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Evidence

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EVIDENCE

CHARLES H. RANDALL, JR.*

The rulings of the Supreme Court in the field of evidence have continued to embody sound common sense during the period covered by this Survey.1 The Court has consistently indicated its awareness that considerable discretion must be placed in the trial judge. The latter of necessity makes his rulings in the heat of battle and not in the calm and leisurely atmosphere of an appellate proceeding. Both the Model Code of Evidence2 and the Uniform Rules of Evidence3 have stressed the necessity of placing this discretion in the trial judge. The great teachers of the law of evidence are strongly of this opinion.4

The cases which arose during this period involve the application of settled principles to difficult factual situations rather than the evolution of new doctrine.

Examination of Witnesses

Opinion Evidence—Skid Marks. In Willard v McCoy,5 the Supreme Court reiterated its rule6 that a policeman who examined the scene shortly after an accident occurred could not give his opinion as to the events he had not seen, but could only testify as to the markings he observed on the road. The officer did not see the accident, but investigated some time after the occurrence and testified as to his conclusions that the car had turned over five or more times, and that by his measure, using a steel tape, the car was doing eighty miles per hour or better. He also opined that a race in which the car had been engaged with another car had ended before the accident. This testimony, admitted over objection,

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1. April 1, 1959 through March 31, 1960.
2. MODEL CODE OF EVIDENCE (1942), especially rules 105, 106, 303, 401.
3. Approved by the Conference in 1953, as well as by the American Bar Association. See especially rule 45.
4. Examples are I WIGMORt, EVIDENCE, §§ 8c, 16 (3d Ed. 1940); MAGUIRE, COMMON SENSE AND COMMON LAW, pp. 2 et seq. (1947).
was termed by the Court "highly speculative." On the basis of this ruling by the court below, the judgment for the plaintiff was reversed and remanded.

**Inference from Failure to Call a Witness.** In *Davis v. Sparks*, an action to foreclose a mortgage, defendant counter-claimed asking reformation of the original contract of sale of the property and the note and mortgage executed pursuant thereto. Plaintiff had listed the property for sale with a real estate broker, one Williams, in 1948. The listed price was $5,750, to include the broker's commission. Another broker, one Lake, found the purchaser, defendant herein, and shared in the commission. The purchaser agreed to make a down payment of $1,500, and a contract of sale was made on October 2, 1948, signed by the parties and the two brokers. A note and mortgage for the balance of $4,250 were executed, payable at $35 per month, with interest at six percent, the monthly payments to be applied first to interest and the remainder to principal. Defendant's evidence tended to show that she and her son, then twenty years old, went with Mr. Lake to inspect the property and there met the plaintiff. The latter priced the property at $4,000, and agreed to a cash payment of $1,500. Later, at Mr. Williams' office, the purchaser stated that she would not sign until Mr. Williams assured her that the amount listed on the contract, $5,750, was different from the agreed price of $4,000 because it included all interest on the indebtedness. Williams testified for the plaintiff, and denied that any such argument concerning the price had occurred. He stated that he had explained the transaction to the defendant, making it clear to her that the price was $5,750, and that she had willingly signed. On appeal to the Supreme Court, the defendant argued that the trial court had given no consideration to the unfavorable inference arising from the failure of the plaintiff to call the broker, Lake, as a witness. Although indicating doubt that either the record or the exceptions raised the point, the Supreme Court, in an opinion by the late Chief Justice Stukes, found that no inference should be raised under the circumstances of the case. The opinion points out that Lake was not an employee of the plaintiff, who had no control over him and had not listed the property with him but with

Mr. Williams. Further, plaintiff had called Mr. Williams to testify to the same facts. Additional support for the ruling was found in the pleadings of the defendant, which, although they referred many times to Mr. Williams, made no reference to Mr. Lake. In these circumstances said the Court, to raise a presumption against the plaintiff "would in view of the contents of appellant's pleading, be like springing a trap upon him."

