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Evidence

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EVIDENCE

I. OPINION EVIDENCE

In *South Carolina State Highway Department v. Rural Land Co.*,[1] the Highway Department contended that the assistant secretary and executive manager of the Buckfield Plantation, ninety and one half acres of which had been condemned for the construction of Interstate Highway 95, had been erroneously allowed to testify as to the value of the condemned land.[2] The department contended that he should not have been allowed to testify because he was not the owner of the property nor was he qualified as an expert witness. The corporate landowner conceded that the mere fact that the witness was an officer of the corporation would not qualify him to testify as to the value of the land, but it was shown that as the manager, he was thoroughly familiar with the land, its use and its value. The lower court felt that it was his knowledge, not his position, which qualified him to testify as to the value of the land. The supreme court, in ruling the testimony properly admitted, quoted the South Carolina principle that "[g]enerally, the best available proof of what land is worth is the opinion of those who know enough of the factors, which must be a basis of the opinion, to express their judgment about it."[3]

II. IMPEACHMENT

A. Impeaching One's Own Witness

In *State v. Richburg*,[4] South Carolina fell in line with the majority rule that a party calling a witness must be *damaged* as well as surprised before he can use a prior inconsistent statement to impeach his own witness.

In the lower court the defendant was convicted of murdering a deputy sheriff and was sentenced to death. The

1. 250 S.C. 12, 156 S.E.2d 333 (1967).
2. The trial court rendered a verdict of $129,835 in favor of the landowner.
3. South Carolina State Highway Dep't v. Rural Land Co., 250 S.C. 12, 25, 156 S.E.2d 333, 339 (1967); *accord*, Miller v. Parr Shoals Power Co., 104 S.C. 129, 132-33, 88 S.E. 374, 375 (1916).
4. 158 S.E.2d 769 (S.C. 1968).

State called as a witness Thomas Lee Johnson who was at the scene of the gun fight in which the defendant was wounded and the deputy slain. When on the stand the witness denied pertinent knowledge of the shooting. While he gave no testimony which was adverse or damaging to the State's case, he did not testify as the solicitor had expected on the basis of a statement which the witness had previously signed. Had the witness given testimony consistent with his previous statement, such testimony would have been a key point in the State's case.

When the witness gave testimony to the effect that he knew nothing of real importance about the shooting, the solicitor claimed surprise and was allowed to cross-examine and impeach his own witness, whom the judge declared to be hostile. The witness admitted signing the statement but denied having made substantially all of it as it was read to him by the solicitor in the presence of the jury. The solicitor in turn put up witnesses who testified that the written statement had been given by Johnson voluntarily and with apparent understanding.

The supreme court, after assuming that the prosecutor had adequately shown surprise, concluded that the claimed surprise had not resulted in the giving of any evidence which was detrimental to the State's case. The court held that under the facts shown by the record the solicitor should not have been allowed to cross-examine his own witness, that the statement which was read in the presence of the jury as a part of that cross-examination was prejudicial, and that because of this a new trial was required.

As a general rule a party may not impeach his own witness,[5] but most courts permit impeachment if two requirements are met:

> The first is that the party seeking to impeach must show that he is surprised at the testimony of the witness. The second is that he cannot impeach unless the witness' testimony is positively harmful to his cause, reaching further than a mere failure ("I do not remember," "I do not know") to give expected favorable testimony.[6]

5. 98 C.J.S. *Witnesses* § 477 (1957).
6. C. McCORMICK, THE LAW OF EVIDENCE 73 (1954).

