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Evidence

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EVIDENCE

I. RELEVANCE

A. *Photographs*

Photographs are usually considered mere illustrations of testimony and may be authenticated by a witness, familiar with the scene, who vouches for their accuracy.[1] In *State v. Campbell*,[2] because a policeman testified that the photographs offered were correct representations of the area portrayed, it was not necessary that the photographer himself be present for cross-examination.

The court also held that, even after substantial descriptive testimony, photographs of the scene of a homicide may be admitted at the discretion of the trial judge.[3] Dicta in a 1959 case,[4] indicating that photographs are not to be admitted unless "necessary to show material facts or conditions," has probably been responsible for many appeals in recent years. An interest in allowing trial judges to function with a minimum number of rules has prevailed, however, for it appears that lower court rulings will not be disturbed short of admitting pictures of ghastly wounds in the absence of some necessity. Thus it has been held that receipt in evidence of a gruesome picture of a decomposed body was not an abuse of discretion where the trial judge believed it necessary for identification by witnesses.[5] But, when the circumstances do not necessitate admittance, receipt in evidence of a photograph showing the battered body of the deceased is reversible error.[6] *Campbell* thus follows the traditional rule that determinations of materiality and relevance are left to the discretion of the trial court.

The court states its rule regarding photographs as follows: "If such photographs are calculated to arouse the sympathy or prejudice of the jury or if they are entirely irrelevant or not necessary

1. *See generally* C. MCCORMICK, EVIDENCE § 214 (1972) (hereinafter cited as MCCORMICK); 3 J. WIGMORE, EVIDENCE § 790 (Chadbourn rev. 1970) (hereinafter cited as WIGMORE).
2. 259 S.C. 339, 191 S.E.2d 770 (1972).
3. *Id.*; *accord*, State v. Jones, 228 S.C. 484, 91 S.E.2d 1 (1956).
4. Peagler v. Atlantic C.L.R.R., 234 S.C. 140, 162, 107 S.E.2d 15, 27 (1959).
5. State v. Edwards, 194 S.C. 410, 10 S.E.2d 587 (1940) (3-2 decision).
6. State v. Waitus, 224 S.C. 12, 77 S.E.2d 256 (1953).

to substantiate facts, they should be excluded."[7] As applied, the test requires an unacceptable purpose of the proponent, immateriality of the photograph, or perhaps both.[8]

B. Evidence of Other Crimes

In *State v. Miller*[9] evidence of another crime, the physical abuse of victims during the course of a robbery, was held admissible at defendant's trial for armed robbery. The court reasoned that the beatings were "part and parcel" of the robbery and thus reaffirmed South Carolina's common scheme exception to the general rule that evidence of an accused's other crimes is inadmissible.[10]

C. Evidence of Remarriage in Wrongful Death Actions

In *Smith v. Wells*[11] the trial court permitted defendant to prove that plaintiff had remarried within six months of her husband's death. Defendant argued that because of South Carolina's unique wrongful death statute[12] such evidence should be admissible to avoid maximizing plaintiff's speculative damages for grief and sorrow, loss of companionship, and deprivation of society. The court held evidence of remarriage to be inadmissible against either the surviving spouse or children because its introduction would necessitate an inquiry into the relative merits of the two husbands, including a comparison of their prospective earnings, contributions, services, society and companionship.

Although several jurisdictions allow this evidence,[13] the majority do not.[14] Exclusion is rationalized by noting that damages

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7. 259 S.C. at 344, 191 S.E.2d at 773, *quoting* State v. Thorne, 239 S.C. 164, 167, 121 S.E.2d 623, 624 (1961), *cert. denied*, 368 U.S. 979 (1962).

8. 259 S.C. at 344, 191 S.E.2d at 773.

9. 193 S.E.2d 802 (S.C. 1972).

10. *E.g.*, State v. Gamble, 247 S.C. 214, 146 S.E.2d 709 (1966), *cert. denied*, 390 U.S. 927 (1968); State v. Sharpe, 239 S.C. 258, 122 S.E.2d 622 (1961).

11. 258 S.C. 316, 188 S.E.2d 470 (1972).