**Waiver of Objection.** In *Gary v. Jordan* the Supreme Court reiterates what seems to be an unsound rule made in earlier cases. Defendant was on the stand as a witness and in cross-examination was asked questions concerning another proceeding instituted against him by the State Veterinarian. Counsel for defendant objected, presumably on grounds of relevancy. This objection was overruled and the questioning proceeded. On re-direct, defendant was questioned and testified on the same subject without reservation. The Supreme Court held that this constituted a waiver of the objection. This is distinctly a minority view. As the Supreme Court of Texas has said:

> It would indeed be a strange doctrine, and a rule utterly destructive of the right, and all the benefits of cross-examination, to hold a litigant to have waived his objection to improper testimony because by further inquiry he sought on cross-examination to break the force or demonstrate the untruthfulness of the evidence given in chief, in the event, as would most usually occur, that the witness should on cross-examination repeat or restate some or all of his evidence given on his direct examination.

Professor McCormick agrees with this latter view and argues that the party should be entitled to treat the ruling as the "law of the case" and explain or rebut the evidence while preserving his exception.

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10. The Court points out, 235 S. C. at 334, 111 S. E. 2d at 549, "A litigant is not required to produce as a witness every person who may give evidence in his favor; and his failure to do so does not necessarily imply a design on his part to suppress the truth."

11. 235 S. C. at 335, 111 S. E. 2d at 549.


Sequestration of Witness. The Supreme Court in State v. Britt\(^{16}\) again ruled\(^{17}\) that sequestration of witnesses was a matter within the sound discretion of the trial court and that no abuse of discretion was present. The defendant had moved that the trial Judge sequester all witnesses. At the request of the solicitor, the judge ruled that the sheriff, a deputy sheriff, an officer of the State Highway Patrol and Chief Strom, of the South Carolina Law Enforcement Division could remain in court to assist the solicitor.\(^{18}\)

Direct Evidence and Circumstantial Evidence

Jackson v. Jackson\(^{19}\) was an action\(^{20}\) by plaintiff against her husband to recover damages for alleged reckless operation of an automobile driven by him, in which she was riding as a guest. The answer admitted the accident, denied generally the other material allegations of the complaint, and further alleged that if defendant was guilty of recklessness, the wife knew of and acquiesced in it and failed to take action for her own protection, and that such acquiescence contributed as a proximate cause to the injuries she suffered. The accident occurred about three a.m. on the morning of July 18, 1958. About midnight, the wife in her husband's car had picked him up when he got off from work. They went to a drive-in restaurant, where they stayed some time. The wife testified that her husband took a drink of whiskey in her presence from a bottle under the seat of the car and put the bottle in his pocket. They then went to another drive-in, which they left at about three o'clock. The wife testified that that was all the drinking she saw her husband do and that she did not think that he was intoxicated. She also testified as to the speed of the car and its conduct just preceding the accident, which testimony was materially at variance with eye-witness testimony of a police officer who was in close pursuit of the car at that time. The officer testified that when the husband got out of the car he was staggering, that he was then "flat drunk" and anyone could


\(^{18}\) For an interesting general discussion see 6 Wigmore, Evidence §§ 1837-1842 (1940).


tell it, and that he (the officer) found an empty and a half full whiskey bottle, apparently quarts, in the car. He said that a strong odor of whiskey was present in the car. An officer who arrived 15 minutes later also testified that it was perfectly obvious that the defendant was drunk.

The trial judge directed a verdict for the plaintiff on the issue of contributory wilfulness and liability and submitted only the issue of damages to the jury, on the theory that the defense had introduced no evidence to contradict the allegations of the complaint. Apparently the theory of the trial judge was that the plaintiff had testified that she had not known that the defendant had been drinking to excess, and since the defense had offered no evidence on this, this testimony must be taken as true. The Supreme Court, in an opinion by Justice Moss, quite properly reversed, holding that the circumstantial evidence raised a question for the jury as to whether plaintiff knew or should have known of the intoxicated condition of her husband, and continued to ride as a guest in the car despite such knowledge.

The opinion of the trial court seems to be based on the fallacy that direct evidence is intrinsically superior to circumstantial evidence, and can be met only by other direct evidence. As Justice Moss succinctly points out, this overlooks the problem of credibility: 21

The fact that the respondent's testimony was not contradicted by direct evidence did not have the effect of making it undisputed or placing the stamp of verity upon it. It was for the jury to pass upon the credibility of the testimony of the respondent. In passing upon the credibility of her testimony the jury could take into consideration her interest in the result, the accuracy of her recollection and all of the circumstances and surroundings tending to impeach her as witness or to throw discredit on her statement.

