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Charles H. Randall Jr.
University of South Carolina

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EVIDENCE

CHARLES H. RANDALL, JR.*

Hearsay

Conduct as Hearsay. In Prince v. C. Y. Thomason Co., a workmen’s compensation case, decedent was killed while on his way to the town of Ninety Six where his employer’s company was beginning a construction project. Decedent was supervisor for the project. At the hearing before the Commissioner, testimony indicated that post hole diggers were necessary and useful for his work at the site, and that decedent’s pick-up truck, in which he was killed, carried such equipment at the time of his death. Decedent was killed early on a Monday morning. Evidence was admitted over objection, that on the previous Friday, decedent had picked up some twine and post hole diggers at the company’s supply house, and had ordered an employee of the company, one Spires, to meet him at Ninety Six at 7 A.M. on the following morning. Another witness testified that on the same Friday decedent had borrowed a pair of post hole diggers that he then declared were to be used to lay out the job at Ninety Six. It was objected that the statements of deceased were not made immediately prior to his departure, and, therefore, should have been ruled incompetent. The Supreme Court, per Mr. Justice Taylor, affirming a finding that the accident was in the course of employment, held that the acts of obtaining the equipment were “certainly competent” as they were acts in connection with his duties and not merely declaratory statements revealing his intentions. It might be equally cogently argued that the directions to Spires to join him in Ninety Six

*Professor of Law, University of South Carolina.

2. Decedent owned the truck under an arrangement whereby the company paid him rental on it, as well as running expenses and repairs expense.
3. Appellant relied on Erwin v. Myrtle Grove Plantation, 206 S. C. 41, 32 S. E. 2d 877 (1945) which held admissible statements made by a decedent just prior to departure, as to the purpose of the proposed journey. In that case the Court said (obiter) that probably the better view as to the effect of the element of time between the statements and the departure is, not that the statements be so close to the departure as to be a part thereof, but that there be such proximity as will furnish reasonable assurance that there has been no change of purpose between the statements and the departure.
were "acts" in connection with his duties. In both instances, the case would seem to be a clear one for using this circum-
stantial evidence approach, rather than classifying the con-
duct as tantamount to declarations of intention of the de-
ceased.4

**Declarations of Intention.** As to the declarations made at
the time of acquisition of the equipment in the *Prince* case, the
Court found that this evidence was at most cumulative, since there was an abundance of competent evidence to sup-
port the finding toward which the offer of evidence was
directed. Thus the Court avoided the necessity of deciding the
question which it posed in the *Erwin* case.5

In *Corley v. South Carolina Tax Comm'n*6 a similar ques-
tion arose. This action was also a workmen's compensation
case, in which decedent was killed in an automobile accident
on his return from a "Big Thursday" football game held
during State Fair week in Columbia. Decedent was employed
as a field agent by the Commission, and it was argued that
his trip to Columbia was motivated partly by the desire to
accomplish Commission business, thus bringing the trip within
the "dual purpose trip" doctrine.7 Decedent's statements as
to the business purpose of the trip were admitted into
evidence. Admissibility of this evidence was conceded,8 but
the Court, per Mr. Justice Oxner, reversed the finding of
the Industrial Commission that the trip was in the course of
employment, and dismissed the complaint. The Court found
that the evidence as to intention to go on business was com-
pletely rebutted by decedent's subsequent conduct, citing Dean
McCormick's observation that "for many reasons the cup of
intention and the lip of action may never meet."9

