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Evidence

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EVIDENCE

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HEARSAY

Previous Testimony

In the case of *Gaines v. Thomas*[1] a question was raised as to the scope of the well-recognized exception to the hearsay rule for testimony at a previous trial. Arguably, testimony at a former trial is not hearsay at all, since it was given under oath and subject to cross examination. American courts, however, have classified such testimony as hearsay, and early cases developed a fairly restricted exception permitting admission into evidence of some such testimony.[2] The orthodox statement of the rule was that "evidence given on a former trial of the same action, or a former action involving the same issues between the same parties, is admissible if it be established that the witness is dead."[3] The history of this exception to the hearsay rule since its outlines became settled in that formula has been one of steady attack upon and erosion of the limitations of "same issues," "same parties," and death of the declarant.

The facts of the *Gaines* case may be quickly stated, as they relate to this point. An automobile driven by one Martin and a truck owned by Peerless Mattress Company (Peerless) and driven by one Byars collided in October of 1957. Plaintiff Gaines was working on the shoulder of the highway near the point of impact, and was injured. Martin was killed, and Thomas appointed as his administrator. Thomas as administrator sued Peerless in a federal court for the alleged wrongful death of Martin. In that action (case I) Byars testified for Peerless and was cross-examined by counsel for Thomas. Gaines then brought an action (case II) against Thomas, in his representative capacity. Before this action came to trial, Byars, the truck driver, had died. Gaines offered in evidence in case II (Gaines v. Thomas) a transcript of the testimony of Byars given in case I (Thomas v. Peerless). The testimony of Byars related to the question of

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1. 241 S.C. 412, 128 S.E.2d 692 (1962).

2. UNIFORM RULES OF EVIDENCE rule 63, begins as follows: "Hearsay Evidence Excluded—Exceptions. Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and is inadmissible except: [the exceptions follow]"

3. McInturff v. Insurance Co. of North America, 248 Ill. 92, 93 N.E. 369 (1910).

which vehicle had been negligently operated, causing the accident—specifically, which had swerved across the center line of the road.

Here the issues are the same, and the witness at the previous trial is deceased, but the parties are not the same. Hence under the rule as stated in the *McInturff* case[4] the testimony would be inadmissible. The trial judge admitted the transcript of Byars' testimony over objection, and the Supreme Court, in an opinion by Justice Brailsford, affirmed. Citing Dean McCormick's masterly one-volume work,[5] Justice Brailsford adopted the view that the rationale of the limitations expressed in the usual statement of the former testimony rule was to afford protection and fairness to the person against whom the evidence was being offered. Probing for the underlying principle, the court found that the facile statement that the litigation must be between the same parties is inadequate:[6]

> The admission of Byars' testimony at this trial was equally as free of the objections to hearsay evidence as its use at a retrial of the former action would have been. The facts with which we deal jibe with the rationale of the rule letting in former testimony. The 'convenient phrase' [same parties] must yield to the underlying principle that properly tested, relevant testimony of a deceased witness should be available to the jury, when no unfairness to the adverse party is involved. The testimony falls within this principle and was properly admitted.

The broadest statement of the reasons underlying most[7] of the exceptions to the hearsay rule is that some strong necessity exists for use of the hearsay evidence and some safeguard exists as to its credibility.[8] The necessity in the instant case arises in the unavailability of the witness because of his death. Can we say that the testimony was subject to safeguards as complete as we could ask, especially when compared with other exceptions to the hearsay rule, since the testimony at the first trial was under oath, and subject to cross-examination? If this approach were adopted, analyzing the reliability of the testimony rather

4. *Ibid.*
5. McCormick on Evidence § 232 (1954 ed.).
6. 241 S.C. 412, 418, 128 S.E.2d 695 #696, (1962).
7. The exception for "admissions" of a party has a different rationale, not unlike that adopted by the court in the instant case. Morgan, *Admissions as an Exception to the Hearsay Rule,* 30 Yale L. J. 355 (1921).
8. 5 Wigmore, Evidence §§ 1420-1427 (3d ed. 1940).

than the approach adopted by the Court a broader exception might emerge. It is to be noted that if Byars, the witness, had given testimony favorable to Thomas in the first case, had then died, and Thomas rather than Gaines had offered the testimony in the second action, it would not be admissible under the rationale of the rule as articulated by the Supreme Court. Some highly respected writers[9] would extend the prior testimony exception to embrace even such a case as suggested, putting emphasis not on fairness to the opponent in the sense that he personally had a chance to cross-examine, but on the fact that some opponent had an opportunity and a strong motive to cross-examine.