While previous cases have required a showing of surprise before allowing impeachment of one's own witness,[7] the *Richburg* case is the first time that the South Carolina Supreme Court has required that the calling party be both surprised and *damaged* by the testimony before he can use a prior inconsistent statement to impeach his own witness.[8]

B. Statement Taken By An Insurance Adjuster

From the standpoint of evidence, probably the most important point in the case of *Powers v. Temple*[9] was one that was discussed by the court after it had already decided that a new trial was necessary. The defendant's cross-examination of the plaintiff clearly tended to convey to the jury the impression that a written statement, which the plaintiff admitted signing, was contradictory to the testimony which she was giving on the stand. On re-direct the plaintiff sought to show the circumstances surrounding the taking of the statement and that the statement had been signed for a Mr. Moody, the defendant's insurance adjuster, but the trial judge only allowed the plaintiff to show that Mr. Moody was not representing her interests in taking the statement. The plaintiff objected to the admission of the statement in evidence unless she was allowed to prove the identity of Mr. Moody. This objection was sustained by the trial judge.

The plaintiff conceded and the supreme court affirmed the general principle that evidence as to liability insurance is not ordinarily admissible,[10] but it was urged that since the message had been conveyed to the jury that the statement was contradictory to the plaintiff's present testimony, she should have been allowed to show Mr. Moody's interest in the case and to offer evidence of prejudice on his part against her in favor of the defendant. The court in *Powers* adopted the following rule:

> As a general rule, where a previously written statement is produced in court and used for the purpose of impeaching plaintiff or one of his witnesses, it is proper for plaintiff's counsel to show that the person

7. *See, e.g.*, State v. Nelson, 192 S.C. 422, 7 S.E.2d 72 (1940).
8. J. DREHER, A GUIDE TO EVIDENCE LAW IN SOUTH CAROLINA 16 (1967).
9. 250 S.C. 149, 156 S.E.2d 759 (1967). Other aspects of this case are discussed in the text accompanying note 39 *infra*.
10. *See generally* J. DREHER, *supra* note 8, at 40.

> procuring such statement was the representative of the defendant's insurance company.[11]

However, in adopting this rule the court hastened to caution that it should only be applied where the reason for the rule exists and the circumstances warrant its application. The reason for the rule was quoted as follows:

> [The statement taker,] though he may never appear in the court room, is nevertheless, in a sense, vouching for the accuracy and authenticity of the document. He is, as it were, a mute witness, and the jury has the right to be informed of his interest in the case when weighing the testimony of the witness who attacks his handiwork.[12]

The court concluded that because of the impression given to the jury about the statement, the application of the rule was warranted in this case and that the trial judge should have allowed the plaintiff "to prove the full circumstances surrounding the taking of the statement, including the identity of the taker and his connection with the case."[13]

In *Brave v. Blakely*,[14] a witness was being questioned about an allegedly prior inconsistent written statement made by him. Asked if he had written the statement, he replied, "I did not. The adjuster wrote the statement, and he asked me to sign it after he wrote it up." The supreme court quoted the above general rule[15] from *Powers* and held that the trial judge had properly followed that case in refusing a motion for a mistrial which was made on the ground that the mention of the word "adjuster" was an implication of insurance coverage and thus so prejudicial to the appellant's case that a mistrial should be ordered.[16]

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11. Powers v. Temple, 250 S.C. 149, 161, 156 S.E.2d 759, 764-65 (1967), *quoting from* Annot., 4 A.L.R.2d 761, 782 (1949).
12. Powers v. Temple, 250 S.C. 149, 161, 156 S.E.2d 759, 765 (1967), *quoting from* Smith v. Pacific Truck Express, 100 P.2d 474, 479 (Ore. 1940).
13. Powers v. Temple, 250 S.C. 149, 162, 156 S.E.2d 759, 765 (1967).
14. 250 S.C. 353, 157 S.E.2d 726 (1967).
15. 250 S.C. at 261, 156 S.E.2d at 764-65 (1967).
16. When liability insurance is incidentally mentioned during the course of a trial, it is within the discretion of the trial judge whether or not a mistrial should be granted. Vollington v. Southern Paving Constr. Co., 166 S.C. 448, 165 S.E. 184 (1932). *See also* J. DREHER, *supra* note 8, at 41.