12. S.C. CODE ANN. § 10-1954 (1962). The statute allows recovery for: 1) pecuniary loss; 2) mental shock and suffering; 3) wounded feelings; 4) grief and sorrow; 5) loss of companionship; and 6) deprivation of the use and comfort of the deceased's society, experience, knowledge and judgment. Mishoe v. Atlantic C.L.R.R., 186 S.C. 402, 419, 197 S.E. 97, 104 (1938).

13. *E.g.*, Campbell v. Schmidt, 195 So. 2d 87 (Miss. 1967); Jensen v. Heritage Mut. Ins. Co., 23 Wis. 2d 344, 127 N.W.2d 228 (1964); Plant v. Simmons Co., 321 F. Supp. 735, 741 (D. Md. 1970).

14. *See generally* Annot., 87 A.L.R.2d 252 (1963).

arise at the time of the spouse's death and that subsequent actions of the surviving spouse should not benefit the wrongdoer. The principal case is also consonant with South Carolina's collateral source rule, which states that compensation received for an injury from a source wholly independent of the wrongdoer does not offset damages recoverable from the wrongdoer.[15]

II. JUDICIAL NOTICE

Benford v. Berkeley Heating Co.[16] was a products liability action brought by a homeowner whose house was destroyed in a fire caused by his furnace. Plaintiff joined the manufacturer, Trane, and the dealer, Berkeley, electing breach of warranty as his theory. The jury absolved Berkeley of liability, although the evidence showed that it had made three major errors in installing the furnace, including failure to provide sufficient clearance between the draft hood and pine joists as required by the manufacturer's manual. Manufacturer, however, was held liable on the basis of expert testimony that a defective blower switch could have caused the fire even if the furnace had been installed with the recommended clearance.[17] In granting manufacturer's motion for judgment notwithstanding the verdict, the South Carolina court concluded that judicial notice may be taken of "the laws of physics and mathematics, together with generally accepted facts relating to natural forces."[18]

Plaintiff's expert had testified that the two or three inch difference in clearance was insignificant and not measurable. To discredit this testimony the court noticed that "the net energy radiated between the hot draft hood and cooler joist would vary with the distance between them in proportion to a variable factor . . .",[19] and held that dealer's negligent installation was an unforeseeable intervening cause. This use of judicial notice indicates acceptance of the view that evidence contradicting the truth

15. Young v. Warr, 252 S.C. 179, 165 S.E.2d 797 (1969); Powers v. Temple, 250 S.C. 149, 156 S.E.2d 759 (1967).

16. 258 S.C. 357, 188 S.E.2d 841 (1972).

17. Trane's manual called for at least 6" clearance from combustible material; Berkeley installed with only a 2 3/4" clearance from the pine joists.

18. 258 S.C. at 367n.5, 188 S.E.2d at 845n.5, *citing* 31A C.J.S. *Evidence* § 74 (1964); *cf.* Johnson v. Atlantic C.L. Ry., 112 S.C. 47, 99 S.E. 755 (1919).

19. 258 S.C. at 367n.5, 188 S.E.2d at 845n.5, *citing* M. JACOBS, ELEMENTS OF HEAT TRANSFER 221 (3d ed. 1957).

of a noticed fact is inadmissible because, by its nature, a fact that may be judicially noticed is an indisputable fact which the jury must be instructed to accept as true.[20]

In support of the fact noticed, the court cited a learned treatise on heat transfer.[21] There is some question whether defendant manufacturer could have introduced the treatise to impeach plaintiff's expert. A 1931 case[22] holds that reading of medical or scientific works in court is precluded by statute,[23] except when the question is one of insanity or the administration of poison. "The restriction of their use to such cases is irrefutable argument that they cannot be used in any other cases."[24] In 1937, however, the court authorized the admission of medical articles and reports to impeach the witness who had previously prepared them,[25] commenting that the only legitimate reason for prohibiting the use of learned treatises is that such use introduces the statement of a person not subject to cross-examination. The witness was thus bound by his own published, prior inconsistent statements because he was subject to cross-examination.

