Evidence
EVIDENCE

I. RES GESTAE EXCEPTION

In two cases in 1974, the South Carolina Supreme Court dealt with the res gestae exception to the rule against hearsay. In State v. Quillien, the court permitted a police officer to report a statement given to him by a rape victim at the hospital shortly after the event. In State v. Maxey, the court refused to allow the defendant’s mother to testify concerning an exculpatory statement he had made to her. The court ruled correctly on the facts of these two cases, but failed to clarify the effect, if any, that a statement’s self-serving aspects would have on its admissibility.

Professor Wigmore has given this definition of the rule against hearsay:

Under the name of the hearsay rule, then, will here be understood that rule which prohibits the use of a person's assertion, as equivalent to testimony to the fact asserted, unless the asserted is brought to testify in court on the stand, where he may be probed and cross-examined as to the grounds of his assertion and of his qualifications to make it.

As a general rule, hearsay testimony at trial is excluded to insure reliability when the credibility of the declarant cannot be tested; several exceptions exist. Dean McCormick sets out the requirements for the well-established exception for spontaneous declarations, under which an “excited utterance” made under the influence of a startling event may be admitted:

First, there must be some occurrence or event sufficiently startling to render normal reflective thought processes of an observer inoperative. Second, the statement of the declarant must

5. Fourteen exceptions are listed at 5 Wigmore § 1426; 28 exceptions are set out in Fed. R. Ev. 803-04.
have been a spontaneous reaction to the occurrence or event and not the result of reflective thought.\(^6\)

The exception is permitted because the excitement of the event supposedly overcomes any reflective thinking by the declarant, thus making the statement an accurate and reliable description of the events observed.\(^7\)

In *Marshall v. Thomason*,\(^8\) the South Carolina Supreme Court quoted approvingly the rule set out in *State v. Long*:\(^9\)

To qualify under the res gestae exception to the rule excluding hearsay testimony, a statement "must be substantially contemporaneous with the litigated transaction, and be the instinctive, spontaneous utterances of the mind while under the active, immediate influences of the transaction; the circumstances precluding the idea that the utterances are the result of reflection or design to make false or self-serving declarations."\(^10\)

Professor Dreher declared that "when the excitement is gone, so is the exception."\(^11\) He also indicated the significance of the *Marshall* case:

It is true that the Court had used similar language in the past but this time they emphasized what they meant by reversing because of the admission as *res gestae* of a statement made after the exciting influences of the occurrence had subsided.\(^12\)

In *State v. Quillien*,\(^13\) the defendant was found guilty of rape and received a 35-year sentence. He appealed the conviction on several grounds, including the admission, over a timely but general objection, of a police officer's testimony concerning a statement made by the prosecuting witness. After first establishing that the interview was made upon her arrival by ambulance at

\(^6\) McCormick § 297. See 6 Wigmore §§ 1745-64; Fed. R. Ev. 803(2).
\(^7\) McCormick § 297.
\(^8\) 241 S.C. 84, 127 S.E.2d 177 (1962).
\(^9\) 186 S.C. 439, 195 S.E. 624 (1938). This rule was first enunciated in *State v. McDaniels*, 68 S.C. 304, 47 S.E. 384 (1904).
\(^10\) 241 S.C. at 89, 127 S.E.2d at 178-79.
\(^11\) J. Dreher, A Guide to Evidence Law in South Carolina 78 (1967) [hereinafter cited as Dreher].
\(^12\) Id. at 78 n.18.
the hospital, and while she was still with the doctor, the officer
gave this account:

At the time she told me she had been picked up off of U.S. No. 1 by a colored subject she did not know at gunpoint. He had taken her by an apartment and raped her. They were coming out from behind there and a police car came in behind them and he started running from the police and at this time they went out the Charleston Highway and the police wrecked him.14

On appeal, defendant objected15 to this statement as inadmissible hearsay and also as a constitutional violation of the right to confront one's accusers.16 The supreme court correctly indicated that the trial judge did not err in allowing this statement as evidence. While the record is unclear as to how much time had elapsed between the event and her relation of it to the officer, the clear indication from the fact of arrival by ambulance shortly after the car accident must be that the witness remained in a state of excitation. The supreme court upheld the admission of the statement on this basis, and thus did not deal with the confrontation issue. Although not mentioned in the opinion, the prosecuting witness had made the same statement at the trial, and was cross-examined at length by defendant's counsel.17 This would appear to dispose adequately of the constitutional objection.

In State v. Maxey,18 the defendant was found guilty of murder and was sentenced to life imprisonment. His appeal included an allegation of error on the part of the trial judge in excluding testimony by his mother regarding a statement made to her. During a fight, two persons were killed by shots fired by the defendant who pleaded self-defense. After the incident, the defendant apparently walked one mile to his house, where he made a statement to his mother which the court characterized as self-serving.19 The supreme court relied primarily on the similar case of State v. Murphy20 to affirm Maxey's conviction. Mattie Murphy, also a defendant in a homicide, was not permitted to introduce testimony of a police officer to the effect that she had gone

14. Id. at 96-97, 207 S.E.2d at 819.
16. U.S. Const. amend. VI.
17. Record at 107-16; Brief for Respondent at 14.
19. Id. at 508, 205 S.E.2d at 843.
to him for protection and had said so when she reported the incident. The court said there:

    The appellant had traveled one-half mile after the shooting in order to reach the presence of this police officer and, if such statement was made to him, it could just as well have been a self-serving declaration made with deliberate design, and therefore does not come within the res gestae rule.\(^{2}\)