Martin v. Southern Railway Co.[10] does not appear to constitute a ruling by the Supreme Court on the former testimony rule. There the transcript of testimony taken at a hearing between the same parties, at which both sides presented testimony, was received by the trial judge, but was not published to the jury. The judge received it to give him a more complete picture in ruling on a motion for directed verdict. He granted this motion; the Supreme Court reversed on grounds not here pertinent. The court observed that admission of the transcript to the trial judge, without publication to the jury, was not prejudicial to the plaintiff.

Official Statements

This important and often overlooked exception to the hearsay rule[11] was applied in *State v. Homewood.*[12] Defendant was convicted of violating a statute[13] prohibiting fraud and misrepresentation in the sale of securities. The trial judge refused to admit in evidence certain documents proffered by the defense, including a routine report of examination of the affairs of the company of which defendant was president and treasurer. The sale of shares of this company was the subject of the indictment. The report, to the South Carolina Insurance Department for the year 1960, had found no important discrepancies in the books of

9. The broad statement of MODEL CODE of EVIDENCE rule 511 would permit the trial judge to admit the testimony in this situation. The more narrow rule expressed in UNIFORM RULES OF EVIDENCE rule 63 (3), drafted by the National Conference of Commissioners on Uniform State Laws, is in accord with the statement of Justice Brailsford.

10. 240 S.C. 460, 126 S.E.2d 365 (1962).

11. MCCORMICK note 5 supra, §§ 291-295.

12. 241 S.C. 231, 128 S.E.2d 98 (1962).

13. S.C. CODE §§ 12-10, 62-306 (1952).

the company, although the indictment was based on such discrepancies. The Supreme Court held that the report was inadmissible as irrelevant, or only slightly relevant, but in any event, found it did not come within the "official statements" exception. Again the court cited the rule of *Commonwealth v. Slavski*[14] as stating the correct rule applicable to this exception. The court's ruling in the instant case also appears adequately supported by the lack of authentication of the offered evidence. It is reasonable to expect, in the light of the greatly increasing governmental activity, federal, state and local, and the increase in reporting and record keeping that accompanies such activity, that this rule will be subjected to considerable pressure. The Uniform Rules and the Model Code suggest that the rule needs liberalization,[15] and development not unlike that in the analagous "business entries" exception[16] would not be a surprise.

Admissions—Multiple Admissibility

In *Eberhardt v. Forrester*[17] the issue was as to which driver was at fault in a collision of automobiles. Shortly after the accident, some twenty minutes thereafter, the owner of one of the cars, a used car dealer, arrived at the scene. The driver of the dealer's car, a prospective customer, told the dealer in the presence of others, "These brakes are the hardest on this car that I have ever seen on any car I have ever driven." To this the dealer allegedly replied, "When the car left the shop the brakes were ok." The trial judge excluded this testimony, offered by the driver of the other car involved. The Supreme Court, per Justice Bussey, held that this was error. The statement was an admission as to the driver of the used car, who was a party to the litigation. As to the dealer, also a party, he was not entitled to have the testimony excluded, but merely to a ruling to the jury that it was admissible only against the driver. This appears to be a correct application of the hearsay exception for "admissions" and the doctrine of multiple admissibility. The statement would not be admissible against the dealer if he were the only party to the action, since it was not authorized[18] nor was it

14. 245 Mass. 405, 140 N.E. 465, 29 A.L.R. 281 (1923).
15. UNIFORM RULES OF EVIDENCE § 63 (15); MODEL CODE OF EVIDENCE §§ 515-516.
16. While some state courts have created broad common-law "business entries" exceptions to the hearsay rule, the most fruitful progress has been by statute, i.e., the FEDERAL BUSINESS RECORDS ACT, 28 U.S.C.A. § 1732.
17. 241 S.C. 399, 128 S.E.2d 687 (1962).
18. MCCORMICK, note 5 *supra*, § 244.

acquiesced in or adopted by him.[19] It is to be noted that the statement was not "against interest" of the driver. If anything, it was self-serving to him; but the admissions exception has no requirement that the statement be against interest. The proponent of the evidence argued it was admissible as "res gestae," which also might be an adequate ground for admissibility.

