South Carolina Law Review

Volume 28 | Issue 4 Article 5

Winter 2-1-1977

The New Federal Rules of Evidence and South Carolina Evidentiary Law: A Comparison and Critical Analysis

William B. Chandler III

C. A. Runyan

NOTE

THE NEW FEDERAL RULES OF EVIDENCE AND SOUTH CAROLINA EVIDENTIARY LAW: A COMPARISON AND CRITICAL ANALYSIS

I. INTRODUCTION

The Federal Rules of Evidence is a comprehensive code of rules and, as finally enacted, is the joint product of the rule-making process evolved by the Supreme Court and the legislative processes of both houses of Congress.[1] As a comprehensive code the Federal Rules of Evidence will provide an accessible and uniform body of rules throughout the federal system.

The practicing attorney in South Carolina will probably recognize the new federal rules as the familiar rules of evidence presently administered in the courts of this state. However, there are specific areas in which the federal rules differ significantly from the evidentiary law applied in the South Carolina courts.

This note had its genesis in the belief that a service could be rendered the practicing bar and the judiciary by cataloguing each of the areas in which the federal rule departed from the law of evidence that is applied by the courts of South Carolina.[2] Since

1. At the direction of the Judicial Conference of the United States, the Advisory Committee on Federal Rules of Evidence was appointed in March 1965 by Chief Justice Earl Warren to formulate rules of evidence for the federal courts. After numerous revisions a revised draft of the rules was prescribed by order of the Supreme Court, Mr. Justice Douglas dissenting, to become effective July 1, 1973. After the rules were transmitted to the Congress pursuant to various enabling acts, the effectiveness of the rules was deferred until expressly approved by the Congress. The rules were amended in various respects and approved on January 2, 1975.

2. Although we continue to believe that this effort will be of service to the bar and to the judiciary, our original conception of what we wanted to accomplish and what we considered to be the purpose of the note has taken on new dimensions. One natural and hopefully beneficial result of this note will be to update the law of evidence in South Carolina. Our intention has been to use only those cases which reflect the most recent and authoritative exposition of the law prevailing in South Carolina. One caveat, however, should be noted. Our intent is not to present a generalized survey of the law of evidence. In light of the various sources available to the practicing lawyer, such as the annual

limitations of time and space preclude a detailed analysis or discussion of all the federal rules,[3] textual analysis is limited to those areas where a particular federal rule *materially* conflicts with the prevailing rule in South Carolina. A brief exposition on how the federal rule applies is first given, which is then followed by an explanation of the conflicting state rule. After the difference between the two rules is explained, arguments for and against each rule are briefly presented. Generally, which rule appears preferable and the reasons for that preference are indicated. In areas where the federal rule does not significantly diverge from the state rule, the reader's attention is directed to a footnote accompanying the subsection title, wherein relevant citations to state authority and some critical commentary are offered.

The fundamental objective of this note is to emphasize to the legal community and to the law-making branches of the state government the superiority of a uniform code of evidence over the ad hoc method of fashioning rules of evidence on a case-by-case basis. The prevailing evidentiary rules in South Carolina are derived basically from the common law, with various statutory modifications and judicial construction and interpretations. We feel that the adoption of a uniform code would produce at least two immediate salutary effects: (1) it would necessitate a revision and updating of the numerous anachronistic rules that continue to survive and which all too frequently constitute a trap for the unwary attorney and the hapless plaintiff; and (2) by engendering debate and controversy over particular rule preferences, adopting a code of evidence would likely result in a more cogent articulation of the true reasons and policies that underly, and justify, specific rules.

We do not mean to say, however, that South Carolina should necessarily adopt verbatim the Federal Rules of Evidence; the new federal rules are merely one example of a code. Rather, the

evidence survey in the *South Carolina Law Review* and Professor Dreher's convenient handbook, the authors firmly believe that their nonsurvey approach is justified. Therefore, the reader, if he proceeds from this preface, should not expect an elaborate discussion of recent cases; nor should he expect a detailed treatment of every area of the law of evidence in South Carolina.

3. In addition to the four main areas of evidence covered in this note, a comparison and analysis of the areas of judicial notice, presumptions in civil actions, privileges, authentication and identification, contents of writings, recordings and photographs, and miscellaneous rules are on file for observation in the South Carolina Law Review office at the University of South Carolina School of Law.

very process of adopting a code—involving judicial and legislative committees and generating commentary and debate within the legal community—would produce the kind of interest and rethinking of basic assumptions that is necessary if the law of evidence is to continue as a meaningful instrument in the pursuit of truth and justice.[4] Hopefully, this note will illustrate the advantages of a uniform system of rules which is codified and easily accessible, and will induce South Carolina to soon follow the lead of other states and the federal system in adopting a uniform code of evidence.[5]

II. RELEVANCY AND ITS LIMITS[6]

A. *Exclusion of Relevant Evidence*

Rule 403[7] recognizes the broad discretionary role of the trial

4. Such a task would not be as formidable an undertaking as it seems since there is a wealth of material, flowing from numerous predecessors in the field of drafting rules of evidence, that would aid greatly in such an effort. The American Law Institute's Model Code of Evidence, the New Jersey Rules of Evidence, the California Evidence Code, the Federal Rules of Evidence, and the recently enacted Maine Rules of Evidence (patterned after the federal rules), with their supporting studies and commentary, constitute an invaluable storehouse of general approaches and solutions to problems encountered in drafting a uniform code of evidence.

5. As a final note the authors want to emphasize that the criticisms throughout this note do not stem from pretentiousness or pedantry; they are offered constructively and deferentially. We realize that in writing this note potentially embarrassing criticisms of many of the rules of evidence currently applied by the courts of South Carolina are advanced. In many instances, however, criticism is directed not so much to the courts' adoption of one rule over another as it is to the often less than lucid explanation or rationalization given a rule in the course of a judicial opinion. An excellent example is in the area of hearsay where an unbelievable deficiency in comprehension is exemplified in numerous judicial opinions. Of course, the members of the legal community who practice before the courts and supply the legal briefs that ostensibly deal with such questions must shoulder a substantial part of the responsibility for this unfortunate muddying of the legal waters—a muddying that all too frequently finds its way into the deeper waters of the state's highest tribunal.

We have attempted to compare carefully the South Carolina rule with the federal rule by the use of critical commentary, giving extended analysis to rules of evidence from both a practical and theoretical standpoint. Our criticisms, therefore, are offered in those cases where the particular rule—be it state or federal—departs from the better reasoned and more enlightened approach.

6. Federal rules 401 and 402 set forth the definition of relevant evidence and the general rule that all relevant evidence is admissible, respectively. The South Carolina definition of what constitutes relevant evidence does not materially differ from its federal counterpart. *See* Francis v. Mauldin, 215 S.C. 374, 378, 55 S.E.2d 337, 338 (1949) ("All that is required is that the fact shown legally tends to establish, or to make more or less probable, some matter in issue and to bear directly or indirectly thereon."); *accord,* Winborn v. Minnesota Mut. Life Ins. Co., 261 S.C. 568, 201 S.E.2d 372 (1973).

Several important rules of evidence relating to relevancy were omitted from textual discussion primarily because South Carolina case law is in accord. Nevertheless, these rules and the South Carolina cases are highlighted briefly. For the full delineation of the following federal rules see FED. R. EVID., 65 F.R.D. 144 (1974).

Rule 407—Subsequent Remedial Measures—this rule incorporates the traditional doctrine excluding evidence of subsequent remedial measures as proof of an admission of fault. Thus exclusion is only called for where evidence of subsequent remedial measures is offered as proof of negligence or other blameworthy conduct. *See generally* 2 J. WIGMORE, WIGMORE ON EVIDENCE, § 238 (3d ed. 1940) [hereinafter cited as WIGMORE]. South Carolina follows rule 407. *See* Maus v. Pickens Sentinel Co., 258 S.C. 6, 186 S.E.2d 809 (1972) (in an action against a carrier for damage to a printing press damaged while being unloaded from a truck, evidence was properly excluded that the shipper subsequently shipped another printing press to the Sentinel more substantially crated and securely bolted down); Holman v. City of Orangeburg, 118 S.C. 361, 110 S.E. 674 (1922) (rule recognized, but evidence of change in condition of sidewalk since accident admitted not to prove an admission of fault by the defendant but to verify the time to which the witness testified since all streets of the city had since been changed); Plunkett v. Clearwater Bleachery & Mfg. Co., 80 S.C. 310, 318, 61 S.E. 431, 433 (1908) (Justice Jones, dissenting in a case in which the court split, 2-2, on the issue of the admissibility of evidence of repairs, remarked that "the question may be regarded as settled under the case of Worthy v. Jonesville Oil Mill, 77 S.C. 73."). *But see* ME. R. EVID. 407, ME. REV. STAT. tit. 14 (1975 Supp.), which did not adopt the federal rule or prior Maine law for the reason that the public policy behind the rule — that to admit such evidence would deter repairs — is unpersuasive today and that rule 403 still would allow the trial judge to exclude such evidence if its probative value is outweighed by the dangers set forth there.

Rule 408—Compromise And Offers To Compromise—South Carolina is in accord with the federal rule which establishes that evidence of an offer to compromise a claim is not admissible as an admission of the validity or invalidity of the claim. *See* Hunter v. Hyder, 236 S.C. 378, 114 S.E.2d 493 (1960); Neal v. Clark, 199 S.C. 316, 19 S.E.2d 473 (1942). Equally inadmissible are statements "made in the course of negotiations looking to a compromise." Robertson v. Blair, 56 S.C. 96, 104, 34 S.E. 11, 14 (1899). However, under South Carolina case law an effort by an accused to "buy off" the prosecution or its principal witness in a criminal case does not come within the rule's policy; hence such offers are admitted. State v. Givens, 87 S.C. 525, 527, 70 S.E. 162, 162 (1911) (the rule about offers to compromise "does not extend to criminal trials"); State v. Rucker, 86 S.C. 66, 68 S.E. 133 (1910).