The element fatal to the defendants' appeals was the elapsed time between the incident and the making of the utterances. The extended interval negated the spontaneity of the situation and thus violated one of the exception's requirements\(^{22}\) because of the opportunity for reflective thought. Although the statements were self-serving, this alone should not mandate their rejection. The excerpt from *Marshall v. Thomason*,\(^{23}\) which appears to indicate that a self-serving statement must be excluded, is incorrect in this respect. An excited utterance gains its trustworthiness from the emotion of the moment which gives rise to it, not from the content of the statement. As Professor Dreher said, "If the statement is truly res gestae, arising solely from the excitement of the occurrence, it should not matter whether it is favorable or unfavorable to the declarant."\(^{24}\) A blanket rule of exclusion for any statement determined to be self-serving could be unfair, and if other requirements are met, the jury should be permitted to weigh the credibility of the statement against its self-serving characteristics.\(^{25}\)

II. IMPEACHMENT OF WITNESSES

Three cases in 1974 presented the issue of the use of a prior inconsistent statement to impeach a witness. In *State v. Miller*,\(^{26}\) the supreme court affirmed a conviction where earlier statements were used to discredit the trial testimony of a codefendant who

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21. *Id.* at 48-49, 56 S.E.2d at 738.
22. *See* note 6 *supra*.
23. *See* text accompanying note 10 *supra*.
25. *See* McCORMICK § 290, which discusses the self-serving aspects of spontaneous declarations, and concludes that a careful examination is required to insure that the declaration was made under circumstances of apparent sincerity, where the danger of injustice to the defendant is great if the testimony is excluded. Such a situation would exist in a homicide or assault case where the declaration of the accused is offered to prove his peaceful intentions or fear of the victim.
there, in contradiction to his confession, exculpated the appellant. In *State v. Smith*,27 a conviction was reversed where the trial judge excluded evidence that the state's witness earlier had made a threat against the life of the defendant; the death of a bystander resulted from an altercation, wherein the defendant pleaded self-defense. In *State v. Williams*,28 defendant's mother, whose testimony had corroborated her son's plea of self-defense in a murder prosecution, was impeached on the basis of matters the defense characterized as collateral, but the action was upheld on appeal.

While a prior inconsistent statement of a witness may be admitted as substantive evidence only in certain circumstances,29 it is universally accepted that such statements may be used to contradict and thus to impeach a witness. Dean McCormick succinctly discussed the issue:

The theory of attack by prior inconsistent statements is not based on the assumption that the present testimony is false and the former statement true but rather upon the notion that talking one way on the stand and another way previously is blowing hot and cold, and raises a doubt as to the truthfulness of both statements.30

The South Carolina Supreme Court, in *Bank of Parksville v. Dorn*,31 indicated that "it was proper to ask him [the witness] whether or not he had made certain statements, and, when he denied making these statements, to contradict him, so as to affect

29. Fed. R. Ev. 801(d)(1) defines the conditions under which a prior statement by a witness is not hearsay and therefore would be admissible to prove the truth of the matters asserted therein. See McCormick § 34, at 67, which indicates that while under a modern view prior inconsistent statements should be admissible as substantive evidence, the more traditional view holds that generally they are not. Section 251, at 601, discusses the hearsay aspects of such substantive use at great length. The matter is also dealt with in 3A Wigmore § 1018.
30. McCormick § 34, at 68. See 3A Wigmore § 1017, at 993 (footnotes omitted, emphasis in original), where it is stated:

The end aimed at by the present sort of impeaching evidence is . . . to show the witness to be in general capable of making errors in his testimony . . .; for upon perceiving that the witness has made an erroneous statement upon one point, we are ready to infer that he is capable of making an error upon other points . . .

It has often been said that a prior self-contradiction shows "a defect either in memory or in the honesty" of the witness.
his credibility. . . ." 32 The rule was clearly set out in Sumter v. American Surety Co., 33 where the court, citing Professor Wigmore, said:

It follows . . . that Prior Self-Contradictions . . . are to be employed merely as involving a repugnancy or inconsistency; otherwise they would in truth be obnoxious to the Hearsay Rule. . . .

Such testimony of inconsistent statements is admissible only for the purpose of impeaching the credit of the witness, but cannot be received as evidence of any fact touching the issue to be tried. . . . 34

One additional caveat must be added: if the scope of cross-examination on prior inconsistencies encompasses "collateral" matters, then the attorney is required to "take the answer," and is not permitted to prove the making of the denied statement by other witnesses. 35 Dean McCormick explained the rationale for this requirement, and provided a working definition of "collateral matters:"

At this latter stage, of extrinsic evidence, that is, the production of attacking witnesses, the range of impeachment by inconsistent statements is sharply narrowed for obvious reasons of economy of time and attention. . . . [T]o impeach by extrinsic proof of prior inconsistent statements, the statements must have as their subject (1) facts relevant to the issues in the cause, or (2) facts which are themselves provable by extrinsic evidence to discredit the witness. Facts showing bias or interest . . . would fall in the second class. 36

In South Carolina, impeachment on collateral issues was restricted in State v. Bodie, 37 where it was stated:

[I]t is apparent that the point upon which it was proposed to contradict [the witness] was wholly irrelevant and incompe-

32. Id. at 371, 120 S.E. at 72.
35. McCormick § 36, at 70.
36. Id. at 70-71 (footnotes omitted). See 3A Wigmore § 1020, at 1009-10 (emphasis in original), which proposes this test: "Could the fact, as to which the prior self-contradiction is predicated, have been shown in evidence for any purpose independent of the self-contradiction?"
37. 33 S.C. 117, 11 S.E. 624 (1890).
tent to the issue which was being tried. . . . It is clear, therefore, that the proposed testimony . . . was properly excluded. . . .

This test to determine whether a question is collateral to the issues joined was articulated in State v. Brock:

Would the cross-examining party be entitled to prove the fact as a part of, and as tending to establish, his case? If he would be allowed to do so, the matter is not collateral; but, if he would not be allowed to do so, it is collateral. Collateral matters, in this sense, are such as afford no reasonable inference as to the principal matter in dispute.

