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Appeal and Error -- Excluded on Cross-examination -- Preservation for Appeal

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of art in admiralty (*supra,* p. 472), and operates solely for the benefit of the owner, not of his insurance carrier.

The result of this particular contest between plaintiff and defendant in the arena of personal injury and death actions was an unquestioned victory for the defendant-owner, but a limited measure of success was reserved also for the plaintiff. It was an example of reasoned judicial compromise, supported by the weight of both legal principal and common sense. This can be said in spite of the almost fortuitous manner in which the conclusion was reached.

As a practical matter, whatever advantage remains to the plaintiffs, it may well be short-lived. If, as suggested, marine liability insurance rates are increased, shipowners may decide to be self-insurers so far as their public liability is concerned, on the theory that they can normally make sure that they are free of the taint of "knowledge or privity." In that case insurance on the hull would fully protect them in any limitation proceeding, and even Mr. Justice Black has said that hull insurance belongs to the owner, not to the damage claimants. It is, of course, too early to say whether such a trend will develop in practice.

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Appeal and Error—Excluded Evidence on Cross-examination—Preservation for Appeal

It is a generally accepted rule that an exception to a ruling of a trial court, complaining of an erroneous refusal to allow a witness to answer a question, will not be considered on appeal where the record does not set out what the answer of the witness would have been if he had been permitted to testify, or what the interrogating counsel expected to elicit or prove by the question asked.[1] The reasons for the

[1] Bridges v. Harold L. Schaefer, Inc., 207 Ark. 122, 179 S. W. 2d 176 (1944); Swearingen v. Dill, 21 Cal. App. 2d 151, 68 P. 2d 388 (1937); Read v. Micek, 105 Colo. 35, 94 P. 2d 452 (1939); Gilpin v. State Highway Board, 39 Ga. App. 238, 146 S. E. 651 (1929); Whyte v. Rogers, 303 Ill. App. 115, 24 N. E. 2d 745 (1940); Pearson v. Butts, 224 Iowa 376, 276 N. W. 65 (1937); Greenway Wood Heel Co. v. John Shea Co., 313 Mass. 177, 46 N. W. 2d 746 (1943); Anderson v. Anderson, 158 Miss. 116, 130 So. 91 (1930); State *ex rel.* State Highway Commission v. Baumhoff, 230 Mo. App., 1030, 93 S. W. 2d 104 (1936); Gugelman v. Kansas City Life Insurance Co., 137 Neb. 411, 289 N. W. 842 (1940); Whiteheart v. Grubbs, 232 N. C. 236, 60 S. E. 2d 101 (1950); Carolina Coach Co. v. Central Motor Lines, 229 N. C. 650, 50 S. E. 2d 909 (1948); Newbern v. Hinton, 190 N. C. 108, 111, 129 S. E. 181, 183 (1925) ("We are precluded from passing upon the merits of the defendant's objections to the evidence, since the record does not disclose what the witnesses would have said if the questions had been allowed. The burden is on the appellant to show error, and, therefore, the record *must show* the competency and materiality of the proposed evidence. This Court will not do the vain thing to send a case back for a new trial when it does not appear what the excluded evidence is, or even that the witnesses would respond to the questions in any way material to the issues. This is the established practice in this Court, in both civil and criminal cases."); Wallace v. Barlow, 165 N. C. 676,

rule are obvious. Unless such information is entered into the record at the time, the trial court cannot tell how to rule on the objection to the question propounded to the witness,[2] nor can the appellate court ascertain the competency or materiality of the proposed testimony. If on appeal it is found that the objection to the question was erroneously sustained, the appellate court will be unable to determine if the exclusion of the testimony was prejudicial, justifying a reversal, for the simple reason that the court will not have the rejected testimony before it to see if such testimony would have been favorable or unfavorable to the excepting party.[3]

Undoubtedly the general rule applies where a question is asked on direct examination of a friendly witness.[4] However, the matter of preservation in the record of excluded testimony for purposes of appeal presents problems when the answers are excluded on cross-examination of an adversary's witness or examination of a hostile witness. Should the general rule requiring that rejected evidence be perserved in the record be applied in such situations?