Dying Declarations—"Settled Hopeless Expectancy of Death."

In *State v. Bethea*,[20] defendant was convicted of manslaughter, charged with shooting the victim, Mrs. Leona Prevatte, a widow. Defendant pleaded self-defense. The state offered and the trial court admitted in evidence as dying declarations statements of the victim to a sheriff at the scene of the shooting and to a nurse at the hospital where the victim died the next day. To both she said that she was "going to die."[21] The statement of the sheriff included the following:[22]

> .... Then she said, "Bill shot me." I asked her why he had shot her and she said, "For no reason at all other than he got mad." ....

The nurse testified that:[23]

> The first thing she said was that Bill Bethea shot her and that she was going to die and she wanted him to pay for it.

Objection was made on two grounds: First, that the admission of a dying declaration violated the constitutional right of a defendant to confront witnesses against him;[24] and second, that the evidence was insufficient to show that declarant had given up all hope of recovery when the statement was made. The first ground, the Supreme Court rejected peremptorily, only noting that this exception to the hearsay rule was well established.[25] As to the second objection, the court noted that the trial court had the primary responsibility of determining whether a proper

19. *Id.* § 246.
20. 241 S.C. 16, 126, S.E.2d 846 (1962).
21. 241 S.C. 16, 22-23, 126 S.E.2d 846, 849 (1962).
22. *Id.*
23. *Id.*
24. This argument, of course, could be equally applicable to all the hearsay exceptions, but has been rejected as a ground for exclusion. MCCORMICK, note 5 *supra*, § 231.
25. 241 S.C. 16, 23, 126 S.E.2d 846, 849. "The objection on constitutional grounds is athwart the decisions of this court, to which we adhere, and apparently unanimous authority elsewhere.
40 C.J.S. *Homicide* § 287c."

foundation had been laid to admit the dying declaration and the court would be reversed only for a ruling "clearly incorrect and prejudicial." The Supreme Court found adequate foundation in the record to support the decision of the trial court.[26]

Vicarious statements—non-hearsay—"Res Gestae."

In the *Homewood* case[27] the state introduced into evidence the testimony of one Roy Krell, a securities salesman registered as agent of the defendant, who testified to the fraudulent "sales pitch" which the defendant had directed him to make to prospective purchasers. The state also introduced in evidence the names of other agents of defendant, as indicated on the records of the state securities commissioner. Purchasers of the stock then testified as to what they had been told by these other agents of defendant. Agents other than Krell did not testify. The testimony of these purchasers was that the "sales pitch" of the other agents was substantially the same as that testified to by Krell. Defendant objected to the admission of the testimony of the purchasers of stock as to what these other agents had told them, on the ground that it was hearsay. The Supreme Court rejected an exception on this point, holding that the testimony was admissible as "res gestae." This would appear to be, without question, a sound ruling. The statements were not hearsay, not being offered for "the truth of the matter stated;" on the contrary, the state's whole case was that the statements were false. The statements were being offered to show only that the statements had been made; on this, the witnesses who heard the statements were testifying to direct, observed experience of their own.[28] Whether the statements were admissible in evidence is

26. The victim was bleeding profusely and in pain and unable to move her legs when she spoke to the sheriff. The doctor at the hospital found a "large gaping hole" through her liver, and "tremendous hemorrhage." She was treated with transfusions, but stayed in shock.

27. Note 12 *supra.*

28. The ruling demonstrates the utility of the label "res gestae" when applied by a court as a convenient catch-all phrase to uphold admissibility without further analysis. Such great names as Wigmore, Holmes and Learned Hand can be cited for the proposition that the term "res gestae" is confusing and useless, and should be dropped from the legal vocabulary. But at least two of the most able writers on the law of evidence find its usage aids the developing law of evidence in a case like the present one. McCORMICK ON EVIDENCE § 274; LADD, CASES AND MARERIALS ON THE LAW OF EVIDENCE, pp. 565-569 (2d ed. 1955).

not a matter of the law of evidence, but of the substantive law, as the court's opinion suggests.[29]

BURDEN OF PRODUCING EVIDENCE, BURDEN OF PERSUASION, AND PRESUMPTIONS.

