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Evidence

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EVIDENCE

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Relevancy

Meaning of Relevancy — Manner of Objecting. In *Elliott v. Black River Electric Cooperative,*[1] an action for the alleged wrongful death of a farmer killed by a discharge of electricity from a high voltage uninsulated wire of defendant's power line passing over his farm, plaintiff offered in evidence a photograph of the deceased taken shortly before his death. Defense counsel objected, saying, "I don't see the relevancy of that." Plaintiff's counsel replied, "It shows the condition of his health. They can judge that from the photograph, your Honor."[2] On appeal, defendant argued that the photo should have been excluded as prejudicial and inflammatory.

The offer was clearly logically relevant on the issue of damages to show the condition of decedent's health shortly before his unfortunate death. The foundation laid for receiving the photo appears likewise clearly adequate. It would also seem that the prejudicial effect of the photo was slight compared to the probative value thereof, and that therefore the trial judge in his discretion could properly admit the photo. The Supreme Court did not reach this consideration, however, holding in an opinion by Mr. Justice Legge that the objection was lacking in sufficient specificity to raise any question other than logical relevancy. This accords with the definition of relevancy in the Uniform Rules of Evidence;[3] however, the key provision of the Rules, a provision which merely restates the better common law cases on the sub-

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1. 233 S. C. 233, 104 S. E. 2d 357 (1958).
2. 233 S. C. 258, 104 S. E. 2d 370 (1958).
3. The Uniform Rules have not been as yet adopted in any jurisdiction, although Utah and New Jersey are well advanced in consideration of proposals for adoption. Relevancy is defined in Rule 1, Definitions, "(2) 'Relevant evidence' means evidence having any tendency in reason to prove a material fact." In the instant case the evidence was probative of the issue of damages.

ject, is Rule 45,[4] which provides that relevancy is always to be balanced against the counter-factors of undue consumption of time, confusion of the jury, prejudice and unfair surprise. Judges and lawyers should automatically consider these counter-factors to admission when a question of relevancy is posed. It is difficult to see what defense counsel was objecting to here, other than that admission of the photo would be prejudicial. The general objection is usually inadequate, but an exception obtains where the ground for the objection is obvious.[5] Perhaps a sounder ground for decision in the instant case would be that suggested above: that the photo was of slight prejudicial value, and admissible in the trial court's discretion.

Similar transactions and events. South Carolina State Highway Dept. v. Hines[6] was a *de novo* appeal from an award of the condemnation board compensating the owners of a filling station site for the taking of a fifteen feet wide frontage strip of the property. The trial court excluded evidence of the owner that he had received an offer from the landowner of adjoining property on the rear to sell an equivalent strip for $5,000. The Supreme Court, by Mr. Justice Legge, approved this ruling, saying that the evidence of the offer was "clearly inadmissible." Justice Legge based his conclusion, which is clearly dicta, on *Sharpe v. United States*:[7]

> . . . . The liberal attitude of the courts toward admission of evidence tending to show the fair value of the property taken permits competent evidence of the fair value, at or near the time of the taking, of land similar to and near that taken, and, as evidence of such value, the price realized from voluntary sales of similar land in the vicinity within a reasonable time. 29 C.J.S. Eminent Domain § 273; Orgel, Valuation Under Eminent Domain (1936 Ed.), Par. 135; United States v. 5139.5 Acres of Land, 4

4. Rule 45 provides: Rule 45. Discretion of Judge to Exclude Admissible Evidence. Except as in these rules otherwise provided, the judge may in his discretion exclude evidence if he finds that its probative value is substantially outweighed by the risk that its admission will (a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury, or (c) unfairly and harmfully surprise a party who had not had reasonable opportunity to anticipate that such evidence would be offered.

5. McCORMICK, EVIDENCE 118 (1954). On p. 119, Professor McCormick argues that objection on the ground of irrelevancy should raise the question of prejudice.

6. 234 S. C. 254, 107 S. E. 2d 643 (1959).

7. 191 U. S. 341 (1903).

