes here, p. 101 supra.

"Even if a stmt. were illegally obtained it would not be incompetent or inadmissible in evidence for that reason."

"The exclusion = error, even if the evid. was not at the time competent, since it could be made so."

And see note, p. 500 cbk.

(SEC. 7) FREEDOM TO IGNORE THE RULES (cont'd.)

(A) JURY TRIALS

STIPULATIONS: You cannot stipulate, in most states, guilt in a 1st degree murder case. [But, in N.C. you can plead guilty to 1st degree murder and automatically get life imprisonment. It won't go to the jury. But, this is contingent upon the Solicitor accepting the plea.]

If the stip. is extra-judicial, it should be written and signed by both parties. Changes can be made by agreement of the parties. But, if the change be not permitted by opponents and you can show an error in the stip. due to inadvertence, fraudulent inducement or mistake, the judge may grant the change w/in his own discretion.

Once stipulated, evid. contra cannot be introduced.

Once done, ALL parties must agree to a change in stip. or to

the stipulations initially.

Quaere: Should evid be offered when offering atty. knows its inadmissible, as a matter of ethics? = No. But, sometimes it is difficult to catch this before a judicial ruling is given.

(B.) NON-JURY TRIALS

(p. 505) Builders Steel Co. v. Commissioner of Internal Revenue

"In the trial of a non-jury case, it is virtually impossible for a trial judge to commit reversible error by receiving incompetent evid., whether objected to or not. An appellate ct. will not reverse a judgment in a non-jury case because of the admission of incompetent evid., unless all of the incompetent evid. is insufficient to support the judgment or unless it affirmatively appears that the incompetent evid. induced the court to make an essential finding which would not otherwise have been made. ... On the other hand, a trial judge who,

Errors in exclusion of evid. make trial judge more vulnerable to reversal on appeal than errors in admission of evidence.

in the trial of a non-jury case, attempts to make strict rulings on the admissibility of evid., can easily get his decision reversed by excluding evid. wh is objected to, but which, on review, the appellate Ct. believes should have been admitted."

Presumption

In a non-jury case, the presumption is that the trial court considered only the competent evidence and disregarded all evid. which was incompetent.

One who is capable of ruling accurately upon the admissibility of evidence is equally capable of sifting it accurately after it has been rec'd, and, since he will base his findings upon the evid. wh he regards as competent, material and convincing, he cannot be injured by the presence in the record

of testimony which he does not consider competent or material.

Levins v. Buchholtz (p. 510)

Re Small Claims Court:

(1.) Hearings shall be conducted in such a manner as to do substantial justice between the parties according to the rules of substantive law and the court is not bound by stat. provisions or rules of practice, procedure, pleading or evidence, except those relating to privileged communications and sec. 347 of the (N.Y.) Civil Prac. Act.

(2.) Either party may appeal on the sole grounds that substantial justice has not been done between the parties according to the rules and principles of substantive law.

(3.) Policy: It is self-evident that the usefulness of this institution demands

that in gen. finality at-
tach to its pronounce-
ments. The litigants for
whose benefit the Small
Claims Part was
created ought to have
the feeling that its
decision is the end,
not a mere intermediate
stage, of their lawsuit.
That feeling will be
encouraged if the rule
is declared and rigorously
enforced that nothing
but the weightiest and
most compelling of
reasons can justify
interference w/ its
judgments.

(3.) The test of appealability:
We should ask solely
whether y was un-
fairness or other mis-
conduct in the trial
or whether the re-
sult shocks conscience
or one's basic sense
of justice.

(4.) Policy: The integrity of the
judicial forum and
confidence in its pro-
cesses are of far greater

concern than the outcome of any particular litigation, whether the amount at stake is large or small. The cause of justice is ill-served in the denial to the judgments of this important court of their intended stability and the consequent undermining of its usefulness.

11 DEC. 63

* (CHAPTER 6) HEARSAY *

General Rule

(N.C.) — whenever the assertion of any person, other than that of the witness himself in his present testimony, is offered to prove the truth of the matter asserted, the evid. so offered is hearsay (H).