The strict prior inconsistent statement notion would not extend to include the use of scientific books authored by others. It could be argued, however, that the learned treatise statute is to be treated as merely a special hearsay rule. Thus, the book on heat transfer might be read in court during cross-examination, not for its substantive value, but rather to impeach the expert witness.[26] Concern about allowing a "battle of the books" should be minimal in the cross-examination setting, and the point seems worth arguing.

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20. MCCORMICK § 332, at 769, *citing* Morgan, *Judicial Notice*, 57 HARV. L. REV. 269 (1944). Another view is that the function of notice is merely to expedite trials, so that contradictory evidence is admissible, and the jury is free to accept or reject the fact noticed. 9 WIGMORE § 2567a.

21. M. JACOBS, ELEMENTS OF HEAT TRANSFER 221 (3d ed. 1957).

22. Baker v. Southern Cotton Oil Co., 161 S.C. 479, 159 S.E. 822 (1931).

23. S.C. CODE ANN. § 26-142 (1962): "In all actions in which the question of sanity or . . . the administration of poison or any other article destructive to life is involved and in which expert testimony may be introduced, medical or scientific works . . . shall be competent and admissible to be read before the court or jury . . . ."

24. Baker v. Southern Cotton Oil Co., 161 S.C. 479, 483, 159 S.E. 822, 823 (1931).

25. LaCount v. General Asbestos and Rubber Co., 184 S.C. 232, 192 S.E. 262 (1937).

26. *See generally* J. DREHER, A GUIDE TO EVIDENCE LAW IN SOUTH CAROLINA 11 (1967) (hereinafter cited as DREHER).

III. EXPERT TESTIMONY

The court in *Benford* was also faced with discrediting testimony that the joist would eventually have ignited at a distance of six inches. The expert's conclusion was held to be *without probative value* on this crucial issue because it was not made in response to a hypothetical question and the facts underlying the opinion were not stated. The court reasoned that the opinion may have rested on the assumption that one of the installation errors was present, and further noted that the expert gave no estimate of how much additional time would have been necessary for ignition.

The court has never stated the rule regarding expert opinion quite so strictly. The hypothetical question is, of course, required when an expert is not testifying about facts within his personal knowledge.[27] When the expert has personal knowledge of the facts, he is generally required to first state the facts upon which his opinion is based, unless those facts cannot be effectively reproduced in language.[28] In *South Carolina Highway Department v. Bryant*,[29] however, the court looked to the expert's testimony as a whole to determine the facts upon which his conclusion rested. And it has traditionally been held that, once admitted, expert testimony capable of more than one reasonable inference should be afforded whatever weight the jury wishes.[30] A comment by the court in *Benford* that the opinion could have rested on the assumption that one of the installation errors contributed to the fire makes it clear that more than one reasonable inference was possible from the testimony. Thus, to reach the court's result, it was necessary to hold the expert's opinion to be without probative value.[31]

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27. State v. King, 158 S.C. 251, 286, 155 S.E. 409, 422 (1930); Easler v. Southern Ry., 59 S.C. 311, 37 S.E. 938 (1901). *See generally* 7 WIGMORE § 1927.

28. Smith v. Smith, 194 S.C. 247, 9 S.E.2d 584 (1940) (testimony about humiliation and damage to reputation). Under rule 705 of the proposed Federal Rules of Evidence, it is not necessary to disclose the underlying facts unless required to do so by the judge or opposing counsel.

29. 253 S.C. 400, 171 S.E.2d 349 (1969).

30. Poston v. Southeastern Constr. Co., 208 S.C. 35, 36 S.E.2d 858 (1946); Smith v. Southern Builders, 202 S.C. 88, 24 S.E.2d 109 (1943); Anderson v. Campbell Tile Co., 202 S.C. 54, 24 S.E.2d 104 (1943).

31. *Benford* is probably best explained as a "hard case" resulting from the questionable verdict. Indeed, the court concluded as follows: "We find the record devoid of any evidence from which the jury reasonably could have concluded that the fire would have

The case also seems to limit *Greer v. Greenville County*[32] in which the court held that if a timely objection is not made to a defective hypothetical question, the objection is waived and the answer retains probative force. The court there reasoned that, since opposing counsel could have cross-examined to show that consideration of all facts would have changed the expert opinion, the evidence was properly admitted; once admitted it was to be considered and weighed by the jury.[33] The expert's answer is not to be disregarded by the court simply because the question omits some essential feature.[34]

It is difficult to reconcile the *Greer* conclusion, that the answer to a deficient hypothetical question should be weighed by the jury, with the *Benford* holding, that an opinion has no probative value whatsoever in the absence of a statement of the underlying facts. *Greer* is distinguishable because some underlying facts were expressed there, but its rationale seems to have been seriously eroded. In *Benford* there was no objection to the opinion, and opposing counsel had at least one opportunity to cross-examine.

