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Instructions to the Jury

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INSTRUCTIONS TO THE JURY

One should take caution in using "instructions" or "requests to charge" as collected from other jurisdictions which place no limitation on the judge's power to charge a jury as does Article 5, Section 26 of the South Carolina Constitution. They will be found collected in "Brickwood Sackett Instructions", "Branson's Instructions to Juries" and "Reed's Branson's Instructions to Juries", the latter being Branson's Text brought up to 1936.

Since a judge in South Carolina cannot charge on the facts, any request to charge must not state a fact in it, directly or indirectly. If a request is so framed as to present to the jury a certain fact or facts together with a conclusion to be drawn in behalf of that party, the request must be framed hypothetically. Therefore, even if there is a doubt whether the request harbors a fact within itself, solve that doubt by beginning the request with "IF".

For example: "If you find from the evidence that so and so is the truth, then plaintiff would not be entitled to recover and your verdict would be for the defendant."

Be very careful, before adopting verbatim a request or instruction from any of the three above texts, that it does not state any fact. It is always advisable to try and find a like South Carolina case with requests in it that have met the Supreme Court's approval, and select one's requests therefrom.

Collins etc. Co. v. Hewlett (1917), 109 S. C. 245, 95 S. E. 510, tells one that in South Carolina the judge must charge basic law even though not requested. Following that case is generally considered by the Bar that in a negligence case a judge must (1) define negligence and state what legal duty was owed the defendant; (2) that defendant is not liable unless his negligence was a proximate cause, defining same; (3) that actual damages are to be awarded, if liability, defining same; (4) who has the burden of proof, defining same.

As said in the *Collins* case at page 253:

> . . . . Suppose the Court had only read the pleadings, and then directed the jury: "You will, therefore, decide either in favor of the plaintiff or for the defendant. If you find that the plaintiff has not made out its case by the greater weight of the evidence, you will find for the

defendant. If you find that the plaintiff has made out his case by the greater weight of the evidence, you will find for the plaintiff."

Plainly that would not have been a compliance with the direction of the Constitution to declare the law. The law is the right of a party arising out of a state of facts. A jury ought to be instructed about what right springs out of a fact to be determined by them. The jury ought not to be left to cut a way through the woods with no compass to guide it. It is true a Court is not bound to charge all the law, on every phase of the case, at the risk of a reversal for a violation of the Constitution. It has been frequently held that a party who desires a specific charge, one not embraced in the general charge of the Court, ought to request it. We think the instant charge was hardly a sufficient compliance with the Constitution. The jury was not instructed in what the breach of a contract consisted, and the difference between a partial breach and an entire breach, and the legal consequences of such breaches, and the duty the plaintiff owed to the defendant in the event of a breach by the defendant, and the measure of damages the plaintiff was entitled to, in the event of recovery. . . .

However, *White v. Charleston etc. Ry. Co.* (1925), 132 S. C. 448, 129 S. E. 457, has cast serious doubt on the entire matter as to what is "basic". There the judge left out (3) above, and the Supreme Court said he was under no duty as to defining actual damages since such omission could occur by "inadvertence", and that the duty was on the attorney to specially request such a charge. So, where does the judge's contsitutional duty begin and end? We have no definite yardstick. The law as to that is now on a case basis, i.e., one must know his cases on the particular subject.

State v. Brice (1930), 190 S. C. 208, 2 S. E. 2d 391, tells the judge he must charge the law of self-defense, when that issue is in the case, and no special request by the attorney is necessary, and yet, in a homicide case, an attorney can virtually electrocute his client in South Carolina if he fails to request a charge as to recommendation to mercy. *State v. Adams* (1903), 68 S. C. 421, 97 S. E. 676, wherein the Court declared at page 427:

. . . . Failure to charge the jury that they could convict of murder and recommend to mercy, and that such recommendation would result in a sentence of life imprisonment instead of a sentence of death, has been held by this Court not to be reversible error, when there was no request for such a charge. *State v. Owens,* 44 S. C., 324, 22 S. E., 244. The rule is thus stated in *State v. Myers,* 40 S. C., 556, 18 S. E., 892: "As will be observed, in the first ground of appeal the appellant alleges that the Circuit Judge erred in failing to make a charge that appellant now thinks would have inured to his benefit. By numerous decisions of this Court it has been held to be the law in this State, that no such allegation of error will be considered in this Court unless a request for such charge has been made to the Circuit Judge on the trial before him." See 11 Ency. P. & P., 217, and the numerous authorities there cited. The author says: "The failure of a Judge to charge upon any material point usually results from inadvertence, and the law casts upon the parties the duty of calling the Judge's attention to the matter. If he then refuses to give a proper requested instruction, such refusal is a ground of error; but a party cannot, in a court of error, avail himself of an omission which he made no effort to have supplied at the time. The Court cannot be presumed to do more in ordinary cases than express its opinion upon the questions which the parties themselves have raised on the trial. It is not bound to submit to the jury any particular proposition of law unless its attention is called to it. If counsel desire to bring any view of the law of the case before the jury, they must make such view the subject of a request to charge, and failing in this they cannot assign error."