The Court further pointed out that the circumstantial evidence provided a basis for an inference that plaintiff knew of the condition of intoxication. Thus, a case in which one party introduces direct evidence on an issue, favorable to his position, and the other party introduces no evidence at all on that issue can be distinguished. 22

Relevancy

Evidence of Other Crimes—the Molineux Rule. In State v. Brooks,23 defendant was indicted for the rape of the prosecutrix. The State was permitted to introduce evidence to show that the prosecutrix and her sister-in-law were walking along a street after dark to catch a bus and that defendant at pistol point forced them into an alley and raped both of them. Apprehended immediately after the acts, defendant was taken to a police station, identified by the victims and made and signed a written statement to the officers admitting intercourse with both women at the time and place. No reference was made therein to use of force or to the pistol. Defendant argued at the trial that since his defense was consent and he did not deny commission of the acts, the testimony as to intercourse with the prosecutrix' companion was inadmissible.24 The Supreme Court, in an opinion by the late Chief Justice, held that the evidence as to the related crime was admissible as tending to prove forcible rape and to negative consent.25

State v. Bullock,26 further discussed below, also involved an application of this rule. Defendant in that case attacked with a pistol the two occupants of an automobile in a cemetery, a man and a woman, firing several shots. He was indicted for the murder of the woman. Admitted into evidence was a bullet taken from the shoulder of the man. The Court approved the admission of this testimony under the Lyle27 case as tending to establish the identity of the perpetrator of the murder and to corroborate his confession.

Character Not in Issue. The orthodox rule in a criminal case is that character of the defendant is not in issue unless the defendant elects to put it in issue by introducing evidence of his good character. This is a rule of relevancy in the broad sense of the term, based on the policy that a defendant

24. No objection was raised to this evidence at the trial, but the Supreme Court considered the question in favor of vita, since the case involved capital punishment.
25. Citing the rule of State v. Lyle, 125 S. C. 406, 118 S. E. 803 (1923), which case adopted the rule of the leading case on the point, People v. Molineux, 168 N. Y. 264, 61 N. E. 286 (1901). A broader statement of the rule than that in the Lyle case is offered by McCORMICK, EVIDENCE § 157, at 327 (1964).
is entitled to be tried on the case at bar, and possible prejudice would arise if his past history of crime were paraded before the jury.\textsuperscript{28} A quite distinct rule with an independent foundation in reason is the rule permitting impeachment of the defendant if he takes the stand as a witness. In \textit{State v. Britt},\textsuperscript{29} which together with \textit{State v. Bullock}\textsuperscript{30} provides an excellent survey of much of the law of criminal evidence, Mr. Justice Moss deals with the distinction.

Britt was charged with murder, along with one Tilson and one Westbury, and the three were tried together. Tilson was found guilty with recommendation of mercy, while Britt and Westbury, also found guilty, were sentenced to death. The latter two appealed. The defendants had moved for separate trials, asserting that their defenses were antagonistic. All three has signed written confessions and made oral ones, but Britt and Tilson had asserted that Westbury fired the fatal shots, while Westbury contended that he had not. The Supreme Court held that the ruling denying a separate trial for each defendant was in the sound discretion of the trial court. Since separate trials were refused below, inevitably the problem termed by Wigmore "multiple admissibility" arose at the trial.\textsuperscript{31} The confessions of each defendant were admitted, with a limiting instruction from the trial court that such confession applied only to the individual defendant making it, and statements therein relating to the participation of other defendants were to be disregarded.

The confession aspect of the case is discussed below, but the admission of the confessions led to the problem with which we are here concerned. Appellant Westbury argued on appeal that error was committed in the ruling of the trial court limiting the cross examination of one Tuttle, a witness for the State. This ruling excluded evidence of previous convictions of Britt and Tilson for armed robbery and grand larceny. Tuttle was a city detective on the Savannah police force. The theory of counsel for Westbury was that this line of cross examination of Tuttle was permissible since the confessions of Britt and Tilson were in evidence and contained accusations against Westbury. The cross-