C. Impeaching Statement Before it is Offered in Evidence

In *Crowder v. Carroll,*[17] the trial judge allowed a highway patrolman to testify to what the son of the defendant had told him about two hours after the occurrence of the accident which was the subject of this litigation. The trial judge ruled that this testimony was admissible as an admission by a party opponent because the statement of the son, who was driving the father's automobile at the time of the collision, was that of an agent under the family purpose doctrine and could therefore be used against the principal. The supreme court said that this was obviously erroneous under *Marshall v. Thomason,*[18] which held that a statement given by an agent truck driver to a patrolman was not admissible as an admission against his principal.[19]

The supreme court inferred that the actual reason that the plaintiff wanted to have the patrolman's testimony admitted was for the purpose of impeaching a pre-trial statement by the defendant's son which was to be offered later in the trial. The court said that, of course, it is not proper to allow testimony for the purpose of impeaching a witness who had not at that time testified either in person or by means of a statement. However, the admission of the testimony at that premature time was held not to be prejudicial because it could have been properly admitted after the anticipated statement by the defendant's son was in fact admitted.

D. Collateral Matters

In *State v. Ladd,*[20] a rape case, the mother of the prosecutrix denied on cross-examination that she had, only two months before the trial of the present case, signed a warrant in another county charging another man with a similar offense against her daughter. After this denial by the mother, the lower court refused to allow the defense counsel to continue to cross-examine her on this matter saying that it was a collateral matter which did not affect the issues on trial.

17. 161 S.E.2d 235 (S.C. 1968).
18. 241 S.C. 84, 127 S.E.2d 177 (1962).
19. According to Professor Dreher, the court in *Marshall* said in effect that the agent truck driver was hired to drive a truck and not to give statements. J. DREHER, *supra* note 8, at 68.
20. 161 S.E.2d 230 (S.C. 1968).

The supreme court affirmed this decision of the trial judge as being one peculiarly within his discretion.[21]

III. CREDIBILITY OF WITNESSES

In *State v. Richburg*,[22] the court restated its position that even though there is no direct evidence to dispute the testimony of a witness, the court is not justified in directing a verdict if there is anything in the circumstances tending to create distrust in the truthfulness of the witness, and, that the question of a witness' credibility is one for the jury.[23]

IV. RELEVANCY

A. *In General*

In *Gause v. Livingston*,[24] an action by a passenger to recover damages for personal injuries suffered in an automobile accident, the court held that the trial judge had erroneously admitted testimony which was irrelevant and possibly prejudicial to the defendant. The disputed testimony was given by the mother of the injured passenger, Josephine Gause, to the effect that Josephine's father had been blind for twenty-five years, that Josephine was one of six children, and that the mother was the sole support of Josephine. In holding that this testimony was not relevant the court restated the familiar principle that: "It is necessary that the fact shown by the evidence offered legally tends to prove, or make more or less probable, some matter in issue and bear directly or indirectly thereon."[25]

In *State v. Bell*,[26] which was a review of the trial of the accused slayer of Mrs. Justin Bridges, the wife of a prominent Laurens County attorney, one of the reversible errors cited by the supreme court was the admission of testimony by Chief Strom of the South Carolina Law Enforcement Division that the defendant had told him some two and one half years after the Bridges' murder that "he [the defendant] had to kill another young white woman; he wanted to bathe his feet and his head in her blood." The court held that

21. *See* J. DREHER, *supra* note 8, at 15.
22. 158 S.E.2d 769 (S.C. 1968).
23. State v. Brown, 205 S.C. 514, 32 S.E.2d 825 (1945); Thompson v. Bearden, 200 S.C. 519, 21 S.E.2d 189 (1942).
24. 159 S.E.2d 604 (S.C. 1968).
25. *Id.* at 607.
26. 250 S.C. 37, 156 S.E.2d 313 (1967).

this inflamatory testimony could only bear on the defendant's state of mind at the time that he made the statement and should have been excluded as having no logical relevance to the murder for which the defendant was on trial.