In *Oglesby v. Smith*[35] none of three medical experts would testify that deceased's injury was "most probably" caused by the accident in question. Other facts showed, however, that his condition had deteriorated seriously within five days of the accident and that no signs of the other alleged cause had been noticed. The court held that the evidence was sufficient to sustain a finding of causation because the testimony of the medical experts was not solely relied upon to support that conclusion.[36] In the absence of other corroborating evidence, however, it remains necessary that the experts testify that the disability or death "most probably" resulted from the accidental injury.[37]

Defendant argued on appeal that the unanimous opinion of

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occurred in natural course, absent faulty installation by the defendant Berkeley." 258 S.C. at 368, 188 S.E.2d at 846. Thus it might be expected that the court will not strictly adhere to its new rule.

32. 245 S.C. 442, 141 S.E.2d 91 (1965) (seven alleged deficiencies in hypothetical question).

33. *Cf.* Chapman v. Foremost Dairies, Inc., 249 S.C. 438, 154 S.E.2d 845 (1967) (substantially all material facts included in hypothetical question).

34. 245 S.C. at 458, 141 S.E.2d at 99, *quoting* 88 C.J.S. *Trial* § 155, at 303 (1955).

35. 258 S.C. 392, 188 S.E.2d 856 (1972).

36. *Accord*, Grice v. Dickerson, Inc., 241 S.C. 225, 127 S.E.2d 722 (1962).

37. Cross v. Concrete Materials, 236 S.C. 440, 114 S.E.2d 828 (1960).

the medical experts that causation was possible but not probable was dispositive of the case. It was suggested that where the question is one for experts alone and concerns a matter of science, specialized art, or other matters of which laymen can have no knowledge, expert opinion may be conclusive.[38] There is language to this effect in the reports, but it appears to be only dicta emanating from a 1943 decision[39] that has never been actually applied.

IV. DOCUMENTS

A. *Authentication of Writing Introduced to Impeach*

In *State v. Miller*[40] the prosecution, without specifying a purpose, introduced a note received by the defendant's alleged accomplice, Davis. The note instructed Davis to include in his confession a statement exculpating defendant Miller. Davis first testified that the defendant had sent the note, but later testified that he did not know who had sent it. The court reversed Miller's conviction, holding that the writing should have been excluded at trial because it had not been authenticated. The accomplice had repudiated his knowledge of the note's source, and no other evidence established the identity of the sender. The implied subornation obviously prejudiced defendant, and apparently no curative instructions were given.

It is difficult to ascertain the precise holding of the case. Justice Littlejohn's dissent makes it clear that the majority rejected the notion that unauthenticated documents may be received to impeach, at least where that purpose is not specified. The dissent reasoned that the writing was properly admitted to show that the accomplice had changed his testimony and that the change was motivated by the note.[41] This reasoning follows Wigmore's statement that "[w]hen the execution of a document is

38. Brief for Appellant at 11, Oglesby v. Smith, 258 S.C. 392, 188 S.E.2d 856 (1972).

39. Anderson v. Campbell Tile Co., 202 S.C. 54, 63, 24 S.E.2d 104, 107-08 (1943), *quoting* 32 C.J.S. *Evidence* § 569(c), at 607 (1964). *See, e.g.*, Polk v. E.I. duPont de Nemours Co., 250 S.C. 468, 475, 158 S.E.2d 765, 768 (1968); Dennis v. Williams Furniture Corp., 243 S.C. 53, 60, 132 S.E.2d 1, 5 (1963). For a discussion of South Carolina cases regarding contradictory medical and lay testimony, *see* Hines v. Pacific Mills, 214 S.C. 125, 51 S.E.2d 383 (1949).