\textsuperscript{28} McCormick, supra note 25. \textit{Compare} § 154, at 323 with § 42, at 89.
\textsuperscript{29} 295 S. C. 395, 111 S. E. 2d 669 (1959).
\textsuperscript{31} McCormick, Evidence § 59 (1954); 1 Wigmore, Evidence § 13 (3d ed. 1940).
examination was resisted by counsel for Britt on the ground that it would put the character of Tilson and Britt in issue. The Supreme Court, in upholding the ruling of the trial judge, held, first, that the confessions were properly admitted, second, that the limiting instruction telling the jury that they could use each confession only against the respective defendant who made it adequately protected the other defendants, and third, that since neither defendant had yet taken the stand as a witness nor put character in issue by producing testimony as to good character, evidence of convictions would have been improper. Westbury's theory was that since the confessions were in evidence, Britt and Tilson were in the same position as if they were already witnesses and, therefore, could be impeached. Mr. Justice Moss appears quite correct in rejecting this theory; to hold otherwise would deprive the defendants of their election whether or not to take the stand. The admission of their confessions were in no way equivalent to their being witnesses; the confessions are admitted as hearsay, under the admissions—confessions exception to the hearsay rule.

Tuttle was also asked by counsel for Westbury if these defendants “were known to the [Savannah police] Department?” Considerable discussion ensued between the court, the witness and counsel, in which discussion the Supreme Court felt the jury inevitably was made aware that defendant Britt had a criminal record. The trial court eventually ruled that the testimony was inadmissible and instructed the jury to disregard it. Nevertheless, the Supreme Court held in favorem vitae that appellant Britt was prejudiced by this fact being made known to the jury and a new trial was granted.

**Expert Testimony as Foundation to Show Relevancy.** In *Gary v. Jordan*, plaintiff brought an action for fraud and deceit, alleging that six of twenty cows purchased by him from defendant under assurances that they were “clean” were positive reactors to brucellosis (Bang’s disease), and that this necessitated the slaughter of some thirty of plaintiff’s own cows. Plaintiff claimed that defendant knew of the existence or the possibility of Bang’s disease in the cows subject to the contract of sale. The twenty cows were delivered on July 14, 1956. On August 31, 1956, they were tested and six found

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to have the disease. These were removed and destroyed and the remainder of the herd quarantined. On September 28, the whole of plaintiff's herd, including the remaining purchased cows and some replacements sent by defendant for the diseased cows was tested. No diseased cows and no suspects were then found. A test on November 14 revealed four reactors and five suspects. Many later tests were made, until a test on December 4, 1957 revealed no reactors and no suspects. Defendant objected to the admission into evidence of any test taken after the test of September 28, 1956, which apparently showed a clean herd. His objection was that such evidence was not related to or connected with his acts and any disease appearing after that date was a result of plaintiff's mingling the purchased cattle with his own herd. Expert testimony for plaintiff had showed that Bang's disease was highly infectious and could appear in an animal anywhere from fourteen days to seven or eight months after exposure. In view of this testimony, the Supreme Court held that the admission of the evidence of later tests and of the resulting appearance therein of Bang's disease was proper.

**Lie-Detector Test.** The Britt\(^{32}\) reversal was also based upon the prejudicial effect of permitting the jury to hear that defendant Britt was offered and refused to take a lie detector test. Defendant Westbury asked to be given the test and took it; defendants Britt and Tilson, on advice of counsel, refused offered tests. Chief Strom of the State Law Enforcement Division was questioned concerning the test and was permitted to testify, over objection, that Britt refused to take such a test. After discussion with counsel and an indication that the evidence might be admissible, the trial court instructed the jury to disregard the testimony, saying, "Of course, they are nothing but laymen, anyway. They should have acted upon the advice of their counsel and actually it was not their decision after all."\(^{32}\) A witness Faulk had testified that less than one per cent of suspects refuse to take the test, even though many are known criminals.\(^{32}\) The Supreme Court held that, while the instruction would in a normal case cure any error, in a case involving a sentence to death extreme caution should be exercised lest


\(^{32}\)b. Id. at 423, Id. at 684.

\(^{32}\)c. Ibid.
prejudicial testimony convict a defendant. Since the testimony could have affected the verdict, the Court granted a new trial. In view of the indicated fact that defendant acted on advice of counsel, the ruling seems correct. The refusal to take the test under such circumstances would have little weight as indicating a consciousness of guilt.