> Cir., 200 F. 2d 659. But testimony of the condemnee as to a price at which adjacent or nearby property has been offered for sale to him is manifestly inadmissible, especially where such offer has not been accepted. As was said in Sharpe v. United States, 191 U. S. 341, 24 S. Ct. 114, 48 L. Ed. 211, quoted with approval in Baynham v. State Highway Department of S. C., 181 S. C. 435, 187 S. E. 528, 534:
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> 'Oral and not binding offers are so easily made and refused in a mere passing conversation, and under circumstances involving no responsibility on either side, as to cast no light upon the question of value. It is frequently very difficult to show precisely the situation under which these offers were made. In our judgment they do not tend to show value, and they are unsatisfactory, easy of fabrication, and even dangerous in their character as evidence upon this subject. Especially is this the case when the offers are proved only by the party to whom they are alleged to have been made, and not by the party making them. There is no chance to cross-examine as to the circumstances of the party making the offer in regard to good faith, etc. . . . '

The Court held however that the trial judge had correctly applied this rule and had excluded the evidence, permitting only respondent's testimony as to his opinion of the value.

Shepherd v. United States Fidelity & Guaranty Company[8] involved a closer question under this heading. Defendant company's car, parked in the driveway at the home of one of defendant's employees, also a defendant, who was using it with the company's permission, rolled down the driveway at night and hit plaintiff's car driving past the employee's house. The defense offered the employee's neighbor, who lived two houses away, as a witness to testify that the latter's car had been tampered with on other occasions while in its driveway. The purpose of this line of questioning would be, of course, to establish an alternative hypothesis to negligence, to account for the car's rolling down the driveway where little direct evidence was available. The trial court refused to permit this line of questioning. In affirming, the Supreme Court, per Chief Justice Stukes, said:[9]

8. 233 S. C. 536, 106 S. E. 2d 381 (1958).
9. 233 S. C. 544, 106 S. E. 2d 384 (1958).

> . . . . Answer to the question was properly excluded. It did not relate to the premises of the Halls [defendant employee of defendant company] or to the night in question and was, therefore, irrelevant. Green v. Sparks, 232 S. C. 414, 432, 102 S. E. 2d 435.

A more difficult question would be raised had the trial judge admitted the evidence. Chief Justice Stukes' language above suggests that he would favor a flat rule of exclusion in such a situation, but surely here as in all relevancy questions considerable discretion must reside in the trial court. The evidence is not logically irrelevant but is of slight circumstantial weight. It opens up collateral inquiries and possible undue consumption of time. Perhaps had the trial judge admitted the evidence that ruling should likewise be upheld on appeal.[10]

Ward v. Liberty Life Insurance Company[11] was an action for damages for fraudulent breach of an alleged undertaking by defendants, a life insurance company and a savings and loan association, to procure and put in force a policy of insurance on the life of plaintiff's intestate. The policy in question was a term policy covering the term of a home mortgage loan to plaintiff and her husband. The policy was not to take effect until the first premium was paid. Plaintiff's intestate died before the first premium payment was made by the savings and loan association.

Plaintiff's theory was that the loan association officer, also an agent of the defendant insurance company, who received the insurance application should have paid the premium from funds held in an escrow account. Plaintiff offered a witness, an officer of another savings and loan association, to testify to the custom of that organization in making payments of premiums under insurance undertakings containing identical provisions, on policies of the same insurance company. The witness testified, however, that he did not know whether associations other than his own handled such transactions in the same manner. The trial court excluded this testimony, the Supreme Court affirming on the ground that the evidence was res inter alios acta. This expression usually serves more to stifle than to aid thought,[12] but in the instant case the ruling was obviously within the sound discretion of the trial court.

10. McCORMICK, *supra*, note 5 at 351.
11. 232 S. C. 582, 103 S. E. 2d 48 (1958).
12. McCORMICK, *supra*, note 5 at 346.

Waltz v. Equitable Life Assurance Society of U. S.[13] involved a similar ruling, the Supreme Court upholding the trial judge's exclusion of evidence concerning action of the parties under a group life policy, where in issue in the case was an accidental death policy containing different terms.