Any other doctrine would, we think, produce overwhelming embarrassment and delay in the practical administration of justice. Under the Constitution of 1895, the rule has been applied in *State v. Smith,* 57 S. C., 489, 35 S. E., 727; *State v. Chiles,* 58 S. C., 47, 36 S. E., 496; *Youngblood v. R. R. Co.,* 60 S. C., 9, 38 S. E., 232; *Sudduth v. Sumeral,* 61 S. C., 276, 39 S. E., 434, and other cases. The doctrine is based on acquiescence and waiver. It is true, the Constitution of 1895 requires the Judges

> in charging juries "to declare the law." But the right to have all the law declared may be waived like any other right, and an omission acquiesced in. The failure to request instructions on any particular point is regarded waiver of the right to such instruction and acquiescence in the omission.

State v. McGee (1930), 185 S. C. 184, 193 S. E. 303, puts no duty on the judge as to charging regarding the degree of proof necessary as to the elements of self-defense. Maybe that case can be distinguished because the judge asked the attorney if there was anything further and got no response. He is under no duty to charge that certain conduct is negligence per se. There again a careless or ignorant attorney can lose his client's case by waiver. *Williams v. S. A. L. Ry.* (1906), 76 S. C. 1, 56 S. E. 652.

Even the presumption of innocence, one of the strongest known to the law, is not basic when the Court by "an oversight" fails to charge as to it. In the absence of a request to charge there is waiver. *State v. Barnett* (1951), 218 S. C. 415, 63 S. E. 2d 57.

Of course, if the judge charges a principle of law which is correct as far as it goes, but something could have been added, it is the attorney's duty to request the addition, else there is waiver. *Harrelson v. Reeves* (1951), 219 S. C. 394, 65 S. E. 2d 278. As said in *Nichols v. Congaree Fertilizer Co.* (1929), 151 S. C. 417, 149 S. E. 162, at page 420:

> .... The Court made a general and comprehensive charge of the law applicable to the issues made by the pleadings and the evidence; and what he said with respect to contributory negligence and assumption of risk could not possibly have misled or confused the jury. In fact, the charge on these questions was unusually clear. If counsel for the defendant thought it was too general, he should have requested more specific instructions. [Cases cited]

Only law that is applicable to the issues in the case should be charged. *State v. Rivers* (1938), 186 S. C. 221, 196 S. E. 6. This also should make a trial attorney cautious in preparing his requests to charge. As the Court pointed out on page 224 of the *Rivers* case:

> In charging a jury, the Circuit Judge should be cautious to charge only the law which is applicable to the

> case as made by the facts, for under some circumstances a mass of inapplicable law burdened upon the juror's mind may lead to great confusion. It is the constitutional duty of the Circuit Judge to declare the law, but this duty as heretofore stated only requires a statement of the law which is required by the facts adduced by the testimony. However, even though there was no testimony concerning the commission of a felony, we do not feel that this utterance on the part of the Circuit Judge in his charge constitutes reversible error. The jury could not have been misled by the reading of the above section of the Code when they were clearly and unequivocally instructed that the section read to them was not applicable to the facts of the case presented for their determination and conclusion, inasmuch as no felony or larceny had been disclosed by the testimony. This exception is overruled.

See *Munn v. Asseff* (1954), 226 S. C. 54, 83 S. E. 2d 642, especially page 59.

Judge's Duty in Charging Jury: See *Powers v. Rawls* (1922), 119 S. C. 134, 112 S. E. 78.

Judge's Duty in Ruling in Evidence: State v. Turner (1921), 117 S. C. 470, 109 S. E. 119.

Attorney's Duty at Time of Argument: State v. Singletary (1938), 187 S. C. 19, 26, 196 S. E. 527.