40. 193 S.E.2d 802 (S.C. 1972).

41. Davis had, shortly after his arrest, inculpated the defendant in a statement to the police.

not in issue, but *only the contents* or the fact of the existence of a document of such a tenor, no authentication is necessary."[42] Because the majority did not specifically consider the distinction regarding use of the writing for impeachment, the case may be read to exclude any use where the source is not proved. On the other hand, the case could be narrowly applied to only those situations in which no purpose for introduction is specified and no limiting instructions are given to the jury.

B. Best Evidence Rule

South Carolina generally applies the best evidence rule as stated by McCormick: "In proving the terms of a writing, where the 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."[43]

In *State v. Miller*[44] the prosecution sought to prove that the defendant had spent four twenty-dollar bills which bore the serial numbers of bills taken in a robbery. The bills spent by Miller had disappeared from a locker at police headquarters and could not be produced at the trial. When the unavailability of the bills was discovered, counsel for the defendant moved to strike all evidence about the bills and their serial numbers as hearsay. On appeal the evidence was challenged on the basis of the best evidence rule. The court was not required to decide the question but did advise the trial court (on remand) that the best evidence rule does not bar such testimony, stating: "[T]he evidence related to the identity of the bills and not to their contents as written instruments, and the bills had apparently been stolen and were not available at trial."[45]

There is authority in South Carolina for the proposition that the best evidence rule applies only if the terms of the writings are

42. 7 WIGMORE § 2132. *See* People v. Marsh, 58 Cal. 2d 732, 376 P.2d 300, 26 Cal. Rptr. 300 (1962) (statement admissible to show defendant relied upon it); State v. Waldrop, 73 S.C. 60, 52 S.E. 793 (1905) (contract not offered to prove contents but rather that lease existed).

43. MCCORMICK § 230; DREHER at 49. *See* Vaught v. Nationwide Mut. Ins. Co., 250 S.C. 65, 156 S.E.2d 627 (1967); Sims v. Jones, 43 S.C. 91, 20 S.E. 905 (1895).

44. 193 S.E.2d 802 (S.C. 1972).

45. *Id.* at 804.

in issue[46] so that testimony about identity is not barred by the rule.[47] According to Wigmore,

> The fundamental notion of the rule requiring production is that in writings the smallest variation in words may be of importance, and that such errors in regard to words and phrases are more likely to occur than errors in regard to other features of a physical thing. Thus the rule applies only to the *terms of the document*, and not to any *other facts about* the document.[48]

Determining when to make this distinction is difficult;[49] and concern about the likelihood of small variation could extend to remembered serial numbers. But since the bills in *Miller* had been impounded the possibility of mistake seems minimal. Just as the witness would have been allowed to testify that he received reportedly stolen bills, it is not unreasonable to allow him to testify about the serial numbers. Of course, even if the rule did apply, the testimony is admissible as secondary evidence. Because the rule is aimed at securing the best obtainable evidence of a document's contents, other evidence should be admissible where the original cannot be produced as a result of loss or destruction through no serious fault of the proponent.[50]

V. CONFESSIONS

The United States Supreme Court recently held in *Lego v. Twomey*[51] that state courts are free to require that the voluntariness of confessions be established either by a preponderance of the evidence or by proof beyond a reasonable doubt in *Jackson v. Denno*[52] hearings before trial judges:

> [W]hen a confession challenged as involuntary is sought to be used against a criminal defendant at his trial, he is entitled to a reliable and clear-cut determination that the confession was in fact voluntarily rendered. Thus the prosecution must prove

46. *See, e.g.*, W.R. Grace & Co. v. LaMunion, 245 S.C. 1, 138 S.E.2d 337 (1964) (terms); Sims v. Jones, 43 S.C. 91, 20 S.E. 905 (1895) (content).

47. United States v. Alexander, 326 F.2d 736, 742 (4th Cir. 1964).

48. 4 WIGMORE § 1242, at 574.

49. *Id.*

50. MCCORMICK § 237; Vaught v. Nationwide Mut. Ins. Co., 250 S.C. 65, 156 S.E.2d 627 (1967).

51. 404 U.S. 477 (1972).