Rule 409—Payment of Medical and Similar Expenses—South Carolina law corresponds with the federal rule. *See* Howell v. Hairston, 261 S.C. 292, 199 S.E.2d 766 (1973) (evidence that the defendant paid the plaintiffs $100 in partial payment of the medical expenses incurred in the treatment of plaintiffs' son's eye should have been excluded). The court in *Howell* also noted, however, that the rule would probably not be extended to exclude evidence of conduct or statements not a part of the act of furnishing or offering to pay. *Id.* at 299-300, 199 S.E.2d at 769. This accords with rule 409. As noted by the Advisory Committee on the federal rules:

> Contrary to Rule 408, dealing with offers of compromise, the present rule does not extend to conduct or statements not a part of the act of furnishing or offering or promising to pay. This difference in treatment arises from fundamental differences in nature. Communication is essential if compromises are to be effected, and consequently broad protection of statements is needed. This is not so in cases of payments or offers or promises to pay medical expenses, where factual statements may be expected to be incidental in nature.

Advisory Committee Note to FED. R. EVID. 409, 56 F.R.D. 228.

Rule 410—Offer to Plead Guilty; Nolo Contendere; Withdrawn Plea of Guilty—this federal rule disallows the admission into evidence of withdrawn prior pleas

judge in controlling the admission of evidence by determining whether its probative value is outweighed by the harmful consequences that might flow from its admission. The pertinent consideration in this assessment is the tendency of the evidence to produce unfair prejudice, confusion of the issues or misleading the jury, undue delay or waste of time. Its unlimited terms make this provision applicable "to all forms of evidence: direct and circumstantial, testimonial, documentary, real proof and demonstrations."[8] South Carolina apparently recognizes the rule excluding relevant evidence where its probative value is outweighed by these dangers.[9] In addition to those dangers set forth

---

of guilty or nolo contendere. There is no law in South Carolina on the admissibility of withdrawn pleas of guilty, of nolos, or of offers of the same. One commentator has noted that since the state policy on plea bargaining is generally the same as that in federal courts, the rule should be applied, as well, to withdrawn pleas or offers to plead in state criminal cases. *See* 2 J. WEINSTEIN, WEINSTEIN'S EVIDENCE, ¶ 410[01], at 410-10 [hereinafter cited as WEINSTEIN]. Once a plea of guilty is made, however, it may thereafter be admissible under South Carolina law. Globe & Rutgers Fire Ins. Co. v. Foil, 189 S.C. 91, 200 S.E. 97 (1938).

Rule 411—Liability Insurance—generally, evidence of liability insurance is not admissible under the federal rules. South Carolina law is in agreement. *See* Adams v. Orr, 260 S.C. 92, 194 S.E.2d 232 (1973); Crocker v. Weathers, 240 S.C. 412, 126 S.E.2d 335 (1962). Evidence of liability insurance is admissible in South Carolina courts when offered for another purpose such as to prove the bias or prejudice of a witness. Powers v. Temple, 250 S.C. 149, 156 S.E.2d 759 (1967). Some members of the South Carolina Bar are apparently dissatisfied with the second sentence of federal rule 411. Voicing their opposition to that sentence, the South Carolina chapter of the American College of Trial Lawyers stated that the "less said about insurance the better." Report of the Committee of the South Carolina Chapter of the American College of Trial Lawyers 4 (March 1970), *cited in* 2 WEINSTEIN ¶ 411[01], at 411-4 n.5.

7. FED. R. EVID. 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

8. 1 WEINSTEIN ¶ 403[01], at 403-4 (footnote omitted).

9. Professor Dreher states that relevant evidence may be excluded where its probative value is outweighed by certain dangers inherent in its admission: (1) undue arousal of jury prejudice; (2) unreasonable consumption of time; (3) creation of side issues diverting the jury's attention and (4) unfair surprise. J. DREHER, A GUIDE TO EVIDENCE LAW IN SOUTH CAROLINA 34 (1967) [hereinfter cited as DREHER].

Very few cases can be found to support this statement, probably because few cases reach the appellate court on this issue since the trial judge's discretion in this area is quite broad. *See* State v. Anderson, 253 S.C. 168, 169 S.E.2d 706 (1969), *cert. denied*, 397 U.S. 958, *reh. denied*, 397 U.S. 1031 (1970). *See generally* Harper v. Bolton, 239 S.C. 541, 124 S.E.2d 54 (1962) (recognizing the rule that undue prejudice is a ground for exclusion, but holding the introduction of the "enucleated eye" of plaintiff-respondent to have been error since defendant had admitted the loss of the eye and had therefore made that evidence no longer relevant to any issue in the action).

above, Professor Dreher lists unfair surprise as a danger which may outweigh the probative value of relevant evidence.[10] It is not clear, however, that South Carolina does in fact recognize unfair surprise as a ground for exclusion.[11] Nevertheless, the better view is the common law approach which states that unfair surprise, standing alone, is not a ground for the exclusion of evidence.[12] Although the trend of not recognizing unfair surprise alone as a ground for exclusion is not without dispute,[13] South Carolina should officially recognize, by judicial decision or legislative enactment, that exclusion is not the appropriate remedy:

> While it can scarcely be doubted that claims of unfair surprise may still be justified despite procedural requirements of notice and instrumentalities of discovery, *the granting of a continuance is a more appropriate remedy than exclusion of the evidence.*[14]

Modern day discovery practices and pretrial procedures in civil

---

There may be some question as to whether South Carolina would allow the process of balancing prejudicial impact against the probative value of direct evidence and not merely against the probative value of circumstantial evidence. *See* State v. Whitener, 228 S.C. 244, 89 S.E.2d 701 (1955). While the value of direct evidence will not as easily be outweighed by prejudicial impact as will circumstantial evidence, situations do arise where undue prejudice can call for the exclusion of direct evidence. Professor Wigmore noted one such situation by stating that the "rules requiring the exclusion of certain kinds of witnesses whose personality might be supposed to carry undue weight with the jury and thus to direct them from an impartial consideration of the evidence . . . rest upon the principle . . . of undue prejudice." 6 WIGMORE § 1906, at 576.

Along the lines of the foregoing, South Carolina recognizes the power of the court to limit the number of witnesses in criminal cases. State v. Lee, 203 S.C. 536, 28 S.E.2d 402 (1943) (rule recognized and upheld). *See also* C. MCCORMICK, EVIDENCE § 185, at 439 n.30 (2d ed. 1972) [hereinafter cited as MCCORMICK]. Since the general rules of evidence are the same in both criminal and civil cases, State v. Heavener, 146 S.C. 138, 143 S.E. 675 (1928), this rule should also be applicable to civil cases.

10. DREHER at 34.

11. While Professor Dreher lists unfair surprise as a ground for exclusion, he gives no citation of authority for that statement. *Id.*

12. *See* 6 WIGMORE § 1849.

> Surprise may often arise out of the offer of evidence strictly competent, and yet that circumstance has never been considered as affecting the question of its admissibility. Embarrassments of that sort, which are more or less incident to every trial, are usually remedied by motion to the Court for a postponement of the trial to a future day in the term or for a continuance.

United States v. Holmes, 26 F. Cas. 349 (1st Cir. Me. 1858) (No. 15, 381), *quoted in* 6 WIGMORE § 1845, at 374; *accord,* Advisory Committee Note to FED. R. EVID. 403, 56 F.R.D. 218 (1972).

13. *See* 1 WEINSTEIN ¶ 403[01], at 403-9 and nn. 8,9.

14. Advisory Committee Note to FED. R. EVID. 403 (emphasis added). *See also* note 12 *supra.*

practice referred to above substantially reduce the possibility of surprise; however, South Carolina criminal prosecutions are not subject to the same liberal discovery rules as are present in the federal courts.[15] Thus, the case for unfair surprise as a ground for the exclusion of evidence in criminal cases would appear to be stronger. Nevertheless, constitutional requirements of disclosure,[16] as well as the professional obligations of disclosure[17] which the prosecution should recognize, should limit instances in which unfair surprise could be claimed.

B. Character Evidence

1. Admissibility

Rule 404[18] governs the admissibility of character evidence. Generally, it provides that character evidence is not admissible for the purpose of proving that a person acted in conformity with the implications of that evidence except in those instances where the character of an accused, a victim, or a witness is being used for purposes of impeachment. South Carolina, for the most part, follows these rules.[19] Evidence of character in civil actions, how-

15. *See* 1 WEINSTEIN ¶ 403[01], at 403-11 and n.16. South Carolina's criminal discovery devices are extremely limited. *See* W. LEDBETTER & W. MYERS, CRIMINAL DEFENSE IN SOUTH CAROLINA 50 (1970).

16. Brady v. Maryland, 373 U.S. 83 (1963).

17. ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-103(B) & EC 7-13, *adopted in* S.C. SUP. CT. R. 32 (Cum. Supp. 1973).

18. FED. R. EVID. 404 provides:

> **(a) Character evidence generally.** Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
>
> (1) *Character of accused.* Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;
>
> (2) *Character of victim.* Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;
>
> (3) *Character of witness.* Evidence of the character of a witness, as provided in rules 607, 608, and 609.
>
> **(b) Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

19. Under South Carolina law an accused in a criminal case may introduce evidence of a pertinent trait of his character which the prosecution may then rebut. State v. Gibert, 196 S.C. 306, 13 S.E.2d 451 (1941). Evidence of a pertinent trait of character of the victim

ever, is admissible in South Carolina in certain instances when under the federal rule it would not be.

Rule 404 adopts the basic and orthodox rule of rejecting character evidence in civil actions as a basis for inferring an act.[20] South Carolina apparently allows this type of evidence in some cases where the conduct is criminal in nature, but not in others.[21] In *Rogers v. Atlantic Life Insurance Co.*,[22] an action upon a contract of life insurance where the defendant had raised the defense of fraud on the part of the insured, the court held that it was proper to admit testimony as to the "good character and honesty of the deceased."[23] Some powerful reasoning in an earlier case

for violence similarly may be introduced. State v. Boyd, 126 S.C. 300, 119 S.E. 839 (1923). This latter mode of proof cannot be done, however, by showing specific instances of conduct. While evidence of other crimes, wrongs or acts is not admissible to prove the person acted in conformity therewith, it is admissible for other purposes. State v. Thompson, 230 S.C. 473, 96 S.E.2d 471 (1957); State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923) (evidence of other crimes admissible to prove motive, intent, absence of mistake or accident, a common scheme or plan embracing several crimes so related to each other that proof of one tends to establish the others, and the identity of the person on trial charged with the commission of the crime). For a discussion of the relevance of other criminal acts in this context in South Carolina, *see* W. Reiser, *Evidence of Other Criminal Acts in South Carolina*, 28 S.C.L. REV. 125 (1976).

