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Evidence

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EVIDENCE

I. Opinion Evidence

A. Expert's Opinion

In *Roumillat v. Keller*[1] the appellant's car was struck and forced into the respondent's car causing severe injuries to the respondent. The ability of the appellant to steer his car after the first impact was an issue in the trial. The respondent sought to have an expert automobile damage appraiser and repairman show that his car was mechanically incapable of being steered after the first impact. The lower court allowed the witness to testify as to the total damage done, but refused to allow the expert to give his opinion as to the damage caused by each impact. The South Carolina Supreme Court affirmed the decision of the lower court on the basis of the general rule in this state:

> Opinion evidence is based on necessity and is not admissible as a general rule when the facts can be reproduced before the jury, in such a way as to show the condition of things upon which the opinion of the witness was based. It is a cardinal rule that the evidence must be of such a character as not to fall within the range of common experience and observation, and therefore not to be intelligible to jurors without the aid of opinion.[2]

B. Laymen's Opinion

In agreeing with the opinion espoused by Professor Wigmore[3] and earlier South Carolina cases,[4] the supreme court in *Living-*

1. 167 S.E.2d 425 (S.C. 1969). In the lower court there were two defendants, but only Keller appealed the $50,000 judgment for the plaintiff.

2. Jenkins v. E. L. Long Motor Lines, Inc., 233 S.C. 87, 95, 103 S.E.2d 523, 527 (1958). This was a car-truck collision case in which the defendant sought to have an expert repairman show a trailer slid in a certain manner.

3. 7 J. Wigmore, Evidence § 1918 (2d ed. 1940). Professor Wigmore states that an opinion should be rejected only when it is superfluous in the sense that it will be of no value to the jury.

4. *E.g.*, in Lynch v. Pee Dee Express, Inc., 204 S.C. 537, 544, 30 S.E.2d 449, 452 (1944), the court stated:

> Defendant further suggests that plaintiff and his driver were in no position to judge the speed of the truck. It is true that their opportunity for observation before the collision was limited. But they saw the vehicles as they crashed and their subsequent movements. We cannot say that this testimony as to the speed of the truck is without probative value.

ston v. Oakman[5] rejected a contention that an estimate of speed given by the defendant at the trial was of no probative value to the jury and should have been disregarded. The estimate of speed given in this case was based not only on the observation of the vehicle before the collision but also upon the nature and extent of the impact and the subsequent movement of the vehicles. There was also other testimony bearing on the issue of speed[6] which served to further persuade the court that the counterclaim and plea of contributory negligence put forth by the defendant were matters which could not be decided by the court as matters of law and should have been submitted to the jury for their determination. Since the issues mentioned were not submitted to the jury, the case was reversed and remanded for a new trial.

C. "Most Probably" Rule

Testimony concerning medical cause-in-fact must meet a special standard of admissibility.

> [W]hen the testimony of medical experts is relied upon to establish causal connection between an accident and subsequent disability or death, in order to establish such, the opinion of experts must be at least that the disability or death "most probably" resulted from the accidental injury.[7]

But even when testimony does not satisfy this requirement, the so-called "most probably" rule, it is nevertheless admissible if it is not solely relied on to establish the causal connection.[8]

In *Gambrell v. Burleson*[9] the plaintiff tried to establish a causal connection between an automobile accident and an alleged aggravation or acceleration of a cancer which the decedent had. The supreme court felt *Gambrell* did not fit into the exception to the "most probably" rule and thus reversed the lower court judgment in favor of the plaintiff. The court based its reversal

5. 164 S.E.2d 758 (S.C. 1968).
6. Testimony as to the impact and damage to the automobiles, the subsequent movement of the automobiles, and a statement by the plaintiff that he was on a "hurry up call" at the time of the accident was also introduced.
7. Cross v. Concrete Materials, 236 S.C. 440, 442, 114 S.E.2d 828, 829 (1960).
8. Grice v. Dickerson, Inc., 241 S.C. 225, 230, 127 S.E.2d 722, 725 (1962).
9. 165 S.E.2d 622 (S.C. 1969). This action was brought under the survival act and sought damages for pain, medical expenses, etc. which were sustained by the deceased in an automobile accident with the defendant.

on the fact that there was no other evidence which would directly and probably connect the accident with the cancer and make proof of it legally sufficient. The court reasoned that the jury could do no more than surmise and conjecture on the basis of the evidence presented.