The custom now is to present requests to county and circuit judges as soon as the trial begins, usually after the pleadings are read. It was started, the writer understands, by Circuit Judge Griffith, and it is very practical and helpful to a trial judge and gives him plenty of time to check the requests.

When Jury is Judge of the Law: In South Carolina under Article I, Sec. 21 of the Constitution, the jury is the judge of the law as well as the facts in criminal libel cases only, and not in criminal slander cases. But, under the rule in *State v. Syphrett* (1887), 27 S. C. 29, 2 S. E. 624, even tho the jury is the judge of what the law is, the judge must charge them the law as it exists in South Carolina, whether they apply it or not, and, if the judge charges them the wrong law, a new trial will be granted. So in such cases also the necessary requests to charge should be prepared and handed to the judge. The Court said at page 30:

> Judge Kershaw, in his charge to the jury, while fully recognizing the right of the jury, under an indictment for libel, to be the judges of the law as well as the facts, said that he did not think that this relieved him from the duty of giving to the jury his views of the law of libel. ...

Again at page 34 it was declared:

> From this it follows that it is not only the right, but the duty, of the presiding judge, upon the trial of indictments for libel, to declare to the jury the law applicable thereto, and if he errs in so doing, such errors may be reviewed on appeal, just as in any other case, unless the defendant is acquitted, when, under a well settled principle of the common law, now incorporated in our constitution, "no person, after having once been acquitted by a jury, shall again for the same offence be put in jeopardy of his life or liberty." *Constitution*, article I., section 18.

Judge Must Charge as to Issues Made by the Evidence: In this state the judge must charge the law applicable to the issues as they exist when all the evidence is in, even tho by neglect, ignorance or by consent of an attorney, the evidence that has come in without objection has changed the issues from those raised by the pleadings and may have changed the entire cause of action. *Taylor v. Winnsboro Mills* (1927), 146 S. C. 28, 143 S. E. 474. The Court said at page 36:

> "There may be a recovery upon evidence tending to show that an injury was caused by the negligence alleged in the complaint operating as a proximate cause in conjunction with another independent proximate cause not alleged." [Cases cited]
>
> In this case we think the issue of proximate cause was properly left for the jury to decide. Of necessity the practice requires that the items of negligence relied on for recovery must be alleged in the complaint, and, if objection be made, no other act of negligence can be shown by the testimony; but, if the testimony does tend to establish other acts of negligence, and no objection be made thereto, the jury may consider the other acts of negligence, though, if objection is made thereto, the plaintiff should move to amend his complaint by inserting them without actually serving a new complaint, and this mo-

> tion is addressed to the sound discretion of the trial Judge, and, if he allows the amendment, then the testimony may be admitted; if he disallows the amendment, the testimony will be excluded.
>
> In this case there was testimony tending to show that the defendant had promulgated an oral rule, but that it was customary for the servants to disregard the rule. This item of negligence was not alleged in the complaint, but it is in the record without objection, and was before the jury, and the jury had the right to consider it. . . .

It should be noted that if new or different issues are allowed to come into a case, to that extent changing the cause as pled, the attorneys should see to it that the pleadings are at once amended so that the case as finally tried will so show up as a matter of record in the clerk's office, since evidence never becomes a matter of record. Unless this is done, one's client may win on the case as finally tried and the other side may sue again on that cause or issue as was made by the evidence, and when the record is brought up from the clerk's office, it will not show any res adjudicata because that record would show that an entirely different cause was tried, or that an entirely different issue was tried, and hence one's client would be open to fighting again a suit he had already won, because his attorney failed to move to have the pleading amended to correspond to the evidence.

BURDEN OF PROOF:

See the writer's article on "Variations in Burden of Proof" in S. C. Law Quarterly, Vol. 1 of 1949.

The charge that the writer adopted when county judge as to burden of proof was as follows:

> By preponderance the law means not necessarily by the greater number of witnesses or the greater quantity of the evidence, but by the greater truth, i.e., by that evidence in which the jury has not necessarily the greatest faith, but the greater faith.

He has heard circuit judges express it in about the same language.

Waiver as to Misstatement of Issues: If in South Carolina a judge misstates an issue to the jury, the attorney should at once call his attention to it, otherwise his client will have waived the error. *Hancock v. Junior Order, etc.* (1936), 180

S. C. 518, 186 S. E. 538, and *Richardson v. Gen. Motors etc. Corp.* (1952), 221 S. C. 15, 68 S. E. 2d 874.

Jury to be Absent, When: Act No. 27 of 1953, page 28, now set forth in the Supplement to Code as Sec. 10-1210, added a new judicial step in that it provides that, after the charge, "the Court shall temporarily excuse the jury" so that objections to the charge or additional requests may be made "out of the presence of the jury".