The rule remains valid in South Carolina.

In October of 1970, a loan office in North Charleston was the scene of an armed robbery where several employees were either shot or beaten. John Miller and Raymond Davis were arrested; after a lineup identification, Davis confessed to the crime, making a statement inculpating Miller, and was allowed to plead guilty to the armed robbery charge alone. Miller's subsequent conviction was reversed, and on remand, resulted in a second conviction on charges of armed robbery and assault with intent to kill and sentences of 25 and 20 years to be served concurrently. The second conviction is the topic of the present discussion.

In the first trial, Davis had repudiated the statement given to the police insofar as it named Miller as his partner, and had testified that Miller was not involved at all in the incident. The basis for reversal involved the admission into evidence of a two-page handwritten note, bearing this notation at its top: "Raymond this is what you write me back [sic] (hurry)."

The note

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38. Id. at 129-30, 11 S.E. at 628. The rule was stated in South Carolina very early, in Smith v. Henry, 2 Bail. 118, 127 (S.C. 1831): "The general rule is, that the answer of a witness, to an immaterial question, cannot be contradicted to impeach his credit; but if the question is in any way material to the issue, his answer can be contradicted."


40. Id. at 254-55, 126 S.E. at 29.

41. State v. Milam, 88 S.C. 127, 70 S.E. 447 (1911). See Dreher at 14-15, which criticizes the strict application of this rule: "The trial judge should have the right, in his discretion, to relax this rule when it appears that the fact testified to, no matter how minor, was one which the witness could not have been mistaken about if his story was true."

42. State v. Miller, 260 S.C. 1, 193 S.E.2d 802 (1972).

43. Record, on remand, at 194. The note began:

My name is Raymond L. Davis. I am confessing about that arm robbery [sic] which happened on Weneday [sic] Oct. 20, 1971 about 4:10 or 4:15 that after-
followed the form of a confession that Davis had committed the robbery with a "Robert Smith" and that Miller had not been involved. The note concluded: "The statement I gave them is not true this is the real truth he don't know nothing about it [sic] he is not guilty, so I hope they will let him go. Sign [sic] Ramond L. Davis." At the first trial, the State had introduced this evidence to show that Davis' repudiation of his statement to the police officers was a result of receiving this communication, which the State inferred was sent by Miller. On the stand, Davis first testified that he received the note from Miller, and then that he did not know its source. Over objection for failure to connect the document to Miller in any way, the trial judge permitted its introduction. In reversing, the South Carolina Supreme Court said:

The witness' original affirmative response to the solicitor's suggestion that the note had been sent to him in jail by appellant was in the nature of a conclusion, which would not have qualified the writing. . . . The witness having repudiated this conclusion and disclaimed knowledge of the source of the writing, and no other facts having been developed, the proffered exhibit should have been excluded. Its admission, which enabled the State to picture appellant as one who had suborned his accomplice to renounce the truth from the witness stand and to substitute a fabrication accusing an innocent person, was manifestly prejudicial.

At the second trial, Davis was again called as a witness for the defense, and again named Robert Smith as his partner, denying that Miller had been a participant. On cross-examination, the State confronted Davis with his prior written statement (the confession) for the purposes of impeaching his direct testimony exculpating Miller. Davis admitted having signed the statement, but claimed he had no memory of most of the events

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noon. Me and my partner Robert Smith which is [sic] 5, 10 ½ inches tall, light complexion. Him and I did commit it [sic], and I met Robert at the train station that Wednesday. . . .

Id. at 193.
44. 260 S.C. at 7, 193 S.E.2d at 804.
45. Id. at 7, 193 S.E.2d at 805.
46. Id. at 7-8, 193 S.E.2d at 805.
47. Record, on remand, at 183.
48. Id.
49. Id. at 172.

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described therein,\textsuperscript{60} replying, "I don't remember, really; I don't remember" to the portions specifically naming Miller as being involved.\textsuperscript{51} This testimony was admitted over defense counsel's continued objections. The trial judge, however, was clearly correct in permitting the contradictory evidence to be admitted, for impeachment only, although he should have accompanied that admission by a contemporaneous appropriate limiting instruction to the jury. Those instructions, however, were not given until later, at the conclusion of Davis' testimony.\textsuperscript{52}

The prosecution then turned to the matter of the handwritten note, and Davis again testified that he remembered nothing about the note.\textsuperscript{53} The prosecutor read from Davis' testimony at the first trial, where he had admitted receiving the note, and Davis again denied any recollection of such receipt, or of giving the note to a police officer, Frazer.\textsuperscript{61} The foundation was then laid, and Davis was put on notice that Frazer would take the stand and testify that Davis had called him to the jail, given him the note, told him that the original statement given to the police was the truth, and that the note was not. Davis did not change his testimony.\textsuperscript{65} During a discussion before the bench, the solicitor indicated, "I'm offering [the note] for the purpose to show that he received the note, and regardless of who it came from, he changed his testimony as a result of this note."\textsuperscript{56} He then added, "If Your Honor is inquiring whether I can prove this defendant sent the note, no, I can't, I can't prove who sent it to him."\textsuperscript{57} The judge then ruled on the matter:

Well, I think it's admissible, Mr. Hopkins, [defense counsel] to that extent, that a note was sent to him and as result of this he subsequently changed his . . . [pause] not necessarily as a result of this, but a note was sent and he subsequently changed his statement and I think the jury is entitled to all the circumstances under which he changed his statement and then it can draw inferences from the note as it sees advisable.\textsuperscript{58}