Demonstration by Personal Injury Claimant. In *Green v. Boney*,[14] during the testimony of plaintiff's doctor to the effect that plaintiff had permanent disability and "some degree of limp", plaintiff's counsel requested that his client be permitted to walk before the jury so as to obtain the physician's opinion as to whether the injury caused the limp. The trial court ruled that he would not permit this until plaintiff had been sworn. Later when plaintiff was testifying he was permitted to walk before the jury. The Supreme Court, per Mr. Justice Oxner, held that this was within the sound discretion of the trial court. The authorities are in general agreement that such simple demonstrations are permissible,[15] although some courts stress the possibility of exaggeration and differentiate between active and passive demonstrations, permitting only the latter.[16]

Photographs. A photograph of the scene of an accident, intended to depict visibility conditions at the time of the accident, was excluded in *Peagler v. Atlantic Coast Line Railroad Company*.[17] Grounds for the exclusion were that the circumstances at the time of the taking were not identical in important respects to those at the time of the accident, and that the photograph was merely cumulative. On the former point, the trial judge said:[18]

> . . . I examined the picture again carefully during the argument for the new trial, and I advised counsel for the Defendants that I desired it to be clearly set forth in the record that my reasons for excluding the picture was that it did not appear to clearly and substantially represent the conditions at the time of the injury to the Plaintiff, and the proper foundation had not been laid as to similarity of conditions, and that the lights in

13. 233 S. C. 210, 104 S. E. 2d 384 (1958).
14. 233 S. C. 49, 103 S. E. 2d 732 (1958).
15. MCCORMICK, *supra*, note 5 at 346-7. Justice Oxner cites O'Keefe v. Ripp, 110 N. J. L. 555, 166 A. 197 (1933), Annot., 103 A. L. R. 1335 (1936); 20 AM. JUR., *Evidence*, § 724 (1940).
16. Willis v. City of Browning, 161 Mo. App. 461, 143 S. W. 516 (1912).
17. 234 S. C. 140, 107 S. E. 2d 15 (1959).
18. 234 S. C. 140, 107 S. E. 2d 27 (1959).

> the rear in the upper section of the picture appeared more like a Christmas tree or the lighted windows of a passenger car, and counsel for Defendants admitted that there was no lighted passenger car present at the time of the injury. . . .

The Supreme Court affirmed this ruling as being a sound exercise of the discretion of the trial judge, Mr. Justice Moss saying:[19]

> We have carefully considered the record in this case and we conclude as did the trial Judge, that it was proper to exclude the proffered photograph for the reason that there were no facts in the evidence to support what the picture attempted to portray. The conditions under which the photograph was taken differed from those in dispute.

Opinion Evidence

Non-Expert Testimony — Value of Land. In *South Carolina State Highway Department v. Hines, supra,*[20] plaintiff, a civil engineer, had for many years been a general contractor and had been buying and selling real estate for some years, although he did not consider himself a "real estate man". He was permitted to give his opinion as to the value of a fifteen foot strip of property adjoining the back of his land, which strip he had been interested in obtaining to offset the loss of a similar strip of his frontage taken by the city. The Supreme Court upheld the admissibility of this opinion evidence, apparently on the ground that the subject was one that permitted non-expert testimony, Mr. Justice Legge saying:[21]

> . . . . No peculiar ability or specialized training is required to enable a witness to testify as to his opinion of the value of property with which he is acquainted. Orgel, Valuation Under Eminent Domain (1936 Ed.), Par. 130. Decision as to his competency in such a matter rests largely in the discretion of the trial judge, the extent of his experience going not so much to his competency as to the weight of his testimony. As Judge Parker said in United States v. 25.406 Acres of Land, 4 Cir., 172 F. 2d 990, 995: "Artificial rules of evidence

19. 234 S. C. 140, 107 S. E. 2d 28 (1959).
20. 234 S. C. 254, 107 S. E. 2d 643 (1959).
21. 234 S. C. 254, 107 S. E. 2d 645 (1959).

> which exclude from the consideration of the jurors matters which men consider in their everyday affairs hinder rather than help them at arriving at a just result. In no branch of the law is it more important to remember this, than in cases involving the valuation of property, where 'at best, evidence of value is largely a matter of opinion'. See Montana R. Co. v. Warren, 137 U. S. 348, 352, 11 S. Ct. 96, 97, 34 L. Ed. 681." We find no error in the admission of this testimony.