Hearsay

Ancient Documents—Exception to the Hearsay Rule. Town of Ninety-Six v. Southern Ry. Co.\textsuperscript{33} was a dispute as to the width of the railway’s right of way through the town. The railway claimed it was one hundred feet on each side of the center-line of its main track, while the town claimed it was limited by written agreement to thirty feet from the center-line. The special act\textsuperscript{34} of the legislature chartering the railroad’s predecessor provided that in the absence of any written contract, the land on which the track was constructed, together with one hundred feet on each side, shall be presumed to have been granted to the railroad. A search of plaintiff railroad’s records revealed no agreements limiting the right of way. Some license agreements between the railroad and the town between 1917 and 1931, incorporating by reference plats specifically showing the right-of-way north of the track to be one hundred feet, were introduced. Defendant town offered in evidence a copy of a letter dated September 3, 1872 and recorded in the office of the clerk of court for the county on May 29, 1905. The original of this letter was not available and the copy did not purport to be in the handwriting of the author of the original. The letter contained the statements, “In answer to your inquiry of last week about the public lands at 96 I have to say that the R.R. claims 60 feet 30 on each side that the balance of the land on each side of the R.R. up to the line of the houses is public property.” The purport ed author was a predecessor in title to the land before the railroad was built. The identity of the addressee is not indicated.

Two problems arise as to the admissibility of this offer, as District Judge Stanley, writing for the Fourth Circuit, points out in the instant case. First, the technical requirement of authentication must be satisfied. Here the court

\textsuperscript{33} 267 F. 2d 579 (4th Cir. 1959).
\textsuperscript{34} S. C. Act No. 2953, 11 Stat. (1845).
recognizes the ancient documents rule as a substitute for the usual procedure of authentication. The opinion suggests that the letter could be properly excluded as not meeting the requirements of this rule, since "there is doubt as to whether the letter was produced from proper custody and is free from suspicion since it was not found in a place where normally would be found a genuine document such as a letter, and was not recorded for almost thirty-three years after it was allegedly written. . . ." It seems regrettable that the court did not stop here and rest on this sound ground. However, the court proceeded on the hearsay question. Conceding without deciding that the authentication test was met, the court held that the letter could properly be excluded as hearsay. While recognizing that an ancient documents exception to the hearsay rule exists, it found such an exception to be limited to statements in wills, deeds and other documents purporting to transfer land or personal property. This is the position taken by the Uniform Rules of Evidence, but Professor McCormick argues persuasively for a more liberal rule.

Admissions. Allen v. Island Co-op., Ltd. also involved an offer of evidence which was held properly excluded under the hearsay rule. The facts of the case are involved and restatement here is not warranted. Suffice to say that the question was whether the Bank of Nova Scotia received a certain draft as purchaser with full rights, or as a collection agent for Island Co-Operative. Allen had attached the proceeds as the property of Island. Allen offered, as evidence tending to show that the Bank held the draft for collection only, that one Cantrell had instituted a similar action in North Carolina against Island and had attached two drafts therein, and that the Bank there too had interposed a claim of ownership. During the pendency of that action, one Jerome O'Brien, an officer of Island, had come to North Carolina and settled Cantrell's claim by paying the agreed sum. During the negotiations, O'Brien stated that Island had a credit arrangement with the Bank, and that O'Brien would not have taken the trouble to come

36. 267 F. 2d at 583.
38. Rule 63(29).
to North Carolina if Island "had not been interested in the proceeds of the drafts which had been attached." The Supreme Court in an opinion by Justice Moss held these remarks were properly excluded. Both irrelevance and incompetence of the evidence are given by Justice Moss as reasons for supporting exclusion. The irrelevancy argument rests on the fact that the North Carolina transaction was an entirely different contract; the incompetency argument is that the remark of O'Brien is hearsay, and since there was no evidence that any of the participants in that transaction were agents of the Bank, the admissions exception to the hearsay rule does not apply. The decision would appear sound on both grounds.