Perhaps *Gambrell* should be noted most for the distinction which the court draws between it and *Grice v. Dickerson, Inc.*,[10] which sets forth the exception to the "most probably" rule. Both *Gambrell* and *Grice* were automobile accident cases. Almost immediately after the accident in *Grice*, the decedent complained about injuries which later proved to be symptoms of the illness. There was no evidence of a pre-existing condition of this nature. Even though the medical experts could not testify conclusively that the condition was caused by the accident, the surrounding circumstances were sufficient to allow the evidence to be admitted even though it did not meet the "most probably" rule requirements. In contrast to *Grice*, the deceased in *Gambrell* allegedly suffered from the malady at the time of the accident. Plaintiff's witness testified that if the cancer was in existence at the date of the accident it would have been unlikely for the deceased to have lived another year. Since the death of the decedent did in fact occur between ten and eleven months after the accident, it would be difficult to say that the death was hastened by any injuries received in the accident. Thus the plaintiff in *Gambrell* failed to show how the accident had accelerated the cancer, and there were no other circumstances to fit this case into the exception laid down by the court in *Grice*.

II. CIRCUMSTANTIAL EVIDENCE

Havird v. Schissell[11] was a suit brought to contest the will of Lee E. Havird. The suit was brought by a surviving sister of the deceased and another woman of unknown relation. The will was executed the day the testator entered the hospital and was admitted to probate upon his death. At trial it was found that the instrument was a will in accordance with the statutes of this state. The lower court also found no undue influence in the making of the will. The only question submitted to the jury was the mental capacity of the deceased and he was found to have

10. 241 S.C. 225, 127 S.E.2d 722 (1962).
11. 166 S.E.2d 801 (S.C. 1969). Lee E. Havird was a bachelor, but he had two illegitimate sons to whom he left his estate.

had sufficient mental capacity to make a will. On appeal the parties contesting the will contended that the issue of undue influence should also have been submitted to the jury. Even though undue influence may be proved by circumstantial evidence in South Carolina, the circumstances must point unmistakably to the fact that the testator could not think for himself.[12] The supreme court felt the circumstances[13] relied on in *Havird* were not sufficient to raise an issue for the jury in this instance, and affirmed the validity of the will.

III. COMPETENCY OF WITNESSES

In *Havird v. Schissell*,[14] *supra*, South Carolina fell in line with the rule followed in jurisdictions having Deadman's Statutes similiar to ours.[15] The appellants contended that the testimony of the attorneys who were representing the estate of the deceased should have been excluded since they were parties whose interest would be affected by the results of the case. Most of the attorneys' testimony was addressed to an issue not involved on appeal. The remainder was addressed to the question of the competency of the testator and certain other details concerning the preparation and execution of the will.

Havird presented the court with a novel question: Is an attorney who draws a will and later is appointed by the executor to defend the same will disqualified from testifying at the contest of the will because of the Deadman's Statute? In approaching this question the court relied in part on *McLauchlin v. Gressett*,[16] which stated:

> . . . a witness is disqualified only when there is a possibility that his interest may be affected by "the direct legal operation and effect of the judgment."[17]

12. Smith v. Whetstone, 209 S.C. 78, 39 S.E.2d 127 (1946).
13. Appellants attempted to show that Mr. Havird was in poor mental condition and thus was capable of being influenced by others. The evidence as to his mental condition was in conflict and capable of more than one reasonable inference. Only one person testified that on the date the will was made he was irrational. Appellants contended that John F. Tribble had influenced Mr. Havird in making the will, but respondent's evidence showed this to be an unfounded contention. A doctor also testified that Tribble had convinced Mr. Havird to enter the hospital, but there was no evidence that any pressure had been exerted on Mr. Havird when he was making the will. The court felt the testimony of the witnesses did not point to any conclusions and was not substantiated by the facts.
14. 166 S.E.2d 801 (S.C. 1969).
15. South Carolina's statute is found at S.C. CODE ANN. § 26-402 (1962). For the rule in other jurisdictions, *see* 58 AM. JUR. *Witnesses* § 312 (1948).
16. 224 S.C. 296, 79 S.E.2d 149 (1953).
17. *Id.* at 318, 79 S.E.2d at 159.