Hypo: John Doe ran from crowded theater yelling, "FIRE." Several people, including P, were hurt in the ensuing rush. P v. Doe in tort, and a witness

testified that Doe had yelled "FIRE." — Admissible because not offered to prove that there was a fire. Therefore, no H. It was offered only to prove that the statement was made.

Rationale for Exclusion

Reasons for H:

(1.) Lack of sanction of an oath.

(2.) Lack of opportunity for cross-examination.

Rationale for Admission of Exceptions

These reasons really bear on the trustworthiness of the testimony. But, where conds. exist which guard against these dangers of H, the test. should be admitted. Thus there are many exceptions.

EXCEPTIONS

(1.) Dying Declarations — Dying declarant makes statements re how his injury was caused and subsequently dies. — HERE, no other evid. exists, and the likelihood of falsity of the statements is small.

Limitations:

(a.) Death must have been impending, when declarant spoke, speedily, surely and consciously;

(b.) his stmts. re circumstances leading immediately to his death will be rec'd., and only those.

(c.) Case at issue must be criminal charge (homicide or wrongful death).

(d.) Declarant must be the person whose death is now charged; i.e., You cannot use the dying declarations of X to prove cause of death of Y.

All elements must exist for the D.D. to be admissible.

On Bar Exam, answer the specific question asked.

(Declarations v. Interest) (2.) Stmts. of Fact Against Interest —

Rationale Human experience shows that people don't ordinarily make stmts. of fact v. their own interest.

Limitations:

(a.) The declarant must now be unavailable by death, insanity or absence from juris, or the like.

(b.) The matter stated must have been against the declarants interests at the time stated.

(c.) Must have been v. declarant's pecuniary or proprietary interests, and not ~~his~~ merely his penal interests.

(3.) Stmts. About Family History

Rationale

Necessity is the rationale here. There may be no other way to prove matters re ~~=~~ birth, marriage, death, etc.

Limitations:

(a.) Declarant must be deceased or otherwise unavailable.

(b.) Stmt. offered must have been made before the ~~controversy~~ ~~dated~~ at bar had arisen.

(c.) Declarant must be shown to have been related by blood or marriage to the family about which the stmts. were made.

(d.) (England & N.Y.) Main issue must have been one of inheritance

(4.) Attesting Witness' Stmts.
Stmts. of a deceased attesting witness re the will or attestation clause are admissible.

(5.) Business Entries
Regular entries in the course of business are admissible.
Limitations:
(a.) Entrant must be deceased or otherwise unavailable.
(b.) Entries must have been made as a regular part of a series in the regular course of an occupation or profession.
(c.) Entries must have been made at or near time of transaction.
(d.) Entrant must have been qualified by personal observation of the matters recorded.
(e.) Orig. entries must be produced.
Used often for hospital records. [M. E. Johnson says: (d) refers to librarian who must show custody of the re-

← Entrant must have had 1st hand know. of the transaction recorded OR must have made the entry from oral reports or temporary memoranda rec'd. from another in the firm whose DUTY it was to know the facts first hand.

cords. (Quaere?)]

If the Entrant is unknown, (a) would be satisfied be— cause of unavailability.

(6.) Stmts. Re Private Land Boundaries

Declarant must be dead or otherwise unavailable.

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12 DEC. 63

(7.) Stmts. of Decedents Generally

Stmts. cannot serve interests of proponent.

(8.) Reputation about Land, Character, Marriage, etc.

Reputation is hearsay and knowingly so. Hear— say is sought here: what do people in the community or land say about the person in question.

Presumption of Marriage

If people are living together as H and W, the presump. is that they are married.

(9.) Scientific Treatises

Gen. Rule

Don't have to bring the author of any accredited writings or treatises of any sort into court.

(10.) Commercial and Professional Lists

e.g., Dunn and Bradstreet, credit ratings; mortality tables; abstract of titles by reputable people or firms; prices in trade journals.