This Act like Sec. 38-202 of the Code is evidently mandatory, however it should be noted that none of the cases applying the Act have as yet held that, if the judge does not excuse the jury of his own accord, the attorney would waive his client's right in that regard, if he did not request that the jury be excused. *Munn v. Assef* (1954), 226 S. C. 54, 83 S. E. 2d 642; *Richardson v. Register* (1955), 227 S. C. 81.

Magistrates Must Charge Basic Law: Does the Constitutional provision apply to a magistrate, even if he has no legal education? Undoubtedly, yes. *Marshbank v. Marshbank* (1900), 58 S. C. 92, 36 S. E. 438, holds that all magistrates are "judges" and must charge the basic law; if any cannot do so, the court said he should not hold office. This really places a special responsibility on an attorney to have requests prepared on the basic law and to present them to the magistrate as soon as the trial starts, because nearly all magistrates are laymen.

Positive and Negative Evidence: At this point it may be well to call attention to positive and negative evidence since when they appear together in a case the jury should be charged regarding their respective legal values. The rule in South Carolina as to whether positive would legally outweigh negative evidence used to be rather tenuous. *Littlefield v. Clarke* (1811), 4 Desaus. 165. There preference was given to positive, but seemingly only where the credibility of the witnesses had not been attacked. *Callison vs. Ry.* (1916), 106 S. C. 123, 90 S. E. 260 no longer gives any legal preference. It now turns on the weight to be given the two kinds of evidence and on the credibility of witnesses, both of which are for the jury. *Davis v. Payne, D. G.* (1922), 120 S. C. 473, 113 S. E. 325, doesn't change the *Callison* case rule, since in the *Davis* case the negative evidence was no good as a matter of law because of the existing noise making the hearing of any sound signals reasonably improbable.

Although a jury in South Carolina must apply the law that comes from the judge in order to reach a proper verdict, it is a peculiar coincidence that their oath doesn't cover that, but they swear only to render a "true verdict" "according to the evidence". Earle's Forms numbers 179, 425 and 438. Hence, it is well to have a request to charge that they must apply only the law charged them by the court, except, of course, in criminal libel cases, where they are judges of the law under the constitution.

Are Written Requests Necessary for Further Instructions? The answer is, No. As stated in *Goodwin v. Harrison* (1957), 231 S. C. 243, 98 S. E. 2d 255, at page 248:

> A further contention of appellants is that the request for the instruction was not presented in writing as required by Circuit Court Rule 11. In the first place, that was not the reason of the refusal of it by the court which stated that it was uncertain whether that issue was in the case, and it was added by the court that instruction would not be given with reference to it, quoting from the record, "one way or the other." Secondly, Code Section 10-1210 [See 1955 Supplement to Code] does not contemplate written requests for further or other instructions. It provides that after the court has delivered to the jury a charge on the law, the jury shall be temporarily excused to give counsel an opportunity, quoting from the statute, "to express objections to the charge or request the charge of additional propositions * * *." See the several decisions which have construed and applied the statute and are cited in the footnotes to it in the code supplement.

Use of West's Digest: At this point attention is called to the fact that hereafter West's S. C. Digest, which should always be thoroughly checked, will not be referred to by sections but only by volume and beginning page of the subject. It will be just as easy for the reader to turn to the index of the subject in the Digest and find the phase he desires to check. So, reference is now made to Volume 18 of that Digest, beginning at page 1.

Quotient Verdicts: Bunton v. State Highway Depart. (1937), 186 S. C. 463, 196 S. E. 188, at page 476 calls attention to the rule that a judge can refuse to charge a request

regarding a quotient verdict as it may "suggest evil to the jury." The Court followed the law of other jurisdictions when it declared on page 477:

> Upon consideration, we hold, in line with the rule stated in other jurisdictions, that a quotient verdict is illegal, and that where it is clearly shown that the verdict rendered is such a one, it should not be allowed to stand. We see no good reason, however, to require the trial Judge to charge the jury with regard thereto; but we hold that, in the exercise of a wise judgment, he may properly do so, it being a matter entirely in his discretion. . . .