The court also stated that it is well established in this state that an executor is obligated to obtain an attorney to defend the will of his testator and to pay the attorney's expenses out of the estate without regard to the success of the action.[18] After considering these rules the court stated that the attorneys in this instance had no interest which would be affected by the judgment in the case. It was pointed out, however, that an agreement for a contingent fee to be paid out of the judgment recovered might give an attorney an interest which would disqualify him.

Although the court found no error in the trial and did not want to be unduly critical of counsel, it strongly advised strict adherence to the 19th Canon of Professional Ethics, Supreme Court Rule 32, which states:

> When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in Court in behalf of his client.

Strict adherence to this rule would probably prevent a question similar to this from being raised again in the future.

The appellants also contended that the admission of testimony by the executor and a son of the deceased violated the Deadman's Statute.[19] In holding the testimony admissible, the court cited the following authority:

> The majority doctrine is that notwithstanding the testimony of an interested witness may generally fall within the inhibition of the statute as to evidence of transactions or communications with a decedent, he may testify to the acts, demeanor, or conduct of the decedent where the testimony is offered merely for its bearing on an issue of mental competency.[20]

IV. DAMAGES

In *Diamond Swimming Pool Co. v. Broome*[21] the plaintiff sued for part of the cost of a swimming pool and patio which he

18. Ex parte Miller, 192 S.C. 164, 5 S.E.2d 865 (1939).
19. S.C. CODE ANN. § 26-402 (1962).
20. 166 S.E.2d at 806, *citing* Annot., 146 A.L.R. 250, 268 (1943).
21. 166 S.E.2d 308 (S.C. 1969).

had built for the defendant.[22] The master awarded the defendant a setoff of $1275 against the plaintiff's claim because of defects in the work. On appeal the defendant claimed that the master had not given the proper amount in setoff. The only evidence introduced concerning the cost of repairing the defect was submitted by a single witness for the defendant. The defendant contended that the master should have followed the general rule which the court stated to be:

> . . . the testimony of an unimpeached disinterested witness which concerns facts within the witness' knowledge and competence and is neither improbable nor contradicted in any way by any other evidence in the case, must be taken as true.[23]

If the court had followed this rule the master would have had to accept the witness' estimate of the cost of repairing the defect ($3385) and used it as the setoff amount. But the court in this instance found a way around the general rule:

> There may be, however, inherent contradiction or improbability in the witness' statements which take the case out of the general rule and justify the fact finder in giving the testimony less than full value. Similarly, the witness' manner of testifying or omissions in his statement may give rise to reasonable doubts of his sincerity or knowledge.[24]

The court felt in this instance the fact finder was correct in not accepting the estimate of the only witness. The estimate was one-half the total cost of the pool and even though the witness stated he had computed the cost of repair, he was unable in a reasonable length of time to give a break-down of his estimate. Since the witness had not sufficiently substantiated his figure the court felt the master was correct in not accepting it.

Justice Brailsford in his dissent[25] agreed that the master was not bound to accept the estimate of defendant's witness, but argued that the master was not authorized to use another figure

22. The parties had entered into a written agreement in consideration of $3,000 cash and a balance of $4,975 to be due upon completion of the patio and pool. (The agreement was alleged to have been orally modified later on.) On completion of the job $3475 remained unpaid.
23. 166 S.E.2d at 311.
24. *Id.* *See* Annot., 62 A.L.R.2d 1191, 1207-10 (1958) (cited by the court).
25. 166 S.E.2d 308, 312 (dissenting opinion). Justice Bussey concurred in Justice Brailsford's dissent.

as a setoff which had no support in the evidence. According to the dissenters' argument there was not sufficient evidence to decide the case either way. Accordingly, it should have been remanded for a new trial.