(11.) Affidavits

(12.) Stmts. of Phy Sensation and Mental Condition

13 Dec. 63

(Contemporaneous, spontaneous and excited utterances)

13.) Spontaneous Utterances — If one makes a stmt. spontaneously under excitement, and it is part of the res gestae, that stmt. is deemed trustworthy, the presumption being that s has not been suff time to reflect on the consequences of the stmt.

Rationale

Hypo: Car accident case. P testified that he heard someone on the street yell, "My God, did you see that guy run that red light?!" — Admissible.

You don't have to account for the unavailability of the utterer; but it would naturally be better if the utterer could be produced in person.

Limitations:

(1.) Startling external event.
(2.) The utterance must be soon after, before time has elapsed for deliberation. Question of time depends on facts of each case.
(3.) Utterance must relate to circumstances of the startling event. Utterer may be a bystander rather than only the victim.

(14.) Official Statements

Death certs., driver's license, etc. You need not produce the official. Also, weather reports.

Limitations

(1.) Stmt. must be written.
(2.) Made pursuant to a duty.
(3.) Based on personal knowledge.

Caveat!! The purpose for wh the stmt. is offered shall deter. whether the H Rule applies.

STATE v. Tolisano (p. 519)

whether the test. of the cops re the telephone stmts. was H: the issue.

Held, the ~~telephone~~ phone calls were admiss. as evid.

that the belts were being placed but not that the stmts. made to the officers were true. The evid. is admitted, not as an exception to the H Rule, but because it is not w/in the rule. — Ga. in accord: Marshman v. State, 88 Ga. App. 250, 76 S.E. 2d 443 ('55).

Johnson v. State (p. 522)

Cop testified that the boy - complainant picked out D from a police line - ulp. "This is not H evid. (Cop) was test. to something he saw, something (the boy) did in his presence. He was relying on what he observed and not what the boy told him."

Trainor v. Buchanan Coal Co. (p. 524)

Held credit report of P not offered to prove truth of the matter therein contained, but to show that the D acted in good faith by relying on the report and that D did believe the matters reported.

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20 DEC. 63

can be oral or written. If written, must be authenticated to be admiss. and must NOT be offered to prove the truth of the matter.

Young v. State (p. 526)

Declarations of decedent were offered for the purpose of identifying him as the Jonah Fenstermacher who was born in Pa., & who is shown by the test. to have been a relative of the present Ps.

Exception of stmts. about family history applicable here.

Loetsch v. N.Y.C. Omnibus Corp. (p. 530)

Stmt. in will of deceased wife that her husband (P) mistreated her and that, therefore, she was leaving him only one dollar.

Wrongful death action. Certain stmts. offered to show state of mind. HELD, error to exclude that stmt. "It is always proper to make proof of the relations of the decedent to the person for whose benefit the action is maintained, because such proof has a bearing upon the pecuniary loss suffered by the person entitled to the recovery, and this is true whether the beneficiary is the surviving H or W or one or more of the next of kin." P Such declarations are evid. of the decedent's state of mind and are probative of d disposition on the part of the declarant wh bears vitally on the reas. expectancy, or lack of it, of future assistance or support if life continues."

6 JAN. 64

Howe v. Howard (p. 540)

Stmts. tending to show the character of the relationship between H and W were competent, not hearsay, and admissible as part of the res gestae.

VALUE OF LAND

Re value of land. One jury is not bound by another jury's value of land. "A price so fixed represents only the opinion of those who make it, and, as the grounds and reasons of their opinion are not known, and they cannot

be presumed to have been qualified experts, and cannot be subjected to cross-examination by the parties whose rights the evid. will affect, their opinion is not competent evid. to show the value of other land."

Evid. of the amt. paid under an award of arbitrators for adjoining land taken from another owner by the same D was rightfully excluded.

Forced sale of land not evid. of its value.

Grand Forks etc. v. Implement Dealers Mut. Fire Ins. Co. (p. 541)

H Rule applies to written as well as oral stmts.

"Gen. proof of previous stmts. by a wit. consistent w/ and corroborative of his testimony, is incompetent and inadmissible unless and until some attack on his credibility has been made."