Jake v. Jones[30] is the kind of case in which the result often turns on allocation of the burden of producing evidence, the test for determining whether the burden has been met, and the application of presumptions. Claimant applied for death benefits under the workmen's compensation laws, arising out of the death of her husband by drowning while he was at his place of employment. No eye witnesses to the death were found, and decedent's body was discovered, naked, in the water a few feet from a dredge which his duty required him to operate. Hypotheses that he had drowned while swimming, against the rules of the company, or while trying to deal with some unforeseen circumstance which arose in connection with his work, were tendered by the defense and the claimant, respectively. The issue was whether death "arose out of and in the course of employment."[31] The Commission found in favor of the claimant, and the trial court affirmed the award. This was affirmed by the Supreme Court, aided by the presumption that an employee assigned a duty at a particular place would be carrying out his duty and that if he should be found there, injured, the injury arose out of the performance of the employment.[32] The court carefully analyzed the testimony and found it consistent with the presumed fact.

Another recurrent and troublesome question in compensation cases arises where the medical testimony cannot pinpoint causation of a particular ailment, but can only state that an injury received in employment is one of a number of possible causes. *Grice v. Dickerson, Inc.*[33] involved an employee who suffered a hernia, admittedly in the course of employment, for which he underwent surgery. He thereafter became totally disabled from rheumatoid arthritis. The Commission found a causal connection and awarded compensation for total disability. The circuit court

29. 241 S.C. 242, 128 S.E.2d 103. "Moreover, the statements of the salesmen were admissible here as a part of the res gestae, being statements made at the time of sale in connection with the sale of stock and being within the scope of authority of such salesmen."
30. 240 S.C. 574, 126 S.E.2d 721 (1962).
31. S.C. CODE §§ 72-1 *et. seq.* (1952).
32. Citing Owens v. Ocean Forest Club, 196 S.C. 97, 12 S.E.2d 839 (1941).
33. 241 S.C. 225, 127 S.E.2d 722 (1962).

reversed, finding no medical testimony to support the findings. The medical testimony was to the effect that the cause of rheumatoid arthritis is not known, but that several precipitating causes are recognized by medical science, including "infection, dental infection, sinus infection, emotional shocks and stresses, stress of a surgical operation, and injuries."[34] None of the doctors who testified could state a probable cause of the claimant's total disability, but expressed their opinions in terms of possibilities. The Supreme Court observed that under its prior decisions[35] were the medical testimony in the record the only support for causation, it would be inadequate. Testimony that the arthritis "most probably" was caused by the injury or surgery would be required to support a finding for the claimant, under those cases. In the instant case, however, the court found that sole reliance was not placed on the medical testimony; the circumstances surrounding and following the injury also shed some light on causation or at least the Commission could so find. The Supreme Court reinstated the award of the Industrial Commission. A similar problem of causation arose in *Gosnell v. Bryant*,[36] in which the Commission found that the claimant had failed to establish causation. The Supreme Court affirmed. In *Randolph v. Fiske-Carter*,[37] the Supreme Court held that the standard of proof, medical testimony that the injury was "most probably" caused by the accident, was met. There the doctor's testimony was that "it is my considered professional opinion that his injury and the subsequent complications following it did very definitely have a bearing on his course and his death."[38]

Martin v. Southern Railway Co.[39] dealt with allocation of the burden of producing evidence. A union and the railway had a contract whereby an employee could not be fired except for cause. Plaintiff, an employee who had been fired for allegedly drinking on the job or reporting for work under the influence, brought an action for wrongful discharge. Reversing a directed verdict for the railway and remanding for new trial, the Supreme Court held that the burden of producing evidence was on the plaintiff insofar as showing the contract and the fact of discharge was concerned, but on the railway to show that the

34. 241 S.C. 228, 127 S.E.2d 724 (1962).
35. *Especially* Cross v. Concrete Materials, 236 S.C. 440, 114 S.E.2d 828 (1960).
36. 240 S.C. 215, 125 S.E.2d 405 (1962).
37. 240 S.C. 182, 125 S.E.2d 267 (1962).
38. 240 S.C. 187, 125 S.E.2d 269 (1962).
39. 240 S.C. 460, 126 S.E.2d 365 (1962).