V. RELEVANCY

A. Generally

In appealing an abortion conviction, the defendant in *State v. Hutto*[26] alleged that the trial court had erred in admitting a bank loan payment book into evidence. The book had been admitted in spite of the defendant's contention that it was irrelevant. Since the book did not show the purpose of the loan or its relation to the facts in question, the defendant argued that the lower court had erred in its ruling. According to the decision in *Francais v. Mauldin*,[27] all that is required of evidence for it to be relevant "is that the fact shown legally tends to establish, or to make more or less probable, some matter in issue and to bear directly or indirectly thereon."[28] The loan book admitted in *Hutto* allegedly represented a loan, obtained by the individual by whom the prosecutrix became pregnant, to pay for her abortion. If the loan book had been admitted into evidence without further explanation the supreme court might well have held it to be inadmissible. The loan book, however, was transformed into relevant evidence by later testimony concerning the loan and its purpose to which the defendant did not object. The court felt the defendant could not have been prejudiced by the admission of the book since the testimony was later offered without objection. Thus the decision of the lower court was affirmed on the basis of the general rule that the admission of evidence is a matter largely within the discretion of the trial judge and his ruling will not be overturned unless there is an abuse of this discretion.

Although the supreme court felt that the lower court should have allowed one of the plaintiff's witnesses to testify concerning certain water drippings around the body of the deceased, the court in *Smith v. Winningham*[29] affirmed the decision of the lower court. The court found no error in the exclusion since testimony to the same effect was later admitted. This decision

26. 165 S.E.2d 72 (S.C. 1968).
27. 215 S.C. 374, 55 S.E.2d 337 (1949).
28. *Id.* at 378, 55 S.E.2d at 338.
29. 166 S.E.2d 825 (S.C. 1969).

is in accord with the well established rule in this state that "[a]lleged error in the exclusion of offered testimony is of no avail if the same testimony or testimony to the same effect had been or was afterwards allowed to be given by the witness."[30]

B. Demonstrative Evidence

Appealing a conviction for murder, the defendant in *State v. Norris*[31] alleged error in the trial judge's admission of certain pictures into evidence. The pictures showed injuries sustained by a witness to the crime and the condition of the witness' clothing at the time of the murder. The defendant contended the judge erred in admitting these photographs because the witness had stated that all her injuries were not caused by the defendant. The witness did, however, point out which injuries were caused by the defendant. The supreme court, following the accepted rule in South Carolina, stated that the trial judge has within his discretion the power to determine the relevancy and materiality of a photograph.[32] The court found no abuse of this discretion in *Norris* and therefore affirmed the defendant's murder conviction.[33]

Even though the lower court in *Jones v. Dague*[34] had allowed the jury to have with them during deliberation a high school yearbook which contained material that had been ruled inadmissible, the supreme court rejected a contention by the defendants that they were entitled to a new trial because of this alleged prejudical error. The lower court had allowed pictures of the deceased to be entered into evidence, but excluded portions of the yearbook which contained a memorial to her. When the

30. 166 S.E.2d at 827. As authority for this rule the court cited: Nelson v. Coleman Co., 249 S.C. 652, 155 S.E.2d 917 (1967); La Count v. General Asbestos & Rubber Co., 184 S.C. 232, 192 S.E. 262 (1937); and five earlier cases.

31. 168 S.E.2d 564 (S.C. 1969).

32. *Id.* at 568. The court cited State v. Thorne, 239 S.C. 164, 121 S.E.2d 623 (1961); State v. Jones, 228 S.C. 484, 91 S.E.2d 1 (1956); State v. Edwards, 194 S.C. 410, 10 S.E.2d 587 (1939).