PRIOR CONSISTENT STATEMENTS

* (Sec. 2) Exceptions *

(A.) Reported Testimony

(1.) Depositions (F.R.C.P. 26)

Caveat: Take depos. out of an abundance of precaution that the wit. may not be able to appear or be unavailable for whatever reason.

And see F.R.C.P. 26 (d)(4)

If part of a written instrument is offered by one party, the other party may require that the whole instrument be offered.

Read 40 pages.

8 JAN. 64

Gill v. Stolow (p. 545)

Rule of Law

"The Rules do not permit the officer before whom the deposition is taken to add his own gratuitous comments on the demeanor of the wit. or on answers or shrugs. made by the wit. other than those included in the written interrogatories."
F.R.C.P. 31(b) and 30 (c), (e), and (f), 28 U.S.C.A.

held, "the motion to suppress such part of the deposition as consists of the aforementioned statements of the Vice Consul is granted."

(2.) Reported Testimony

N.C. follows gen. rules here.

On the test. offered into evid. was test. in a prior action, it will be admissible in the instant (second) case where (1.) ~~s~~ is complete identity [redacted]

(a.) of parties P and D.
(b.) of proponent and of opponent of the test.
(c.) of the action.
(d.) of all issues in the action.
(e.) of the issue on wh the evid is offered.

(2.) Wit. at the earlier trial was under oath and subject to X-exam. by the opponent.

(3.) wit's unavailability at the later trial was ~~under oath + subject to X-exam by the opponent~~ because of his death;

(4.) Wit's [redacted] at the earlier trial was subject to no valid objection.

Met. St. Ry. Co. v. Gumby (p. 547)

The parties here were not the same nor in priority (sic) w/ each other; the issues were not exactly the same; and P could have successfully objected to the reading in evid. against her of the test. of the dft. who testified in the earlier suit, [redacted] and therefore she cannot read the same test. in evid. v. D.

IDENTITY OF PARTIES: PRIVITY

"The parties must be substantially the same, or privies, in blood, in law, or in estate. The test. is either held to be competent because such privity is found to exist, or is held incompetent because no privity is established."

"The term PRIVITY denotes mutual or successive relationships to the same rights of prop., and privies are distributed into several classes, according to the manner of this relationship." "Privity" really means "claiming under." (Johnson).

"It should further be noted that

testimony of a wit of a former trial cannot be admitted against one subsequent of the parties to a [redacted] trial unless it could be admitted against the other."

Bartlett v. Kan. City Pub. Ser. Co. (p. 557)
Held was complete identity of interests and issues.
See p. 552-553

Rationale for Identity-of-Parties Requirement

"If identity of parties is required, it can only be because this is necessary to assure a proper and effective X-exam."

"... Under the law of (Mo.), absolute identity of parties is not required. It is said to be such if the party-opponent in the subsequent case is in privity with the party-opponent in the former case."

Quaere: Quaere the admissibility against P.-wife in the second trial of incompetent test. given in the former trial against then P-husband to wh P-husband failed to object?

State v. Maynard
184 N.C. 653 - see re State v. Ortego, p. 556.

State v. Ortego (p. 556)

"We will now say that the party seeking the admission of such testimony must lay a proper predicate therefor by showing to the satis. of the trial ct (1) that the wit. whose test. is sought to be produced is unavailable because of his death, insanity, or phy. disability preventing his appearance in ct., or his absence from the state or juris. of the ct. w/o the connivance of the party seeking to intro. the test. of such wit., or his absence when after diligent search and due inquiry he cannot be found, or his absence resulting from some other contingency of equal preventive force and gravity, (2) that such wit was sworn and testified in the former trial, and that the accused was present and had an opportunity for X-exam.; and (3) that the person thru whom the test. of the absent wit. is sought to be reproduced will state, under oath, that he heard, remembers, and can relate the substance of all the test. of such absent wit., or at least the substance of all such test. on the particular subject sought to be proved. If the sufficiency of the foundation laid for the admission of such test. thru the offered wit. will then rest in the sound discretion of the trial court."