discharge was not wrongful. In *Hoffman v. County of Greenville*,[40] landowners brought an action alleging that the county had changed the normal course of drainage in the area, resulting in the flooding of plaintiffs' lands. The county, in addition to a general denial, pleaded that the cause of flooding was unusually heavy rains, which constituted an act of God for which the county was not liable. The Supreme Court, citing the orthodox rule that the burden of proof (persuasion, in this instance) falls on the party who has the affirmative on the issue under the pleadings, stated that the defense would have the burden on the second issue. However, the defense offered no proof on the issue of act of God, so the court held that the trial court had properly refrained from instructing the jury thereon. This being so, the only defense in issue was the general denial; on this issue, the plaintiff had the burden of persuasion. The case was remanded because of language in the instructions placing the burden of persuasion on the defense.

RELEVANCY

Demonstrative Evidence and Experiments

Reid v. Strickland[41] was an action on behalf of a three year old girl for damages sustained in an automobile accident. The girl allegedly had received facial injuries which required plastic surgery and left disfiguring marks. The extent and nature of her injuries were presented solely by expert medical testimony; the child was not presented to the jury. Defendant appealed the refusal of the trial judge to require exhibition of the minor to the jury. The Supreme Court, pointing to medical testimony in the record which indicated that much of the injury suffered by the plaintiff would not be apparent to a layman by observation, held that the matter was within the discretion of the trial judge and affirmed. *McDowell v. Floyd*[42] involved an experiment, *ex parte*, conducted by a witness to determine at what point an automobile could first be seen when approached around a particular curve in the road. The witness went during the night and at approximately the same time and place where the accident had occurred, then approached the spot in his car driving around the curve, and marked the place at which he could first observe a car parked where the respondent's car had

40. 242 S.C. 34, 129 S.E.2d 757 (1963).
41. 242 S.C 166, 130 S.E.2d 416 (1963).
42. 240 S.C. 158, 125 S.E.2d 4 (1962).

been parked. The next day the witness offered to testify to his experiment, and the testimony was received in evidence over objection that the circumstances attending the experiment were not the same as those at the time of the accident. The Supreme Court reversed, pointing out that at the time of the accident, according to the testimony of the appellant, Floyd, Floyd was blinded by the lights of an on-coming pick-up truck and thus could not see the parked car. At the time of the experiment, there was no on-coming truck, thus the conditions of the experiment were not sufficiently similar to permit the introduction of the testimony.

Evidence of Insurance

In *Crocker v. Weathers*,[43] counsel for plaintiff stated in argument to the jury, "If you will write a verdict for the amount we ask for in this complaint, I will collect at least $20,000." The complaint had asked for $50,000 damages, actual and punitive.[44] Defendant moved for a mistrial, which motion was denied. The jury rendered a verdict for $15,000 actual and $10,000 punitive damages.[45] Defendant's motion for judgment N.O.V. or for a new trial was denied. Circuit Judge Littlejohn, presiding at the trial, recognized that the issue was more serious than mere mention of insurance:[46]

> . . . I don't think actually the inferences of insurance have the impact that they originally had when the Supreme Court handed down the rule. I am not at all sure but what a jury assumes that everybody has got it now whether they have or not . . . . What concerned me more in it was the mention of a figure. Not only the possibility of an inference of insurance, but going a little bit beyond a possible inference, as to the amount. [This was Judge Littlejohn's oral response to the requested ruling of a mistrial.]

After giving the matter further consideration, Judge Littlejohn denied the motion for a new trial or judgment N.O.V. In his order denying the motion, the learned trial judge said:[47]

> . . . Every member of the jury who owns an automobile is of necessity, well aware of the likelihood of liability in-

43. 240 S.C. 412, 126 S.E.2d 335 (1962).
44. RECORD, p. 4, 5.
45. *Ibid*, p. 52, 56.
46. *Ibid*, p. 49.
47. *Ibid*, p. 59.

surance coverage, and this is especially true when close kin folks are in litigation, as in this case.

This Court cannot, of course, change the rule of law as laid down by the Supreme Court, but in determining whether or not there has been prejudice such as to entitle the defendants to a new trial, this Court should and does take notice of the fact that the common law grows from day to day, and the application of rules of common law should be applied in the light of all of the changing circumstances set forth hereinabove.