When Instruction Coercive: Harper v. Abercrombie (1920), 115 S. C. 360, 105 S. E. 749, tells one how far the judge may go, without being reversed, while *Fairey v. Haynes* (1916), 107 S. C. 115, 91 S. E. 976, points out when he has gone too far, such as telling the jury: "I would dislike to send such a good-looking body of men to jail . . . ."

Delivery of Verdict: A verdict is published when it is read in the courtroom in the presence of the jury. Prior to that, no one in the courtroom except the jury would know what the verdict was.

In *Lorick and Lowrance v. Walker* (1929), 153 S. C. 309, 150 S. E. 789, where a jury, as instructed, left a sealed verdict with the bailiff, the writer ruled that he had no power to have the jury reform the verdict. But the ruling was reversed because they never had been discharged and should have been instructed and sent back to the jury room. As said at page 314:

> . . . . Even when a sealed verdict is permitted to be returned, and the jury has been allowed to disperse and separate from the time of their announcement of agreement to the time of the publication of the verdict, when it appears that the verdict is clearly erroneous as to form, the judge has the power to require a reconsideration by the jury. [Cases Cited]
>
> If the judge thought there was an error in the form of the verdict, either in the misuse of the word "defendant" for that of "plaintiff," or as to the amount of the finding for the defendant, he had the right to inquire thereabout, in the proper manner, or by polling

> the jury, and, upon ascertainment that there was an error, he could have directed a proper correction, either by sending the jury back to their room to write a correct verdict or by having the correction made in open Court with the jury's consent. . . .

Here is another instance that clearly shows a trial attorney should be present when a verdict is to be published. Also, if an attorney is present, he can exercise the right of polling the jury, which is a substantial right of his client's though apparently in South Carolina one discretionary with the judge. It can be exercised at any time between publication of the verdict and discharge of the jury.

In *State v. Prince* (1937), 185 S. C. 150, 193 S. E. 429, at page 156 one finds the application of the South Carolina rule as follows:

> The presiding Judge held that a sufficient agreement had been shown, and received the verdict. Upon appeal being taken to this Court it was held that there was a single and simple matter to be determined, whether at the moment of the publication the verdict represented the juror's conclusion, which required nothing more than his statement, unless there should be made to appear some fact which would discredit him. The Court quoted with approval the following statement in 16 C. J., 1098: "Polling the jury is a practice whereby the jurors are asked individually whether they assented and still assent to the verdict. * * * The jury may be polled after the verdict is given and before it is filed; and a motion or request to poll should be made as soon as the verdict is announced."
>
> It is quite obvious that it would be an idle ceremony to poll the jury if the dissent of a juror to the verdict when it is published is to be disregarded; his previous assent, until such polling is accomplished, is in all instances presumed. [Cases Cited.]

Durst v. So. Ry. at al., (1931), 161 S. C. 498, 159 S. E. 844, gives us a rule in South Carolina that seems to be more liberal in construing a verdict than some of the cases in other jurisdictions, in that the *Durst* case says at page 506 not only the language of the verdict but "other things occurring in the trial", including the charge and forms of

verdicts given the jury may be "regarded" in construing the verdict. One wonders if the court meant to include the evidence also as one of the "other things" to be considered. An earlier decision, *Manson v. Dempsey* (1910), 88 S. C. 193, 70 S. E. 610, would leave no doubt, for there the meaning of the verdict was allowed to be explained by reference to the evidence.

Special Verdicts: Sections 10-1452 to 10-1455, with their annotations should be carefully read relative to this topic. Technically a "special verdict" is one where the jury finds all the facts — operative facts or principal facts — as alleged in the pleading, and the judge applies the law and reaches a conclusion. In South Carolina we have confusion although section 10-1452 defines "special verdict", as where the jury "finds the facts only leaving the judgment to the court". *Armitage, Admix. v. Ry.* (1932), 166 S. C. 21, 164 S. E. 169, tells us it is a special verdict though but one issue, or pleaded fact, was found by the jury. In reality, it was a "special finding of fact", namely, whether Mrs. Armitage was the statutory beneficiary. A general verdict was also rendered for the defendant.

Even in Sec. 10-1453 the legislature used confusing language. First, it speaks of a "special verdict" upon "any or all of the issues", then, that the jury, if they render a general verdict, may be instructed to "find particular questions of fact with a written finding thereon". Thus, we find that in South Carolina a special verdict can be nothing more than a finding of a fact or facts. And Section 10-1454 provides that "when a special finding of facts shall be inconsistent with a general verdict the former shall control the latter."