Confessions

In State v. Bullock, defendant, an illiterate Negro forty-six years of age, was indicted for the murder of a young white woman in the early morning hours of August 3, 1958. At the trial the confessions of the defendant, in considerable detail and strongly corroborated by the evidence found at the scene of the crime and by the defendant's leading the sheriffs to the relevant sites, including the place where the body had been hidden, were introduced in evidence. Under South Carolina law, the admissibility of a confession is first determined by the court out of hearing of the jury. Then, if the court finds it admissible, the evidence as to its voluntariness is repeated to the jury, and they are instructed to disregard it unless they find it to have been voluntary. This rule, criticized by Dean McCormick, is followed in many of our State courts. In the instant case, the evidence of the sheriff who took the confessions was unequivocally to the effect that the confessions were completely voluntary. Defense counsel vigorously cross-examined this witness, but did not shake his story except to reveal that the confessions as taken down and read back to the defendant might not have been word for word what the defendant had said, but embodied the substance thereof. The confessions were then read to the jury. Later, in the presentation of the defendant's case, the defendant took the stand

41. 234 S. C. at 549, 109 S. E. 2d at 450.
43. WHALEY, SOUTH CAROLINA EVIDENCE, 9 S. C. L. Q., No. 4A, 34-36.
44. McCORMICK, EVIDENCE § 112 (1954).
45. Transcript of Record, South Carolina v. Bullock, 90-98, especially 96-98.
46. Id. at 101-102, 104-106.
47. State's Exhibits 9 & 10, Id. at 104-106.
and gave testimony to the effect that he had signed the confessions after two cotton sheets had been placed over his head and he had been beaten and kicked by the officers. The jury was instructed to disregard the confession unless they found it to have been made "freely and voluntarily and without fear or duress of any kind and without reward or the slightest hope of reward." The defendant was found guilty of murder.

On appeal, defendant challenged the admission of the confessions, both under the State rule as above stated by the trial judge in his instructions and under the Due Process clause of the Fourteenth Amendment. He argued that on the uncontradicted testimony, it was shown (a) that defendant was a Negro, (b) illiterate, (c) held incommunicado for four days after his arrest, save for a conversation with his wife, who was also a prisoner, at the jail, (d) continuously questioned by several persons in authority, and (e) moved from one jail to an older vacant jail, thence to the judge's chambers adjoining a courtroom, to a motel, and finally to a jail in an adjoining county, "all in the presence of a large number of persons in authority and under the threat of mob violence." Each of these factors, he argued, have been found relevant by the Supreme Court of the United States on the issue of coercion of a confession. The Supreme Court of South Carolina, in an opinion by Mr. Justice Moss, found no evidence in the record to indicate, nor any attempt at the trial on the part of the defendant to show, that he had been held incommunicado. The Court found that the record indicated minimum, rather than continual questioning. As to the removals from place to place, and the presence outside some of the prisons of a crowd of two hundred to three hundred persons, the Court found that they did not influence the confessions. At the time of the confessions defendant had been moved to the adjoining county where there was no crowd. Nothing in the record aside from the testimony of the defendant himself indicated physical or psychological duress, and the Court held that this issue was properly submitted to the jury.

48. Id. at 193-200.
49. Id. at 242-243.
50. Appellant's Brief at 11-12.
51. Id. at 12.
52. Id. at 11.
53. 235 S. C. at 371, 111 S. E. 2d at 664.
54. 235 S. C. at 372, 111 S. E. 2d at 665.
55. Certiorari was granted by the Supreme Court of the United States, but the writ was dismissed per curiam on February 20, 1961, 29 U. S. L. W.
In State v. Britt, defendant appellant Britt excepted to the trial court’s failure to excuse the jury while cross-examination concerning the voluntary nature of the confessions of the three defendants were pursued. The Supreme Court pointed out that when the confessions of Britt and Tilson were offered in evidence, counsel for these defendants expressly stated that they had no objections thereto. Furthermore, the Court held that since the confessions were held admissible by the trial court, any error in the failure to hold the preliminary hearing without the presence of the jury was cured.

_Best Evidence Rule—“Book of Original Entry”_

**Business Entries.** In Graves v. Garvin, the principal dispute was as to the number of pounds of turkey held in storage by the plaintiff for the account of the defendant Graves, a farmer. As turkeys were prepared by Graves, he would turn them over to Garvin’s company and an employee thereof would issue a receipt showing the quantity of each delivery. These receipt forms were issued in triplicate, Graves receiving the original and one carbon, and the other carbon being retained. As turkeys were released to Graves for sale by him to a customer, he would receipt for them. These receipts of “ins” and “outs” were posted in a bound “day book” for each customer. The storage company plaintiff offered three of these day books in evidence, together with an audit made by an accountant after examining all available receipts. The evidence showed that the regular bookkeeper, Mrs. Sieg, generally prepared the receipts for “ins” and “outs” but that in her absence other employees made them up. It was held that this procedure indicated that the company policy was to treat the original receipts as temporary memoranda, and that the day books therefore qualified as the books of original entry to satisfy the best evidence rule.