"The legal question here involved is whether, in a criminal case, the testimony given at a former trial by a wit., or witnesses, who cannot be produced at a subsequent trial, may, over the objection of the accused D, be proved by parol at the later trial." Yes, if certain conditions exist.

"The Const. right of an accused person to confront the witnesses against him is NOT infringed by the reproduction of [redacted] the testimony given by those witnesses at a former trial at wh the accused was present and accorded the opportunity for X-examination, which such wits are not available at the subsequent trial."

See pp. 558-559 for requirements.

9 JAN. 64

* (B.) ADMISSIONS *

Quaere declarations v. interest as against admissions?

(p. 560) Link v. Eastern Aircraft, etc. G.M. Corp.

Admissions as Affirmative Proof

Prior contradictory declarations of any PARTY to the litigation who becomes a wit. are admissible by the opposing party to neutralize the testimony of the declarant but once admitted into evid. they may be used as substantive proof for either party. Such evid. is affirmative proof and is not, as in the case of non-party witnesses, solely to contradict, neutralize or discredit.

Where the Admitter testifies the admission may constitute both a contradictory stmt. tending to destroy his credibility and positive evid. of the fact stated.

Smith v. Ill. Cent. R. Co. (p.563)

Re admissions of a party - infant.

"While an infant who has not a due sense of the obligation of an oath may be excluded from testifying in ct., yet when an infant becomes a party to a suit, the same kinds of evid., including admissions and declarations, are rec'd. against him as are rec'd. v. an adult, subject to the limitation that his admissions cannot be given the effect of imposing upon him a kind of liab. which the law permits an infant to avoid. ... However, the admissions of a child of such tender age as the P in this case should be rec'd. w/ caution, and the weight and effect of such admissions are to be determined by the triers of fact, after due consideration of the child's age and understanding, and all the facts and circumstances in the case."

Weight for the Trier of Fact

"The question of the admissibility of the child's stat. as to how the accident occurred was not whether he

was able to comprehend the binding effect of an oath, wh would have been necessary to qualify him to testify as a wit., but WHETHER HE HAD SUFI UNDERSTANDING TO ENABLE HIM TO [redacted] RELATE FACTS."

TEST OF ADMISSIBILITY OF INFANT'S ADMISSIONS

10 JAN. 64 Jeanne's birthday.

Janus v. Akstin (p. 566)

Issue

whether a [redacted] party's stmt. based not on personal knowledge, but on info. from a third party, is admiss. as an admission? YES.

HELD, "The fact that the D Paul did not see the accident is immaterial. The admiss. of this class of evid. does not depend upon the personal know. of a D, but is predicated upon the assumption that he will not make stmts. of fact contrary to his interest unless he is satisfied that such stmts. are true. His lack of personal know. is, of course, a circumstance

Held

Effect of Lack of Personal Knowledge:

for the jury to consider in estimating the value of the evid., but that is all."

Allert v. Ziebell (p. 567)

Does silence = admission?

Held, "The non-denial of a stmt. made in the presence of the party charged which tends to estab. his liab. may amount to an admission of its truth, if, as it appears in this case, (1) the stmt. was heard and understood by the party and (2) he had knowl. of the facts stated; (3) was not physically disabled from answering; (4) had a motive for denying it and (5) would naturally do so if he does not intend to admit it, and (6) was at liberty to reply.

"D's silence was admissible evid. from which an admission of its truth may be inferred, the inference to be drawn being left to the jury."

RULE: ADMISSION BY SILENCE

(or, "ADMISSION BY ADOPTION")

These admissions by silence are almost universally admissible as exception to the H Rule. But, where an accusation is made and denied, almost universally excluded because the accusation = H and does not come w/in any exception to the Rule.

Exception: However, on accusations are made against an accused in custody and he fails to deny, not admissible.

Harmon v. Haas (p. 571)

Damages sought for wrongful death.

Re an admission by conduct.