20. It should be noted that rule 404 does not prohibit the introduction of character evidence in civil cases when not offered as a basis for inferring an act, such as (1) where character is in issue, *e.g.*, defamation, chastity of a victim where the crime is seduction, wrongful death action on issue of damages; (2) where the evidence is offered to reflect upon the credibility of a witness; (3) proving something other than that the defendant acted in conformity with his character, *e.g.*, negligence cases and the introduction of evidence of other accidents to prove that the person was more likely to be at fault. *See generally* 2 WEINSTEIN ¶ 404[03], at 404-18 to 404-19. South Carolina follows this viewpoint where character is in issue. *See* Jennings v. Clearwater Mfg. Co., 171 S.C. 498, 172 S.E. 870 (1933) (plaintiff's reputed bad character admissible as mitigating damages in action for malicious prosecution); Buford v. M'Luny, 10 S.C.L. (1 Nott & McC.) 267 (1818) (plaintiff's reputed bad character admissible as mitigating damages for defamation; it is not allowable "for instance where a person is accused of stealing, to prove by way of mitigation that he had committed murder or that he was a drunkard or gambler; but the evidence must go to show that his character is so bad that he might well be suspected of the offense charged, and could not be injured by the report."); Leppard v. Southern Ry., 174 S.C. 237, 177 S.E. 129 (1934) (recognizing the rule that character evidence of the deceased in respect to his use of intoxicants is admissible on the issue of damages in an action for wrongful death but holding that evidence of specific instances of conduct is not admissible to show that deceased was addicted to the habitual use of intoxicants).

21. Smoak v. Robinson, 156 S.C. 370, 153 S.E. 342 (1930) (batttery and trespass to personality in a dispute over timber cutting, defendant's reputation "for peace, good order and law abiding habits" excluded); Rogers v. Atlantic Life Ins. Co., 135 S.C. 89, 133 S.E. 215 (1926) (character evidence admissible where defense of fraud raised).

22. 135 S.C. 89, 133 S.E. 215 (1926).

23. *Id.* at 101, 133 S.E. at 221. *See also* Dawkins v. Gault, 39 S.C.L. (3 Rich.) 153 (1851), where the court in alluding to an instance where character evidence in a civil case

would suggest that this result should not have been obtained.[24] Nevertheless, it cannot be said with certainty that the admissibility of such evidence is not the better view.

The Advisory Committee on the federal rules derided the use of such evidence because

> [c]haracter evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on a particular occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened.[25]

Wigmore, however, recognized that a blanket rule of exclusion of character evidence in civil cases may not be justified. "[W]here a moral interest is marked and prominent in the nature of the issue, the defendant's good moral character should be received as in criminal cases."[26] Professor McCormick has noted that the issue is a close one:

> Should the same dispensation be accorded to the party in a civil action [permitting him to introduce evidence of his good character] who has been charged by the adversary's pleading or proof with a criminal offense involving moral turpitude? The peril of judgment here is less, and most courts have declined to

---

is admissible to prove or disprove an act said: "Where an actual fraud is charged, perpetrated with a fraudulent intent, and the proof of the charge consists of the circumstances, then, good character, as in a case of a crime, might be resorted to, as a circumstance to prove innocence."

24. In Smets v. Plunkett, 13 S.C.L. (1 Strob.) 158 (1847), an action in assumpsit where the defendant in set-off claimed a balance due from sales by the plaintiff, as commission agent, which he had falsely suppressed, evidence of the plaintiff's good character was excluded on the basis that

> [i]f, in every case where an act of dishonesty is imputed, the imputation may be met by such evidence, then there are few cases into which such evidence might not be introduced; trials would be insupportably tedious, and the result of a trial would as often depend upon the popularity of a party, as upon the merits of his case. . . . It is plain, that in civil cases, where the nature of the action itself does not involve the general character of a party, evidence as to that character cannot be offered to contradict an imputation of dishonesty, or even of fraud.

Id. at 161.

25. Advisory Committee, Note to FED. R. EVID. 404, 56 F.R.D. 219, 221 (1972), *quoting* CAL. LAW REVISION COMM'N., TENTATIVE RECOMMENDATION AND A STUDY RELATING TO THE UNIFORM RULES OF EVIDENCE 615 (1964).

26. 1 WIGMORE § 64, at 478-80.

> pay the price in consumption of time and distraction from the issue which the concession entails. A growing minority, however, has been impressed with the serious consequences to the party's standing, reputation, and relationships which such a charge, even in a civil action, may bring in its train, and has followed the criminal analogy, by permitting the party to introduce evidence of his good reputation for the trait involved in the charge. The balance of expediency is a close one.[27]

Ultimately, the decision of whether to allow the admission of character evidence in civil actions as a basis for inferring an act is largely one of preference depending upon which faction the court chooses to follow. It should, nevertheless, be consistent in either allowing or denying the admission of such evidence.[28] To this end, a rule of evidence either adopting or rejecting the view taken by the federal rules should be adopted.

2. Methods of Proof

Three methods of proof of character are provided for in rule 405:[29] (1) by testimony as to reputation, (2) by testimony in the form of opinion or (3) where character is "in issue," by evidence of specific instances of conduct. South Carolina allows the proof of character by testimony as to reputation or by evidence of specific instances of conduct when character is a material, consequential fact.[30] Specific instances of conduct may also be brought out on cross-examination.[31] In contrast to rule 405, testimony in

---

27. MCCORMICK § 192, at 459-60 (footnotes omitted).

28. *See* note 20 and accompanying text *supra.*

29. FED. R. EVID. 405 provides:

> **(a) Reputation or opinion.** In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.
>
> **(b) Specific instances of conduct.** In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.

30. State v. Outen, 237 S.C. 514, 118 S.E.2d 175, *cert. denied,* 366 U.S. 977 (1961) (testimony as to reputation to prove character allowed); Buford v. M'Luny, 10 S.C.L. (1 Nott & McC.) 267 (1818) (specific act admissible where character in issue in certain instances). For examples of instances where character is "in issue," *see* note 20 *supra.*

31. State v. Lyles, 210 S.C. 87, 41 S.E.2d 625 (1947) (a witness may be asked about particular acts or crimes imputed to the accused involving traits of character which the accused has put in issue). The same rule applies with equal force to the cross-examination of the defendant. State v. Gibert, 196 S.C. 306, 310, 13 S.E.2d 451, 453-54 (1941) ("where the accused in a criminal case voluntarily puts his good character in evidence, and has

the form of opinion to prove character is not allowed in South Carolina.[32]

The genesis of the rule against allowing testimony founded exclusively upon personal knowledge, requiring the question at least in form to be directed to reputation alone appears to be in a statement made in an old English decision[33] which was subsequently misread.[34] The result has been the development of a technique whereby a witness is asked if he knows the reputation of the person whose character is in question, and if the answer is in the affirmative, a further inquiry is made as to whether that reputation is good or bad.[35] The limitation on the use of opinion testimony to prove character has apparently been grounded upon the notion that, since cross-examination may probe into the grounds for that opinion, the allowance of "opinion from observation would provoke distracting side-issues over disputes about specific conduct of the [person] attacked."[36] Wigmore presents the contrary argument in powerful fashion:

> Take the place of a juryman, and speculate whether he is helped more by the witnesses whose personal intimacy gives to their belief a first and highest value, or by those who merely repeat a form of words in which the term "reputation" occurs. . . . The Anglo-American rules of evidence have occasionally taken some curious twistings in the course of their development; but they have never done anything so curious in the way of shutting out evidential light as when they decided to exclude the person who knows as much as humanly can be known about the character of another, and have still admitted the secondhand, irresponsible product of multiplied guesses and gossip which we term "reputation."[37]

The Advisory Committee aptly noted that reputation evidence has persisted "due to its largely being opinion in dis-

---

made it one of the issues of the case, he may be cross-examined as to particular acts or conduct derogatory to his good character, but such examination must be confined to the nature of the charge against him.").

32. State v. Logue, 204 S.C. 171, 28 S.E.2d 788 (1944); Chapman v. Cooley, 46 S.C.L. (12 Rich.) 654, 661 (1860) (the belief of the community, and not of the individual testifying").

33. Rex v. Jones, 31 Howells St. Tr. 251, 310 (1809) ("It is reputation; it is not what a person knows.").

34. 7 WIGMORE § 1981, at 146.

35. State v. Outen, 237 S.C. 514, 118 S.E.2d 175, *cert. denied*, 366 U.S. 977 (1961).

36. MCCORMICK § 44, at 94-95.

37. 7 WIGMORE § 1986, at 166-67.

guise."[38] The use of direct opinion evidence is desirable since it would supplant the use of indirect fictions where the witness, in testifying as to another's general reputation, is undoubtedly expressing his personal opinion as well. The South Carolina Supreme Court has apparently recognized, although inadvertently, that testimony as to reputation is in fact testimony of the opinion of the community in disguise or, undisguised, an opinion of the opinion of "those persons who have had the opportunity, through social or business contact, to form an opinion of the character of the person . . . under inquiry."[39] More forceful argument has not been made to unveil this disguise than that by Barrister Taylor, arguing in *Regina v. Rowton*,[40] when he observed that

> [r]eputation is only the repetition of the judgment of others. . . . There is no rule of law that, to make evidence of reputation admissible, it must be founded on the judgment of a definite number. If, then, the judgment of ten or a less number of men is admissible under the name of reputation, how can the judgment of one only, that is, how can the estimate of disposition formed by one man only, or, in other words, individual opinion, be excluded[?][41]

Since opinion evidence is actually admitted under present practice in the form of testimony as to reputation, and since in fact opinion evidence is probably more reliable in proving character than is evidence as to reputation, it would be desirable if South Carolina's rule as to proof of character be revised to conform with Federal Rule of Evidence 405. Admission of opinion evidence would eliminate the anomalous and inconsistent situation created under South Carolina's present evidentiary rule.