52. 378 U.S. 368 (1964).

> at least by a preponderance of the evidence that the confession was voluntary.[53]

In two recent decisions, the South Carolina Supreme Court appears to have acknowledged that proof beyond a reasonable doubt is necessary.[54] The cases arise out of two separate trials for murder in which the circumstances surrounding one oral confession[55] to both crimes were presented differently. Only the later decision will be discussed for its facts make it the stronger of the two.

At his trial Andrew Bellue contended that because he was under the influence of drugs at the time of his confession he was mentally incompetent to give it voluntarily.[56] Two doctors testified that it was difficult to determine from what drugs, if any, defendant was withdrawing, but it was their opinion that he was in "sufficiently bad shape" to preclude his making a critical decision for some time.[57] Two police officers with experience in drug abuse cases testified that Bellue appeared alert, coherent and normal at the time of his questioning.[58] The trial judge admitted the confession after finding "beyond a reasonable doubt that [it] was voluntarily given."[59]

Noting that there was evidence reasonably supporting the trial judge's factual findings, the supreme court held:

> We affirm under the established rule that the determination by the trial court of the preliminary facts upon which the admission of evidence depends will not be disturbed on appeal "unless so manifestly erroneous as to show an abuse of judicial discretion."[60]

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53. Lego v. Twomey, 404 U.S. 477, 489 (1972).

54. State v. Bellue, 194 S.E.2d 193 (S.C. 1973); State v. Bellue, 193 S.E.2d 121 (S.C. 1972). *Cf.* State v. Thomas, 248 S.C. 573, 583, 151 S.E.2d 855, 861 (1966): "Appellant's plea of not guilty, of course, put upon the State the burden of proving every element of the crime beyond a reasonable doubt." [1970] S.C. REP. ATT'Y GEN. 35 (No. 2882) (highest degree of proof required to demonstrate that *juvenile* waived rights freely, competently, and knowingly). The Fourth Circuit also requires proof of voluntariness beyond a reasonable doubt. Ralph v. Warden, 438 F.2d 786, 793 (4th Cir. 1970).

55. The detective in charge of the questioning testified that although statements were generally reduced to writing he "didn't feel in this particular instance that it was necessary." Record at 383, State v. Bellue, 194 S.E.2d 193 (S.C. 1973).

56. *See generally* Townsend v. Sain, 372 U.S. 293 (1963); Blackburn v. Alabama, 361 U.S. 199 (1960); *see also* Survey of Criminal Law and Procedure *supra*.

57. Record at 330-53, State v. Bellue, 194 S.E.2d 193 (S.C. 1972).

58. *Id.* at 353-63.

59. *Id.* at 365.

60. 194 S.E.2d at 194, *citing* State v. Bethea, 241 S.C. 16, 126 S.E.2d 846 (1962) *and* State v. Henderson, 74 S.C. 477, 55 S.E. 117 (1906).

The court does not cite *Lego v. Twomey*, nor does it expressly address itself to the quantum of proof question. It does, however, seem to be acknowledging the more exacting standard because it chose not to disturb the conclusion of the trial judge over defendant's specific contention that the evidence could not support a finding of voluntariness beyond a reasonable doubt. It could be argued that because the court did not mention the reasonable doubt quantum it is prepared to use the preponderance test in the future. Such a decision, however, would necessitate distinguishing both the *Bellue* cases and *State v. Thomas*,[61] and the argument thus assumes that the court would go out of its way to require less of the prosecution than it presently does.

VI. HEARSAY

Player v. Thompson[62] involved an attempt to prove a driver's recklessness and heedlessness in an action under South Carolina's guest statute.[63] To show knowledge of defective tires, the plaintiff offered a prior statement by the driver that she had heard a motor vehicle inspector tell the owner that the car needed two new tires. The trial court's exclusion of the statement as hearsay was reversed by the court which expressly accepted McCormick's definition:

> Hearsay evidence is testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out of court asserter.[64]

The prior statement should have been received not to prove that the tires were slick, but to indicate that the driver had obtained knowledge of their condition, the fact of slick tires having been established by other evidence.[65]

The court also rejected a determination by the trial court that the admission should be excluded because the driver had no

61. 248 S.C. 573, 151 S.E.2d 855 (1966). *See* cases cited note 54 *supra*.