D's daughter driving D's car. D alleged she was about her own business (family purpose doctrine not raised). While action is pending, D transfers all of his property. P alleges this raised inference that D thought he would be found liable.

Held, evid. of this conduct admissible. See weight

to be attributed to it is for the jury.

SPOLIATION

Destruction of evid. (spoliation) may be an admission by conduct.

If one takes sides between conflicting stmts. that person may be held to answer for so doing, as that would = admission.

Frank R. Jelleff, Inc. v. Braden (p. 573)

"It is merely a piece of evid. intro. in the case, together w/ its explanation, and what significance it may have or what weight may be given to it is entirely w/in the province of the trier of fact alone to deter. It is neither controlling nor determinative. The allegation in the complaint did not prove that the garment was flammable but it certainly was evid. that Jelleff's claimed it was.

Ptf. alleg. for D made stmts. in pleading by D v. mfgr. of garment which harmed P. D = seller of garment to P. The stmts. were found admissible as admissions.

13 JAN. 64

Jelleff case — read carefully.

Martin v. Savage Rock Line, Inc. (p. 578)

" The characteristic of truthfulness, which makes exception to the H rule, attaches to a stmt. being made at the time of the occurrence, namely, as part of the RES GESTAE, on the theory that it is the facts speaking

through the speaker, while the characteristic of truthfulness as to a stmt. against interest is that it is a stmt. which would not have been made but for the fact that it was true!"

* **RES GESTAE** -

Must be **a spontaneous utterance** made during a period of time following or during the incident before the speaker has time to reflect and make a value judg. The latter — whether or not there was time to reflect, etc. — is a question of fact.

U.S. v. U.S. Shoe Machinery Corp. (p. 580)

"name case"

(Read carefully.) Re intra-company stmts. of an agent in written memoranda. Are they admissible against the principal?

"Unlike stmts. of fact v. interest (sometimes loosely called admissions), an extrajudicial admission of a party is receivable v. him not as an exception to the H rule but as

RESTMT. OF AGENCY § 286 - "Where a natural person has an agent who makes a stmt. to a third person, the stmt. is the principal's if the agent was authorized to make the stmt. or was authorized to make on the principal's behalf true stmts. re the subject matter." This is because of the doctrine of respondeat superior. This applies, too, to corps. However, on these agents report to other corp. agents, the mere fact that the corp. gave the agents authority to make such intramural reports does not make stmts. in those reports the stmts. of the corp. But, corp. may be bound in some cases by intramural ~~stmts~~ ~~reports~~ in or apart from a report. Shareholders or directors may authorize or adopt the intra-company stmts. of the agents as the stmts. of the corp.

not being within the purpose of the H rule. ... That purpose does not apply, and so the H rule does not apply, or the evid. offered is: a PARTY are HIS stmts.

The question remains as to what are "HIS" stmts.

"Where the party is a natural person, any stmt. made by him either publicly or secretly is his.

"Where the agent makes a report to the PRINCIPAL OR TO ANOTHER AGENT, and all that appears is that the principal had authorized the agent to make such a report, a stmt. in the report is not the principal's and is not an extrajudicial admission of the principal. ... Authority merely to report TO a principal or a fellow agent is not authority to commit the principal. ... And the doctrine of RESPONDEAT SUPERIOR does not apply.

"However, if the principal expressly said either before or after the agent spoke that he vouched for the agent's stmt. or wanted action taken upon

It is well settled that evid. of declaration of an alleged agent or servant is inadmissible to prove the agency or employment. ¶ A large minority of courts hold admissible in automobile accident cases evid. of such declarations as to the scope of the employment after the fact of employment has been shown by competent evidence.

it, then it is his stmt. even though it was not made for communication to the outside world. ... And authority to report as a substitute for a principal is authority to commit him. The basis for regarding the stmt. as the principal's is that he has expressly authorized it to be used or has adopted it. ... Even if the principal does not expressly vouch for the agent's stmt, if he acts or conducts his business in such a way as to show, by implication that he adopted the stmt., then such parts of the stmt. as he acted upon are "HIS". And to that extent the stmt. is receivable v. the principal as an ADOPTIVE ADMISSION."