\textsuperscript{50.} Id. at 172-81.
\textsuperscript{51.} Id. at 177.
\textsuperscript{52.} Id. at 199.
\textsuperscript{53.} Id. at 182-83.
\textsuperscript{54.} Id. at 185.
\textsuperscript{55.} Id. at 197.
\textsuperscript{56.} Id. at 192-93.
\textsuperscript{57.} Id. at 194.
\textsuperscript{58.} Id. at 194-95.
The State then called Frazer, who testified substantially as predicted by the solicitor. The note was published to the jury, solely to test the credibility of the witness, Davis, and an instruction to that effect was given. As a final precaution, these limiting instructions were repeated in the judge's charge, in accordance with State v. Bottoms. The appeal dealt with the manifest prejudicial effect of this admission, but the trial judge's action was correct. Davis had first implicated Miller in his confession; he reinforced this evidence when, at the jail, he told Frazer that his confession was the truth and that the note was not. When Davis, at trial, reversed his testimony and indicated that Miller had not been present at the crime and that he did not remember the note or the conversation with Frazer, the State was correctly permitted to impeach that testimony, and the supreme court affirmed the conviction.

In State v. Smith, the defendant was found guilty of manslaughter and received a 10-year sentence. His appeal was based in part on the trial judge's exclusion of testimony of a threat allegedly made against the defendant by the State's principal witness. The witness had denied making the threat, and the defendant sought to use the evidence both as a prior inconsistent statement to impeach, and to establish hostile feelings between the parties. The South Carolina Supreme Court agreed, and reversed and remanded the case.

Smith began dating Gordon's ex-wife after their divorce, and the two did not have a friendly relationship. On the day of the

59. Id. at 228-30.
60. Id. at 231.
61. Id. at 251.
62. 220 S.C. 187, 185 S.E.2d 116 (1973). The court laid down this rule:
   Even where the making of the inconsistent statement is denied and it is appropriate to introduce such for the purpose of impeachment, it is the duty of the court, upon request, to instruct the jury that it can consider such evidence for the purpose of impeachment only, not as substantive evidence of the facts.
63. Id. at 194, 195 S.E.2d at 118 (citation omitted).
64. 262 S.C. at 373, 204 S.E.2d at 732.
66. Id. at 155, 208 S.E.2d at 535.
67. This hostility is shown in some of the testimony the solicitor elicited from Smith:
   Q. Now, Mr. Smith, it would be a fair statement to say that there was certainly no love lost between you and Buddy Gordon.
   A. Yes.
   Q. In fact, you didn't like him a little bit, did you?
   A. No, sir.
incident, Mrs. Gordon had telephoned Smith and asked him to come to her house to discuss some vulgar statements Gordon had claimed Smith had made about her. En route in his automobile, Smith passed a grocery store and heard a shout; seeing a friend, he stopped and began to back up. According to his testimony, two gunshots then hit his car; getting a pistol from the glove box, he shot back at his assailant, whom he recognized as Gordon. The friend was killed by a stray shot, and Smith turned himself in to the police.

At the trial, it was established conclusively that a bullet from Smith’s weapon caused the homicide. Gordon testified that Smith began the firing, and that his shots were taken in self-defense. On cross-examination, Gordon denied threatening Smith; when asked specifically if he had made an uncommunicated threat at a particular time and place, he again denied it, and further denied making any other threats. The defense then presented a third party, and after placing him at the previously mentioned time and place, sought to introduce the evidence in issue. The record relates what ensued:

Q. Did he [Gordon] at that time make a treat [sic] in your presence on the life of ike [sic] Smith?
A. Yes, sir.
Solicitor Green:
We will object to it, may it please the Court, unless it is established that it was communicated.
The Court:
I sustain the objection.
Mr. Lynn [defense counsel]:
Q. Was anyone else present?
The Court:
I sustained the objection.
Mr. Lynn:
Can I ask him...
The Court:
You can’t go into threats unless you lay the proper foundation.

Q. In fact you hated him didn’t you?
A. I didn’t hate him. I didn’t like him a whole lot.

Record addendum at 13.
6. 263 S.C. at 154, 208 S.E.2d at 534.
68. Record at 4-5.
Mr. Lynn:
Your Honor, I'm doing this to impeach the statement I asked Mr. Gordon earlier. I asked Mr. Gordon on the stand whether or not he made this statement.
Solicitor Greene:
We object to it unless the proper foundation is laid.
The Court:
And I sustain it.69

On appeal, Smith maintained that this testimony concerning the alleged threat should have been admitted to show that Gordon was the probable aggressor in the shooting between the two and to show the relationship between the parties. The threat could also impeach Gordon's credibility both as a prior inconsistent statement and by showing Gordon's bias against Smith.70 The State argued that the threat, made six months earlier, was too remote to be admitted, and that since the relationship and aggressor arguments were not advanced before the judge at the time of the objection, they could not be raised now on appeal.71 The State further viewed the evidence as inadmissible to show bias because the testimony would merely be cumulative to testimony already given concerning their relationship,72 and again, that the grounds for this admission were not made below.73 The State then argued that even if the judge had inadvertently and incorrectly excluded the threat for impeachment, because it was uncommunicated, it was defense counsel's "duty to place before the Trial Court the proper basis of admissibility."74 Finally, the State suggested that the alleged threat was a collateral matter and thus could not be used to contradict the witness, maintaining that "it

69. Id. at 7-8.
70. Id. at 11-12.
71. Brief for Respondent at 4-5.
72. Id. at 7; see note 66 supra.
73. Brief for Respondent at 7.
74. Id. at 8. The State asserted:

In the instant case, the Trial Judge, according to Appellant, made it clear that he was ruling the threat inadmissible because it had not been communicated. This, of course, had no bearing on its admissibility for impeachment purposes. It was incumbent upon Appellant to point out to the Trial Judge his error in excluding the testimony. Having failed to do so, he is foreclosed from raising it here.