Perhaps the most frequently employed method of preserving the excluded testimony is for the excepting counsel to state to the court, out of the hearing of the jury, the expected answer of the witness.[5]

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81 S. E. 924 (1914); Steeley v. Dare Lumber Co., 165 N. C. 27, 80 S. E. 963 (1914); *In re* Smith's Will, 163 N. C. 464, 79 S. E. 977 (1913); Dickerson v. Dail, 159 N. C. 541, 75 S. E. 803 (1912); Stout v. V. C., S. & E. P. Turnpike Co., 157 N. C. 366, 72 S. E. 993 (1911); State v. Leak, 156 N. C. 643, 72 S. E. 567 (1911); Whitmire v. Heath, 155 N. C. 304, 71 S. E. 313 (1911); Boney v. Atlantic Coast Line R. Co., 155 N. C. 95, 71 S. E. 87 (1911); Cunningham v. Austin & N. W. R. Co., 88 Tex. 534, 31 S. W. 629 (1895); Knapp v. Wing, 72 Vt. 334, 47 Atl. 1075 (1900); 4 C. J. S., *Appeal and Error* § 291 (b) (1) n. 44 (1937); 4 C. J., *Appeal and Error* § 1662 n. 14 (1916); 3 C. J., *Appeal and Error* § 736 (bb) n. 53 (1916); 1 WIGMORE, EVIDENCE § 20 n. 6 (3d ed. 1940); Blume, *The Problem of Preserving Excluded Evidence in the Appellate Record*, 13 MINN. L. REV. 169 (1929).

[2] Griffin v. Henderson, 117 Ga. 382, 43 S. E. 712 (1903).

[3] Newbern v. Hinton, 190 N. C. 108, 129 S. E. 181 (1925); State v. Lane, 166 N. C. 333, 337, 81 S. E. 620, 622 (1914) ("We must know what the answer would have been before we can pass upon the competency or relevancy of the evidence."); Steeley v. Dare Lumber Co., 165 N. C. 27, 80 S. E. 963 (1914); Allred v. Kirkman, 160 N. C. 392, 393, 76 S. E. 244 (1912) ("We must be governed by the record in such case, and as it appears from it that the question was not answered, there is no ground for the exception, an unanswered question not being objectionable."); Whitmire v. Heath, 155 N. C. 304, 306, 71 S. E. 313, 314 (1911) ("A court can never pass intelligently upon the evidence unless it knows what the evidence is, in order that its bearing upon the issue may be determined.").

[4] See note 1 *supra*.

[5] "But ordinarily the exclusion of oral testimony can be made available as error only by asking some pertinent question, and, if an objection is sustained, informing the Court at the time what the answer would be, so that he can then determine whether the fact is or is not material. It will not do to state thereafter what the witness would have answered. . . . If a new trial should be granted because the answer was excluded, it might happen that on the second trial the question would be again propounded, allowed, and the witness give hearsay, inadmissible, or irrelevant testimony, or the answer might be harmful instead of helpful, or the witness may reply, 'I do not know,' with the result that the time

When this method is employed, the trial court must rely on the good faith of the interrogating counsel.[6] It is readily apparent that the interrogating counsel cannot state as fully what the answer would have been had the witness been allowed to testify where the question is asked to an adverse or hostile witness, as he could if he were examining a friendly witness introduced by himself.[7] Counsel does not always know on cross-examination what he expects to elicit from the witness in response to a particular question, since by its very nature, cross-examination is often exploratory.[8] Some courts have said that the application of the general rule where a question is asked on cross-examination or examination of a hostile witness requires counsel to hazard a guess as to the probable answer of the witness or to deal with the court unfairly.[9]

Another reason advanced by some courts for allowing an exception to the general rule in the case of cross-examination of an adversary's witness or examination of a hostile witness is the fact that requiring counsel to disclose the expected answer would often tend to hinder or defeat the very purpose of the interrogation. The witness is apprised of what counsel is attempting to elicit or prove by a series of questions. If the witness is apprised of the expected answer, he is placed on guard and can defeat the objective of the examination. This being the case, the real value of cross-examination might be lost if such a disclosure were required.[10]

