Case Western Reserve Law Review

Volume 13 | Issue 3 Article 15

1962

Evidence

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part before he can require specific performance on the part of the purchaser. Furnishing the septic tank easement was considered to be a material act.

The seller argued that even if he could not be granted specific performance the purchaser was liable for the loss under the doctrine of equitable conversion. The court of appeals ruled against this contention. It set forth the following prerequisites for an equitable conversion of real property: (1) the seller must have fulfilled all conditions; (2) the seller must be entitled to specific performance; and (3) the parties by their contract must have intended that title pass to the purchaser upon the signing of the contract of sale. The court held that none of these requirements had been met in the *Sanford* case.

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EVIDENCE*

Numerous rulings in this field were handed down during the period covered by this survey. The paragraphs below set forth cases which seem most significant or interesting.

ADMISSIBILITY

Expert Testimony

In *Piotrowski v. Corey Hospital*[1] plaintiff's attorney introduced into evidence a copy of a medical journal which criticized the treatment of plaintiff's decedent by defendant's doctor. Plaintiff's decedent entered defendant hospital as a patient and was delivered of a child by Caeserean section. Because of postoperative pulmonary difficulties the attending physician, who was also the superintendent of defendant hospital, prescribed administration of oxygen. While the tank which supplied the necessary oxygen was being replaced with a full one, plaintiff's decedent died as a result of being deprived of much-needed oxygen for a period of approximately twenty minutes.

The medical case was discussed and criticized in the August, 1958 issue of the *Ohio State Medical Journal,* published prior to the trial of the case. The article contained a critique of the method used in treating the decedent and concluded that death could have been prevented by changes both in anesthetic techniques and immediate postoperative care.

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1. 172 Ohio St. 61, 173 N.E.2d 355 (1961).

Having elicited from the attending physician agreement with part of the conclusion of the article, plaintiff's counsel offered into evidence a copy of the journal with passages favorable to the plaintiff underlined in ink. It was admitted over the objection of defendant's counsel. The jury returned a verdict in the sum of $50,000 — the amount prayed for in the plaintiff's petition.

The supreme court reversed the judgment and remanded the case, holding that "medical and other scientific treatises representing inductive reasoning are inadmissible as independent evidence of the theories and opinions therein expressed."[2] The basis for such exclusion is the lack of opportunity to cross-examine, lack of certainty as to the validity of the conclusion expressed, and technicality of language.

The decision is in line with the general rule.[3] Particular difficulties arise in the instant case, however, in that as the writers of the critique were unnamed and probably unavailable, plaintiff's sole evidence regarding accepted practice was inadmissible, even though he put on the stand a physician who testified to a causal relationship between the lack of oxygen and the decedent's death. Furthermore, since the physician himself admitted agreement with at least part of the conclusion of the journal, the harm perpetrated is not too clear, as the lack of opportunity to cross-examine does not appear prejudicial. This evidence could have been admissible as an admission or a declaration against interest. In reversing, the court also placed emphasis on the lack of unanimity of the jury, the verdict being equal to the prayer, and on the underlining in the journal. Since each of these items separately is not sufficient grounds for reversal, it is submitted that all taken together ought not to be either.

Privileged Communications

In another opinion[4] the supreme court redefined the extent of the attorney-client privilege. The case involved a will contest, in which plaintiffs called an attorney as a witness to testify regarding the testator's competence to dictate a will. He had been asked to draw a will for the testator, but, in fact, had never done so. The trial court refused to admit the testimony, on the lawyer's claim of privilege. The court of appeals reversed the ruling on the ground that the testimony sought to be elicited was not within the purview of the concept of privilege.[5]

In reversing the court of appeals, the supreme court held that in order to encourage total disclosure by the client, information gained through

2. *Id.* at 69, 173 N.E.2d at 360.

3. See, *e.g.*, Hallworth v. Republic Steel Co., 153 Ohio St. 349, 91 N.E.2d 690 (1950). See generally 20 AM. JUR. *Evidence* § 968 (1939); 32 C.J.S. *Evidence* § 718 (1942).

4. Taylor v. Sheldon, 172 Ohio St. 118, 173 N.E.2d 892 (1961).

5. See OHIO REV. CODE § 2317.02.

the mere seeking of an attorney's services is to be regarded as privileged. Furthermore, observations made by the attorney under such circumstances come within the concept of communication. The rule in *Bahl v. Byal*[6] is thus somewhat restricted.