Id. at 9. This argument is ludicrous, because it is obvious from the testimony and the record that defense counsel made it clear that the purpose of the introduction of the evidence was impeachment, and after the State again objected for lack of foundation, the judge again cut defense counsel off. See text accompanying note 69 supra.
is clear that the Trial Judge was clearly acting within his discretion in finding that these threats were collateral and could not be used for impeachment.”76 This theory also appears spurious as it is apparent that the trial judge never actually considered the issue of the threat as a collateral matter.76

The supreme court held that a threat made six months prior was not too remote, relying on State v. Brooks,77 where a threat made eight months before a homicide was held “properly admitted under the well-settled rule admitting evidence of previous quarrels, ill-feeling, or hostile acts between the parties to show the animus probably existing between them at the time of the homicide.”78 The remoteness issue having been decided in the defendant’s favor, evidence of Gordon’s threat was then found admissible for impeachment purposes as a prior inconsistent statement of the witness . . . . The foundation for the use of this threat was properly laid through the cross-examination of the State’s witness and the Appellant clearly stated the purpose for which the testimony was introduced.79

Finally, the court correctly concluded that the issue was not collateral,80 as it dealt directly with the issues involved.

In State v. Williams,81 the defendant was convicted of voluntary manslaughter and received a 15-year sentence. One of the bases for his appeal was the impeachment of a defense witness, his mother, on a collateral issue.

The defendant, Bobby Williams, testified that after an argument with the deceased concerning his girlfriend, he had gone to his room to get two wallets containing some money left there. He did not find the wallets, but a pistol he had left with them was there. His mother, his brother, and the deceased, Phoebe Maybank, all denied having taken the money.82 An argument followed

75. Brief for Respondent at 10.
76. See Reply Brief for Appellant at 10, where it is stated: “No question as to the collateral nature of the threat was raised nor did the Court mention the question of whether the threat was collateral. It is obvious that the Court did not find the threat to be collateral and did not exclude it on that ground.”
77. 79 S.C. 144, 60 S.E. 518 (1908).
78. Id. at 146, 60 S.E. at 518.
79. 263 S.C. at 153, 208 S.E.2d at 534.
80. Id. at 155, 208 S.E.2d at 534-35. The court cited State v. Brock, 130 S.C. 252, 126 S.E. 28 (1925), to support this conclusion. See text accompanying note 40 supra.
82. Record at 138, 140.
between the defendant and the deceased. The defendant testified at trial that he exhibited the pistol and explained that one of them must have the money because a thief would have taken the weapon as well. He also declared that Maybank threatened him with a butcher knife, and that he shot her in self-defense. Defendant's brother contradicted this, saying that the deceased, his common-law wife, had had no weapon and was not advancing towards the defendant when she was shot.

Defendant's mother, Essie Williams, testified in corroboration of her son's version of the incident. On cross-examination she denied that she had hidden the wallets. When asked if she hadn't told a neighbor, Barbara White, "that if she had given Robert his money this shooting would never have taken place," she denied making the statement; and the solicitor put her on notice that he would call the neighbor to contradict her. Mrs. White was later produced, and over objection as an attempt to impeach on a collateral matter, she testified:

She [Mrs. Williams] said that Phoebe had made up the bed and that she had found Bobby's wallet and she brought the wallet and gave it to Mrs. Essie and Mrs. Essie said she heard them arguing at the time and that if she only had given him his pocketbook that wouldn't have happened because she showed us the wallet with the money in it. ... .

On appeal, Williams maintained that since his mother's testimony was crucial to his self-defense argument, the impeachment on a collateral matter was highly prejudicial and required reversal. This appeal indicated that one of the key issues regarding this testimony was whether the defendant had acted in self-defense in shooting the deceased. What Mrs. Williams said to her neighbors about the

83. Id. at 141.
84. Id. at 142.
85. Id. at 33.
86. Mrs. Williams declared, "He had a gun and Phoebe had this butcher knife here and she was hitting, knocking [sic] at him with the knife like that and she said shoot, shoot and I'll cut you up with this knife." Id. at 120.
87. Id. at 126.
88. Id. at 127.
89. Id.
90. Id. at 128.
91. Id. at 166.
92. Brief for Appellant at 11.
money in dispute was totally irrelevant to any of these issues, to which the State's evidence might properly be addressed.

Therefore, the evidence impeaching Mrs. Williams on this point tended to distract the jury from the real issues, and may have impeached her credibility in the minds of the jurors upon an improper basis.\(^{93}\)

The State replied that the matter was not collateral, and that even if it was, the trial court acted within its discretion in allowing impeachment. The State asserted that if Mrs. Williams not only had the wallets, but had told her son that she had them, then he would have had no reason to confront the deceased with the gun other than that he was still angry at her from their previous argument, and he planned to threaten her. If this could be shown, it would seriously weaken the defendant's case of self-defense.\(^{94}\)

The State offered another argument for the position that the court acted within its discretion in allowing the impeachment. Relying on Dean McCormick's exception for facts showing bias or intent,\(^{95}\) the State proposed:

If, as the Appellant testified, she told him that she did not have the wallets, then this untruth on her part was the cause of the trouble between her son and Miss Maybank, which culminated in the latter's death. Any mother, of course, would have an interest in seeing her son acquitted. However, in the instant case, Mrs. Williams must have had more than the usual amount of interest because of her feeling of guilt in indirectly bringing about her son's difficulties. The state had a right to establish this and the trial court acted properly in allowing them to do so.\(^{96}\)

The State then concluded that "given the fact that the missing wallets, allegedly, were the cause of the fatal altercation, there can be no doubt that Mrs. Williams could not have been mistaken about their true location if the rest of her story were true."\(^{97}\)

In affirming the conviction, the supreme court first noted that the problems presented in the application of the prior inconsistent statement exception to the hearsay rule center around

\(^{93}\) Id. at 13.
\(^{94}\) Brief for Respondent at 13.
\(^{95}\) See text accompanying note 36 supra.
\(^{96}\) Brief for Respondent at 14.
\(^{97}\) Id. See also note 41 supra.
clarifying the definition of collateral matters. The court noted "that considerable latitude and discretion should be allowed the trial judge in determining the admissibility of impeaching testimony." After discussing the arguments presented by the State, the court concluded:

The circumstances indicate significant probabilities that misrepresentation in the mother's statements concerning the wallets may have operated on her other testimony and materially affected its trustworthiness.