**Admissions.** *Hunter v. Hyder*10 was an action brought by
Hunter alleging that defendants entered his land, destroyed

4. McCormick, Evidence § 229 (1954), discusses the problem, the
learned author concluding as does Justice Taylor in the instant case that
the circumstantial evidence approach is preferable. The test of admissi-
bility then becomes the usual test of relevancy of the offered evidence.
5. Supra, note 3.
8. Under the *Erwin* case, supra, note 3.
9. McCormick, Evidence § 270 (1954). Justice Oxner cites with ap-
proval Dean McCormick's discussion beginning on page 575 of his text on
the weight to be accorded such declarations of intention in testing the
sufficiency of the evidence to support a finding that the intention was
carried out.
fences thereon, and cut and removed timber therefrom. Defendant Wyatt owned the land adjoining the plaintiff's tract, and sold his interest in the timber thereon to defendant Hyder. Plaintiff contracted with one Sam Walker to cut the timber. Plaintiff introduced testimony to the effect that after Walker cut timber and destroyed the fences on plaintiff's tract, plaintiff talked with Walker, and as a result of the conversation, Wyatt and Hyder came to see him. Wyatt then said, "I thought the wood foreman had gotten drunk and had gotten over on it and I wanted to straighten it up." Plaintiff also testified that he talked with Wyatt on the phone several times, asking him to fix the fence, and Wyatt told him that he would get in touch with Hyder and "the boys that tore it down" and tell them to fix it. At the trial, defendants took the position that Walker was an independent contractor for whose acts they were not responsible. The Supreme Court, in an opinion by Mr. Justice Moss, affirmed a judgment for the plaintiff, and held the statements were admissible as "a declaration against interest and as an admission of liability for the trespass committed." The Court also refers to the statements of Wyatt as "declarations or admissions against his interest." Courts frequently speak in these terms, thus confusing the two independent exceptions to the hearsay rule, the exception for declarations against interest and that for admissions. It is clear that here the declarations against interest exception does not apply, if only because the requirement of unavailability of the declarant is not met. As to the admissions exception, which the Court here is applying, there should be no requirement that the declaration or statement be against interest when made, although such statements as the opponent wishes to introduce are usually against interest.

**Hunter v. Hyder** also involved the admissibility of statements which Walker, alleged by defendants to be an inde-

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11. The argument that these conversations constituted an offer of compromise and hence were inadmissible as privileged was rejected. See below, text at note 47.
12. 236 S. C. at 388, 114 S. E. 2d at 498.
13. 236 S. C. at 387, 114 S. E. 2d at 498.
15. McCormick, EVIDENCE §§ 253, 257 (1964). Dean McCormick expresses agreement with Dean Wigmore that the line should be clearly drawn between the two exceptions to the hearsay rule. In the **Hyder** case, both Hyder and Wyatt were defendants and testified at the trial.
16. Id. at 547.
dependent contractor, and not a party to the action, made to the plaintiff. Mr. Walker was alleged to have said he would send some men down to plaintiff’s place. Defense counsel objected to this conversation being admitted, and the trial court ruled that if Walker were an agent, the statement was admissible. Most of the argument between court and counsel turned on whether plaintiff had pleaded agency; the trial court ruled that the pleadings should be liberally construed, and permitted evidence of agency. On this issue, the Supreme Court affirmed, and held that the agency issue was properly involved in the case. If Walker were found by the jury to be an agent, the Court said, “his acts, declarations or admissions, within the scope of his agency, [are] competent evidence against his principals.” It would seem that the issue could have been disposed of on the simpler ground that little concerning the conversation with Walker came out on direct anyway; most of it came out on cross-examination. However, several theories might support the ruling of the Court that the declarations were admissible. First, it could be argued that they were “res gestae” — statements made at the time of and in conjunction with acts then being performed in the scope of the agent’s duties. Second, it could be argued that the agent was authorized to make the statements, tested by pure agency principles. Dean McCormick suggests a broad phrasing of the exception that seems to find support from Mr. Justice Moss’ statement in the instant case — if the declaration concerns a matter within the scope of the agent’s employment, and was made before termination of the agency, it is admissible.

Admissions of Fault. In Beasley v. Ford Motor Co., an issue was raised as to the sufficiency of the evidence of negligence to go to the jury. A Lincoln automobile sold to plaintiff’s husband by a dealer of defendant developed a fire under the hood while the car was being driven in heavy traffic. The car was inspected by the dealer after the fire, and a few days later, plaintiff’s husband was called to the dealer’s place of business and there introduced to one Hodges, an alleged representative of defendant. Hodges admitted to the husband

17. RECORD, p. 21.
18. 286 S. C. at 387, 114 S. E. 2d at 497.
19. RECORD, p. 21, on direct examination, and pp. 34-35 on cross-examination.
that the mishap was the fault of the auto company; another representative of defendant made the same admission some time later. No objection was raised to these admissions. The Supreme Court in an opinion by Chief Justice Stukes, held that whatever question of sufficiency to carry the case to the jury might exist otherwise, these admissions sufficed to resist the motion for a directed verdict. The Court then commented:

... Incidentally, if proper objection to the evidence of the admissions had been preserved, a nice question would be presented because of the nature and form of them. 20 Am. Jur. 462, Evidence, sec. 548; Annotation, 118 A. L. R. 1230; Piedmont Mfg. Co. v. Columbia & Greenville Railroad Co., 19 S. C. 353.22

The "nice question" referred to by the Chief Justice is the question whether a statement otherwise admissible as an admission is rendered incompetent because it is in the form of an opinion of the declarant. The opinion rule requires a witness on the stand to state what he observed, and not to testify to his opinions or mere conclusions.23 In the instant case, the out-of-court declarant has made a statement of opinion as to the "fault" for the fire under the hood of the car. It would seem to be the better view that the opinion rule is inapplicable to such declarations.24 In the case of the witness on the stand the statement can generally be restated in a form that will qualify for admission into evidence; however, it is apparent that the out-of-court declarant cannot be asked to restate his remarks in a form that will qualify. Thus the choice is between taking the remark as made or rejecting the testimony entirely. Thus the writers urge that the opinion rule, sound when applied as a rule of testimonial preference regulating the manner in which a witness may testify on the stand,25 has no proper place as a test for the admissibility of hearsay statements. A variant of the opinion rule is the objection that opinions which are conclusions on the ultimate issue in the case, such as fault in the instant case, should not be permitted.26 This objection is likewise considered to be hypertechnical and unsound.

22. Id. at 510, 117 S. E. 2d at 865.
24. Id. § 241.
25. Supra, note 23.
26. Id. § 12.
Impeachment — Prior Consistent Statements to Rehabilitate. Burns v. Clayton\textsuperscript{27} was a per curiam decision involving review of a disbarment proceeding. A witness, Tyner, testified that one of the respondent lawyers had agreed to pay him a portion of any fee that would be recovered in a pending tort liability case at which Tyner would testify. Tyner, who had not seen the accident, was to testify as an eye-witness. In November, 1957, Tyner had executed an affidavit containing details as to the accident. On January 6, 1958, Tyner executed an affidavit for a police officer which stated that he had not seen the accident, and that earlier statements had been procured from him for money. Tyner so testified at the hearing before the Commissioners on Grievances. His credibility was vigorously impeached by counsel for one of the respondents, impeaching evidence including prior inconsistent statements made by Tyner to others. Impeaching counsel suggested that Tyner's testimony at the trial and his affidavit to the policeman were motivated by promises to him. To rehabilitate the witness, counsel on re-direct called one Mills, who testified to declarations by Tyner to him consistent with his affidavit to the police officer. Tyner had shown this witness a copy of the first affidavit, and had told him that this statement was a falsehood. The Supreme Court held that this testimony was properly admitted to corroborate Tyner's testimony.\textsuperscript{28} In theory, of course, this testimony is not admissible as substantive evidence under an exception to the hearsay rule, but rather as bearing only on the credibility of the witness' in-court testimony.\textsuperscript{29}

In State v. Harrison\textsuperscript{30} defendants were convicted of aggravated assault and battery on an indictment charging also rape and assault with intent to rape. The Supreme Court upheld admission of statements which the prosecutrix had made to her mother some two hours after the assault. Such testimony is limited to the time and place of the occurrence, in corroboration of the testimony of the prosecutrix; details beyond time and place, and the fact that the event occurred, are not admissible. If the prosecutrix does not testify, the decla-

\textsuperscript{27} 237 S. C. 316, 117 S. E. 2d 300 (1961).
\textsuperscript{28} Dean McCormick indicates that this use of prior consistent statements to rehabilitate the witness is at least proper where the impeaching evidence suggests a charge of a plan or contrivance of the witness to give false testimony. McCORMICK, EVIDENCE § 49 (1954).
\textsuperscript{29} Id. § 39.
\textsuperscript{30} 236 S. C. 246, 113 S. E. 2d 783 (1960).
rations are inadmissible, since the foundation for admissibility is their use in corroboration of the prosecutrix’s testimony.