It should also be noted that Section 10-1453 says "in every action for the recovery of money only or specific real property the jury in their discretion may render a general or special verdict."

Of course, a jury being laymen wouldn't know they had the power or how to use it. So they never act of their own accord, and even if a judge instructed them in such cases to find a special verdict and defined it, they wouldn't have to do so under a strict interpretation of the above language. What definite interpretation the Supreme Court has given the section it is difficult to say. In *Manson v. Dempsey,*

supra the decision let the general language of the section, namely, that *"in all cases"* the court "may instruct the jury, if they render a general verdict, to find upon particular questions of fact", override the specific language, but the ruling was pure dictum, as the case was not to recover specific real property.

In *Palmetto Fertilizer Co. v. Columbia N. & L. R. Co.*, (1910), 99 S. C. 187, 83 S. E. 36, which was for the recovery of money only, the above dictum rule on this point seems to have been applied. However, in the later decision of *Floyd v. N. Y. Life Ins. Co.*, (1918), 110 S. C. 384, 96 S. E. 912, a case also for "recovery of money only", the court held that whether a special verdict or finding of fact should be rendered was solely in the discretion of the jury, thus giving the specific language of the section right of way over the general, which is the usual rule of construction. The opinion in the *Floyd* case declares at page 390:

> The Court was not bound to direct the jury to find a special verdict upon any or all of the issues. The statute directs that the Court may make such direction. Section 321, Code. In the cases relied upon by the appellant the Court had so directed, and we only held that the jury was bound to follow the direction. *Fertilizer Co. v. Railroad,* 99 S. C. 197, 83 S. E. 36. More than this, the instant action is for the recovery of money only, and in such a case the rendition of a special verdict is in the discretion of the jury. Code, sec. 321.

Care should be taken as it is the duty of the attorney, not the judge, to see to it that a special verdict or finding of fact is rendered. *Castles v. South Carolina Law and Collection Agency,* (1915), 104 S. C. 81, 88 S. E. 273. Also, that the attorney should hand it to the judge, who in turn will see that it goes to the jury.

Since one never knows what facts a jury has found or whether they applied the law as charged then when a general verdict is rendered, it is sometimes wise in civil cases to have them find particular facts along with a general verdict.

The writer, as head of the trial department of the Federal Land Bank in Columbia from 1933-1935 ascertained that in North Carolina a general verdict was seldom rendered. In the everyday trial of cases, the jury brought in only

special verdicts or findings of facts; the judge then applied the law and came to a conclusion. It appeared to the writer, and this was confirmed by a number of North Carolina attorneys, that greater justice was done in the long run by this method, and that it was a wholesome check on the jury phase of a trial.

Special Interrogatories: South Carolina has no statute with reference to submitting interrogatories to a jury as to issues of facts. The nearest thing to that is "finding upon particular questions of fact", as provided in Sec. 10-1453, above discussed.

One wonders about the rule in Indiana as stated in *Evansville etc. Co. v. Spiegel,* (1911), 49 Ind. App. 412, 94 N. E. 718, that, in order to reconcile the interrogatories with a general verdict, evidence which might have been introduced (but wasn't) would be treated as though introduced and acted on by the jury. Such a rule seems too far-fetched for attaining justice or else jurors in Indiana can be given credit for far-reaching imaginations.

Impeaching The Verdict: In South Carolina, while not technically impeaching a verdict, the result of the trial judge's viewing the premises of an occurrence without the knowledge and consent of the attorneys is indirectly the same in effect in that it results in a new trial. *Ralph v. So. Ry.* (1931), 160 S. C. 229, 158 S. E. 409.

Should a jury take a like view there would be no doubt of their verdict being impeached, but as to how their conduct would be proved, whether by their affidavits or testimony in court, or by affidavits or testimony of those who saw them viewing the premises or else heard them say they took such view, is a matter of "much refinement and qualification by different courts."

The more modern rule, as applied in several other jurisdictions seems to be gaining ground, namely, that matters "resting in the personal consciousness of one juror" and thus inhering in his conclusion or verdict cannot be explored at all, while his overt acts such as are "open to the knowledge of all the jury" can be fully gone into. Two interesting decisions which go rather thoroughly into the question are *Phillips v. Rhode Island Co.* (1910), 32 R. I. 16, 78 Atl. 342 and *Mattox v. U. S.* (1892), 146 U. S. 140, 13 Sup. Ct. 50.