Under the foregoing facts and circumstances, we cannot hold that the trial judge abused his discretion in permitting the impeachment of the witness as to her alleged self-contradicting statement.

III. JUDICIAL COMMENTS

A trial judge has the right, originating in the common law, to interrogate a witness to clarify testimony or to bring to light facts necessary for the proper resolution of the issue, particularly when these facts are not introduced by the parties themselves. Inherent in this right is the concurrent obligation to question in

98. 263 S.C. at 302, 210 S.E.2d at 304.
99. Id. at 303, 210 S.E.2d at 304-05.
100. Professor Wigmore noted:

The sporting theory of the common law... in which litigation was a game of skill, to be conducted according to specific rules and to be decided by the combined effects of skill, strength, and luck, tended to place the judge primarily in the position of the umpire of a game, whose duty it was to interfere only so far as needed to decide whether the rules of the game had been violated. But this tendency never dominated (so far as the judge's functions were concerned) in the orthodox English practice; the judge there has never ceased to perform an active and virile part as a director of the proceedings and as an administrator of justice.

... 

Nevertheless, in the United States the degenerate tendency has steadily been to relegate the judge to the position of merely umpire presiding over contestants in a game. Not only has public opinion pressed towards this end, but the judiciary as a whole has often not resisted, but rather abdicated. Several reasons... have contributed to this; chief among the illustrations of the tendency is, perhaps, the ill-advised yet almost universal legislative prohibition against comments by the judge upon the evidence in his charge to the jury.

3 Wigmore § 784, at 188-89 (footnotes, citations omitted).

101. McCormick § 8, at 12. Fed. R. Ev. 614(b) states: "The court may interrogate witnesses whether called by itself or by a party." The Advisory Committee's note to proposed rule 614(b) added: "The authority is, of course, abused when the judge abandons his proper role and assumes that of advocate. ..." 56 F.R.D. 183, 280 (1973).
a guarded manner, lest the judge imply an opinion as to the veracity of the witness:

Thus, if the judge uses leading questions, suggesting the desired answer, the questions may strongly imply that the desired answer is the truth. . . . [Q]uestions which are aimed at discrediting or impeaching the witness, though allowable for counsel, when asked by the judge may often — not always — intimate the judge’s belief that the witness has been lying, and thus be an implied comment on the weight of his testimony. 102

The judge must carefully avoid assuming the role of advocate, or “he faces the risk that the appellate court will find that he has crossed the line between judging and advocacy.”103

The South Carolina rule was set out in 1910 in State v. Anderson104 where an appellant claimed the circuit judge had erred in not leaving the examination of the witnesses wholly to the attorneys. The court answered:

A grave responsibility rests upon a trial judge. It is his duty to see to it that justice be done in every case, if it can be done according to law; and if he thinks that the attorney for either party, either from inadvertence or any other cause, has failed to ask the witnesses the questions necessary and proper to bring out all the testimony which tends to ascertain the truth of the matter under investigation, we can see no legal objection to his propounding such questions; but, of course, he should do so in a fair and impartial manner, and should not by the form or manner of his questions, express or indicate to the jury his opinion as to the facts of the case, or as to the weight or sufficiency of the evidence.105

The court has discretion in determining whether to interrogate a witness, and generally the judge is given wide latitude in his actions.

[T]his discretion will not be controlled except where it appears that the manner in which the judge exercised his right tended unduly to impress the jury with the importance of the testimony

102. MCCORMICK § 8, at 12-13 (footnotes omitted).
103. Id. § 8, at 13. MCCORMICK notes several instances when convictions were set aside where the judge asked an inordinate number of questions, implied incredulity by the manner of his questions, or became a partisan. Id. § 8, at 13 n.37.
elicited, or would be likely to lead the jury to suppose that the judge was of the opinion that one party rather than the other should prevail in the case.\textsuperscript{106}

There is further indication that the judge should refrain from such questioning except in certain limited situations:

In \textit{State v. Robinson},\textsuperscript{108} the defendant was convicted of murder and burglary and was sentenced to life imprisonment. His appeal was based in part upon the judge’s interruption of the cross-examination of one of the state’s witnesses; in the course of the exchange between the two, the judge expressed an odious, derogatory opinion of the defendant in the presence of the jury. Counsel’s immediate motion for a mistrial was overruled, but the South Carolina Supreme Court reversed the conviction.

The alleged murder took place at the house of Shirley, a woman with whom Robinson had lived for about three years. They had separated some six weeks prior to the shooting.\textsuperscript{109}

On cross-examination, Shirley admitted she was a prostitute.\textsuperscript{110} While she was being questioned about how much money she had contributed to the living expenses they incurred when she and Robinson had lived together, the judge interrupted:

\textit{THE COURT}: How much money did you give him all together?

A. Concerning a week, Your Honor-

\textit{THE COURT}: I mean the whole time you were there.


\textsuperscript{107} 147 S.C. at 85, 144 S.E. at 840. See \textit{State v. Vickers}, 226 S.C. 301, 84 S.E.2d 873 (1954); \textit{State v. Martin}, 216 S.C. 129, 132, 57 S.E.2d 55, 56 (1949) (“It is usually better for the trial Judge to refrain from cross-examining witnesses and, always, from making any remark which may affect the weight to be given the testimony of a witness by the jury.”).