33. After the admission of the photographs into evidence and their publication to the jury, the defendant's counsel objected to them on the grounds that they would tend to inflame the jury. Although the court said it found nothing inflamatory in the pictures, this objection was not considered in detail because it was not asserted until after the pictures were offered as evidence and published to the jury. Objections of this nature should be interposed when the photographs are offered as evidence.

34. 166 S.E.2d 99 (S.C. 1969). This was an action brought by the plaintiffs for the alleged wrongful death of their daughter. The lower court rendered judgment for the parents in the sum of $25,000. When the defendant's motions for judgment *non obstante veredicto* and in the alternative for a new trial were denied, he appealed to the supreme court.

yearbook was submitted to the jury the inadmissible portions were held back by rubber bands and the trial judge reminded the jury that they could not consider these portions of the book. Defendant felt these instructions caused the jury to speculate that something harmful to the defendant was in the excluded portion of the book. It was also suggested that the jury might have examined these portions of the yearbook, but there was no proof to this effect. The supreme court rejected the defendant's contentions and followed the general rule which leaves the determination of the relevancy and admissibility of a photograph within the discretion of the trial judge.[35] Since it felt this discretion had not been abused, the court affirmed the lower court's decision.

Although the court gave no actual indication that in the future it would hold evidence prejudical which was admitted in a manner similar to that in *Jones*, it did suggest what it felt to be a better procedure. The court suggested that the judge in these instances should so remove and isolate the excluded portion as to eliminate all possibility of jury inspection of the inadmissible evidence.

C. Liability Insurance Coverage

> [T]here was once a vague theory that an insured person was more likely to be careless than an uninsured one and therefore the existence of insurance was relevant on the issue of negligence. This idea was, of course, discarded long ago, and the only problem now is whether the incidental mentioning of insurance in the court room is so prejudical to the insured side that a mistrial should be ordered.[36]

The court in *Jones v. Massingale*[37] said that the possible prejudice which might result from the jury's knowledge of the insurance coverage must be weighed against the burden on the court and the plaintiff from a multiplicity of suits. *Jones* seems to follow the decision in *Vollington v. Southern Paving Construction Co.*[38] which stated that the court has the power, but is not compelled, to set aside a verdict because of the mention of insurance coverage.

35. *See* Reid v. Swindler, 249 S.C. 483, 154 S.E.2d 910 (1967); Peagler v. Atlantic Coast Line Ry., 234 S.C. 140, 107 S.E.2d 15 (1959).
36. J. DREHER, A GUIDE TO EVIDENCE LAW IN SOUTH CAROLINA 40 (1967).
37. 251 S.C. 456, 163 S.E.2d 217 (1968).
38. 166 S.C. 448, 165 S.E. 184 (1932).

In *Jones* the defendant alleged that a release had been signed and executed by the plaintiff. The plaintiff replied that the release was obtained by fraud. A separate trial on the issue of the validity of the release was requested by the defendant because of alleged prejudice that would result from the jury's learning of the defendant's insurance coverage. The lower court refused the defendant's motion and the supreme court affirmed this ruling since the trial judge had shown no abuse of his discretion. The court in *Jones* appears to have taken a realistic approach to the problem of the jury's being made aware of insurance coverage in an automobile accident case when it stated:

> [A] jury in an automobile collision case today, in view of our financial responsibility law, can perhaps hardly be expected to doubt seriously the existence of liability insurance coverage.
>
> Today owners of motor vehicles are almost required by law to procure liability insurance, and there is a popular belief (though an erroneous one) that liability insurance in this state is actually required. Before a person (including, of course, jurors) may procure an annual license plate for his motor vehicle he must prove his liability coverage or contribute to the uninsured motorist fund. Accordingly, every juror who owns an automobile is of necessity well aware of the likelihood of liability insurance coverage. When evidence is admissible on one issue but should not be considered as to another issue in the trial of the same case, such need not be excluded.[39]