This is a sound, common-sense approach to the problem. Further support for the ruling might be found in the position that, if expert testimony is deemed a requisite here, the witness was sufficiently qualified as an expert.[22]

Collective-Facts Rule. In *Jenkins v. E. L. Long Motor Lines*,[23] involving a collision of an automobile with wrecked tractor-trailer unit, one issue was whether the defendant's tractor-trailer had been speeding before it wrecked. To show such excess speed, plaintiff testified that the trailer had slid along the ground after turning over. Defendant offered a witness who had repaired numerous wrecks of trailers and had observed the wrecked trailer involved in the instant case. The witness was asked whether, judging from the marks on the left side of this trailer, he had an opinion whether the trailer had slid for any considerable distance. The trial judge permitted the witness to testify as to the marks on the trailer, but did not permit an opinion as to skidding. The Supreme Court affirmed this ruling in an opinion by Mr. Justice Taylor, stating that the witness did not qualify as an expert on abrasives, and that the subject, being within the range of ordinary experience, was not one for expert testimony anyway. Assuming the correctness of this analysis, the further question should be raised whether this witness might not state his impressions in opinion form as a non-expert. The witness did actually view the damaged trailer and thus had personal observation to relate to the jury. The witness should not be inhibited from saying that the trailer looked like it had skidded, or had not skidded, if this method of statement would add factual content to his testimony.[24] This

22. A recent leading case containing an excellent discussion of the requirements for expert testimony is Bratt v. Western Air Lines, 155 F. 2d 850 (10th Cir. 1946).
23. 233 S. C. 87, 103 S. E. 2d 523 (1958).
24. See MCCORMICK, *supra*, note 5 at 21, cases cited in Note 13, 14 p. 23.

is of course the familiar "collective facts" rule. Apparently this possibility was not suggested to either the trial court or the Supreme Court.

Best Evidence Rule

The most difficult thing for lawyers and judges to remember about the best evidence rule is that there is no such rule.[25] There is no rule known to the common law which requires the exclusion of any evidence other than the best available proof of the fact sought to be established.[26] There is of course an important rule imprecisely called the "best evidence" rule but better denominated the "preferred documents" rule. This rule provides that in proving the terms of a writing, where such terms are material, the original writing only is admissible unless its absence is satisfactorily explained. If the absence of the original is satisfactorily explained, a copy is then admissible.

In two cases this year, the Supreme Court purported to apply the best evidence rule. Perhaps in neither case was the result wrong, but language in the opinions may return to haunt later cases. In *Want v. Best Company*,[27] the court purported to apply the rule to an offer of an *original document*, a letter, written by one of two co-executors. The letter was offered as a vicarious admission against the other co-executor, and was excluded as hearsay. The letter stated that the latter co-executor had taken a considerable sum of cash belonging to the estate "down to Darlington with him in a brief case." The letter was rejected as hearsay. It was argued that the letter should be received under the hearsay exception for vicarious admissions because of privity between the two co-executors. Rejecting this argument, Mr. Justice Legge said:[28]

> . . . . We need to explore that theory, in its relation to the case in hand, no further than to say that in our judgment the competency of such vicarious admissions

25. MCCORMICK, *supra*, note 5 at 408.
26. Nor, as Professor Maguire pointed out, is there any rule to the effect that the best evidence available on a particular issue is admissible. See MAGUIRE, EVIDENCE, *Common Sense and Common Law*, 31 (1947). Cases are legion in which the only evidence offered to prove a particular fact in issue was incompetent, such as hearsay evidence, and the proponent's case therefore failed.
27. 233 S. C. 460, 105 S. E. 2d 678 (1958).
28. 233 S. C. 488, 105 S. E. 2d 692 (1958).

> should be tested by the fundamental rule that requires the evidence offered to be the best available proof of the fact sought to be established. The exhibit in question fails to meet that test.

It is apparent that this is not an application of the "best evidence" rule. The proper ground for the decision is that the admission exception to the hearsay rule is inapplicable to a declaration by one co-executor against another.[29]

In *Peagler v. Atlantic Coast Line Railroad Company*,[30] Mr. Justice Taylor writing for the Court upheld the trial court's exclusion of certain hospital records on the ground that they were merely cumulative, since physicians who had treated the particular patient (the plaintiff) had given their personal testimony using the records to refresh their recollection. The learned Justice then added two further grounds for exclusion, one based on hearsay-opinion considerations,[31] the other on the best evidence rule. On the latter point the opinion says:[32]

> We conclude that even though the proffered documents of the hospital records of the respondent in form complied with section 26-101 of the 1952 Code of Laws of South Carolina, their admission in the evidence would clearly have been a violation of the best evidence rule. We think the trial Judge committed no error in excluding the hospital records from the evidence.