\textsuperscript{109} \textit{Id.} at 196, 203 S.E.2d at 433-34.

\textsuperscript{110} Record at 148.
A. I couldn't add it up, it was so much.

THE COURT: How much would you make as a prostitute?

Say a night?

A. A night — something like $200 a night.

THE COURT: He was just a pimp living off of your income, and other people's income, is that right?"'

Immediately after this exchange, defense counsel moved for a mistrial, and the judge tried to justify his remarks:

MR. GLEASON [defense counsel]: May it please the Court, the defense would at this time make a motion for a mistrial on the grounds of the remarks interjected in front of the jury by the Court, to the effect that the defendant on trial here is nothing more than a pimp living off the earnings of this witness. I think that this is so prejudicial that it will amount to a verdict of guilty in this case.

THE COURT: He's not being tried for being a pimp, he's being tried for murder.

MR. GLEASON: Nevertheless, those remarks, I feel, would only tend to prejudice the jury against this defendant in arriving at a verdict, Your Honor.

THE COURT: The record will preserve your objection. I'm not going to comment on it any further — but you asked the original question as to how she made a living, and she said she was a prostitute. Then you asked her about what she made and how much did she give him, and she said half of it. You asked her was that in a week, and I was just clarifying the fact that she was talking about the entire time, and you were attempting to limit it to a week. The door was opened by you on cross-examination. The motion is overruled."

It is obvious that the judge's odious comment did nothing to clarify the answer being given to counsel's questions.

The supreme court correctly reversed on the basis of these remarks, characterizing them as "entirely uncalled for and patently so erroneous and prejudicial as to require little discussion or citation of authority." Robinson had not put his character in issue, and the record showed that he had been employed for over

111. Id. at 149.
112. Id. at 150-51.
113. 262 S.C. at 197-98, 203 S.E.2d at 434.
three years in a position of responsibility. The judge's remarks, the court noted,

imputed to the appellant the commission of a crime other than that for which he was being tried and such comment was in violation of . . . Article 5, Section 17 of the South Carolina Constitution, which provides that "Judges shall not charge juries in respect to matters of fact, but shall declare the law."114

IV. SIMILAR HAPPENINGS

An elementary rule in presenting evidence of a similar happening is that the circumstances of both events must be substantially identical. Professor Dreher has indicated the value of such evidence: "The description in court of an out-of-court simulation of the actual occurrence which gave rise to the litigation in order to demonstrate cause or effect can be a very effective trial technique."115 Failure to adhere to this precept resulted in the affirmation of the trial court's ruling in Hankins v. Foye.116

In determining the admissibility of such evidence, its probative value is balanced against the possible hazard of misleading the jury. Dean McCormick cautions against having the jury give disproportionate weight to the results of experiments: "Usually the best gauge of the probative value of experiments is the extent to which the conditions of the experiment were identical with or similar to those obtaining in respect to the litigated happening."117 The requirement of similarity is relative; so long as it may be concluded that the results of an experiment are of substantial value, the evidence should be admitted.118

The leading case on the subject in South Carolina is the 1962 decision of McDowell v. Floyd.119 There, plaintiff's automobile was stopped at night without lights, facing east on a two-lane road. Plaintiff was out of her car talking to the driver of a truck which was stopped alongside her car in the other lane, facing west, with its headlights burning. Defendant's automobile rounded a curve and struck plaintiff's vehicle, which then struck her. The defense was based on the inability to see the stopped

114. Id. at 198, 203 S.E.2d at 434.
115. DREHER at 42.
118. Id. § 202, at 486.
vehicle due to plaintiff's negligence in having her lights turned off. At the trial, plaintiff's counsel was successful in his attempt to enter evidence of an experiment; his witness testified that he had parked a car at the same place in the road, extinguished its lights, and then drove around the curve in another car, marking the place at which he was first able to observe the parked car. This distance was then measured. On cross-examination defense counsel elicited an admission that at the time of the experiment, there was no second vehicle parked with its lights facing the curve, corresponding to the position and condition of the truck. A motion to strike due to these different circumstances was denied. On appeal, the South Carolina Supreme Court reversed, stating:

It can hardly be reasonably contended that the conditions which confronted Appellant Floyd as he approached the bright lights of the pickup truck were substantially similar to the conditions with which he would have been confronted had there been no bright lights facing him.120

Hankins involved an automobile accident as well. The plaintiff, travelling south on Highway 301 in Allendale, was struck while turning left by defendant's northbound car. Plaintiff testified that she looked for oncoming traffic in both directions "before and as she proceeded to turn left . . . and saw none."121 In addition, she testified that there was a dip in the road beyond the intersection such that an approaching vehicle would disappear for a short period. This fact was critical to her position.

Two witnesses testified in her behalf. The first witness was asked, "Have you experienced any visibility difficulties as far as oncoming traffic is concerned?"122 An objection to this was sustained, and the witness excused. A second individual, a highway engineer, testified that

he had experienced difficulty in seeing automobiles approaching the intersection from the south. He was not familiar with the type vehicles involved in this collision and did not testify as an expert, but testified from his previous general observation in driving through the intersection.123

120. Id. at 164, 125 S.E.2d at 7.
121. 263 S.C. at 312, 210 S.E.2d at 306.
122. Id.
123. Id. at 312-13, 210 S.E.2d at 306.
The other answers of the witness established that his testimony was merely opinion based on personal observations. For this reason the trial court struck the testimony.