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and money of the parties and the country has been wasted for so inconsequent a conclusion. That this is not unlikely to occur is shown by the experience of all practising lawyers, who have often seen a long and heated argument as to the right to ask a question, followed by the laughter of all bystanders when the Court held it competent, and the witness replied that he knew nothing about the matter. Parties can often agree in the presence of the Court as to what the witness would testify, or, if not, the witness or examining attorney can state what the answer would be; and, where the subject-matter is important, the judge may, in his discretion, retire the jury until its admissibility has been settled. We are well aware that the rule may be perverted into a means of getting inadmissible evidence before the jury, or, by forcing their constant withdrawal, retard the trial. The Courts must rely upon the good faith of counsel not to bring about such a result. But it would never do to grant a new trial until it appeared not only that the question was proper, but that the answer was material, and would have been of benefit to the complaining party." Griffin v. Henderson, 117 Ga. 382, 384, 43 S. E. 712, 713 (1903); Blume, *The Problem of Preserving Excluded Evidence in the Appellate Record*, 13 MINN. L. REV. 169 (1929).

[6] Griffin v. Henderson, 117 Ga. 382, 43 S. E. 712 (1903).

[7] Brock v. Cato, 75 Ga. App. 79, 42 S. E. 2d 174 (1947); Gilpin v. State Highway Board, 39 Ga. App. 238, 146 S. E. 651 (1929); Harness v. State, 57 Ind. 1 (1877); State v. Martino, 27 N. M. 1, 192 Pac. 507 (1920); Martin v. Elden, 32 Ohio St. 282 (1877); Burt v. State, 23 Ohio St. 384 (1872); Cunningham v. Austin & N. W. R. Co., 88 Tex. 534, 31 S. W. 629 (1895).

[8] Alford v. United States, 282 U. S. 687 (1931); Costa v. Regents of University of California, 116 Cal. App. 2d 445, 254 P. 2d 85 (1953); Tossman v. Newman, 37 Cal. 2d 522, 233 P. 2d 1 (1951).

[9] State v. Goodager, 56 Ore. 198, 106 Pac. 638 (1910), *rehearing denied*, 56 Ore. 261, 108 Pac. 185 (1910); Cunningham v. Austin & N. W. R. Co., 88 Tex. 534, 31 S. W. 629 (1895).

[10] *In re* Powell, 83 Neb. 119, 119 N. W. 9 (1908); State v. Goodager, 56

Because of these problems, the majority of the jurisdictions in the United States have held that the general rule applies only to direct examination of a friendly witness, allowing an exception in cases of cross-examination or examination of a hostile witness;[11] a minority of courts have refused to make such an exception.[12]

Prior to 1936 the North Carolina Supreme Court specifically refused to recognize an exception to the general rule in the case of cross-examination of an adversary's witness or examination of a hostile witness.[13] In 1936, the court, relying on the reasoning of a New Mexico

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Ore. 198, 106 Pac. 638 (1910); *rehearing denied,* 56 Ore. 261, 108 Pac. 185 (1910); Knapp v. Wing, 72 Vt. 334, 47 Atl. 1075 (1900).