Other parts of the opinion indicate that not only were certified copies of these hospital records offered, to be filed in the case, but *the originals* were offered in evidence as well. If the original documents are offered in evidence, the best evidence rule has no application. If the originals are required to be kept on file in a public office, the purpose of the cited statute is to make the offer in evidence of certified copies a sufficient compliance with the best evidence rule. Otherwise the cited statute would seem to have no meaning at all.

29. MCCORMICK, *supra*, note 5 at 524, f. n. 3, 4, 5.
30. Peagler v. Atlantic Coast Line R. R. Co., *supra*, note 17.
31. Discussed below under Hearsay.
32. 234 S. C. 140, 107 S. E. 2d 32 (1959). Perhaps, in context, this statement of Mr. Justice Taylor is only his summary of the preceding paragraph. See discussion *infra* under Hearsay.

Cross-Examination

Foundation for Impeachment. In the *Black River Electrical Cooperative* case,[33] a witness who could not read or write, except to sign his name, denied on cross-examination having signed a particular written statement. Cross-examining counsel presented the statement to him and asked, for the purpose of laying a foundation for impeachment, whether he had not made the statement to one Irvin. Later in the trial, the next day, counsel offered as a witness to impeach the principal witness above, one Morris rather than Irvin, offering to show that the original witness made the statement to Morris. The trial court refused to permit impeachment of the witness by the testimony of Morris. In affirming this ruling, Mr. Justice Legge said:[34]

> . . . . The purpose of the preliminary questioning of the witness is to adequately apprise him of the particular circumstances in which and the occasion on which it is claimed that he made the former statement, so that he may be prepared to disprove it or explain it away, State v. Hampton, 79 S. C. 179, 60 S. E. 669. The question of whether or not the witness has been thus adequately warned of the contemplated impeachment of his testimony is addressed to the discretion of the trial judge, Jones on Evidence, 4th Ed., Vol. 3, Section 844; and his decision as to the extent of the preliminary cross examination and as to the allowance of contradictory testimony will not be disturbed on appeal except for manifest abuse of that discretion.

Except for the fact that the prior inconsistent statement was written by another person and was signed by the otherwise illiterate witness, this is a typical application of the rule requiring that a foundation be laid before such impeaching testimony is permitted.[35]

Opening Line of Inquiry. In *Hansson v. General Insulation and Acoustics*[36] defendant introduced in evidence a letter which contained a post-script not related directly to the body of the letter. On cross-examination, plaintiff's counsel questioned concerning the post-script, to attempt to show that

33. Elliott v. Black River Electric Cooperative, *supra*, note 1.
34. 233 S. C. 261, 104 S. E. 2d 372 (1958).
35. MCCORMICK, *supra*, note 5 at 67.
36. 234 S. C. 177, 107 S. E. 2d 41 (1959).

defendant's officer was a litigious person. Over objection the trial court permitted this questioning. The Supreme Court affirmed, holding that the trial court in its discretion could permit this questioning, since defendant had introduced the letter.

Hearsay

Conduct as Hearsay. In the *Ward* case,[37] Mrs. Ward on the witness stand was asked whether Mr. Ward, the deceased, had gone to nearby Greer to pay his bills on the day he was taken ill. The offer of proof was intended to develop that he had gone to Greer, and had paid his bills, and that since he had not paid the insurance premium on that visit, a permissible inference was that he had not received notice that the premium was due. The trial court on objection excluded this evidence as irrelevant, "a little far afield". This would appear a correct analysis of the problem; the circumstantial evidence is of weak probative force, if any, and the trial judge's ruling in excluding it was within his sound discretion. It has been suggested that such an offer of evidence also had characteristics of a declaration through conduct, and hence can be analyzed as hearsay. The Uniform Rules of Evidence[38] classify this kind of evidence as hearsay only where the actor intended the non-verbal conduct as a substitute for words. In the instant case no such intent appears, and analysis in terms of circumstantial evidence rather than of hearsay appears sound.[39]