Jones may be an expansion of the *Vollington* ruling since it deals with a motion made before the trial. *Vollington* and the cases before[40] and after[41] dealt with situations in which counsel or a witness accidently or intentionally mentioned insurance coverage. While these cases involve overt reference to insurance, in the present case the mention of the validity of a release would inform the jury of the presence of insurance only by implication. Another possible qualifying factor in *Jones* is that the insurance company was not a party to this action. Whether this would

39. 251 S.C. 456, 463, 163 S.E.2d 217, 220 (1968).
40. Horsford v. Carolina Glass Co., 92 S.C. 236, 75 S.E. 533 (1912).
41. Crocker v. Weathers, 240 S.C. 412, 126 S.E.2d 335 (1962); Powell v. Drake, 199 S.C. 212, 18 S.E.2d 745 (1942); Haynes v. Graham, 192 S.C. 382, 6 S.E.2d 903 (1940).

have any bearing on the outcome of the case the court did not say.

D. Character

Although in a criminal prosecution evidence of the commission of another, independent crime is generally inadmissible,[42] *State v. Daniels*[43] was an exception to the rule. In *Daniels* the defendant and another were convicted of burgulary after the admission of testimony given by a woman whose diner had been robbed on the same night as the burgulary by men answering the description of the co-defendants. The appellant contended that the woman's testimony allowed the jury to infer that she was robbed by the appellant. The court felt the jury was not left with this inference, but even if the opposite were conceded, this would not amount to reversible error. In affirming the decision of the lower court, the supreme court cited an exception to the general rule against admissibility, and stated that evidence of another crime is competent to prove the specific crime charged when it tends to establish identity.[44]

According to Professor Dreher, "[w]hat is important is that the proof of other crimes must come in to prove directly some issue of substance in the present case and not just to show that the accused is a bad man and probably guilty.[45] *Daniels* fits the exception described above since the purpose of the testimony was to establish the whereabouts of the defendants at a certain time on the night of the burgulary. This testimony thus had direct bearing on an issue of substance in the case.

VI. WRITINGS

A. Parol Evidence Rule

In *Draffin v. Chrysler Motors Corp.*[46] the lower court permitted the plaintiff's son to testify in apparent violation of the

42. State v. Thomas, 248 S.C. 573, 151 S.E.2d 855 (1966).
43. 167 S.E.2d 621 (S.C. 1969).
44. In State v. Thomas, 248 S.C. 573, 151 S.E.2d 855 (1966), the court stated that there were various exceptions to the general rule and set them out:

> Generally speaking, evidence of another crime is competent to prove the specific crime charged when it tends to establish, (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; (5) the identity of the person charged with the commission of the crime on trial.

Id. at 582-83, 151 S.E.2d 855.
45. J. DREHER, A GUIDE TO EVIDENCE LAW IN SOUTH CAROLINA 36 (1967).
46. 166 S.E.2d 305 (S.C. 1969).

parol evidence rule, but the supreme court set aside the verdict without considering this issue because the verdict was excessive. In dicta, however, the court reiterated the existing South Carolina rule that a written warranty cannot be enlarged by oral testimony if the warranty is unambiguous and is not lost or unavailable at the time of the trial.[47] The court also said that in the absence of testimony showing that an employee had the power to vary the manufacturer's written warranty, the manufacturer is bound only by the terms of the written agreement.[48]

B. Best Evidence Rule

In *Riddle v. City of Greenville*[49] the owner of a dairy farm which adjoined a stream brought suit to recover for damages sustained because of pollution of the stream.[50] The lower court rendered a verdict in the plaintiff's favor for $22,500. On appeal the defendant argued that the plaintiff failed to prove damages in the present suit different from those recovered in a prior action. The supreme court agreed with the defendant's contention and reversed the judgment of the lower court.