Confessions

In *State v. Outen*, appellants, a Negro man, was convicted of rape and sentenced to death. A portion of his statement given to police officers shortly after he had been arrested and identified by the prosecutrix, which statement had been reduced to writing in question and answer form, was offered in evidence at the trial. The statement contained a detailed account of his raping of the prosecutrix. It also contained the following:

“Q. Walter, we have had lots of complaints about a man prowling around homes at night in that community. Have you been going out without shoes and watching white women in their homes in that community before?”

“A. No, sir.”

The statement in its entirety was offered by the solicitor as a confession. Counsel for defendant objected to the quoted portion, and the solicitor agreed to and did delete it from the statement by physically cutting it out. On the solicitor’s renewing his offer of the statement in its expurgated form, counsel again objected, this time on the ground that the confession was not complete since a portion had been deleted. The trial judge admitted the statement, and the Supreme Court affirmed. Mr. Justice Moss observed that the confession as amended contained only those parts material to the crime, and in this particular confession, the competent could be separated from the incompetent parts without twisting or distorting the pertinent parts. The rule permits the defendant where only part of the confession is admitted to put in evidence the entire confession relating to the controversy, including exculpatory or self-serving declarations therein.

On reversal for new trial in *State v. Britt*, discussed in last year’s survey, defendants Britt and Westbury were again tried jointly and found guilty of the murder of a police officer and were sentenced to death. On appeal the convictions were affirmed. Many questions regarding the unfair-

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32. Id. at 530, 118 S. E. 2d at 183.
ness of denial of separate trials were again raised. Once again defendant Westbury objected to the admission against Britt of the confession of the latter. That confession contained the assertion by Britt that Westbury had fired the fatal shots. Britt did not take the witness stand. The Court held that the admission of the confession was proper where the trial court had repeatedly admonished the jury that it must consider this confession as evidence only against the defendant Britt. 36

In State v. Harrison37 once again38 a trial court permitted the preliminary examination to determine the voluntariness of a confession to be made in the presence of the jury. The Court then found the confession admissible based on evidence showing that the statements had been freely and voluntarily made. No evidence was presented to the contrary. The Supreme Court affirmed, but again admonished that the better practice is to conduct such examinations in the absence of the jury.

In State v. Graham39 the statement of one Holland, co-defendant in the case, as to his whereabouts when the fire which was the basis of the criminal prosecution occurred, and as to when he had last been on the third floor of the hotel where the fire started, was admitted into evidence. This statement had been given to police officers while Holland was in custody. It was objected that the statement was a confession and inadmissible because given under duress and because proper limiting instructions were not given the jury. The Supreme Court affirmed, resting admissibility on the dual ground that the statements did not constitute a confession since there was no acknowledgment of guilt,40 and that the statements were freely and voluntarily made.

Relevancy

As usual, the past term of court offers a sampling of cases raising points concerning the relevancy of offered evidence.

36. This is the orthodox rule, McCormick, Evidence § 59 (1954); although it has not been free of criticism. See Id. note 6, discussion by Judge Learned Hand, and dissent of Mr. Justice Frankfurter in Paoli v. United States, 352 U. S. 232, 247 (1957).
37. Supra, note 30.
38. State v. Chasteen, 228 S. C. 88, 88 S. E. 2d 880 (1955) is a leading case.
40. Dean McCormick expresses the view that "it is unreasonable to make a difference in the ultimate rule of exclusion for involuntary confessions and involuntary admissions," although he would permit procedural differences in the two cases. McCormick, Evidence § 113 (1954).
The orthodox test of relevancy of an offered item of evidence considers first whether the item is logically relevant, that is, whether it has any tendency in reason to prove or disprove the existence of any material fact.\textsuperscript{41} If this test is satisfied, then the further question arises whether reception of the evidence would be unwise because of a counter-factor of probative danger. These counter considerations include the likelihood of the offered evidence tending to consume undue time, create substantial danger of prejudice or of confusing the issues in the case or misleading the jury, or unfairly surprising the party against whom the evidence is offered.\textsuperscript{42} The probative value of the evidence is weighed against these risks. This analytical approach leads to an understanding of many of the specific rules which courts have developed to govern legal relevancy.