[11] Alford v. United States, 282 U. S. 687 (1931); *California:* Costa v. Regents of University of California, 116 Cal. App. 2d 445, 254 P. 2d 85 (1953); Tossman v. Newman, 37 Cal. 2d 522, 233 P. 2d 1 (1951); *Georgia:* Griffin v. Henderson, 117 Ga. 382, 43 S. E. 712 (1903) (leading case); Brock v. Cato, 75 Ga. App. 79, 42 S. E. 2d 174 (1947); Gilpin v. State Highway Board, 39 Ga. App. 238, 146 S. E. 651 (1929); *Hawaii:* Choy v. Otaguro, 32 Hawaii 543 (1932); *Indiana:* Hyland v. Milner, 99 Ind. 308 (1884); Hutts v. Hutts, 62 Ind. 214 (1878); *Iowa:* Schulte v. Ideal Food Products Co., 203 Iowa 676, 213 N. W. 431 (1927); *Kansas:* Leavens v. Hoover, 93 Kan. 661, 145 Pac. 887 (1915); McIntosh v. Standard Oil Co., 89 Kan. 289, 131 Pac. 151 (1913); *Massachusetts:* Grandell v. Short, 317 Mass. 605, 59 N. E. 2d 274 (1945); *Michigan:* O'Donnell v. Segar, 25 Mich. 366 (1872); *Minnesota:* Uhlman v. Farm Stock & Home Co., 126 Minn. 239, 148 N. W. 102 (1914); *Montana:* Loncar v. National Union Fire Ins. Co., 84 Mont. 141, 274 Pac. 844 (1929); Howard v. Fraser, 83 Mont. 194, 271 Pac. 444 (1928); *Nebraska:* Larson v. Hafer, 105 Neb. 257, 179 N. W. 1013 (1920); *In re* Powell, 83 Neb. 119, 119 N. W. 9 (1908); *New Mexico:* State v. Martino, 27 N. M. 1, 192 Pac. 507 (1920); *Ohio:* Martin v. Elden, 32 Ohio St. 282 (1877); Burt v. State, 23 Ohio St. 394 (1872); *Oregon:* Arthur v. Parish, 150 Ore. 582, 47 P. 2d 682 (1935); State v. Goodager, 56 Ore. 198, 106 Pac. 638 (1910), *rehearing denied,* 56 Ore. 261, 108 Pac. 185 (1910); *Texas:* Cunningham v. Austin & N. W. R. Co., 88 Tex. 534, 31 S. W. 629 (1895); Galveston, H. & S. A. Ry. v. Currie, 91 S. W. 1100 (Tex. 1906) (exception to the general rule was not allowed when a leading question was propounded on cross-examination because evidently counsel knew what he intended to elicit from the witness); *Vermont:* State v. Parker, 104 Vt. 494, 162 Atl. 696 (1932); Knapp v. Wing, 72 Vt. 334, 47 Atl. 1075 (1900); *Washington:* Le Doux v. Seattle North Pacific Shipbuilders Co., 114 Wash. 632, 195 Pac. 1006 (1921). The exception to the general rule is also supported by Wigmore. 1 WIGMORE, EVIDENCE § 20 (3d ed. supp. 1953).

[12] Birmingham Electric Co. v. McQueen, 253 Ala. 395, 44 So. 2d 598 (1947); Flowers v. Graves, 220 Ala. 445, 125 So. 659 (1929); Williams v. State, 175 Ark. 752, 2 S. W. 2d 36 (1927); Munsell v. Yerger, 155 Ark. 385, 244 S. W. 465 (1922); Vale v. Illinois Pipe Line Co., 281 Ky. 1, 134 S. W. 2d 940 (1939); Walker v. Rogers, 209 Ky. 619, 273 S. W. 439 (1925); Holladay v. Moore, 115 Va. 66, 78 S. E. 551 (1913); American Bonding & Trust Co. v. Milstead, 102 Va. 683, 691, 47 S. E. 853, 856 (1904) ("'Where a question is asked, and the witness is not permitted to answer, the bill of exceptions must show what the party offering the witness expected or proposed to prove by him.' And the same rule applies where a question is asked on cross-examination which the witness is not permitted to answer."); Soules v. Brotherhood of American Yeoman, 19 N. D. 23, 120 N. W. 760 (1909).