62. 193 S.E.2d 531 (S.C. 1972).

63. S.C. CODE ANN. § 46-801 (1962).

64. MCCORMICK § 246, at 584.

65. 193 S.E.2d at 535. DREHER at 59 notes that the formal definition of hearsay has been largely ignored in South Carolina except for two cases: Watson v. Wall, 239 S.C. 109, 121 S.E.2d 427 (1961) and State v. Rivers, 186 S.C. 221, 196 S.E. 6 (1938).

personal knowledge that the tires were slick. Citing *Wigmore*,[66] the court stated that personal knowledge of the person making an admission is immaterial.[67]

State v. Miller[68] reaffirmed South Carolina's rule allowing the introduction of prior inconsistent statements to impeach a witness.[69]

VII. THE DEAD MAN STATUTE

Hicks v. Battey[70] follows the announced policy of the court to strictly construe the dead man statute.[71] Plaintiff sustained injuries when hit and knocked down by a boat trailer attached to a vehicle driven by deceased. Deceased's executor asserted that plaintiff was incompetent to testify, arguing that the accident was a "transaction or communication" within the dead man statute.[72] The court declined to hold the statute operative, stating:

> [T]ransaction . . . means a carrying on or through of any matter or affair, and implies a mutuality; something done by both in concert, in which both take some part.
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> . . . .
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> The necessity that there be mutuality or concert of action to constitute a transaction eliminates a fortuitous, involuntary act, such as here involved.[73]

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66. 4 WIGMORE § 1053.

67. 193 S.E.2d at 535.

68. 193 S.E.2d 802 (S.C. 1972).

69. Elliott v. Black River Elec. Cooperative, 233 S.C. 233, 104 S.E.2d 357 (1958); McMillan v. Ridges, 229 S.C. 76, 91 S.E.2d 883 (1956); State v. Williams, 222 S.C. 354, 72 S.E.2d 830 (1952). *See generally* MCCORMICK § 34.

70. 192 S.E.2d 477 (S.C. 1972).

71. *See, e.g.*, Havird v. Schissell, 252 S.C. 404, 166 S.E.2d 801 (1969); Lisenby v. Newsom, 234 S.C. 237, 107 S.E.2d 449 (1959).

72. S.C. CODE ANN. § 26-402 (1962) provides:

> [N]o party to an action or proceeding . . . shall be examined in regard to any transaction or communication between such witness and a person at the time of such examination deceased . . . as a witness against a party then prosecuting or defending the action as executor [or] administrator . . . of such deceased person . . . when such examination or any judgment . . . can in any manner affect the interest of such witness . . . .

For a general discussion of the statute, *see* Long v. Conroy, 246 S.C. 225, 143 S.E.2d 459 (1965).

73. 192 S.E.2d at 479, *citing* Burns v. Caughman, 255 S.C. 199, 202-03, 178 S.E.2d 151, 152 (1970); Jeffords v. Muldrow, 104 S.C. 388, 89 S.E. 357 (1916); Sullivan v. Latimer, 38 S.C. 158, 17 S.E. 701 (1893).

VIII. IN FAVOREM VITAE

In favorem vitae is the doctrine by which the court in capital cases reviews on appeal exceptions not properly reserved below.[74] The policy is employed only in cases in which the death penalty has been ordered and is not applicable when the defendant could have received the death penalty but did not.[75] Since *Furman v. Georgia*[76] invalidated the imposition of the death penalty, the South Carolina Supreme Court has treated death sentences as convictions with recommendations of mercy, which generate sentences of life imprisonment,[77] and thus no longer relies upon *in favorem vitae*.[78]

IX. TECHNICALITIES: UNINTENTIONAL WAIVER OF OBJECTION BY CROSS-EXAMINATION

State v. McKinney[79] is reported as follows:

> Malcolm McKinney, the appellant herein, was convicted in the Spartanburg County Court of an assault of a high and aggravated nature. During the course of the trial certain testimony was admitted over the objection of his counsel. Thereafter, counsel for the appellant cross-examined the witness thereabout without reserving the objection previously made. The objection was thereby lost and if any error had been committed in the admission of the testimony it was cured. [Citations omitted.]
>
> The only error alleged was the admission of the testimony hereinbefore referred to. It is apparent under the cases above cited that the exception posing this question is without merit.
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> The judgment below is, Affirmed.