C. *Habit or Custom*

Rule 406,[42] contrasted with the admission of character evidence in rule 404, allows the admission of evidence of habit or

38. Advisory Committee Note to FED. R. EVID. 405, 56 F.R.D. 222 (1972).
39. *In re* Greenfield's Estate, 245 S.C. 595, 603, 141 S.E.2d 916, 920 (1965).
40. 169 Eng. Rep. 1497 (Ct. Crim. App. 1865).
41. *Id.* at 1501, *quoted in* 7 WIGMORE § 1986, at 167 n.5.
42. FED. R. EVID. 406 provides:
> Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eye witnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

routine practice as relevant to prove that an act was conducted in conformity therewith. This is in accord with an almost "universally" accepted practice[43] and is based upon the view that the probative value of evidence of habit is much greater than that of character.[44] South Carolina follows the federal rule on admitting evidence of habit[45] except that one case seems to suggest that evidence of habit to prove conduct is only admissible where there were no eyewitnesses to the occasion.

In *Holcombe v. Watson Supply Co.*,[46] an action was brought for the death of one fatally injured by the alleged negligence of the defendant's servant in striking the deceased while he was attempting to cross a street. The trial court refused to allow the testimony of defendant's witness which was offered to show that the deceased habitually walked "more in the road than . . . [on] the side of the road."[47] The supreme court correctly held that this evidence was not relevant since the accident occurred at a pedestrian crosswalk in the City of Greenville. The court, nevertheless, in some unfortunate dicta went on to discuss the issue of whether eyewitnesses should be absent in order that the evidence of habit be admissible. Quoting from an old treatise, the court stated that "the weight of authority seems to be against admitting evidence of general conduct under proven circumstances to show conduct of the same kind under similar circumstances on a particular occasion, when there were eyewitnesses of the occurrence."[48] Therefore, it is unclear in view of the dicta in *Holcombe,* the age of the case, and the general status of the law today[49] whether the South Carolina court would only allow evidence of habit when there are no eyewitnesses to the occasion.

Clearly, the better reasoned view is that taken by rule 406

43. 1 WIGMORE § 93, at 520.

44. MCCORMICK § 195, at 463.

45. *See* State v. Phillips, 194 S.C. 46, 9 S.E.2d 32 (1940) (prosecution for unlawfully storing unstamped liquors; other similar violations of the law admitted for the purpose of showing habit); State v. Hester, 137 S.C. 145, 134 S.E. 885 (1926) (prosecution for murder of storekeeper on leaving his store; his habit of taking money home from store admitted).

46. 171 S.C. 110, 171 S.E. 604 (1933).

47. *Id.* at 116, 171 S.E. at 606.

48. *Id.* at 117, 171 S.E. at 606 (quoting 10 R.C.L. at 955).

49. The court in *Holcombe* placed reliance upon an earlier California decision, Wallis v. Southern Pacific Co., 184 Cal. 662, 195 P. 408 (1921). 17 S.C. at 117, 171 S.E. at 606. This decision is no longer authority for that proposition since § 1105 of the California Evidence Code eliminates the preexisting eyewitness rule by implication. *See* 2 WEINSTEIN ¶ 406[02], at 406-10 to 406-11 n.3. *See also* note 44 and accompanying text *supra.*

admitting evidence of habit "regardless of the presence of eyewitnesses." The need for the particular evidence of habit sought to be admitted seems to be equally as great where the eyewitnesses disagree or where the issue of fact is otherwise doubtful, as where the absence of eyewitnesses produces the trouble. As noted by the California Law Revision commission in commenting on a section of the California Evidence Code which, by implication, removes the eyewitness rule:

> The no eyewitness' limitation is undesirable. Eyewitnesses frequently are mistaken, and some are dishonest. *The trier of fact should be entitled to weigh the habit evidence against the eyewitness testimony as well as all of the other evidence in the case.*[50]

A related problem to the eyewitness rule in South Carolina is the tendency of the courts to confuse the distinction between character and habit evidence. This results in the expression of habitual conduct as character, *e.g.*, "habit of carelessness," thereby rendering it inadmissible. Professor McCormick states that the eyewitness rule is probably a product of this "failure to draw a clear line between character and habit."[51] By understanding the distinction between character and habit and by correctly applying the two rules, courts can limit the admission of evidence to specific habits which are far more probative and less prejudicial than character. Probably the best, certainly the most often quoted, contrast of character with habit has been that of Professor McCormick:

> Character and habit are close akin. Character is a generalized description of one's disposition, or of one's disposition in respect to a general trait, such as honesty, temperance or peacefulness. "Habit" in modern usage, both lay and psychological, is more specific. It describes one's regular response to a repeated specific situation. If we speak of character for care, we think of a person's tendency to act prudently in all the varying situations of life, in business, family life, in handling automobiles and in walking across the street. A habit, on the other hand, is the person's regular practice of meeting a particular kind of situation with a specific type of conduct, such as the habit of going down a particular stair way two stairs at a time, or of giving the hand

50. *Comment—Law Revision Comm'n*, CAL. EVID. CODE § 1105 (West 1968) (emphasis added).

51. MCCORMICK § 195, at 464.

signal for a left turn, or of alighting from railway cars while they are moving.[52]

A good example of this confusion can be found in *Bedenbaugh v. Southern Railway*[53] where the court correctly held that the individual's character as a heavy drinker was not admissible to show that he was not sober on a given occasion. Unfortunately, the court incorrectly labeled the issue as whether his "habit of drinking" was so admissible.[54]

South Carolina should officially clarify this area by judicial decision or legislative enactment and dispense with the apparent requirement that no eyewitnesses be available before evidence of habit will be admitted. By doing away with this unsound requirement, the trial judge will no longer be able to exclude evidence on the grounds that an eyewitness is present, thereby evading its categorization as character or habit. Thus, the must needed clarification of the difference between character evidence and habit evidence will be aided by forcing the trial judge to categorize the evidence to determine its admissibility in addition to allowing the trier of fact to weigh all the evidence including the habit evidence and testimony of any eyewitnesses.

---

52. *Id.* at 462-63 (footnote omitted). The difference between character and habit evidence is also well explained by the Advisor's Note to ME. R. EVID. 404, ME. REV. STAT. tit. 14 (1975 Supp.):

> Rule 404 states the general rule that evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion. Why should habit be treated differently? The rationale is that habit describes one's regular response to a repeated specific situation so that doing the habitual act becomes semi-automatic. It is the notion of the invariable regularity that gives habit evidence its probative force. Evidence that one is a "careful man" or a "careful driver" is inadmissible as lacking the specificity of an act becoming semi-automatic; it goes to character rather than habit.

53. 69 S.C. 1, 48 S.E. 53 (1903).

54. *Id.* at 16, 48 S.E. at 58 (emphasis added). As noted by Professor Wigmore, courts have frequently used the term "habits of intemperance" to signify "frequent indulgences, and not constant or periodical intoxication." 1 WIGMORE § 96, at 529. Used in this sense the term denotes a general disposition for excessive drinking which is evidence of character and not admissible. If it is used in the sense of a specific habit of drinking at regular times and in a regular manner, *e.g.*, drinking a certain number of glasses of whiskey every day upon arriving home from work, then it is evidence of habit and it should be admissible. Admittedly, the distinction is superficially a fine one; it, nevertheless, reflects the true meaning of habit as opposed to character. The courts, however, have used the term "habit" loosely, and as a consequence, "the judicial applications of the principle are by no means uniform." *Id.* (footnote omitted).

III. WITNESSES

A. *Rules of Competency*[55]

Federal Rules 601,[56] 605[57] and 606[58] are general rules of com-

55. Because they are not materially different from the prevailing law in South Carolina, the following federal rules do not merit textual discussion. **Rule 602—Lack of Personal Knowledge;** *accord,* Wilson v. Clary, 212 S.C. 250, 47 S.E.2d 618 (1948). **Rule 603—Oath or Affirmation;** *accord,* State v. Hicks, 257 S.C. 279, 185 S.E.2d 746 (1971). **Rule 604—Interpreters;** *cf.* Peoples' Nat'l Bank of Greenville v. Manos Bros., 226 S.C. 257, 84 S.E.2d 857 (1954). **Rule 605—Competency of Judge as Witness;** *accord,* State v. Bagwell, 201 S.C. 387, 23 S.E.2d 244 (1942). **Rule 606—Competency of Juror as Witness, paragraph (a);** *contra,* State v. Vari, 35 S.C. 175, 14 S.E. 392 (1892) (no error committed where juror called only to testify to an isolated particular matter); **Rule 606, paragraph (b);** *see* Barsh v. Chrysler Corp., 262 S.C. 129, 203 S.E.2d 107 (1974) (testimony of juror will not be received on the hearing of a motion to set aside a verdict on the ground of mistake, irregularity or misconduct on the part of the jury or some one or more of the panel); *but see* Cohen v. Robert, 33 S.C.L. (2 Strob.) 410 (1848) (juror's affidavit of alleged misconduct by party to the action admissible; new trial granted). **Rule 608—Evidence of Character and Conduct of Witness, paragraph (a)(1);** *cf.* State v. Robertson, 26 S.C. 117, 1 S.E. 443 (1887) (evidence of witness' character for "truth and veracity"); **Rule 608, paragraph (b);** *see* Daniel v. Hazel, 242 S.C. 443, 131 S.E.2d 260 (1963); State v. Williamson, 65 S.C. 242, 43 S.E. 671 (1903) (testimony by accused does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters relating only to credibility); State v. Merrimam, 34 S.C. 16, 12 S.E. 619 (1891). **Rule 610—Religious Belief or Opinion;** *see* State v. Hicks, 257 S.C. 279, 185 S.E.2d 746 (1971). **Rule 611—Mode and Order of Interrogation and Presentation, paragraphs (a) and (c);** *accord,* State v. Cook, 204 S.C. 295, 28 S.E.2d 842 (1944) (leading questions on direct examination); State v. Nelson, 192 S.C. 422, 7 S.E.2d 72 (1940) (leading questions on cross and direct examination of hostile witness). **Rule 612—Writing Used to Refresh Memory;** *accord,* State v. Collins, 15 S.C. 373 (1881). **Rule 614—Calling and Interrogation of Witnesses by Court;** *accord,* Elletson v. Dixie Home Stores, 231 S.C. 565, 99 S.E.2d 384 (1957); State v. Chasteen, 228 S.C. 88, 88 S.E.2d 880 (1955).