[13] State v. Brewer, 202 N. C. 187, 162 S. E. 363 (1932); Steeley v. Dare Lumber Co., 165 N. C. 27, 80 S. E. 963 (1914); Stout v. V. C., S. & E. P. Turnpike Co., 157 N. C. 366, 72 S. E. 993 (1911); State v. Leak, 156 N. C. 643, 72 S. E. 567 (1911).

case,[14] decided *Etheridge v. Atlantic Coast Line Railway Company*,[15] recognizing an exception where the question was asked a witness on cross-examination or examination of a hostile witness. The court in the *Etheridge* case stated:

> "Upon examination, we have been unable to find in North Carolina [a case], in applying the general rule, where the question was asked on cross-examination of an adversary and hostile witness. The decision in the *Martino case, supra,* seems to be the 'logic of the situation.' "[16]

The reason advanced by the court for the exception was the fact that the interrogating counsel could not be expected to state to the court what the witness would answer in such a case. This proposition was followed in two later cases,[17] decided in 1936 and 1940 respectively. However, in the interim, the court in 1939, without overruling or disapproving the previous cases which recognized the exception, refused to allow an exception to the general rule where the question was asked on cross-examination.[18] Until the recent case of *State v. Poolos*,[19] the North Carolina position in regard to this matter was somewhat uncertain. In the last previous case in which the court discussed the allowance of an exception where the question was asked on cross-examination or examination of a hostile witness, *State v. Wray*,[20] decided in 1940, the court recognized the exception. However, in 1950 the court, without mention of the previous cases which allowed such an exception, applied the general rule even though the question was propounded to the witness on cross-examination.[21]

[14] "It is further to be noted that this witness was asked this question upon cross-examination, and counsel for appellant where not charged with knowledge of what the answer of the witness would be. He was not appellant's witness. Counsel for appellant, therefore, would not be expected to be able to state to the court what the witness would answer. Under such circumstances the rule requiring a statement by counsel, advising the court of the nature of the testimony which the witness would give, has no application." State v. Martino, 27 N. M. 1, 8, 192 Pac. 507, 509 (1920).

[15] 209 N. C. 326, 183 S. E. 539 (1936).

[16] Etheridge v. Atlantic Coast Line Ry. Co., 209 N. C. 326, 332, 183 S. E. 539, 542 (1936).

[17] State v. Wray, 217 N. C. 167, 7 S. E. 2d 468 (1940); State v. Huskins, 209 N. C. 727, 184 S. E. 840 (1936).

[18] Hammond v. Wiliams, 215 N. C. 657, 35 S. E. 2d 437 (1939).

[19] 241 N. C. 382, 85 S. E. 2d 342 (1955) (Counsel for the defendant, cross-examining one of the State's witnesses, asked the witness if on one occasion she had tried to commit suicide by eating bobby pins. The State's objection to the question was sustained. Defendant's counsel merely excepted to the ruling and assigned it as error. On appeal, the question was found to be a proper one for the purpose of impeaching the credibility of the witness, but the appellate court refused to consider the exception because the record did not disclose what the reply of the witness would have been if she had been allowed to testify.).

[20] 217 N. C. 167, 7 S. E. 2d 468 (1940).

[21] Whiteheart v. Grubbs, 232 N. C. 236, 60 S. E. 2d 101 (1950).

The *Poolos* case disapproved the New Mexico case[22] and the previous North Carolina cases[23] which had recognized the exception, and refused to accept as a valid reason for an exception in the case of cross-examination or examination or a hostile witness the fact that the interrogating counsel could not be expected to state the expected answer.

> "We do not think this reasoning is sound, for, after all, it is not what the attorney knew or did not know that is determinative of the question. Here, as in other similar situations, it is what the witness would have said in response to the question, if she had been permitted to answer, that would enable us to determine whether the appellant was prejudiced by the ruling below."[24]

Thus, all doubt is now removed as to the position of the North Carolina courts. The rule may now be stated that when an objection is sustained to a question propounded to a witness on either direct or cross-examination, and the record fails to show what the witness would have answered had he been permitted to do so, the exception to the exclusion of the testimony will not be considered on appeal.[25]

In North Carolina, when an objection is made to a question asked a witness, and there is some doubt as to the competency of the answer, the trial judge should ask the interrogating counsel in the absence of the jury, to state what he expected to prove by the question asked.[26] If counsel does not show what he intended to prove by the proposed testimony, an exception to an exclusion of the testimony will not be considered by the appellate court.[27] If the trial judge then sustains the objection, excluding the testimony proposed to be elicited, the interrogating counsel must see that the testimony the witness would have given, if he had been permitted to answer, is entered in the record by the witness to the court stenographer outside of the hearing of the jury, in order for an exception to the ruling to be considered on appeal.[28] This practice meets all of the needs of the reviewing court.