Liberty Nat. Bank etc. v. Merchants, etc., Co. p. 591

Issue: Is the petition in an earlier action admissible to show title to property?

"The stmts. of a vendor in regard to his title & the manner in which he held,

made before sale, but not afterwards, may be used against his vendee."

Statements of a former owner of property:

The gen. law —
"As to the subject matter of the proof, declarations of a former owner are admitted "v." his successor in interest of any issue of title, ownership, or poss. that may be proved by parol evid. — such as the nature, character, and extent of the declarants poss., the identity or location of boundaries and monuments described in a deed, or any material matter re the physical cond. or use of the prop."

* (c.) DECLARATIONS AGAINST INTEREST *

(Johnson says he does not see any real difference between D.A.I. and admissions !!!)

15 JANUARY 64

Roe v. Journegan (p. 603)

Declarations v. int. are different from admissions:

(a.) Ad. is the stmt of a PARTY; the d. a. i. is made by a 3RD PERSON.

(b.) To be admissible at all the d. a. i. must contravene, to the knowledge of the declarant, his pecuniary or proprietary interest. In case of an admission, such a state of ~~facts~~ affairs would enhance the probative weight; it would not, however, be essential to admissibility. To secure that, it is suff that the stmt. should be the voluntary act of the party and cover a probative or RES GESTAE fact.

It is required ~~that~~ the interest in derogation of which the declarant speaks should be shown by the proponent to be (1) actual; (2) known to the declarant; (3) the substantial interest involved in the matter.

(c.) The d. a. i. is secondary evid., and is incompetent unless the declarant is shown to be dead, absent from the juris., or unavailable for some other suff cause. The admission, on the contrary, is primary evid., and is competent, though the declarant be present in ct. and ready to testify.

(d.) An ad. may be made at any time. D. a. i. is incompetent if made post litem motam.

"post litem motam" - after the beginning of a controversy. (though not necessarily an ACTION).

(e.) Admissibility of a d. a. i. is governed by the rules of sound reason. That of an ad. is deter. largely by procedure.

An acknowledgment of liability or responsibility is against one's interest. Rochinski case (Penn. R.Co. v. Rochinski, 158 F. 2d 325 (1946).

"Unavailability"

16 JANUARY 64

[Discussed Rochinski case, p. 608.]

Sutter v. Easterly (p.609)

Witness made affadavit ~~that~~ he had sworn falsely before. Wit. brought back to court ~~but~~ but took 5th Amendment. Q. Was the witness "unavailable" to qualify his affadavit admissible as a d.a.i.? Held, yes. Applied Wigmore's "Necessity Principle" which signifies the impossibility of obtaining other evid. from the same source, the declarant being unavailable in person on the stand. Whenever the wit. is practically unavailable his st'mts. should be rec'd. — The affadavit was held admissible as a declaration against interest by a third person not available as a witness.

(D.) Dying Declarations

The declarations of a dying man are admissible if:

(1.) He was conscious of impending death.
(2.) Death actually followed.
(3.) Death must result from homicide or wrongful death.

Marshall v. State (p. 614)

Usually Judge to left up to deter., from all the circumstances, whether the dying declarant was conscious of impending death at the time he made the declaration.

Deceased alleged to be an infidel. At Cal., held that one was an infidel, w/o more, would not be sufi to bar the stat. But if it were shown that the declarant did not believe in a Supreme Being, the basis of the exception making the stat. fairly re-

liable would not exist and would render the stmt. inadmiss. due to untrustworthiness.

Limitations

D/D only admiss. to the extent that the deceased could have testified had he been alive at the time of trial, and therefore must speak of FACTS ONLY.

(E.) Business Entries

Originated from the C.L. shop-book doctrine.

Rule of Law

Entries, made pursuant to a duty to make them, in the regular course of business in regularly kept books of business, are admissible for truth.

Arnold v. Hussey (p. 624)

Diary not a regularly kept business record; and the fact that the old man habitually made entries would not satisfy requirement that ∃ be a duty to make the entries.