The rule is one with which all South Carolina attorneys should be familiar, but in recent years a surprising number of appeals have been dismissed for unintentional waiver.[80] In spite

74. *See, e.g.*, State v. Thomas, 248 S.C. 573, 151 S.E.2d 855 (1966).

75. State v. Anderson, 253 S.C. 168, 169 S.E.2d 706 (1969).

76. 408 U.S. 238 (1972).

77. State v. Gibson, 192 S.E.2d 720 (S.C. 1972).

78. State v. Bellue, 193 S.E.2d 121 (S.C. 1972).

79. 258 S.C. 570, 190 S.E.2d 30 (1972). *Accord*, State v. Hall, 193 S.E.2d 269 (S.C. 1972).

80. *E.g.*, State v. Hoffman, 257 S.C. 461, 186 S.E.2d 421 (1972); State v. Lee, 255 S.C. 309, 178 S.E.2d 652 (1971); State v. Harvey, 253 S.C. 328, 170 S.E.2d 657 (1969); State v. Anderson, 253 S.C. 168, 169 S.E.2d 706 (1969); State v. Motley, 251 S.C. 568, 164 S.E.2d 569 (1968); State v. Sanders, 251 S.C. 431, 163 S.E.2d 220 (1968); State v. Jenkins, 249 S.C. 570, 155 S.E.2d 624 (1967).

of the acceptance and frequent application of the rule, there is precedent to the contrary that apparently has not been presented to the court. A 1926 decision, *Green v. Shaw*,[81] which has never been overruled or distinguished, seems to contradict the present doctrine. There the court concluded:

> Without making the testimony elicited the testimony of the cross-examining party, cross-examination may serve a number of useful purposes in the trial of a case, such as . . . testing the credibility of the witness or combating the effect of the testimony upon the minds of the jury. And we are unable to see why a litigant who has duly objected to the admission of incompetent testimony should be required to choose between foregoing the opportunity to accomplish such legitimate purposes through cross-examination of the testifying witness and waiving his right of appeal based on the Court's error in admitting the testimony.[82]

It does not appear that the cross-examining party in *Green* requested that his objection be reserved, nor did the court require such a reservation as it now does. Indeed, the court went on to state:

> When testimony has been admitted and an exception noted, counsel may deem it necessary to cross-examine the witness on the subject; and, if it is simply a cross-examination, he ought not be deprived of his exception, provided the record shows he does not intend thereby to waive it, and that ought to be inferred when it is strictly cross-examination.[83]

Cases holding that an objection is waived by cross-examination originated shortly after *Green* and of course never mentioned the earlier rule.[84] No justification has ever been offered for the present rule; administrative convenience seems to be the only explanation for its vitality.[85] Thus Professor Dreher has criticized the rule, stating:

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81. 136 S.C. 56, 134 S.E. 226 (1926). *See also* Horres v. Berkely Chem. Co., 57 S.C. 189, 35 S.E. 500 (1900).

82. 136 S.C. at 65, 134 S.E. at 228. The court also noted that its holding was not in conflict with any prior decision.

83. *Id.* at 68, 134 S.E. at 229, *quoting* United Rys. & Elec. Co. v. Corbin, 109 Md. 442, 455, 72 A. 606, 610 (1909).

84. *E.g.*, Snipes v. Augusta-Aiken Ry. & Elec. Corp., 151 S.C. 391, 149 S.E. 111 (1929) (citing no authority).

85. *Cf.* State v. Burnett, 226 S.C. 421, 85 S.E.2d 744 (1954).

It is completely illogical to think that a cross-examining lawyer is intentionally waiving an objection which he insisted upon a few minutes earlier, but [the requirement of a specific reservation of objection] is settled South Carolina law . . . . This would seem to be a pure technicality and important enough to change.[86]

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86. DREHER at 2. *See also* 1 WIGMORE § 13; MCCORMICK § 55; 24 S.C.L. REV. 559 (1972).