**Parol Evidence Rule**

In Swift & Co. v. Griggs the plaintiff company sued H. H. Griggs and Azalea R. Griggs for a balance due on certain 4197, the Court saying, “After hearing oral argument and fully examining the record which was only partially set forth in the petition for certiorari, we conclude that the totality of circumstances as the record makes them manifest did not warrant bringing the case here. Accordingly, the writ is dismissed.”

57. 272 F. 2d 924 (4th Cir. 1959).
accounts under written agreements dated November 27, 1956 and June 6, 1957. Plaintiff joined as a defendant J. C. Griggs, who on November 30, 1956 had agreed in writing to guarantee performance of the first above agreement and payment of all accounts thereunder. By a second defense, defendants alleged facts which they argued led to showing that the alleged contract was a nullity. They stated that on November 1, 1956, one Sansbury and one Lee, the latter an agent of the plaintiff, called upon the defendants and said that plaintiff was desirous of putting Sansbury, whose wife was a sister of one defendant and a daughter of another, in business. Sansbury was then in poor financial condition, having just lost his business, and had numerous liens and judgments against him, and so could not have property shipped to him personally. The Griggses were urged by Lee and Sansbury to sign the contracts themselves, and plaintiff would put Sansbury in business, would supervise his operations and approve his choice of customers. In response to this offer, defendants signed the contracts and the notes, and the defendant J. C. Griggs signed the guarantee. Defendants further alleged that these promises were reiterated by Lee, within the scope of his employment, from time to time through July of 1957. In upholding the striking of this defense by the trial court, the Supreme Court through Mr. Justice Taylor said:

Defendants' second defense and the stricken words of the third defense attempt to set up the defense of failure of consideration based upon the alleged breach of a contemporaneous parol agreement inconsistent with the terms of the written instrument to the extent of rendering it practically meaningless. This they will not be permitted to do in the absence of fraud, accident or mistake. . . . Appellants in their answer do not allege fraud, accident or mistake but seek to show an entirely inconsistent and contradictory parol agreement.

An application of the same rule to different circumstances was involved in Smith v. DuRant. Defendant had purchased from plaintiff, represented at the time by a guardian ad litem, certain lots in Lake City, being lots 57A, 58A and 59A as

59. Plaintiffs' suit also involved a note dated July 26, 1957, as to which note defendants alleged in a third defense lack of any consideration other than plaintiffs' promises referred to in the second defense. This complication is omitted from discussion herein.

60. 235 S. C. at 65, 109 S. E. 2d at 712.

61. 236 S. C. 80, 113 S. E. 2d 349 (1960).
shown on a certain plat, which indicated that 57A adjoined lot 56A, the latter owned by one Burroughs. In reality, there existed between lot 56A and 57A another lot of over two hundred foot frontage omitted from the plat due to a surveyor’s error. Plaintiff sued for possession of this lot arguing that it was not included within the deed conveying the three lots to defendant. Citing the parol evidence rule, defendant objected to the admission of testimony of another surveyor, one Floyd, who had in 1947 surveyed the whole town and discovered the error in the earlier plat. In November, 1955, plaintiff had learned of the error and in March, 1956, brought suit. In supporting a directed verdict for the plaintiff below, the Supreme Court held that the testimony of the surveyor, Floyd, was admissible. Chief Justice Stukes pointed out for the Court:

Appellant’s position is inconsistent. He claims that he bought by the Isenhower plat whereby his purchase included the disputed area and extended toward the north to lot 56A; but the plat did not include or show the disputed area. How, then, could he have acquired the disputed area if he bought by the plat?

The Court held the testimony admissible under the rule permitting parol in cases of fraud, accident, or mistake. Clearly there was a mistake in the original plat.