Johnson v. Lutz (p. 630)

Re policemen's reports,

Held, the stat. was never intended to apply to a situation like this; and the report was properly excluded." made in the regular course or calling (w/in meaning of liberal stat.) ... The memo. or record must have been made as a part of the duty of the person making it, or on info. imparted by persons who were under a duty to impart such info." The stat. was not intended to permit the receipt in evid. of entries based upon voluntary Hstmts made by third parties not engaged in the biz or under any duty in relation to info."

our cop made memorandum from Hstmts of third persons at the scene of the accident.

The entry must be made in the regular course of biz and must apply to the business in the reg. course of wh the entries were made.

See

17 Jan. 64

Melton v. St. Louis Public Service Co.

Hospital records - usually only those stmts made by the party - patient re his condition or treatment are admissible.

However, here the ct. ruled that the admission of the record containing Ps stmt re how he got hurt was not prejudicial error.

The hospital is not in the biz of keeping records re causes of accidents, and the biz entry, to qualify as such, must relate to

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the biz for which the records are kept. The entries did indicate, in a way, the cause of the accident; but they also indicate "How the ~~accident~~ P was injured" and are admissible.

(F.) Official Written Statements

See pp. 644 – 649 of bk.

May introduce a certified (by custodian) copy of the O.W.S.

This exception is often called "public records and documents."

Reports of accidents –

Might also come in under the exception for biz records.

"Records of accident investigations conducted by a public officer pursuant to requirements of law, and which involve exercise of judgment, expression of opinion and the drawing of conclusions, are not admissible as public records.

Downs v. Newcomb, 267 P.2d 600, 605 (Okl. 1954) ——→ We decline to extend the recognized exception to the rule v. admission of Hsvid. to include instruments wh, alth' they may have been kept by a public official in the course of his duties, were not explicitly required to be kept, were not formal orders issued pursuant to such official's stat. authority, and by the matters revealed therein appear to have been made voluntarily.

(G) Stmts. of Phy. or Mental Cond. of Declarant

If the declaration is not self-serving, it may be admitted.

(1.) Present Bodily Cond. & Stmts. to Physicians

Mutual v. U.S. (p. 650)

This exception includes narrative stmts as well as mere ejaculations, and that it has been extended to a declaration of present symptoms told by a patient to a physician.

Rationale

* However, this is based on the lack of opportunity or motive for fabrication upon an unexpected occasion to which the declarant responds im-

mediately. Thus, if it can be shown that P, or the wit. (whomsoever he be), went to the doctor for the purpose of setting up a diagnosis and that he could have conjured up the symptoms, the judge may so rule and exclude the testimony as hearsay.

(2.) State of Mind

Adoption of Harvey (p. 657)

Did the mother INTEND to abandon the kid?

Gen. Rule | Evid. of stmts. re intent, motive, design or feeling or any state of mind are always admissible.

Commonwealth v. Santos (p. 660)

Stmts. of D's wife ~~that~~ she would commit suicide were found admissible as stmts. of intent or design of the wife, tending to show that D did not murder his wife.

142
Mutual case, p. 664
Shepard case, p. 669
Lloyd case, p. 672

Shepard v. U.S. (p. 669)

Stmts. of deceased wife admissible to show ~~He~~ her state of mind to exclude possibility of suicide. Wife had told nurse ~~that~~ she thought her husband was poisoning her.

Mower v. Mower (p. 676)

Were deeds ever delivered and may the stmts. of deceased be admitted to show intent to do it? Held, they were admiss. to show intent to deliver the deeds, and this may tend to show that delivery was made.

(#.) Spontaneous Contemporaneous + Excited Utterances

Requirements:

(1.) Must be some startling external event.
(2.) Utterance must be soon afterward w/o time for deliberate reflection.
(3.) Utterance must relate to the startling event.
(4.) Utterer may be a bystander and not an injured party.

13 N.C.L.R. 228

* Spontaneous utterances often used interchangeably w/ Res gestae.