56. FED. R. EVID. 601 provides:

> Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.

57. FED. R. EVID. 605 provides:

> The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

58. FED. R. EVID. 606 provides:

> **(a) At the trial.** A member of the jury may not testify as a witness before that jury in the trial of the case in which he is sitting as a juror. If he is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.
>
> **(b) Inquiry into validity of verdict or indictment.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the

petency. The second sentence of rule 601, however, creates two standards of competency that will apply in all federal courts.[59] If state law supplies the rule of decision, as in civil cases where jurisdiction is based on diversity of citizenship, then state limitations on competency of witnesses must be applied. In criminal cases, and in certain civil cases where state law does not supply the rule of decision, rule 601 grants automatic competence to every person to testify as a witness unless that person is a member of the jury that is hearing the case,[60] or is the presiding judge,[61] or refuses to testify truthfully.[62] In federal litigation rule 601 dispenses with the necessity of examining a witness as to his or her competence to testify. As one commentator has observed, the effect of rule 601 has been to "convert questions of competence into questions of credibility while steadily moving towards a realization that judicial determination of the question of whether a witness should be heard at all should be abrogated in favor of hearing the testimony for what it's worth."[63]

Several explanations have been advanced as to why Congress added the second sentence to rule 601: (1) the fear that the original draft, granting automatic competence to witnesses in all cases, would lead to forum shopping;[64] (2) the Supreme Court is prohibited from promulgating rules which might "abridge, enlarge, or modify any substantive right";[65] and (3) the *Erie* doctrine compels a federal court to apply substantive state law.[66] Whatever the legalistic rationale for the second sentence to rule 601, the legislative history clearly indicates that it was primarily a result of the congressional desire to respect the diverse application of the so-called Dead Man's Statutes among the states.

---

question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about what he would be precluded from testifying be received for these purposes.

59. *See generally* 3 WEINSTEIN ¶ 601[03].

60. FED. R. EVID. 606.

61. FED. R. EVID. 605.

62. FED. R. EVID. 603 provides:

Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so.

63. 3 WEINSTEIN ¶ 601[05], at 601-35 (footnote omitted).

64. *See* Hearings on Proposed Rules of Evidence Before the Special Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 93d Cong., 1st Sess. 249 (1973).

65. *See* 28 U.S.C. § 2072 (1972).

66. *See* 3 WEINSTEIN ¶ 601[02], at 601-11.

1. Dead Man's Rule

Section 26-402 of the South Carolina Code is the statutory embodiment of the dead man's rule in South Carolina.[67] The dead man's rule in South Carolina operates to disqualify as a witness any party to an action, or any person who has an interest which may be affected by such action, or any person who previously had an interest in such action, who purports to testify with regard to any "transaction or communication" between such witness and a person now "deceased, insane or lunatic" represented by an executor, administrator, or heir-at-law, etc., when such testimony could affect the interest of such witness.[68] Admittedly, section 26-402 restricts the general provision of section 26-404 which states that a witness is not to be disqualified because of an interest, of whatever nature, in the outcome of the litigation.[69] It is, therefore, a perpetuation in limited form of the discredited common law rule which disqualified a witness from testifying because of interest.[70]

The courts of this state, however, have strictly construed the rule and have endeavored to limit its applicability to cases which clearly fall within its intended scope.[71] The ban of the statute is aimed at the witness, not at the transaction or communication; therefore, the *transaction* can be proved, but not by one of the interested persons designated in section 26-402.[72] A witness can escape the disqualification, however, by renouncing or disclaiming, in good faith, any interest which he or she might have in the outcome of the litigation.[73] Moreover, if the party defending the

67. S.C. CODE ANN. § 26-402 (1962).

68. *Id.*

69. Ropley v. Klugh, 40 S.C. 134, 18 S.E. 680 (1893); Jones v. Pluncknett, 9 S.C. 392 (1877); Guery v. Kinsler, 3 S.C. 423 (1872).

70. *See* Long v. Conroy, 246 S.C. 225, 143 S.E.2d 459 (1965).

71. *See* Hicks v. Battey, 259 S.C. 426, 192 S.E.2d 477 (1972); Respass & Respass, C.P.A. v. King Pontiac, 236 S.C. 363, 114 S.E.2d 486 (1960); Lisinby v. Newsome, 234 S.C. 237, 107 S.E.2d 449 (1959). *See Evidence, 1972 Survey of South Carolina Law*, 25 S.C.L. REV. 378, 389 (1973).

72. The transaction *can* be proved, but *not* by:

(1) a party to the action;

(2) a person having an interest which may be affected by the outcome of the action;

(3) a person who has had such an interest which has come to a party to the action; or

(4) an assignor of anything in controversy in the action.

The above categories of disqualified persons are enumerated in Norris v. Clinkscales, 47 S.C. 488, 25 S.E. 797 (1896).

73. Long v. Conroy, 246 S.C. 225, 143 S.E.2d 459 (1965).

interest of the deceased in the action "opens the door" by testimony concerning the transaction, then any other witness is competent to testify with respect thereto.[74]

Although the rule is in "bad repute" with modern writers, it nevertheless continues to survive as an acknowledged anomaly in American jurisprudence. The vitality of the rule may be a function of "the failure of reformers to appreciate its substantive implications."[75] This failure can be better understood by considering the various ways in which dead man's statutes may be viewed. They could be characterized as a truth seeking device designed to discourage perjury by the surviving claimant.[76] On the other hand they might be viewed as a rule designed to protect a decedent's estate from survivors since the deceased cannot confront the survivor.[77] The rule has been justified in South Carolina on the "principle that it is against public policy to allow a witness thus interested to testify as to such matters when such testimony, if untrue, cannot be contradicted."[78]

The criticisms of the dead man's statute have been persistent and scathing. Bentham labeled the statute a "blind and brainless" technique that resulted in greater injustice than it sought to prevent.[79] Professor Morgan, reporter for the *Model Code of Evidence*, condemned such statutes on the basis that they are "fertile breeders of litigation, and most of them, while preventing the enforcement of many honest claims, are ineffective to prevent perjury by witnesses whose interest does not fall within the statutory ban."[80] Professor Wigmore, characterizing the rule as a "crude, technical, and unjust method of disqualifying witnesses,"[81] advanced several objections to such statutes that apply equally well to the common law "interest" disqualification:

> (1) the supposed danger of interested persons testifying falsely exists to a limited extent only;
> (2) and, so far as they testify truly, their exclusion is an intolerable injustice;

74. Norris v. Clinkscales, 47 S.C. 488, 25 S.E. 797 (1896).

75. 2 WIGMORE § 578. Professor Wigmore refers to the rule as a "crude, technical, and unjust method of disqualifying witnesses." *Id.* at 697. *See also* MCCORMICK § 65.

76. Weinstein, *The Uniformity-Conformity Dilemma Facing Draftsmen of the Federal Rules of Evidence*, 69 COLUM. L. REV. 353, 365 (1969).

77. *Id.*

78. Trimmier v. Thomson, 41 S.C. 125, 130, 19 S.E. 291, 294 (1894).

79. MCCORMICK § 65, at 143.

80. MORGAN, BASIC PROBLEMS OF EVIDENCE 93-94 (1962).

81. *See* note 75 *supra*.

(3) no exclusion can be so defined as to be rational, consistent, and workable;
(4) in any case, the test of cross-examination, and other safeguards for truth are a sufficient guaranty against frequent false decision.[82]

The fallacies in the reasoning underlying the dead man's rule are manifold.[83] Fundamentally, it is based on a mistaken view of human experience, a view that dishonest men outnumber honest men and that self-interest is inevitably accompanied by falsification. In their attempt to further truth-seeking, dead man's statutes actually serve to impede the search for the truth by denying the jury substantial parts of relevant evidence bearing on the issue at hand. Such statutes create "intolerable injustices" by prohibiting the proof of honest claims and defenses, thereby working a "certain injustice" to one side in the name of obviating a *potential* injustice to the other. Furthermore, the dead man's rule fails to consider the ability of judge and jury to weigh the probative value of the evidence in separating truth from falsehood. It also neglects the value of cross-examination in exposing deception.

In South Carolina, as well as in other states, the rule has led to a veritable maze of decisions, most of which tend to exacerbate the confusion and vagaries that already mystify lawyers and judges in applying and interpreting the rule. Nor do the arguments and justifications in support of the rule appear to satisfactorily answer the question, first put by Wigmore, of why the law should decide it more important to save dead men's estates from false claims than to save living men's estates from loss by lack of proof?

Since rule 601 does not eliminate those grounds of incompetency prescribed by State law when State law provides the rule of decision, both federal and state courts in South Carolina must operate within the evidentiary limits prescribed by section 26-402 of the South Carolina Code of Laws[84] whenever the case before them is one governed by South Carolina law. Although abolition of the rule has long been sought, its death has been slow in coming. If the legislature is unwilling to repeal the statute,

82. 2 WIGMORE § 578, at 696.
83. *See generally* Ray, *Dead Man's Statutes*, 24 OHIO ST. L.J. 89, 105-09 (1963).
84. S.C. CODE ANN. § 26-402 (1962).

then the courts should continue to give the statute the narrowest possible application, as in probate cases, for example, where the substantive aspect of the rule would clearly predominate.[85]

2. Husband-Wife

In *Barr's Next of Kin v. Cherokee, Inc.*[86] the South Carolina Supreme Court applied the rule, first espoused in 1777 by Lord Mansfield, that a husband and wife are incompetent to testify as to nonaccess between them in any case where the question of the legitimacy of a child born in wedlock is at issue. In other words, neither spouse is considered competent to testify as to the fact of the lack of opportunity for intercourse with the other spouse so as to bastaridze a child that was born in wedlock. According to Professor Dreher, the rule arises from the "strongest of presumptions, that of legitimacy."[87]

The justification for the rule has been consistently phrased in the same vague and mystifying terms first advanced by Lord Mansfield:

> It is a rule founded in decency, morality and policy, that they shall not be permitted to say after marriage that they have had no connection and therefore that the offspring is spurious.[88]

Although relevant South Carolina cases have offered little in the way of justifying or rationalizing the rule, it has been suggested by other courts that such a rule: (1) operates to preserve the matrimonial relation, (2) inhibits the "disastrous consequences" that would accompany the unsettling of property titles, (3) protects the innocent child from being branded illegitimate, (4) lessens the "public charges" that society must support, and (5) enhances the "peace and quiet" of the family, community, and society.[89]

---

85. 3 WEINSTEIN ¶ 601[03], at 601-20.