\textit{Experiments.} In Beasley \textit{v.} Ford Motor Co.\textsuperscript{43} an issue was raised as to the cause of a fire which started under the hood of plaintiff's automobile. The defense offered to conduct an experiment in court, intended to show that gasoline in contact with a hot metal surface will not ignite. Defendant proposed to use an ordinary hot plate, with his expert witness making the demonstration. The trial court, upon objection, refused to permit the experiment. The Supreme Court affirmed. The Court cited the orthodox rule that to be admissible an experiment must be conducted under conditions substantially similar to those in the facts under investigation and that the trial judge has an ambit of discretion in determining whether this condition has been met. A hot plate was, in the view of the Court, "hardly comparable to the hot automobile motor under the hood of it; nor was there any evidence of the temperature which the hot plate would reach, whether comparable to the motor."\textsuperscript{44}

Far more likely to result in abuse and possible confusion of the trier of fact are those experiments conducted \textit{ex parte} out of court; but these, also, have been held admissible where the appropriate foundation of substantial similarity of conditions has been laid.\textsuperscript{45} In \textit{State v. Langley}\textsuperscript{46} one of the de-

\textsuperscript{41} This is the terminology of the \textit{Uniform Rule of Evidence} 1 (2).
\textsuperscript{42} \textit{Uniform Rule of Evidence} 45; McCormick, \textit{Evidence} § 152 (1954).
\textsuperscript{43} Supra, note 21.
\textsuperscript{44} 237 S. C. 506, 510, 117 S. E. 2d 863, 865 (1961).
\textsuperscript{45} McCormick, \textit{Evidence} § 169 (1954).
\textsuperscript{46} 236 S. C. 395, 114 S. E. 2d 506 (1960).
fendants was alleged to have sold vodka to the prosecuting witness, who identified her as having made the sale. The sale took place through a partition, which was about ten inches wide and five or six inches high. At the trial, the defendant who allegedly made the sale was asked by her counsel whether she had ever tried to identify anyone looking through that partition, when standing approximately where the prosecuting witness had stood. The trial court, on objection by the solicitor, did not permit answer to the question. The Supreme Court per curiam affirmed, holding that the foundation to show substantial similarity of conditions had not been laid. The Court indicated that even had the testimony been admitted, it could not have affected the result because of the substantial testimony and exhibits in evidence on the same point.

Offer to Compromise. In Hunter v. Hyder\(^47\) an action for trespass on plaintiff's land and cutting of trees thereon, testimony was introduced to the effect that one of the defendants, one Wyatt, said that he would get a man who was a timber agent to come down to plaintiff's place and check on the damage. It was objected to this testimony that it constituted an offer to compromise, and should have been excluded, since the law favors such compromises of disputes, and testimony relating thereto is ordinarily inadmissible.\(^48\) The Court held that this did not constitute an offer to compromise, but an admission.\(^49\)

Character in Issue. In State v. Outen\(^50\) the defense put character in issue by presenting testimony of a witness that he had known defendant for a number of years and knew him to be of good reputation. Defense counsel then asked whether defendant had helped members of the witness' family at times, and over objection the witness was permitted by the trial court to answer that defendant helped the witness' mother do some painting, and did yard work for witness' mother. The trial court held too general a question asking the witness for "anything else about [defendant's] family situation and surroundings that you can enlighten us about?"\(^51\)

On appeal defendant listed as an exception the limitation of

\(^47\) Supra, note 10.

\(^48\) This rule is based on privilege and not irrelevancy, of course, although as Dean McCormick points out, courts and writers have frequently classified the rule as one of relevancy. McCormick, Evidence § 76 (1954).

\(^49\) Supra, note 10.

\(^50\) Supra, note 31.

\(^51\) 237 S. C. 514, 523, 118 S. E. 2d 175, 179 (1961).
his development of character of the accused. The Supreme Court in affirming the ruling below noted that while general character was admissible, particular acts to show character were not, and hence defendant had been permitted more than the requisite scope in developing character.52 Another witness was not permitted to answer defense counsel's question whether he thought the defendant was "the kind of person to get into this kind of difficulty."53 Upholding this ruling, the Supreme Court found that expressing an opinion on defendant's guilt was not proper under the character rule.64

**Demonstrative Evidence — Laying a Foundation.** In a prosecution for burning a hotel with intent to defraud an insurance company, an exception was taken to admission in evidence of a can cap and a pair of gloves. *State v. Graham.*55 Both articles had been found by firemen immediately after the fire. Appellants claimed that these objects were in no way connected with them. The Court held that the can cap was admissible as a link in the chain of evidence establishing the corpus delicti; admission of the gloves was held proper since testimony had indicated that one of the defendants had been seen wearing similar gloves previously.