I therefore conclude that the remarks of counsel did not advise the jury of liability insurance and were not of such nature as to justify or require a new trial.

On appeal, the Supreme Court affirmed, in an opinion by Mr. Justice Moss. The Court strongly reaffirmed its adherence to the doctrine laid down in the *Horsford* case,[48] but left to the determination of the trial judge the question whether prejudice resulted from the inference of insurance:[49]

. . . It is highly improper for counsel, in argument, to advise the jury directly or by insinuation that the defendant is covered by insurance. Where it is sufficiently clear that insurance is implied by argument of counsel, this Court will not hesitate to reverse a judgment obtained where such an argument is made.

However, we must leave the control of argument of counsel very much to the discretion of the trial judge, who is on the scene of action and is in much better position than we are to judge as to what is improper argument.

In the light of Judge Littlejohn's intimation that the litigation was between close family members anyway, and the jury might have assumed from this circumstance that insurance was involved, this decision can be viewed as a very narrow one. Potentially, the case might be a beginning of the weakening of the *Horsford* rule. Dean McCormick, in four tightly reasoned pages,[50] has destroyed the logical foundations of that rule, reasoning much as did Judge Littlejohn in the trial court in the instant case. Future decisions will reveal whether the Supreme Court

48. Horsford v. Carolina Glass Co., 92 S.C. 236, 75 S.E. 533 (1912).
49. 240 S.C. 425, 126 S.E.2d 341 (1962).
50. MCCORMICK ON EVIDENCE § 168 (1954 ed.).

will depart from its policy of insisting on a declaration of mistrial where a witness even inadvertently mentions insurance.[51]

WITNESS

Opinion Evidence

The two branches of the opinion evidence rule are now well established.[52] The expert witness, provided the subject is qualified as one appropriate for expert testimony and the qualifications of the expert are established, is permitted to give his opinion to aid the jury. The non-expert witness is supposed to testify to "facts," not "opinions." Usually this means that he is supposed to testify to his own observation or experience of the particular event, in as concrete terms as the situation and the flexibility of language will permit. Both aspects of the rule arose in *State v. Moorer*.[53] The testimony of a physician was challenged by the appellant as incompetent, on the ground that the qualifications of the expert were not shown, and the trial judge had not expressly ruled that the expert was qualified. The Supreme Court upheld the action of the trial judge in admitting the testimony. The witness had testified that he was in the general practice of medicine, and the court found that this was sufficient to permit his testimony on medical matters. The court found that the action of the trial judge in permitting the doctor to testify was an implied ruling that he was an expert. As to the lay testimony, a witness had testified that "it seems like I could hear him saying . . . ." Appellant challenged this as an expression of mere opinion. The Supreme Court rejected the technical argument, saying, in an opinion by Chief Justice Taylor:[54]

> The qualification "it seems like" must be taken within the context of the prosecutrix' testimony in determining its meaning. As used by the prosecutrix the expression merely indicates the degree of positiveness of her recollection as to what defendant actually said and as such will not be excluded as being based on opinion rather than fact. Such qualification affects merely the probative force of the testimony.

51. For example, Haynes v. Graham, 192 S.C. 382, 6 S.E.2d 903 (1939).
52. McCormick, *op. cit. supra* note 50, §§ 10-18.
53. 241 S.C. 487, 129 S.E.2d 330 (1963).
54. 241 S.C. 497, 129 S.E.2d 335 (1963).

Again, the prosecutrix testified as follows:[55] "Q. . . did he ravish you or commit rape?

A. Yes, sir."

Appellant contended that this was the expression of an opinion on the "ultimate issue" and was prejudicial error. The court held that this was an appropriate method by which the prosecution could prove the element of penetration. These appear to be rulings of eminent common sense, in accord with the best modern thinking on the subject.[56]

55. *Ibid.*

56. MCCORMICK, *op. cit. supra* note 50, pp. 23-28. MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION, 351-354 (1949) (American Bar Association, 1938 Recommendation, "That ordinary witnesses should be allowed to state their conclusions with respect to ordinary matters subject to explanation, thus permitting a witness to state his observation in a natural and non-technical manner.")