86. 220 S.C. 447, 68 S.E.2d 440 (1951).

87. DREHER at 25.

88. *Goodright v. Moss*, 2 Cowp. 291, 98 Eng. Rep. 1257 (1777), *quoted in* MCCORMICK § 67, at 146. In 1874, Justice Gordon of the Pennsylvania Supreme Court stated:

> Admission of such testimony would be unseemly and scandalous; and this, not so much from the fact that it reveals immoral conduct upon part of the parents, as because of the effect it may have upon the child, who is in no fault, but who must nevertheless be the chief sufferer thereby. That the parents should be permitted to bastardize the child is a proposition which shocks our sense of right and decency.

Tioga v. South Creek, 75 Pa. 433-37 (1874).

89. *Moore v. Smith*, 178 Miss. 383, 172 So. 317 (1937).

Wigmore has accurately described the rule as "inconsistent, obstructive and pharisaical".[90] Indeed, upon close analysis the proffered justifications for this curious rule prove to be spurious and illusory. To begin with, a married woman can certainly testify that she has lived in adultery, and yet the rule renders her incompetent to testify that her husband had no access to her during the time when the child was conceived. Why is the latter testimony indecent and not the former? Nor is it clear how the matrimonial relation will be preserved by allowing the testimony as to her adultery but not as to her nonaccess to the husband. The "protection of the matrimonial relation" justification is also shown to be fallacious when one considers the fact that a husband and wife are competent to testify to the fact of nonaccess when the legitimacy of a child is not in question.

With respect to the immorality of bastardizing one's issue, courts fail to recognize that parents can prove illegitimacy in other ways, *e.g.*, by testimony that the child was born out of wedlock, or that one spouse was married to a third person at the time or that there was no legal marriage in existence. Thus it seems a patent inconsistency for the law to deny the bastardization of an issue in one way—having testimony by spouses as to nonaccess—and permitting the same result to be accomplished in many other ways.[91]

The "security of titles to property" argument appears to beg the question since the titles to property are always unsettled when they depend on the legitimacy of a claimant to the property and the question of that legitimacy is brought before a court. Furthermore, it makes little sense to deny a jury the benefit of evidence from those most likely to know the true facts surrounding the legitimacy or illegitimacy of the claimant.

The "cost to society of supporting illegitimate children" and the "peace and quiet to society" arguments appear to be merely different verbal formulations of the moral and public policy rationales expressed by Lord Mansfield. Even assuming the relevance of such arguments, they would appear to be negatived by the equally valid claim of protecting an innocent husband from paying for the care and support of a child that he did not father.

Professor Wigmore's scathing indictment should represent the rule's death knell:

---

90. 7 WIGMORE § 2064, at 369.

91. *Id.* at 368 n.2.

> The truth is that these high-sounding "decencies" and "moralities" are mere pharisaical afterthoughts, invented to explain a rule otherwise incomprehensible, and lacking support in the established facts and policies of our law.[92]

As noted earlier, rule 601, when applied in cases in which federal law supplies the rule of decision, grants automatic competency to every person, except as otherwise provided in those rules. This clearly represents the most reasonable approach in any system that seeks to maximize the availability of evidence in the pursuit of truth. Accordingly, South Carolina's nonaccess rule of exclusion should be legislatively or judicially annulled and testimony relating to nonaccess between husband and wife admitted for what it is worth.

B. Who May Impeach?

The traditional rule that a party may not impeach its own witness is officially abrogated in federal courts by rule 607.[93] Most courts have already rejected the concept that a party calling a witness vouches for his or her credibility,[94] and the United States Supreme Court's decision in *Chambers v. Mississippi*[95] probably compels that result in criminal cases.

South Carolina, on the other hand, apparently still adheres to the orthodox rule.[96] There are, however, certain judicially created exceptions to the rule that a witness cannot be impeached by the party at whose instance he testifies. In *State v. Richburg*[97]

---

92. *Id.* at 369.

93. FED. R. EVID. 607 provides: "The credibility of a witness may be attacked by any party, including the party calling him."

94. *See* 3 WEINSTEIN ¶ 607[01], at 607 n.1.

95. 410 U.S. 284 (1973).

96. *See* State v. Richburg, 250 S.C. 451, 158 S.E.2d 769 (1968); Gilfillan v. Gilfillan, 242 S.C. 258, 130 S.E.2d 578 (1963); Squires v. Henderson, 208 S.C. 58, 36 S.E.2d 738 (1946); State v. Russ, 208 S.C. 449, 38 S.E.2d 385 (1946); State v. Kennedy, 85 S.C. 146, 67 S.E. 152 (1909); State v. Waldrop, 73 S.C. 60, 52 S.E. 793 (1905).

South Carolina does recognize, however, a limited exception to the orthodox rule. In White v. Southern Oil Stores, 198 S.C. 173, 17 S.E.2d 150 (1941), the supreme court held that where the witness is not of the party's own selection, but is one whom the law obliges him to call, such as a subscribing witness to a deed or will, then the offering party is permitted to impeach or discredit the witness. *See also* Williams v. Walker, 18 S.C. Eq. (2 Rich. Eq.) 291 (1846) (where a party, in order to make out his title, is compelled by the rules of evidence to call the subscribing witness to an instrument and his testimony tends to invalidate the instrument, the party calling him may impeach his credibility). State v. Hughey, 214 S.C. 111, 51 S.E.2d 376 (1949) (the trial court has broad discretion to allow the party calling a hostile witness to cross-examine him).

97. 250 S.C. 451, 158 S.E.2d 769 (1968).

the supreme court announced that counsel offering a witness will not be permitted to introduce prior inconsistent statements against that witness in order to impeach the testimony[98] unless the offering counsel can demonstrate *both* substantial surprise and injury by the witness' testimony. Thus, if the witness merely fails to remember or refuses to answer, the prior statement cannot be used against him by the offering counsel since there has been no positive harm from the mere failure to give favorable testimony.[99] Similarly, if the turncoat witness should inform counsel beforehand that he intends to recant his former story, counsel cannot claim surprise and offer the previous statements.[100]

There are essentially three reasons offered in support of the orthodox rule:

> (1) the party calling the witness guarantees his trustworthiness;
> (2) if impeaching one's own witness were allowed, then the witness could be "blackmailed" into testifying favorably, and perhaps falsely, for the party calling him; and
> (3) the fear that a jury may accept the impeaching evidence as substantive proof.[101]

These apparent justifications, however, have been met by convincing rebuttals by leading commentators.

With respect to the first reason, it is obvious that in reality a party has "little or no choice of witnesses" and, except as to character or expert witnesses, merely calls those who happened to "observe the partcular facts in controversy."[102] As to the second reason, Professor McCormick has succinctly noted "(a) that it applies only to two kinds of impeachment, the attack on character and the showing of corruption, and (b) that to forbid the attack by the calling party leaves the party at the mercy of the witness and his adversary."[103]

As for the third ground supporting the orthodox rule, it is worth quoting, at some length, Dean Ladd's reply:

98. A fortiori, such statements cannot be introduced as substantive evidence of its truth. *But see* FED. R. EVID. 801(d)(1).

99. MCCORMICK § 76.

100. DREHER at 16 (citing State v. Nelson, 192 S.C. 422, 7 S.E.2d 72 (1940)).

101. Federal Rule 801(d)(1) permits previous contradictory statements to be used as substantive evidence—not merely for impeachment—if made under oath. FED. R. EVID. 801(d)(1).

102. MCCORMICK § 38, at 75.

103. *Id.*

> First, the application of this theory is inconsistent with the accepted doctrine that a counsel may obtain an admission from his own witness that he has made contradictory statements. In case a party shows that he is surprised by the unfavorable testimony, he may make inquiry of his witness concerning prior statements to refresh his memory, to probe his conscience, and to permit him to explain his divergencies if he admits them. If the witness admits making the former statement but maintains that it is not correct, the statement is nevertheless before the jury just as the impeachment statement would be. The danger of receiving the contradition as proof would be the same as if other witnesses proved the former statement.
>
> Second, the inconsistent application of this reason pointedly appears in connection with impeachment of witnesses of an adversary. The identical chance of misuse of impeaching statements exists where the witness has damaged the opponent. Yet in the latter case prior inconsistent statements are universally admitted without fear that the triers may accept the impeaching statements as substantive evidence.
>
> Third,. . . the fact that the witness is present in court, sworn upon oath, and subjected to cross-examination of the adverse party, substantially eliminates the opportunity for error or misjudgement in receiving the former statement. . . . If there is not real danger, even assuming the jury were to accept the prior inconsistent statements as proof, that reason for the rule can not be urged where there is a legitimate basis of admitting the statements for impeachment purposes.[104]

In addition to the "substantial surprise" and "injury" restrictions, another South Carolina case has concluded that the adversary counsel cannot waive the rule that bars impeaching one's own witness.[105] This conclusion was based on the rationale that the rule barring impeachment of one's own witness is "for the protection of the witness" and, therefore, cannot be waived by anyone except the witness himself.[106] In the words of Professor Dreher, however, "[W]hy should any witness be protected against a legitimate effort to make him tell the truth as to a nonprivileged matter?"[107]