Descriptions of the victim's mutilated body and evidence that she had been raped were held properly admitted for the purpose of showing malice and motive.

B. Out-of-Court Experiments

Unless an out-of-court experiment is performed under circumstances substantially the same as those of the actual occurrence, the results are irrelevant to the issue sought to be proved or disproved.

Weaks v. South Carolina State Highway Department,[27] an action to recover personal damages, was a clear application of this principle. On the morning of January 20, 1966, Mrs. Weaks was driving on State Highway 34 at about forty-five miles per hour when she came over the crest of a hill and saw her lane of travel blocked by two maintenance trucks belonging to the Highway Department. At the same time she observed a car approaching in the other lane of the highway, thus preventing her from passing the stopped trucks. She testified that she applied her brakes but was unable to stop and ran into the rear of one of the trucks. She had no way of knowing that there were trucks on the highway until she reached the top of the hill, there being no signs or signals to warn her of their presence.

A highway patrolman testified, in the absence of the jury, that he and another patrolman went to the scene of the collision in separate cars after the trial of the case had begun and conducted an experiment. They parked one of the cars on the shoulder of the road at the point where they believed the collision had occurred. The patrolman testified that he then went down the road, turned around and proceeded toward the point of collision as had Mrs. Weaks. He said that he came over the top of the hill at fifty-eight miles per hour, thirteen miles per hour faster than Mrs. Weaks testified that she had been traveling, and applied his brakes when he saw the other patrol car. He was able to stop two hundred and twenty-four feet before he reached the second car.

27. 159 S.E.2d 234 (S.C. 1968).

The trial judge refused to admit this testimony for consideration by the jury. The supreme court in affirming this ruling pointed out some of the ways in which the experiment differed from the conditions existing on the morning of the collision. The patrol car was a 1966 Chevrolet with power brakes; whereas Mrs. Weaks was driving a 1957 Ford with standard brakes. The patrolmen in conducting the experiment were not sure exactly where the truck had been parked on the day of the collision. The most important variant, however, was the human element. The patrolman not only knew that he would see the parked car and would have to stop, but since he had placed the car and driven away from it, he knew the point at which he would see the car and would have to apply his brakes. Mrs. Weaks, on the other hand, was totally unaware of the danger which awaited her. She did not know of the presence of the trucks on the highway until she crested the hill and even then she did not immediately perceive that they were completely stopped. At the same time that Mrs. Weaks was faced with this sudden emergency she was also confronted with the vehicle approaching from the opposite direction, an additional factor with which the patrolman did not have to cope.

The rule which our court has followed in determining the admissibility of testimony about out-of-court experiments is that the conditions and circumstances under which the experiment is conducted must be *substantially similar* to those existing at the time of the occurrence involved in the controversy.[28] The conditions do not have to be identical; minor variations in the essential conditions should go to the weight, rather than to the admissibility, of the evidence.[29] The court had no trouble in holding that the circumstances of the patrolmen's experiment were not substantially similar to those surrounding Mrs. Weaks at the time of the collision.

V. WRITINGS

A. Best Evidence

In South Carolina and generally, loss or destruction of the original writing has long been an excuse for its non-

28. *Id.*; McDowell v. Floyd, 240 S.C. 158, 125 S.E.2d 4 (1963); Beasley v. Ford Motor Co., 237 S.C. 506, 117 S.E.2d 863 (1961).
29. *See* 29 AM. JUR. 2d *Evidence* § 824 (1967).

production, even when the best evidence rule is clearly applicable.[30]

In *Vaught v. Nationwide Mutual Insurance Co.*,[31] the plaintiff sustained his burden of proof that the original of an insurance policy issued by the defendant had been lost or destroyed through no fault of the plaintiff and was permitted to introduce in evidence a photostatic copy of the policy. The plaintiff sustained this burden of proof by calling as a witness the president of the insured, who was not a party to the case, and soliciting from him testimony to the effect that he did not know where the original policy was, that the photostatic copy was true and correct, and that the insured had paid the premiums on the policy.