Admissions. In *Green v. Boney*,[40] on the issue of negligence, the trial court admitted in evidence defendant's plea of guilty in a criminal proceeding in which he had been indicted for involuntary manslaughter. The Supreme Court, per Mr. Justice Oxner, affirmed on the ground that this constituted an admission, and pointed out that defendant had full opportunity to explain his previous plea. Defendant's argument against admissibility rested on the fact that he had been jointly indicted with the plaintiff herein for causing the death

37. Ward v. Liberty Life Ins. Co., *supra*, note 11.
38. Rule 62 (1): "'Statement' means not only an oral or written expression but also non-verbal conduct of a person intended by him as a substitute for words in expressing the matter stated."
39. The problem is lucidly discussed in MCCORMICK, *The Borderland of Hearsay*, 39 YALE L. J. 489 (1930) and FALKNOR, *Silence as Hearsay*, 89 U. PA. L. REV. 192 (1940).
40. Green v. Boney, *supra*, note 14.

of a passenger in plaintiff's car. Rejecting this fact as a basis for distinguishing cases on admissions arising from pleas of guilty, Mr. Justice Oxner said:[41]

> . . . Counsel for defendant state that it was only an admission that defendant and plaintiff by their joint negligence injured Buggs and argue that the general rule does not apply where there is a joint indictment. We find no basis for the claimed distinction. In order to render a defendant criminally liable, it is not necessary for the State to show that his negligence was the sole cause of injury or death. It is sufficient if it contributed as a proximate cause.

The admission exception to the hearsay rule as it arose in the *Want* case[42] has been briefly noted above.

Hearsay-Opinion; Hospital Records. South Carolina has no business entries or hospital records statute, nor does the Supreme Court appear sympathetic to judicial broadening of the rules for admissibility of such documents, as some courts have done. In the *Peagler* case,[43] appellants offered certified copies of certain records concerning the plaintiff-respondent while he was a patient in United States Navy and Veterans' Administration hospitals. Only two days before the accident in which he ran into a railway flat-car at night, plaintiff had been released from the hospital. The hospital records showed a long history of diagnosis of the plaintiff as a neuro-psychotic and treatment of him for delirium tremens. Appellant called as witnesses some of the doctors who had made the diagnosis, and wanted to offer the hospital records as well to corroborate their testimony. The Supreme Court affirmed the ruling excluding the records on the ground they were merely cumulative. The opinion then adds:[44]

> The hospital records excluded by the trial Judge were made by many physicians and other employees in said hospitals. Dr. Paulsen referred to these records as 'a narrative summary'. They contain records of the history of the patient made pursuant to investigation and inquiries from the various staff officials of the hospitals and from members of the family of the respondent. These

41. 233 S. C. 61, 103 S. E. 2d 738 (1958).
42. Want v. Alfred M. Best Co., *supra*, note 27.
43. Peagler v. Atlantic Coast Line R. R. Co., *supra*, note 17.
44. 234 S. C. 140, 107 S. E. 2d 32 (1959).

records likewise contain many expressions of opinion and conclusions concerning causes and effects, which involved the exercise of judgment and discretion. We think the records were inadmissible in evidence.

In the case of State v. Pearson, 223 S. C. 377, 76 S. E. 2d 151, and in the case of Griggs v. Driggers, 230 S. C. 97, 94 S. E. 2d 225, this Court quoted with approval from the case of Commonwealth v. Slavski, 245 Mass. 405, 140 N. E. 465, 469, 29 A. L. R., 281, the following: 'The principle which seems fairly deducible from them is that a record of a primary fact made by a public officer in the performance of official duty is or may be made by legislation competent prima facie evidence as to the existence of that fact, but that records of investigations and inquiries conducted, either voluntarily or pursuant to requirement of law, by public officers concerning causes and effects and involving the exercise of judgment and discretion, expressions of opinion, and making conclusions are not admissible as evidence as public records.'

We conclude that even though the proffered documents of the hospital records of the respondent in form complied with section 26-101 of the 1952 Code of Laws of South Carolina, their admission in the evidence would clearly have been a violation of the best evidence rule. We think the trial Judge committed no error in excluding the hospital records from the evidence.