In *Graves v. Garvin*, it was argued that inventory receipts given to defendant to inform him as to how many turkeys he had in storage with plaintiff were warehouse receipts within the Georgia Warehouse Act, and hence contracts to which the parol evidence rule applied. The warehouse statement in question indicated that thirty-eight thousand pounds of turkey were in storage. However, plaintiff’s parol and other evidence indicated that the amount was far less, and that the warehouse statement was in error because plaintiff’s agent had accepted defendant’s representation as to the quantity in storage. Defendant had subsequently acknowledged this error, plaintiff maintained. Plaintiff argued that parol evidence to show the error in the warehouse statement was inadmissible. The Fourth Circuit indicated that it “would concede” that if

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62. The record also contained evidence that defendant did not originally believe that the omitted lot was included in his deed.
63. 236 S. C. at 90, 113 S. E. 2d at 355.
64. See statement of Mr. Justice Taylor, supra note 60.
65. *Supra* note 57.
the inventory statements were warehouse receipts within the Georgia Act, they would be construed as contracts and parol would be inadmissible to vary their terms.\textsuperscript{67} However, the Court sustained the judgment below, holding the documents were not warehouse receipts. It was pointed out that much of the information required by the statute to be contained in a warehouse receipt was lacking from the document in question.

\textit{Demonstrative Evidence}

\textit{Use of Blackboard in Aid of Argument to Jury.} In Johnson v. Charleston & W. C. Ry.,\textsuperscript{68} an action for wrongful death, counsel for defendant raised as a basis for a new trial the fact that the plaintiff's counsel had used the blackboard in the course of his argument to the jury, making calculations thereon using some figures not drawn from the testimony. It was also objected that counsel used the figure 17 (decedent's life expectancy) to multiply by decedent's annual income, to reach a figure for total damages for loss of earning power. Decedent was earning $4,000 per year and drawing a veteran's pension of $600 per year. The product of life expectancy and present earnings would be $78,200. The jury's verdict was for $67,618 actual damages. Of course, such calculation on the blackboard would be erroneous and prejudicial, since prospective loss of earnings must be reduced to their present cash value. However, the trial judge so instructed the jury in his charge, after which he asked counsel if there was anything else they wished him to charge, and they replied in the negative. Defendant also urged that counsel for plaintiff used some figures not drawn from the testimony in making his blackboard calculations, but the transcript of record failed to indicate enough detail for the Court to pass on this. These objections at the trial took place during and immediately after the final arguments of counsel for plaintiff. The trial court held that counsel had used the blackboard purely as argument and not as introducing evidence, and that such use was "more or less court routine," but added, "any matters that you think I should instruct the jury in it would help me if you would write down what you think I should say."\textsuperscript{69} On appeal, the

\textsuperscript{67} Although arguably the mistake exception to the parol evidence rule as indicated in the two South Carolina Cases, Griggs and DuBont, would then apply to permit the introduction of parol testimony.

\textsuperscript{68} 234 S. C. 448, 108 S. E. 2d 777 (1959).

\textsuperscript{69} 234 S. C. at 465, 108 S. E. 2d at 785.
Supreme Court affirmed the judgment for the plaintiff. On the issue of the use of the blackboard, Mr. Justice Legge said: 70

There is no impropriety in counsel's use of blackboard during his argument to the jury, for the purpose of fairly illustrating points that are properly arguable. (Authorities cited) ... Calculations made, or diagrams drawn, thereon are of course not evidence. Like statements of counsel in oral argument, they should have reasonable foundation in the evidence or in inferences fairly arguable from the evidence. Just as oral argument may be abused, so may such visual argument; and its abuse may be so flagrant as to require a new trial. Control of the arguments of counsel, with regard to the use of such visual aids, as with regard to oral statements, rests in the sound discretion of the trial judge. (Cases Cited).

Since the trial judge asked for and was not offered further instructions to the jury, the Court held that any failure to caution the jury that the blackboard calculations were not evidence but argument furnished no basis for reversal.

Miscellaneous

Improper Argument. Also in the Johnson case, 71 defendant urged error in denial of a new trial based on improper argument to the jury. Defendant-appellant claimed that counsel for plaintiff argued that a human life was worth as much in Allendale County as it is in Hampton or Charleston County, and that a jury in the former county should make an award in wrongful death cases comparable to awards in the latter two counties in similar cases. Since counsel denied making any such statement, nothing in the record indicating such a statement having been made, and no objection thereto being made until after verdict, the Supreme Court refused to consider this exception.

Legislation. It appears that no legislation bearing on the rules of evidence was enacted during the 1960 session of the General Assembly.

70. Ibid.