B. Parol Evidence

In *Carolina Ceramics, Inc. v. Carolina Pipeline Co.*,[32] the court held that the trial judge had erred in holding that a price escalation clause in a natural gas contract was clear and unambiguous. The disputed provision of the contract was as follows:

> In the event that the Commodity Charge for gas as purchased by Seller from Transcontinental Gas Pipeline Company is increased above or decreased below 24.0 cents per MCF, or the Commodity Charge for gas as purchased by Seller from the Southern Natural Gas Company is increased above or decreased below 18.5 cents per MCF, the amount of such increases or decreases shall be added to or subtracted from, as the case may be, the price of gas to Buyer as set forth herein.[33]

The pipeline company received its natural gas from Transcontinental from the beginning of its operations in March of 1958 until October of 1961 when Southern also became a supplier of the pipeline company. On the day before Southern became a supplier, the pipeline company informed the ceramics company that the charge for gas would be increased

30. Wynn v. Coney, 232 S.C. 346, 102 S.E.2d 209 (1958); Beaty & Co. v. Southern Ry., 80 S.C. 527, 61 S.E. 1006 (1908); Hunter v. Hunter, 63 S.C. 78, 41 S.E. 33 (1902); J. DREHER, *supra* note 8, at 50.
31. 250 S.C. 65, 156 S.E.2d 627 (1967).
32. 161 S.E.2d 179 (S.C. 1968).
33. *Id.* at 180.

because of an increase in commodity charge from Southern. Before this time the price had been based on the Transcontinental commodity charge which had not changed at the time of this increase. The ceramics company brought this action to recover alleged overpayments because of the additional charge which they alleged was not authorized nor warranted by the contract. The supreme court held that the above quoted provision was ambiguous, presumably because it did not contain any guidelines to be used in determining whether to use the Transcontinental charge or the Southern charge in setting the rates to Carolina Ceramics. Since the provision was held to be ambiguous, parol evidence should have been admitted to show its true meaning.[34]

VI. CIRCUMSTANTIAL EVIDENCE

In *St. Paul Fire & Marine Insurance Co. v. American Insurance Co.*,[35] the jury was asked to decide if a father who was driving his son's automobile at the time that he was involved in an accident had his son's express or implied consent to operate the automobile. The action was brought to determine if the son's insurance carrier would have to defend and pay any damages which might be awarded in a suit brought by the occupants and owner of the other automobile involved in the wreck. If it was determined that the father did not have his son's consent, the insurer of the other car would have to defend and respond in damages under the uninsured motorist endorsement of its policy.

All the direct evidence, in the form of testimony by the father and the son, indicated that the father did not have the son's consent. However, the jury found that the father was operating the vehicle with his son's express or implied consent. The son's insurer appealed contending that "the testimony of the father and the son completely refutes implied consent to the exclusion of all other reasonable inferences."[36] In response to this the supreme court said: "Any fact in issue may be proved by circumstantial evidence as well as direct evidence, and circumstantial evidence is just as good

34. Proffitt v. Sitton, 244 S.C. 206, 136 S.E.2d 257 (1964); Spencer v. Republic Nat'l Life Ins. Co., 243 S.C. 317, 133 S.E.2d 826 (1963); Charles v. B. & B. Theatres, 234 S.C. 15, 106 S.E.2d 455 (1959); J. DREHER, *supra* note 8, at 55.
35. 159 S.E.2d 921 (S.C. 1968).
36. *Id.* at 923.

as direct evidence if it is equally as convincing to the trier of facts."[37] The court concluded that it could not say as a matter of law that the evidence excluded all other reasonable inferences; therefore, the verdict of the lower court was affirmed.[38]

VII. DAMAGES

The interrelated and complicated nature of the evidence questions in the important case of *Powers v. Temple*[39] requires a general discussion of that case. This was a guest passenger suit in which the passenger, in consideration of the payment of $6,500.00, had executed a covenant not to sue the driver of the other vehicle involved in the collision. Evidence of the covenant and its amount was brought out during the course of the trial.