The problem of admissibility of such documents is a confusing one, and involved consideration of several rules of evidence. First, the offered records must be authenticated. This requires their being identified by a witness who can testify to what they are. Of course no problem of authentication is involved in the instant case, since the doctor who made the records testified at the trial, and can identify the records. Second, consideration should be given to the applicability of the so-called "best evidence" rule. Mr. Justice Taylor's statement to the contrary notwithstanding, it is clear that no best evidence problem is involved in the instant case, since the original documents are offered in evidence. Third, the statements in the record are offered to prove the truth of the matter stated, and therefore are hearsay. This is the real problem as regards the competency of the evidence. In regard to a particular offered document, problems of multiple hear-

say may arise.[45] The question to which Mr. Justice Taylor's remarks above are properly addressed, therefore, is whether, the matter being hearsay, any exception, common law or statutory, to the hearsay rule would permit their admission. This was the problem in *Commonwealth v. Slavski,* cited by Mr. Justice Taylor, in which the Supreme Judicial Court of Massachusetts upheld as constitutional a Commonwealth statute which authorized introduction in evidence of a certificate by the department of health containing an analysis of composition and quality of liquors made by the department. The distinguished Chief Justice Rugg in the *Slavski* case drew an analogy between the statute and the official statements exception to the hearsay rule, and rejected defendant's assertion that the statute violated his constitutional right to confront witnesses against him. The quotation from the *Slavski* opinion in Mr. Justice Taylor's opinion in the instant case is an attempt to summarize the cases involving the official statements exception to the hearsay rule. This statement and cases from other jurisdictions support Mr. Justice Taylor's refusal to broaden the official statements exception to include statements of hearsay or inference. Counsel in the instant case argued admissibility under this exception to the hearsay rule.[46] Professor McCormick has argued with persuasive power for a more liberal attitude toward admissibility of such medical records, particularly in jurisdictions which have a modern business entries statute.[47] It would seem that hospital records, even where governmental hospitals are concerned, would more logically be treated under the hearsay exception for business entries than the official records exception.

Circumstantial Evidence

Inference contrary to direct testimony. In *Williams v. Ford,*[48] an action for wrongful death, evidence showed that plaintiff's intestate, a colored man wearing blue denim, was struck and killed by defendant's truck at 1:30 a.m. There was evidence from plaintiff's witness that deceased had been drinking but was not drunk. For the defendant, the only eye-witnesses to the accident — defendant's driver, a friend

45. MCCORMICK, *supra,* note 5 at 611.
46. Brief of Appellants, pp. 20-25.
47. MCCORMICK, *supra,* note 5.
48. 233 S. C. 304, 104 S. E. 2d 378 (1958).

driving another truck and a stranger driving an automobile — testified that the deceased was walking in the middle of the road toward the oncoming vehicles when the truck hit him. At the time of the accident, the truck was attempting to pass the car. The trial court denied a motion for directed verdict, but after a jury verdict for plaintiff was returned, and on defendant's motion, granted judgment *n.o.v.* In upholding this ruling, Mr. Justice Legge said:[49]

> The conclusion thus sought to be established here was, under the allegations of the complaint, that the decedent, while walking in a northerly direction on the left side or left shoulder of the highway, facing southbound traffic as required by law for pedestrians, had been negligently and recklessly run down from the rear by the defendants' truck, which was on its wrong side of the road. In support of that conclusion the plaintiff, of necessity, relied solely upon the physical evidence found on the highway immediately or very shortly after the accident. That evidence was perfectly consistent with the direct, uncontradicted and unimpeached testimony of the defendants' eyewitnesses. We agree with the trial judge that it failed to meet the probative requirements before mentioned.
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> 'A fact cannot be established by circumstances which is perfectly consistent with direct, uncontradicted, and unimpeached testimony that the fact does not exist.' 32 C. J. S. Evidence § 1039, p. 1101; 20 Am. Jur., Evidence, Section 1189, p. 1043; Esso Standard Oil Co. v. Stewart, 190 Va. 949, 59 S. E. 2d 67, 18 A. L. R. 2d 1319; City of Summerville v. Sellers, 94 Ga. App. 152, 94 S. E. 2d 69.

