Evidence -- Admissibility of Experiments

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Evidence—Admissibility of Experiments.

In an action for wrongful death of a small child, plaintiff offered evidence that by an experiment it was found that a child dressed in deceased's clothing could be seen from locomotive for a distance of 600 to 1,200 feet from place where the accident occurred. *Held,* inadmissible, since it was not shown how or when deceased reached the track or where she had been immediately before the accident.[1]

Experimental evidence may be introduced if circumstances are shown to be the same[2] or essentially the same[3] at the time of the event and of the experiment, and the witnesses do not have to be experts except where technical knowledge is required.[4] The burden of proving that the circumstances were the same is upon the proponent,[5] after laying the foundation.[6] Time,[7] place,[8] and the seasons[9] may be considered in determining this similarity. Admissibility of such evidence is discretionary with the trial judge,[10] and subject to review only in case of abuse;[11] but trial judges are cautioned by expressions

[1] Neice v. Norfolk and Western R. R. Co., 154 S. E. 563 (Va. 1930).

[2] Langham v. Chicago R. I. & P. Ry. Co., 197 Iowa 1118, 198 N. W. 525 (1924); Going v. N. & W. R. R., 119 Va. 543, 89 S. E. 914 (1918); Owen v. Delano, 194 S. W. 756 (Mo. App. 1917). *Cf.* State v. Graham, 74 N. C. 646 (1876), and Cox v. R. R., 126 N. C. 103, 35 S. E. 237 (1900).

[3] St. Louis I. M. & S. Ry. Co. v. Kimbrell, 117 Ark. 457, 174 S. W. 1183 (1915); Arrowood v. R. R., 126 N. C. 629, 36 S. E. 151 (1900); Zimmer v. Fox, 123 Wis. 643, 101 N. W. 1099 (1905).

[4] Arrowood v. R. R., *supra* note 3. Bystander can testify. Hallawell v. Oil Co., 36 Cal. App. 672, 173 Pac. 177 (1918). Fact that person making experiments knew what he was looking for does not render evidence incompetent. Henderson v. R. R., 132 Va. 297, 111 S. E. 277 (1922).

[5] Riggs v. M. St. Ry. Co., 216 Mo. 304, 115 S. W. 969 (1909). But the duty of going forward with the evidence may shift, as where circumstances make a prima facie case. May Dept. Stores v. Runge, 241 Fed. 575 (C. C. A. 8th, 1917).

[6] Omaha St. Ry. Co. v. Larson, 70 Neb. 591, 97 N. W. 825 (1903); N. & W. Ry. v. Sollenberger, 110 Va. 606, 66 S. E. 726 (1909).

[7] Brewing Co. v. Ice Co., 156 N. Y. S. 410 (1915); Dow v. Bulfinch, 192 Mass. 281, 78 N. E. 416 (1906).

[8] Henderson v. R. R., *supra* note 4. The place where the experiment is made is immaterial, as long as conditions are essentially the same. Olivaros v. San Antonio Ry. Co., 77 S. W. 981 (Tex. Civ. App. 1903).

[9] Range Co. v. Vanderford, 217 Ala. 342, 116 So. 334 (1928).

[10] Beckley v. Alexander, 77 N. H. 255, 90 Atl. 878 (1914); May Dept. Stores v. Runge, *supra* note 5. This discretion does not extend to preliminary proof of similarity of conditions. Amsbary v. R. R., 78 Wash. 379, 139 Pac. 46 (1914).

[11] Augusta Ry. & Electric Co. v. Arthur, 3 Ga. App. 513, 60 S. E. 213 (1908); City of Manchester v. Beavers, 38 Ga. App. 337, 144 S. E. 11 (1928); Konald v. Rio Grande Ry. Co., 21 Utah 379, 60 Pac. 1021 (1900). The evidence may be so clearly relevant and material as not to be within the discretion of the trial judge to receive or reject it. May Dept. Stores v. Runge, *supra* note 5.

in at least two opinions to be wary of permitting experiments at the trial itself, which though permissible when made outside, might confuse the jury when made in court.[12]

Experiments are most often employed in cases involving accidents caused by railroads, automobiles, etc.,[13] cases involving defects in appliances or in construction,[14] cases in which chemical analyses figure,[15] cases involving the range of sight and hearing,[16] and in cases where it is necessary to determine personal responsibility for death.[17]

The following cases illustrate the application of the above principles and the difficulty of simulating actual conditions in an experiment: Defendant was indicted for rape of a young girl in a dark room which she shared with her mother. The mother testified that in the struggle defendant fired a pistol and that she recognized him by the flash. Defendant insisted that the jury be instructed to retire into a darkened room and ascertain whether defendant could be recognized by the gun-flash. *Held,* Not allowed, since the same circumstances could not be reproduced as a foundation for the experiment.[18] In another case, a suit for divorce, defendant offered evi-

[12] Jumpertz v. People, 21 Ill. 375 (1859); Spires v. State, 50 Fla. 121, 39 So. 181 (1905).