In *State v. Puckett,*56 a prosecution for conspiracy to break into a store, attempting to enter the store with intent to steal, and possession of certain tools adapted for burglary with an intent to use them, the solicitor introduced into evidence a crow bar or halicon tool, which was identified by the witness highway patrolman as the one he found near the store. No objection was made to this evidence. Thereafter, the chief of the fire department of North Augusta was sworn as a witness, and the crow bar was shown to him. He testified that his fire station used such instruments, and had had three of them until recently when one disappeared. He also testified that the fire department was located in the same building

52. By a rule of relatively recent origin and doubtful expediency, the only way by which character for this purpose can be proved is by evidence of reputation. This excludes evidence of specific acts or blameless life and rules out opinion-evidence as to the character of the accused for the trait in question based on the witness' knowledge and observation. Reputation-evidence, though muted and colorless, is thought to have the advantage of avoiding distracting side-issues as to particular acts and incidents in the past life of the accused. **McCormick, Evidence** § 158 (1954).


54. Supra, note 52.

55. Supra, note 59.

as the police department in North Augusta, and that one of
another crow bar was then offered through the witness for com-
comparison, identified as one of the remaining two crow bars in
possession of his fire department. Defendants objected to
admission of the second crow bar. The Supreme Court af-
firmed admission on the technical ground that counsel for
appellant had cross-examined concerning the instrument with-
out reserving his previously made objection, but also ob-
erved that the testimony was relevant to the issues. This
would appear sound.

In State v. Outer, wherein defendant was convicted of
rape, the defense objected to the admission of testimony of
prosecutrix’s physician as to the prosecutrix’s physical con-
dition the day after the crime. The Supreme Court found
that the time was close enough to the event to justify admis-
sion as tending to prove the commission of the offense.

Use of Blackboard in Argument on Damages. Plaintiff’s
counsel in Indemnity Ins. Co. of No. America v. Odom, a
wrongful death action, was permitted by the trial court to
multiply on a blackboard the alleged weekly wage of deced-
ent ($58.00) by the number of weeks in a year (52) and
by decedent’s life expectancy (35.15 years) to give a product
of approximately $106,000. Counsel argued that this was the
pecuniary loss of the beneficiaries. Defendant objected that
this argument was improper and highly prejudicial, had no
foundation in the evidence, and was based on sheer specula-
tion. The Supreme Court held that this use of the blackboard
was proper within the dictum of the Johnson case.

Evidence of Excessive Speed. In State v. Cavers, wherein
defendant was convicted of reckless homicide, the crucial
issue was whether the defendant’s car was proceeding at an
excessive speed at the time of the accident. Many objections
were made by defendant to the admission of evidence offered

57. Infra, note 82.
58. Supra, note 81.
60. It would seem clear that the total so reached should be discounted
and thus reduced to present value, but it does not appear that counsel
raised this question. See discussion of Johnson v. Charleston & W. C. Ry.,
61. Ibid.
to prove excessive speed, or offered to identify the defendant's car as the same car that had been speeding just before the collision. The Supreme Court on appeal agreed with the observation of the trial judge that the evidence of the impact itself tended inescapably to show excessive speed. Hence the Court could view the testimony as merely cumulative, and uphold without extended discussion the rulings of the lower court. Furthermore, the Court found that some of the rulings were not properly preserved as exceptions because defendant cross-examined without reserving an objection. Nevertheless, the problems raised are of a recurring class, and merit notice here.