Results of Lie Detector Tests

In *State v. Smith*[7] the Lucas County Court of Appeals reaffirmed the courts' distrust of lie detector tests. The court followed *Parker v. Friendt*,[8] a civil case, in holding that such results are inadmissible because unreliable. The present decision goes further and holds that evidence of willingness or lack thereof to take a lie detector test is equally inadmissible.

Prior Guilty Plea

In *Wilcox v. Gregory*[9] the Summit County Court of Appeals ruled that a plea of guilty in the Wadsworth Mayor's Court may be introduced in the corresponding civil suit. The problem had an interesting ramification. The mayor's court records were so inadequate that a conflict arose as to whether there had been a finding of or a plea of guilty.

By statute[10] and case rule,[11] pleas of guilty are admissible as declarations against interest, but are not conclusive evidence of the facts constituting negligence. The court of appeals approved the trial court's instruction that whether there had been a plea was a question for the jury and if the jury found by the preponderance of evidence that there was, the jury should consider it accordingly as an admission. The judgment for defendant in the civil case was affirmed.

Prior Conviction

Is a former conviction of driving while intoxicated admissible to challenge the defendant's credibility in a subsequent trial for another such offense? The supreme court, in resolving a conflict between this case[12] and an Erie County opinion,[13] held that it is. The defendant argued that the former conviction was inadmissible because the offense was not a

6. 90 Ohio St. 129, 106 N.E. 766 (1914). This case held that it was competent for a physician to express an opinion as to the actual condition of the patient's mind, founded on his study and observation while in professional attendance.

7. 113 Ohio App. 461, 178 N.E.2d 605 (1960).

8. 99 Ohio App. 329, 118 N.E.2d 216 (1954).

9. 112 Ohio App. 516, 176 N.E.2d 523 (1960).

10. OHIO REV. CODE § 1.16.

11. Clinger v. Duncan, 166 Ohio St. 216, 141 N.E.2d 156 (1957); Freas v. Sullivan, 130 Ohio St. 486, 200 N.E. 639 (1936).

12. State v. Murdock, 172 Ohio St. 221, 174 N.E.2d 543 (1961). See also discussion in *Criminal Law* section, p. 460 *supra*.

13. State v. Hickman, 102 Ohio App. 78, 141 N.E.2d 202 (1956).

crimen falsi. Although the court accepted the rule of the *Kornreich* case[14] that the cross-examination of a witness regarding credibility is to be confined to treason, felony, and *crimen falsi,* it held that driving while intoxicated was a proper matter affecting credibility inasmuch as it came within the compass of the term "crime" under the Code.

The section of the Code referred to provides that no person is disqualified as a witness by reason of a prior conviction of a crime.[15] However, it states that such conviction may be shown to affect credibility.

Prior Accidents

In *Coyle v. Beryl's Motor Hotel*[16] plaintiff slipped and fell in defendant's bath tub. She sought to introduce evidence regarding prior accidents in defendant motel's tubs. The appellate court upheld the trial court's exclusion of evidence regarding tubs in other bathrooms of the motel and held that to show a dangerous condition through prior accidents, plaintiff would have had to show prior accidents in the same tub. The question of whether the rule is not unduly narrow still remains, however. Ought not plaintiff be permitted to show that defendant had similar tubs in other rooms and other accidents?

OTHER AREAS

Specifications of Negligence

The danger of pleading specifications of negligence and attempting to introduce evidence outside their scope was pointed out in *Kroger Company v. McCarty.*[17] This Preble County Court of Appeals opinion held that evidence as to speed introduced generally, without a limiting instruction, when the amended petition merely charges defendant with driving over the center-line, is grounds for reversal.

The court followed an older court of appeals decision[18] in limiting the plaintiff to his specifications. The court termed the failure to limit the evidence to the issue of damages prejudicial error.

Questioning the Jury

Interrogatories of the jury under Ohio Revised Code section 2315.16 gained added importance through a recent supreme court decision.[19] Questions of the jury relating to plaintiff's contributory negligence were

14. Kornreich v. Industrial Fire Ins. Co., 132 Ohio St. 78, 5 N.E.2d 153 (1936).
15. See OHIO REV. CODE § 2945.42.
16. 171 N.E.2d 355 (Ohio Ct. App. 1961).
17. 111 Ohio App. 362, 172 N.E.2d 463 (1960).
18. O'Leary v. Pennsylvania R.R., 127 N.E.2d 877 (Ohio Ct. App. 1941).
19. Aetna Cas. & Sur. Co. v. Niemiec, 172 Ohio St. 53, 173 N.E.2d 118 (1961).