During the course of the trial in the present action, the plaintiff on direct examination testified that in the first suit, which was against Ling-Temco-Vaught Electrosystems, Inc. (hereinafter LTV), his verdict was based on damages done to his cattle and dairy operation. The defendant's counsel objected to this statement by the plaintiff as follows:

> Mr. Arnold: Your Honor, we don't agree with that and we think that the record would be the best evidence as to what it related to. We don't mind him testifying to it at the proper time. We want to put in the record in that LTV case.
>
> The Court: All right. You may proceed Mr. Clay.[51]

47. *Id.* at 307, *citing* Profit v. Sitton, 244 S.C. 206, 136 S.E.2d 257 (1964); Charleston & Western Ry. v. Joyce, 231 S.C. 493, 99 S.E.2d 187 (1957).
48. 166 S.E.2d at 307, *citing* Odom v. Ford Motor Co., 230 S.C. 320, 95 S.E.2d 601 (1956).
49. 251 S.C. 473, 163 S.E.2d 462 (1968).
50. The defendant city had sold or leased land to various industries. The city also operated a sewage disposal plant in the area, the discharge from which went into a stream known as Huff Creek. Plaintiff owned a dairy farm near the defendant's land and sought to recover damages caused by the discharge of certain elements into the creek. The gist of the complaint was that the damage to his property caused by the discharge was tantamount to a taking without just compensation.
51. 163 S.E.2d at 463.

The "Best Evidence Rule" has been stated: "In proving the terms of a writing, where such terms are material, the original writing must be produced, unless it is shown to be unavailable for some reason other than the serious fault of the proponent."[52] In light of this rule, the objection apparently should have been sustained. If the terms of the writing are not in issue the rule does not apply,[53] but in *Riddle* the terms of the writing were in issue. The trial judge evidently did sustain the defendant's objection in accordance with the general rule, but his language is not clear. The *LTV* record was never introduced into evidence and the plaintiff did not try to show how his damages differed in the two actions.

The plaintiff later admitted under cross examination that he had testified in *LTV* that his *land* had been damaged by pollution. This admission was in conflict with his testimony that his damages in *LTV* were due to injuries to his cattle and dairy business. The supreme court felt the plaintiff had not given the jury any information from which they could determine if there were different damages involved in the two suits. Thus the court reversed and remanded the case because of an insufficiency of evidence.

VII. DUE PROCESS IN THE LAW OF EVIDENCE

In *State v. Richardson*[54] the defendant was sentenced to seven years for the slaying of his son. On appeal he contended that he was denied the right to confront and cross-examine a witness against him in violation of his sixth amendment right to confrontation. The witness in question was the daughter of the defendant. Her name had been included on the back of the indictment as a possible witness, but she was not called at the trial. Defendant contended that since she was the cause of the family trouble which led to the shooting, he should have the right to cross-examine her.

In order to decide whether the defendant's rights had been violated, the court had to decide whether the prosecution was required to call the girl. In affirming the lower court's ruling, the court said:

52. J. DREHER, A GUIDE TO EVIDENCE LAW IN SOUTH CAROLINA 49 (1967), *quoting* C. MCCORMICK, THE LAW OF EVIDENCE § 196 (1954).
53. Sims v. Jones, 43 S.C. 91, 20 S.E. 905 (1895).
54. Smith's Advance Sheet #22 (June 14, 1969).

> While a different rule apparently prevailed at early common law, it is now the general rule that the State is not required to place upon the stand every witness who has knowledge of material facts connected with the crime charged or whose name is endorsed upon the indictment. The prosecution is required to prove the guilt of the defendant beyond a reasonable doubt and may, in its discretion, determine what witnesses will be called in presenting such proof.[55]

Since in the present case the State did not prevent the witness from attending the trial or rely on any statement of the witness to prove its case against the defendant, the court found the defendant had suffered no legal prejudice.

At the trial the judge had instructed the jury that an adverse inference might be drawn because of the defendant's failure to call a witness available to him. The defendant contended the judge should not have so instructed the jury. The court, however, did not consider this question because the objection was not timely.

ROBERT E. STATON

55. *Id.* at 9. The court cited: 58 AM. JUR. *Witnesses* § 3 (1948); 23 C.J.S. *Criminal Law* § 1017 et seq. (1961); 7 J. WIGMORE, EVIDENCE § 2079 (1940).