[13] Henderson v. R. R., *supra* note 4 (railroad); Panhandle R. R. v. Haywood, 227 S. W. 347 (Tex. Civ. App. 1921) (railroad); Truva v. Rubber Co., 124 Wash. 445, 214 Pac. 818 (1923) (auto); McCarthy v. Curry, 240 Mass. 442, 134 N. E. 339 (1922) (machinery).

[14] Boston Hose and Rubber Co. v. Kendall, 178 Mass. 232, 59 N. E. 657 (1901) (explosion of boiler); Bona v. Auto. Co., 137 Ark. 217, 208 S. W. 306 (1919) (defects in steering-gear); Smith's Adm'x v. Electric Co., 164 Ky. 46, 174 S. W. 773 (1915) (defect in transformer); Kimball Bros. Co. v. Gas and Electric Co., 141 Ia. 632, 118 N. W. 891 (1908) (motor test); Leonard v. Southern Pacific Co., 21 Ore. 555, 28 Pac. 887 (1892) (defects in bridge).

[15] Guinan v. Lasky Corporation, 167 N. E. 235 (Mass. 1929) (explosive quality of motion picture film); Heal v. Fertilizer Works, 124 Me. 138, 126 Atl. 644 (1924) (quality of fertilizer); Hershiser v. Railroad, 102 Neb. 820, 170 N. W. 177 (1918) (blood test); Graustein v. Wyman, 250 Mass. 290, 145 N. E. 450 (1924) (Babcock test); Standard Oil Co. v. Reagan, 15 Ga. App. 571, 84 S. E. 69 (1915) (distinguishing between gasoline and kerosene).

[16] Meaney v. Power Co., 282 Pac. 113 (Ore. 1929) (visibility); Klenk v. Klenk, 282 S. W. 153 (Mo. App., 1926) (visibility); Nelson v. R. R., 208 Mass. 159, 94 N. E. 313 (1901) (surveying); Harper v. Holcomb, 146 Wis. 183, 130 N. W. 1128 (1911) (shooting by mistake for deer); Kansas City R. R. v. Hall, 152 S. W. 445 (Tex. Civ. App. 1912) (visibility of coal chute); Lasityr v. City of Olimpia, 61 Wash. 651, 112 Pac. 752 (1911) (lighting effects); Smith v. Insurance Co., 234 Mich., 119, 208 N. W. 145 (1926) (distance person may be recognized at night); Gambrill v. Schooley, 95 Md. 260, 52 Atl. 500 (1902) (distance voice will carry).

[17] Huestis v. Aetna Life Insurance Co., 131 Minn. 461, 155 N. W. 643 (1915) (experiment with gun); Tackman v. Brotherhood, 132 Ia. 64, 106 N. W. 350 (1906) (experiments with rope); Jumpertz v. People, *supra* note 12 (experiment with door hooks).

[18] Spires v. State, *supra* note 12.

dence that plaintiff's stenographer, at her desk in adjoining room, saw a woman sitting in plaintiff's lap. Plaintiff offered as evidence an experiment to show that from where she was sitting the stenographer could not have seen him. *Held,* Inadmissible, since it was not proved that the furniture was in the same position as at the time of the event.[19] In an action for the wrongful death of a child in a railroad accident, plaintiff offered an experiment in evidence to show that defendant's engineer, when he saw an object upon the track, should have recognized it as a child from a point distant 1,200 feet. *Held,* Admissible, because, in the experiment, it was shown that the circumstances upon which the evidence was predicated could be substantially reproduced, since it was proved that the engineer actually saw the child on the track.[20]

In the principal case, the necessary foundation for the experiment could not be laid and, therefore, the ruling in the case was correct.

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Landlord and Tenant—Effect of Consent to One Assignment of Lease on Condition Not to Assign—Dumpor's Case.

A 1931 opinion[1] of the Supreme Court has ushered onto the North Carolina juristic stage the English case of *Dumpor v. Symms*[2] decided in 1603. In *Dumpor's Case* a condition that the lessee and his assigns would not convey the lease without special license from the lessor was held to have been extinguished, when one such license was given. This holding is obviously contrary to a common sense interpretation of the given transaction. The court based its decision on precedent, but it has been shown that the authorities were invoked by false analogy.[3] *Dumpor's Case* is no longer the law in England,[4] but its doctrine continues to prevail in several American jurisdictions.[5]

[19] Kuenk v. Klenk, *supra* note 16.
[20] Henderson v. R. R., *supra* note 4.
[1] Childs v. Warner Bros. Southern Theatres, Inc., 200 N. C. 333, 156 S. E. 923 (1931).
[2] 4 Coke 119 (1603).
[3] Dumpor's Case (1873) 7 AM. L. REV. 616, 623.
[4] The following statutes nullified the rule in Dumpor's case: 22 and 23 VICT. c. 35, §1 (1859) and 23 and 24 VICT. c. 38, 6 (1860).
[5] Reid v. Weissner & Sons Brewing Co., 88 Md. 234, 40 Atl. 877 (1898); Pennock v. Lyons, 118 Mass. 92 (1875); Aste v. Putnam Hotel Co., 247 Mass. 147, 141 N. E. 666 (1923); Murray v. Harvey, 56 N. Y. 337 (1874); see German Am. Savings Bank v. Gollmer, 155 Cal. 683, 102 Pac. 932, 934 (1909).