[22] See note 14 *supra*.
[23] See notes 16 and 17 *supra*.
[24] State v. Poolos, 241 N. C. 382, 384, 85 S. E. 2d 342, 343 (1955).
[25] State v. Poolos, 241 N. C. 382, 85 S. E. 2d 342 (1955).
[26] Hicks v. Hicks, 142 N. C. 231, 55 S. E. 106 (1906); STANSBURY, NORTH CAROLINA EVIDENCE § 27 (k) (1946).
[27] Steeley v. Dare Lumber Co., 165 N. C. 27, 30, 80 S. E. 963, 964 (1914) ("'The general rule is that the party asking the question which is excluded must disclose to the court what he expects to prove by the witness,' for the reason that the court must be able to judge of the competency or materiality of the evidence proposed to be elicited—not the counsel."); *In re* Smith's Will, 163 N. C. 464, 79 S. E. 977 (1913); State v. Leak, 156 N. C. 643, 72 S. E. 567 (1911); Boney v. Atlantic Coastline R. Co., 155 N. C. 95, 71 S. E. 87 (1911); Bernhardt v. Dutton, 146 N. C. 206, 59 S. E. 651 (1907); STANSBURY, NORTH CAROLINA EVIDENCE § 27 (k) (1946).
[28] State v. Poolos, 241 N. C. 383, 85 S. E. 2d 342 (1955); Carolina Coach Co. v. Central Motor Lines, 229 N. C. 650, 50 S. E. 2d 778 (1954); Snyder v. Asheboro, 182 N. C. 708, 710, 110 S. E. 84, 85 (1921) ("Since the record fails to dis-

It is submitted that the necessity of having the anticipated testimony in the record in order to determine whether the exclusion was prejudicial outweighs the reasons advanced for allowing an exception to the general rule where a question is asked on cross-examination or examination of a hostile witness. The *Poolos* case is in accord with the accepted practice in this jurisdiction as it prevailed prior to 1936 and to this writer represents the sounder view.

GEORGE M. BRITT.

Constitutional Law—Use of the Police Power for the Attainment of Aesthetic Considerations

In the recent case of *Berman v. Parker*[1] the Supreme Court decided that the appellant was not deprived of his rights under the Fifth Amendment to the United States Constitution by the condemnation of his private property for aesthetic considerations by the exercise of the police power of Congress delegated to the District of Columbia Redevelopment Land Agency. The condemnation was made under the authority of the District of Columbia Redevelopment Act of 1945, D. C. Code §§ 5-701 to 5-719 (1951), hereinafter referred to by section number.

The general purpose of the statute as set out in § 5-701 is "to eliminate the substandard housing conditions and the communities in the inhabited alleys and blighted areas" in the District of Columbia by acquiring the property through gift, purchase, or the use of eminent domain.

This act empowers the District of Columbia Redevelopment Land Agency, hereinafter called the Agency, to acquire and assemble real property in order to "further the redevelopment of *blighted territory* in the District of Columbia by the prevention, reduction, or elimination of *blighting* factors or causes of *blight*."[2] (Emphasis added) The Agency, once such property is assembled, then has the power, in accordance with the plan of the District of Columbia Planning Commission, to transfer to the District or to the United States all property to be devoted to public uses, and to lease or sell the remainder to private individuals or corporations to redevelop in accordance with the plan of the commission.

Under the definition of "redevelopment" given in § 5-702 (n) of the Act, the redeveloper would have the power to replan, clear, redesign, and rebuild the project area. This would seem to include totally

close what the witness would have said, we cannot assume that his answer would have been favorable to the defendant. It would be vain to grant a new trial upon the hazard of an uncertain answer by the witness."); STANSBURY, NORTH CAROLINA EVIDENCE § 29 (b) (1946).

[1] 75 Sup. Ct. 98 (1954).
[2] D. C. CODE § 5-703 (1951).