The court conceded that this was a case of first impression in South Carolina, but based on its review of authority[40] in this area, concluded that "the rule is almost universally followed that one tort feasor is entitled to credit for the amount paid by another tort feasor for a covenant not to sue."[41] The court also decided that the preferable method for giving the credit was to exclude evidence of the covenant from the jury and let the court give the credit after a verdict is rendered. But the fact that this preferable procedure was not followed in the instant case was not held to be prejudicial error because the plaintiff, at the time of the trial, sought to avoid the giving of this credit to the defendant.

The court also held that the trial judge committed error, but not reversible error, in not allowing the plaintiff to show that the workmen's compensation carrier, from whom she had received benefits, had received the proceeds of the covenant not to sue. Although evidence as to workmen's compensation is normally not admissible in an action in tort brought to recover damages,[42] the court said that it should have been

37. *Id.*
38. Although the court did not cite any South Carolina decisions to support its holding, its position is consistent with previous South Carolina cases. Marks v. Industrial Life & Health Ins. Co., 212 S.C. 502, 48 S.E.2d 45 (1948); McCready v. Atlantic Coast Line R.R., 212 S.C. 449, 48 S.E.2d 193, *cert. denied*, 335 U.S. 827 (1948).
39. 250 S.C. 149, 156 S.E.2d 759 (1967).
40. Annot., 94 A.L.R.2d 352 (1964).
41. Powers v. Temple, 250 S.C. 149, 155, 156 S.E.2d 759, 761 (1967).
42. S.C. CODE ANN. § 72-127 (1962).

admitted here for the purpose of showing that the plaintiff did not personally receive the proceeds of the covenant and because workmen's compensation was first brought to the attention of the jury by the defendant in an unsuccessful attempt to elicit evidence as to the amount of benefits paid to the plaintiff thereunder.

The court also held that the trial judge clearly erred in allowing the defendant to bring out on cross-examination of the plaintiff that she had continued to receive her salary at the rate of $400.00 per month for eleven months during her disability. While admitting that there was some authority to support the trial judge, the court concluded that the great weight of authority was to the contrary.[43] It was urged upon the court that this error as to the plaintiff's salary was not prejudicial since it bore only on the measure of damages and the jury had found for the defendant on the issue of liability. However, the court refused to accept this, saying that the question of liability appeared to be closely contested and that as a matter of common knowledge in closely contested cases, "the verdict of the jury is not infrequently the result of a compromise of varying viewpoints."[44] The court reasoned that the jury in returning a verdict for the defendant might well have concluded that the plaintiff had already been substantially compensated for her injuries and that, if this were the case, the erroneously admitted evidence could have, in fact, prejudiced the plaintiff's case.[45]

VIII. Due Process as Applied in the Field of Evidence

A. Administrative Hearings

The South Carolina Supreme Court held in *Spartanburg v. Parris*[46] that the Civil Service Commission, in conducting a

43. Annot., 7 A.L.R.3d 516 (1966). The court quoted the following sentence from this annotation on The Collateral Source Rule: "As a general rule, total or partial compensation for an injury which the injured party receives from a collateral source wholly independent of the wrongdoer does not operate to lessen the damages recoverable from the wrongdoer." *Id.* at 518.