The trial judge is vested with discretion in determining the relevance of such evidence, and the supreme court found no abuse of this discretion had taken place. The trial judge was said to have correctly excluded the testimony "because of the failure to show that the observations of the witnesses at other times were made under similar conditions to those under inquiry."\(^2\)

The court properly indicated that the relevance of this testimony was to show that plaintiff could not have seen defendant's oncoming vehicle as she turned, because it was out of view in the roadway depression. Contending that without evidence of the precise location of this dip, one could not determine (from this testimony) the length of time an approaching car would be visible after emerging from the dip before reaching the intersection, the court concluded:

Simply to show that a car would disappear from view in a depression within 300 feet of an intersection, without showing at what point it would reappear into view, would be of doubtful aid to the jury in deciding whether plaintiff should have seen defendant's vehicle when she started to make the turn.

The absence of a more precise location of the depression with reference to the intersection and the failure to show the facts and circumstances surrounding the observations of the witnesses at another time sustain the discretionary exclusion of the proferred testimony.\(^3\)

It is unfortunate that plaintiff's attorney did not take more care in preparing for trial. If, indeed, the road topography was the cause of plaintiff's failure to see the other automobile, counsel should have performed a simple experiment under substantially similar conditions. It should not have been difficult to make such a test with a car of similar model and color, under lighting conditions approximating those at the time of the incident. Such evidence, coupled with precise measurements enabling valid conclusions to be drawn as to the time an oncoming car would have been visible, would no doubt have been admissible under the universal rule; it certainly would have been of assistance to the jury. The

\(^{124}\) Id. at 313, 210 S.E.2d at 307.

\(^{125}\) Id.
outcome might have been different. Under the facts of the case, however, the South Carolina Supreme Court decided correctly.

V. EXPERT WITNESS

In *State v. Pierce*, the defendant was found guilty of murder and received a sentence of life imprisonment which he appealed. The trial court refused to allow a hypnotist to testify to the results of an examination relating to defendant's whereabouts on certain dates, and to his guilt or innocence. The South Carolina Supreme Court affirmed the conviction relying on the generally accepted rule that the results of an hypnotic examination are not admissible if offered for the truth of the matters asserted. The basis for exclusion of this kind of testimony is that as a form of hearsay it lacks reliability. The issue appears to be of first impression in South Carolina.

The homicide purportedly occurred December 18, 1970. The State's principal evidence was an alleged confession, made in Georgia in the presence of several South Carolina officers on April 29, 1971, in which the defendant allegedly admitted that he had been in Sumter, the location of the murder, and that he had committed the act. Pierce maintained at trial that this "confession" had been coerced, and he presented several witnesses who testified that he had been in Swainsboro, Georgia, at the time of the homicide. Thus, the testimony of the hypnotist was critical to his defense, insofar as it corroborated these witnesses.

Testimony admitted at the trial by both the hypnotist, whose qualifications were well-established, and the psychiatrist of the Central Correctional Institute, who was present at the session, indicated that Pierce was a "good hypnotic subject." The synopsis of proffered testimony of the hypnotist, as submitted to the supreme court on appeal, revealed that Pierce, during the examination, had "relived" the events of the time period encompassing the date of the crime:

[H]e accounted for his activities on December 8 through December 23. Briefly, these regressions revealed no criminal activ-

130. Id. at 252, 256.
ity and that Pierce was not in Sumter at any time during this period.131

In addition, these questions and their responses would have dealt with the ultimate issue in the case:

Q. Did you ask Mr. Pierce if he killed Miss Cuttino?
A. Yes. His reply was "no".
Q. Was his finger response [a method used to insure truth-telling] consistent with his verbal response on this particular question?
A. As on all other occasions, his finger response indicated that he was telling the truth.132

On appeal, defendant cited Professor Wigmore's commentary on the general use of scientific experimental tests by psychologists in support of admissibility:

All that should be required as a condition is the preliminary testimony of a scientist that the proposed test is an accepted one in his profession and that it has a reasonable measure of precision in its indications.133

Appellant, however, carefully omitted Wigmore's specific rejection of any hypnotic evidence:

_Hypnotic sleep_ has by some scientists been said to be a condition in which the subject will make truthful answers to questions. But this method has not yet been adequately tested for judicial purposes. . . . [T]he hypnotizer may use his power to falsify the subject's narration, and therefore the method has dangers of its own.134

The appellant further observed that the South Carolina Law Enforcement Division uses hypnosis in its investigations135 and that the same hypnotist was used to clear another suspect in the _Pierce_ case. The defendant thus argued that this testimony should be admitted.136 This contention failed to consider that law enforcement authorities employ a wide variety of testing devices in their investigative work, yet many of these devices are not

131. Record Part III at 171.
132. _Id._ at 181-91.
133. 3A WIGMORE § 990, at 922; Brief for Appellant at 6.
134. 3A WIGMORE § 998, at 943 (footnote omitted, emphasis in original).
135. Record Part II at 154-55.
136. Brief for Appellant at 8.
adequate to determine the ultimate issue, or to replace trial by jury.\textsuperscript{137}

While some jurisdictions have permitted limited use of hypnotic testimony,\textsuperscript{138} Dean McCormick best summarizes the current posture of the issue as follows:

Declarations made under hypnosis have been treated judicially in a manner similar to drug-induced statements. The hypnotized person is ultrasuggestible, and this manifestation endangers the reliability of his statements. The courts have recognized to some extent the usefulness of hypnosis, as an investigative technique. . . . However, they have rejected . . . statements made under hypnosis when offered by the subject in his own behalf. . . .\textsuperscript{139}

In light of the current state of the art of hypnotism, the \textit{Pierce} decision seems to rest on firm ground.

\textsuperscript{137} Brief for Respondent at 8; McCormick § 208, at 510 n.27.
\textsuperscript{138} McCormick § 208, at 510 n.28; 3A Wigmore § 998, at 943 n.5.
\textsuperscript{139} McCormick § 208, at 510.