104. Ladd, *Impeachment of One's Own Witness—New Developments*, 4 U. CHI. L. REV. 69, 87-88 (1936).

105. Farr v. Thompson, 155 S.C. Eq. (Chev. Eq.) 37 (1839).

106. *Id.*

107. DREHER at 16.

The federal rule has made the most reasonable choice: complete abrogation of the orthodox rule. The Advisory Committee's note to rule 607 recited the "false premises" on which the rule is based, as well as the fact that the continued erosion of support for the rule as evidenced by judicial opinions and statutes serves to heighten the doubts as to the soundness and workability of the rule.[108] And finally, as Professor McCormick observed, a "rule against the showing of the prior statements of one's own witness, to aid in evaluating his testimony, is a serious obstruction to the ascertainment of truth."[109] South Carolina would do well to abandon this anachronistic and unworkable rule.[110]

It should be pointed out, however, that the harshness of the orthodox rule can be avoided in certain situations. For example, South Carolina has a procedure, similar to that specified in federal rule 614(a),[111] where a trial judge has the right on his own motion to call a witness, as a witness of the court.[112] Thus, by exercising this power, the witness could be offered for cross-examination by both sides, and previous statements could be produced for impeachment purposes. As Professor Dreher noted, a witness might be expected to "stick to the truth" if he thought that recanting his story would result in previous statements being introduced against him.[113]

One other method, noted by Professor McCormick, for avoiding the rule prohibiting impeachment of one's own witness is for the calling party to question the turncoat witness about the prior statement in order to "awaken his conscience," rather than to discredit him.[114] A good example of this means of escaping the prohibition appears in *Hicks v. Coleman,*[115] in which the South Carolina Supreme Court permitted the calling party, in effect to "refresh the memory" of the witness as to his previous contradictory statements. The court explained that the general rule deny-

108. Advisory Committee's Note to FED. R. EVID. 607, 56 F.R.D. 266-67 (1972).

109. MCCORMICK § 38, at 77.

110. For an acceptable alternative, see ME. R. EVID., ME. REV. STAT. tit. 14 (1975 Supp.).

111. FED. R. EVID. 614(a) provides:

> The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

112. *See* Elletson v. Dixie Home Stores, 231 S.C. 565, 99 S.E.2d 384 (1957).

113. DREHER at 17.

114. MCCORMICK § 38, at 77 (quoting People v. Michaels, 335 Ill. 590, 592, 167 N.E. 857, 858 (1929)).

115. 240 S.C. 227, 125 S.E.2d 473 (1962).

ing a party the right to discredit or impeach his own witness is "subject to the exception that when a witness proves hostile or recalcitrant, the party calling him may probe his conscience or test his recollection to the end that the whole truth may be laid bare; and the extent to which this may be done depends upon judicial discretion exercised in the light of the circumstances in which the question arises."[116]

C. *Rehabilitation of a Witness' Character*

As has been the case at common law, federal rule 608(a)[117] provides that reputation or opinion evidence in support of a witness' character for truthfulness cannot be introduced until after his veracity has been attacked. The justification for the limitation is composed of two elements: (1) the fact that "there is no reason why time should be spent in proving that which may be assumed to exist,"[118] and (2) "the enormous needless consumption of time which a contrary practice would entail. . . ."[119]

A threshold determination in applying this limitation, however, is whether the character of the witness for truthfulness has been attacked. The initial determination is within the discretion of the trial court, and in cases where it is not clear whether the attack on a witness is an attack on his character for veracity (*e.g.*, impeaching a witness by proof of prior inconsistent statements), the court will usually consider whether the circumstances of the attack (i.e., did the witness' denial allay the jury's doubts) "seem to indicate a want of trustworthiness."[120] With respect to the question of whether the witness' character for truthfulness has been attacked, the Advisory Committee's note to rule 608 states:

---

116. *Id.* at 229-30, 125 S.E.2d 474 (quoting State v. Nelson, 192 S.C. 422, 424, 7 S.E.2d 72, 73 (1940)).

117. FED. R. EVID. 608(a) provides:

> The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

118. 4 WIGMORE § 1104.

119. Advisory Committee's Note to FED. R. EVID. 608, 56 F.R.D. 268 (1972).

120. Outlaw v. United States, 81 F.2d 805, 808 (5th Cir. 1936), *cert. denied*, 298 U.S. 665 (1936). The "considering the circumstances" approach is endorsed by the Advisory Committee's Note to FED. R. EVID. 608, 56 F.R.D. 268 (1972).

> Opinion or reputation that the witness is untruthful specifically qualifies as an attack under the rule, and evidence of misconduct, including conviction of crime, and of corruption also fall within this category. Evidence of bias or interest does not.[121]

Although the law in South Carolina is in basic agreement with federal rule 608,[122] the supreme court has recognized a peculiar exception to the common law rule restricting accreditation of a witness' character for truthfulness before an attack on his character has been launched.

In *Woods v. Thrower,*[123] plaintiff brought an action to recover possession of an automobile. The dispute apparently arose when defendant, an automobile repairman, refused to deliver the car to the plaintiff's agent upon the tender of the $100 agreed repair price. The defendant contended that no set price was agreed upon and that the actual cost of repair was $230, thus claiming a lien for repairs and refusing to surrender the car until the $230 was paid. At trial, Judge Whaley overruled the defendant's objection to testimony to show the reputation of the witness, plaintiff's agent, for truth, veracity and fair dealing. The record revealed that the witness "was a resident of Marion, and not of Richland County, in which the action was tried."[124] The defendant appealed, contending that the judge's ruling was erroneous since the character of the witness for truth and veracity had not been attacked and was not, therefore, in need of rehabilitation.

The South Carolina Supreme Court stated the question as "whether the rule heretofore announced (prohibiting accrediting before an attack) is applicable, when the witness is a stranger in the vicinage from which the jury is drawn."[125] The court answered in the negative, distinguishing long-standing contrary precedent,[126] and held the testimony admissible. In order to justify this exception, the court stated:

---

121. Advisory Committee's Note to FED. R. EVID. 608, 56 F.R.D. 268-69 (1972) (citations omitted).

122. *See, e.g.,* Heretis v. Taggs, 217 S.C. 369, 60 S.E.2d 689 (1950); State v. Gibert, 196 S.C. 306, 13 S.E.2d 451 (1941); State v. Gilstrap, 149 S.C. 445, 147 S.E. 600 (1929); State v. Knox, 98 S.C. 114, 82 S.E. 278 (1914); State v. Murphy, 48 S.C. 1, 25 S.E. 43 (1896); State v. Robertson, 26 S.C. 117, 1 S.E. 443 (1887).

123. 116 S.C. 165, 107 S.E. 250 (1921).

124. *Id.* at 166, 107 S.E. 251.

125. *Id.*

126. Chapman v. Cooley, 46 S.C.L. (12 Rich.) 654 (1860).

> The reason why an exception should be made to the general rule . . . is that a party to the action whose witness comes from the vicinage has an advantage over his opponent, whose witness is a stranger, as the good character of a witness known to the jurors may be taken into consideration by the jury. The rights of the parties are equalized, as far as possible, by allowing testimony as to the good character of the witness, who is a stranger, to be shown before it is attacked.[127]

The court's reasoning, however, falls victim to a major fallacy, that the jury is knowledgeable concerning the character for truthfulness of witnesses "coming from the vicinage" and that this knowledge gives the local party an unfair advantage over the foreigner, about whom the jury has no "out-of-court" knowledge. This assumption seems highly suspect in light of the increased mobility and density of the American populace.[128] Moreover, most jurors are carefully screened with respect to their personal knowledge or feelings about the parties involved in an action. The theory that "out-of-court" knowledge will inevitably influence the jury's willingness to believe one side or another also appears doubtful.[129] Finally, the court's opinion seems to accept the proposition that a jury can legitimately take into consideration their personal knowledge *(i.e.,* out-of-court knowledge) as to the character of the witnesses.[130] This proposition seems prima facie suspect since the traditional practice is to instruct the jury that they are limited to the evidence produced and that they must draw their conclusions from the testimony adduced at trial and not from any other source.[131] To hold otherwise would appear to pose significant right to confrontation problems.[132]

---

127. 116 S.C. at 170, 107 S.E. at 251-52.

128. *See generally,* V. PACKARD, A NATION OF STRANGERS *passim* (1973).

129. *But see* Broeder, *The Impact of the Vicinage Requirement: An Empirical Look,* 45 NEB. L. REV. 99 (1966).

130. *See* 116 S.C. at 169, 107 S.E. at 251, *citing* State v. Jacob, 30 S.C. 131, 8 S.E. 698 (1888).

131. *Contra,* State v. Jacob, 30 S.C. 131, 8 S.E. 698 (1889); State v. Jones, 29 S.C. 201, 7 S.E. 296 (1888); McKain v. Love, 19 S.C.L. (2 Hill) 506 (1834).

132. *See, e.g.,* Palestroni v. Jacobs, 10 N.J. Super. 266, 77 A.2d 183 (1950). *Compare* Thomas v. Kansas Power & Light Co., 185 Kan. 6, 340 P.2d 379 (1959) *with* Rostad v. Portland Ry., L. & P. Co., 101 Or. 569, 201 P. 184 (1921) *and* Solberg v. Robbins Lumber Co., 147 Wis. 259, 133 N.W. 28 (1911) *and* Downing v. Farmers' Mut. Fire Ins. Co., 158 Iowa 1, 138 N.W. 917 (1912). The problem, of course, involves how the jury can be prevented from considering extrajudicial evidence. *See* Levin & Levy, *Persuading the Jury with Facts not in Evidence: The Fiction-Science Spectrum,* 105 U. PA. L. REV. 139 (1956); THAYER, EVIDENCE 174 (1898).