Appellant objected that witnesses were permitted to give their opinions as to the speed of a car alleged to be that of the defendant, based on observations up to two miles distant from the place of the collision. One witness, one and one half miles from the place of collision, on being approached by defendant's car, was so frightened by the speed of the latter that he drove off the road. The Supreme Court avoided any problem of relevancy of observations this far distant from the impact by stressing that other witnesses testified to speed at intermediate points, and hence the whole record indicated continuity of excessive speed. One nice question pointed out by defendant was that between the points of these observations by witnesses and the point of impact, and about two-tenths of a mile from the impact, was a traffic circle through which the defendant must pass. Since no car could cross the traffic circle at defendant's alleged rate of speed — one witness estimated it at ninety miles per hour — it was pointed out that defendant must have slowed down here. The Court disposed of the difficulty by taking judicial notice that powerful automobiles accelerate rapidly. Defendant's argument that these witnesses did not positively identify him or his car was rejected in summary fashion. The Court pointed out that the witnesses testified to their observations of a two-toned Lincoln being driven by a colored man; these observations were made immediately before the impact. Defendant was a colored man, and admittedly he and his two-toned Lincoln were involved in the fatal collision. Hence, the Court found the evidence of the witnesses' observations sufficiently connected up to the accident to meet the test of relevancy.68

68. The discussion by Dean McCormick in his text, supra, note 4, indicates the problems and the correct analytical technique for their resolution.
Procedural Rules

Burden of Producing Evidence — Criminal Case. In State v. Puckett,64 voluminous testimony, most of it circumstantial evidence, was offered by the State in the court below. Defendants were convicted, the trial court refusing motions for directed verdicts of acquittal and for judgment non obstante veredicto. On appeal, counsel urged that the case for the State was entirely based on circumstantial evidence, and that this evidence was insufficient to uphold the verdict, "since even if the jury believed each circumstance offered, the same did not point to the guilt of the appellants nor was such consistent with their guilt and inconsistent with their innocence."65 The Supreme Court affirmed the judgment of conviction. Mr. Justice Legge for the Court, quoting the recent opinion in State v. Littlejohn,66 held that the rule to be applied by the trial court in determining whether the evidence was sufficient to go to the jury was less stringent than that suggested by defense counsel:

'... But on a motion for direction of verdict, the trial judge is concerned with the existence or non-existence of evidence, not with its weight; and, although he should not refuse to grant the motion where the evidence merely raises a suspicion that the accused is guilty, it is his duty to submit that case to the jury if there be any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced. State v. Brown, 205 S. C. 514, 32 S. E. (2d) 825.'67

Professor McCormick approves this view,68 observing that trial judges "doubtless ... do and should apply their standard more strictly in view of the gravity of the consequences."69

The same question was raised in State v. Graham,70 where- in defendants were convicted of setting fire to a hotel with intent to defraud certain insurance companies. There, two defendants moved for a directed verdict at the conclusion of the State's case and again at the close of all the evidence.

64. Supra, note 56.
68. MCCORMICK, EVIDENCE § 321 (1954).
69. Ibid.
70. Supra, note 39.
The Supreme Court affirmed conviction, with the opinion of Mr. Justice Oxner again carefully examining the evidence and applying the test of the Littlejohn case.\(^{71}\) Appellants emphasized the fact that the trial judge in passing on the motion for directed verdict observed that he would be "worried" if he were on the jury.\(^{72}\) The Court rejected the argument that this aided the case for reversal:

... But any opinion of his as to the weight of the evidence did not require him to direct a verdict. He was not called upon to determine whether appellants were guilty. His function was solely to determine whether the evidence was sufficient to require the submission of the case to the jury. He, of course, was empowered to set aside the verdict if he felt there had been a miscarriage of justice, but this he declined to do.\(^{73}\)

**Presumption and Burden of Proof.** In Strawhorne v. Atlantic Coast Life Ins. Co.\(^{74}\) an action was brought on a policy of life insurance for the death of plaintiff's wife. The policy provided that liability of the company should be limited to premiums paid if the insured should die by his or her own hands during the first two years in which the policy was in force. Insured died as a result of a gunshot wound within the two year period and the company interposed the defense of suicide. Substantial evidence pointing toward suicide was introduced. The facts and circumstances surrounding the death were largely undisputed, although there was no eyewitness to the shooting. The trial court entered judgment on a jury verdict for the claimant, denying defendant's motions for nonsuit and directed verdict. The Supreme Court reversed saying the burden of proof is upon the insurer to prove the fact of suicide by a preponderance of the evidence:

It is true that where death by violent injury has occurred, unexplained, there is a presumption against suicide, but this is a presumption of law and not of fact. When evidence as to the fact of suicide is introduced, the presumption against suicide vanishes and the question must be resolved upon the evidence. McMillan v. General Am. Life Ins. Co., 194 S. C. 146, 9 S. E. 2d 562 (1940).\(^{75}\)

\(^{71}\) Supra, note 66.
\(^{73}\) Ibid.
\(^{75}\) Id. at 42, 119 S. E. 2d at 102.
The Court held that, considered in the light most favorable to the claimant,\(^76\) the evidence was susceptible of no other reasonable hypothesis than that the insured came to her death by her own hands.

**Judicial Notice.** None of the instances in which the Court utilized the judicial notice technique demand extended discussion. In *State v. Cavers*\(^77\) the Court observed that it was common knowledge that powerful automobiles accelerate rapidly. The automobile in question had been shown to be proceeding at greatly excessive speed at a point some mile and a half before the point of collision with another car. Two-tenths of a mile from the point of collision, however, was a traffic circle, through which the car could not have passed without reducing speed. The Court used this "common knowledge" to permit inference that, having passed through the circle, the automobile in question accelerated and resumed its excessive speed.

In *In re Cogdell's Estate*\(^78\) appellant was adjudicated an incompetent based on an examination made by two physicians some time before the order of the probate court appointing qualified persons to examine his mental condition as an alleged incompetent. The Supreme Court reversed the adjudication of incompetency, holding it void because the governing statute\(^79\) required examination of the condition of the subject after issuance of the order of the probate court. Commenting on the wisdom of the statutory provision, Chief Justice Stukes stated that it was common knowledge that a person may be normal mentally at one time, but not at another. In *Deese v. Williams*\(^80\) the Court took judicial notice that the Highway Department has offices in every county in the State.

**Waiver of Objection.** In *Cavers*\(^81\) appellant urged that certain statements of the solicitor in summation to the jury

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76. The Court says that the question was whether or not all the evidence, considered in a light most favorable to the appellant, is susceptible of any reasonable hypothesis other than that the insured came to her death by her own hands. This would appear to be an inadvertent designation of the party entitled to the advantage in the weighing of the testimony, however, for the Court reverses a verdict for the respondent on the face amount of the policy, and directs entry of judgment for respondent to recover only the premiums paid. Obviously the Supreme Court weighed the evidence in a light most favorable to respondent, and found it still insufficient to support the verdict. *Ibid.*

77. *Supra*, note 62.

78. 236 S. C. 405, 114 S. E. 2d 562 (1960).


were prejudicial. The Court refused to consider the argument since no objection had been made thereto during the trial, nor had an exception been taken thereon. In Puckett\(^8\) defendant objected to the admission in evidence of a certain crow bar. The Supreme Court found the evidence relevant and admissible, but observed that the cross examination of the witness through whom the crow bar was admitted, wherein counsel did not reserve his objection, constituted a waiver of objection. See the comment elsewhere on the undue technicality of this rule.\(^8\)

**Witnesses**

*Questioning by Court.* In *State v. Harrison*\(^8\) appellants urged that they had been prejudiced by the active participation of the trial judge in the questioning of witnesses. The Supreme Court, on examination of the record, found that the questioning was within the proper limits of the trial judge's power, since the questions did not indicate to the jury the judge's opinion as to appellant's guilt or innocence, and could not have resulted in prejudice.

*Leading Questions.* In *State v. Outen*\(^8\) appellant cited six instances wherein the solicitor asked questions in what appellant considered a leading form. In four of these instances the question was restated by the solicitor after objection by the defense and a ruling in defendant's favor by the trial judge; in the fifth, the trial judge on his own motion required the solicitor to restate the question; and to the sixth, no objection had been raised at the trial. The Supreme Court found no error, noting that wide discretion is vested in the trial judge in this matter, and that if opposing counsel persistently asks leading questions resulting in prejudice, a motion for mistrial is appropriate. No such motion had been made.

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\(^{82}\) *Supra*, note 56.
\(^{84}\) *Supra*, note 30.
\(^{85}\) *Supra*, note 31.