On the facts of this case, of course, the result is sound. The suggested rule for weighing circumstantial evidence is not a rule concerning admissibility but one concerning sufficiency of evidence in the record to support the verdict. The myriad situations in which circumstantial evidence is offered in litigation would render futile any attempt to apply so artificial a rule as that suggested. At best, the formula might be useful as a device for avoiding arguments based on the scintilla rule. Recent restatements of that rule by the Supreme Court[50] make such an approach unnecessary.

49. 233 S. C. 311, 104 S. E. 2d 382 (1958).
50. Recent cases are discussed in WHALEY, HANDBOOK OF SOUTH CAROLINA TRIAL AND APPELLATE PRACTICE, 11 S. C. L. Q. 3A (Supp. 1959).

Miscellaneous Rulings

Privilege Against Self-Incrimination. In *State v. Livingston*[51] defendant in a murder prosecution while under arrest was examined for a period of one month by a team of five physicians of the State Hospital. On basis of that examination, one of the physicians testified that the defendant was in his opinion sane. A dictum of the Supreme Court reaffirming *State v. Myers*[52] found no violation of the constitutional guarantee against compulsory self-incrimination in this procedure. In *State v. Sanders*[53] defendant was convicted of reckless homicide by automobile. The Court rejected contentions based on self-incrimination and due process that the result of a chemical analysis of defendant's blood taken shortly after the accident was inadmissible. The Court found the uncontradicted and unimpeached testimony of a police officer showed that defendant had consented to the taking of his blood. Incidentally, in this case the police officer personally turned over the blood sample to the laboratory technician who made the analysis, thus avoiding any problem of tracing the blood sample.[54]

Dead Man's Statute. Chief Justice Stukes, in pointing out in his opinion in *Lisenby v. Newsom*[55] that this statute is inapplicable to transactions and conversations between the deceased and third persons, indicated the attitude of the Supreme Court that the statute should be strictly construed:[56]

> The statute is to be strictly construed rather than extended by construction. Harris v. Berry, 231 S. C. 201, 98 S. E. 2d 251, and cases cited. Incidentally, it is in bad repute with modern writers. II Wigmore, 3rd Ed., 695, Sec. 578. McCormick, p. 142, Sec. 65. The former authority refers to it as a 'crude, technical, and unjust method of disqualifying surviving witnesses.' P. 697.

Judicial Notice. A routine application of this doctrine arose in *Elliott v. Sligh*[57] where the Court held unconstitutional as special legislation a statute applicable to only two counties in the state prohibiting the sale or possession of fireworks. The

51. 233 S. C. 400, 105 S. E. 2d 73 (1958).
52. 220 S. C. 309, 67 S. E. 2d 506, 32 A. L. R. 2d 430 (1951).
53. 234 S. C. 233, 107 S. E. 2d 457 (1959).
54. See Benton v. Pellum, 232 S. C. 26, 100 S. E. 2d 534 (1957).
55. 234 S. C. 237, 107 S. E. 2d 449 (1959).
56. 234 S. C. 237, 107 S. E. 2d 452 (1959).
57. 233 S. C. 161, 103 S. E. 2d 923 (1958).

Supreme Court in aid of its decision judicially noticed the location and population of cities and counties in the State, relying on the United States census figures.

Parol Evidence Rule. Charles v. B & B Theatres, Inc.[58] involved a routine application of the exception to this rule, that where the writings are ambiguous, parol evidence is admissible to explain their import.

Legislation

The only important statute enacted in the past legislative session and applicable to the law of evidence is entitled "An act to provide that certain confidential communications made to ministers, priests or rabbis shall be privileged communications" and provides as follows:[59]

> Ministers, Priests and Rabbis not required to disclose certain information. — In any legal or quasi-legal trial, hearing or proceeding before any court, commission or committee no regular or duly ordained minister, priest or rabbi shall be required, in giving testimony, to disclose any confidential communication properly entrusted to him in his professional capacity and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline of his church or religious body. This prohibition shall not apply to cases where the party in whose favor the same is made waives the rights conferred.

58. 234 S. C. 15, 106 S. E. 2d 455 (1959).
59. Act No. 196 of 1959.