44. Powers v. Temple, 250 S.C. 149, 160, 156 S.E.2d 759, 764 (1967).

45. Chief Justice Moss strongly took issue with this holding in his dissenting opinion. He said that on the question of liability in this guest passenger case the defendant was entitled to a directed verdict in his favor had a proper and timely motion therefor been made. He further said that because of the defendant's lack of liability, as found by the jury, any error in the admission of testimony which related solely to the measure or quantum of damages, *e.g.*, as to the plaintiff's compensation from a collateral source, was immaterial. *Id.* at 165-70, 156 S.E.2d at 767.

46. 161 S.E.2d 228 (S.C. 1968).

hearing to determine if the discharge of a police officer was proper, could not receive in evidence against the officer an affidavit which had been executed by his chief accuser, one Honeycutt. The court said that the officer would be deprived of substantial rights if this testimony was admitted without giving the officer the opportunity to be confronted by and to cross-examine the chief witness against him.

The court reiterated previous South Carolina decisions[47] in saying that when an administrative and quasi-judicial body conducts a hearing it is not bound by the strict rules of evidence which a judicial court must follow. But the court said that this freedom from strict compliance with the rules of evidence must not be carried so far that a party is deprived of his substantial rights. Administrative hearings such as the one in the present case must be "conducted consistently with fundamental principles which inhere in due process of law."[48] The fact that the right to cross-examine witnesses is a fundamental one is well supported by the authorities quoted by the court in *Parris*:

> The right to cross-examine witnesses in quasi-judicial or adjudicatory proceedings is a right of fundamental importance which, in regard to serious matters, exists even in the absence of express statutory provision, as a requirement of due process of law or the right to a hearing, and no one may be deprived of such right even in an area in which the Constitution would permit it if there is no explicit authorization therefor.[49]

B. Line-up Identification

In *State v. Nelson*[50] and *State v. Ladd*,[51] the court held that testimony concerning line-up indentifications of the defendants was admissible. The trials of these cases were held before the United States Supreme Court's decision that

47. Richards v. Columbia, 227 S.C. 538, 88 S.E.2d 683 (1955); Jacoby v. South Carolina State Bd. of Naturopathic Examiners, 219 S.C. 66, 64 S.E.2d 138 (1951).
48. Southern Stevedoring Co. v. Voris, 190 F.2d 275, 277 (5th Cir. 1951).
49. Spartanburg v. Parris, 161 S.E.2d 228, 229 (S.C. 1968), *quoting from* 2 AM. JUR. 2d *Administrative Law* § 424 (1962).
50. 250 S.C. 6, 156 S.E.2d 341 (1967).
51. 161 S.E.2d 230 (S.C. 1968).

line-up identification is a critical stage of the prosecution, requiring the presence of counsel, unless intelligently waived.[52] The Supreme Court on that same day decided that this doctrine would not be applied retroactively,[53] thus exempting these two cases from that requirement. However, the doctrine will apply to all future cases thus making these two state cases of little value as precedent in this area.

Nelson involved voice as well as sight identification and testimony as to this was also held properly admitted. A positive sight identification was made before any words were spoken by the suspects, and then nothing which they said at the time of the crime was used. The court held that the procedure was not "unnecessarily suggestive and conducive to irreparable mistaken identification"[54] and in fact afforded no opportunity for suggestion.

C. Self-Incrimination — Scientific Evidence

In *State v. Bell*,[55] testimony as to comparisons made of hairs removed from the victim's clothing with specimens of the defendant's hair was held not to be a violation of the defendant's right against self-incrimination. The court said that in this evidence it saw no element of testimonial compulsion.

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52. United States v. Wade, 388 U.S. 218 (1967); *accord*, Gilbert v. California, 388 U.S. 263 (1967).
53. Stovall v. Denno, 388 U.S. 293 (1967).
54. State v. Nelson, 250 S.C. 6, 11, 156 S.E.2d 341, 343 (1967), *quoting from* Stovall v. Denno, 388 U.S. 293, 302 (1967).
55. 250 S.C. 37, 156 S.E.2d 313 (1967).