The federal rule does not contemplate such an exception, although traditionally the federal courts have been lenient in cases where error has been alleged because of one party accrediting a witness before his character for veracity has come under attack.[133] Under the federal rules, an error in permitting rehabilitation evidence before an attack on the witness' character has taken place will be judged according to the standards enumerated in rule 103.[134]

Since the peculiar exception recognized in South Carolina does not appear justified either by logic or experience, the best approach would be to adopt the position that rehabilitation is not permitted before the witness' character for veracity has been attacked. However, this general proposition can be tempered somewhat, as it is in the federal system, by acknowledging the trial court's discretion to consider whether the circumstances would justify departure from the general rule.[135] Recognizing the court's discretion would preserve the rule's salutary effects without risking unfairness or injustice in exceptional situations.[136]

D. Impeachment by Evidence of Conviction of Crime

At common law a person convicted of a felony, treason, or *crimen falsi* was considered incompetent to testify. Over the past century, however, this rule has been transformed into a general rule of *credibility* rather than competency. Hence, the rule in most of the states and in the federal courts today is that evidence of a prior conviction may be introduced to impeach the credibility of a witness. The conclusion that a prior conviction is a relevant

133. *See, e.g.*, United States v. Sears, 332 F.2d 199, 200-01 (7th Cir. 1964) (where a deaf person identified a bank robber, and the court allowed a witness to testify that deaf persons often compensate for loss of hearing by training other senses; appellate court held there was no error in admitting this testimony and that in any case no objection had been raised); Kauz v. United States, 188 F.2d 9, 10 (5th Cir. 1951) (holding such testimony to be harmless error); *cf.* Franklin Sugar Refining Co. v. Luray Supply Co., 6 F.2d 218 (4th Cir. 1925).

134. FED. R. EVID. 103.

135. *See* notes 117-18 and accompanying text *supra*.

136. A recent report by the Committee on Evidence to the New Jersey Supreme Court acknowledged the superiority of this flexible approach:

> There may be many cases where it would be of value to the jury to have an appraisal of the witness as truth-teller even where the opponent refuses to cross-examine, and where such an offer would neither consume excessive time nor would surprise. In such cases the judge should be empowered to admit the evidence.

Report to the New Jersey Supreme Court by the Committee on Evidence 64-65 (1973).

consideration with respect to the question of an individual's propensity for truth-telling is a product of the following subjunctives: (1) if a person has a criminal past, then he has a bad general character; (2) if a person has a bad general character, then he is a type of person who would be likely to disregard the obligation to testify truthfuly.[137]

Obviously, the use of prior convictions to impeach a witness is closely allied with two often conflicting goals of the legal system—protecting the innocent and insuring that the guilty receive their just desert. As one commentator observed:

> Permitting unlimited use of defendant's criminal past for impeachment undoubtedly results in more convictions; it also increases the likelihood that a person will be found guilty who, this time at least, has not committed a crime. Limiting the use of convictions for impeachment provides more protection for the innocent, but it also raises the spectre of the guilty out on the streets because the jury has been denied information helpful in evaluating the credibility of witnesses.[138]

Federal rule 609,[139] which went through a number of revisions

137. "A demonstrated instance of willingness to engage in conduct in disregard of accepted patterns is translated into willingness to give false testimony." Advisory Committee's Note to the first draft of FED. R. EVID. 609, 56 F.R.D. 297 (1968). There are significant problems with the basic validity of the assumed psychological truths that form the underpinning of the syllogism stated in the text. *See* 2 WIGMORE § 519, at 610-11, *quoting from* BENTHAM, RATIONALE OF JUDICIAL EVIDENCE book IX, pt. III, ch. III (Bowring's ed. 1827).

138. 3 WEINSTEIN ¶ 609[01], at 609-47.

139. FED. R. EVID. 609 provides:

> **(a) General rule.** For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.
>
> **(b) Time limit.** Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

before reaching its final form, attempts to strike a balance between these two conflicting ends. It is a rather complex and detailed rule which imposes a number of conditions and standards on the use of prior convictions for impeachment purposes. The most important elements of rule 609 are found in subparagraphs (a) and (b). Briefly, the rule works something like this: evidence of a previous conviction can be introduced for the purpose of attacking the credibility of a witness if such evidence is elicited from the witness or established by public record *during cross-examination,* but the crime must (1) be "punishable by death or imprisonment in excess of one year . . . , and the court determines that the probative value of admitting this evidence will outweigh its prejudicial effect to the defendant," or (2) involve "dishonesty or false statement, regardless of the punishment."[140] Thus, a conviction for a crime that is punishable by less than a year[141] and which does not involve dishonesty or false statement is not (presumably because of its low probative value) usable for impeachment purposes. Introduction of evidence of conviction for a misdemeanor, then, depends on the trial judge's ascertainment of exactly which misdemeanors involve dishonesty or false statement.[142] In addition, rule 609(a) contemplates that a prior felony[143] conviction (not involving dishonesty or false state-

---

(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

140. FED. R. EVID. 609(a).

141. Note that the rule refers to punishment that *may* be imposed, not that which *is* imposed. FED. R. EVID. 609(a)(1).

142. *See generally* 3 WEINSTEIN ¶ 609[03], at 609-65 n.8.

143. A "felony" represents the congressional demarcation for offenses punishable by *more* than one year. *See* 28 U.S.C. § 1861 (1970).

ment) may not be used unless the court makes a determination[144] that the probative value of admitting this evidence outweighs its prejudicial effect on the defendant.[145] Prior felony convictions of a prosecution witness, however, can always be introduced for impeachment purposes, thereby avoiding potential right to confrontation problems.[146]

Subparagraph (b) of rule 609 also serves to strike a balance between protecting the innocent and punishing the guilty by generally imposing a time limitation on the admissibility of prior convictions. If more than ten years has elapsed from the date of conviction or the date of the witness' release, whichever is later, the conviction generally is not usable for impeachment purposes.[147] Evidence of a conviction outside of this ten-year rule may be admitted, however, if two conditions are met: (1) the proponent gives advance written notice of intent to use such evidence (to enable the adverse party to prepare to contest its use); and (2) the court determines, in light of the specific facts, circumstances, and nature of the evidence, that the probative value of the conviction substantially outweighs its prejudicial effect.

The remaining sections of rule 609 provide special limitations on the use of a prior conviction. Subparagraph (c) prohibits the introduction of a prior conviction that has been the subject of a pardon, annulment, certificate of rehabilitation or other equivalent procedure if such procedure was (1) based on innocence, or (2) required a showing of rehabilitation and the witness has not been subsequently convicted of a felony.[148]

Subparagraph (d) of rule 609 explicitly forbids the admission into evidence of a juvenile adjudication if the witness is the accused in a criminal case.[149] The rule does allow the court some

144. Note that the burden of going forward with the proof that the conviction may be used rests on the prosecution. 3 WEINSTEIN ¶ 609[03], at 609-67.

145. The language of rule 609 can be construed to include *defense* witnesses. For a thorough enumeration of the factors to be considered by a court in this determination, *see* 3 WEINSTEIN ¶ 609[03], at 609-68 to 80.

146. 3 WEINSTEIN ¶ 609[03], at 609-66. *See* 120 CONG. REC. 40893 (1974) (statement of Rep. Hungate explaining Conference Report version of rule 609).

147. Note the proposal by the South Carolina Trial Lawyers to add an exception where the person has been convicted more than once of a crime covered by the rule, *quoted in* 3 WEINSTEIN ¶ 609[03], at 609-70 n.23.

148. The burden is on the counsel for the party-witness to show that evidence of conviction is *not* admissible pursuant to rule 609(c). 3 WEINSTEIN ¶ 609[04], at 609-84. No relevant South Carolina cases on this matter have been found.

149. *See* Advisory Committee's Note to FED. R. EVID. 609, 56 F.R.D. 270-72 (1972).

discretion in admitting evidence of a prior juvenile adjudication if the witness is other than the defendant and if "the court is satisfied that admission into evidence is necessary for a fair determination of the issue of guilt or innocence."[150]

Subparagraph (e) follows the majority rule in federal courts by allowing the admission of a prior conviction even when an appeal is pending. The rule also permits evidence of the appeal's pendency to be introduced in mitigation of the conviction.[151]

Against this background, the law of South Carolina on this issue of admitting prior convictions for the purpose of impeachment has diverged into three areas. Beginning with the most modest divergence, South Carolina apparently does not impose any condition that the evidence of a prior conviction be introduced or presented only during cross-examination.[152] Rule 609(a), on the other hand, does require that a witness' credibility be impeached only on cross-examination either by eliciting an admission by the convicted witness himself or by establishing the public record of the conviction.[153] The South Carolina Supreme Court's decision in *State v. Van Williams,*[154] that evidence of a prior conviction may be admitted for the purpose of impeaching the witness' credibility at any stage in the trial and that its admission is not restricted to the reply or cross-examination, was based on the following reasoning:

> If appellant felt aggrieved by what he claims to be new matter brought into the case after he had closed his testimony, his remedy was to request the Court to permit him to offer additional evidence by way of rejoinder. If he had any testimony to offer in response to this alleged new matter and had requested

Congress added "criminal case" to make it clear that this cannot be used in a civil proceeding. 3 WEINSTEIN ¶ 609[05], at 609-86.

150. FED. R. EVID. 609(d). S.C. CODE ANN. § 15-1095.40 (1962) provides that the official records of the family court can only be inspected with the consent of the trial judge by "persons having a legitimate interest therein." No case in South Carolina has squarely decided, however, whether such records could be admitted in order to impeach a juvenile witness. *But see* Davis v. Alaska, 415 U.S. 308 (1974), wherein the United States Supreme Court held that the constitution—specifically the sixth amendment—guarantees a defendant the right to use a juvenile conviction in order to impeach a witness.

151. *See* 3 WEINSTEIN ¶ 609[06]. There is no corresponding law, judicial or statutory, in South Carolina.

152. *See* State v. Van Williams, 212 S.C. 110, 46 S.E.2d 665 (1948).

153. *See* FED. R. EVID. 901 & 1005 for authentication and proving contents of documents.

154. 212 S.C. 110, 46 S.E.2d 665 (1948).

> the Court to permit him to offer it, no doubt such permission would have been granted. . . .[155]

This procedure seems acceptable, although it is conceivable that introducing a record of prior convictions at a later stage in the trial, rather than during cross-examination, could have a greater psychological impact on the jury as independent corroboration of the accused's guilt as to *this* crime, rather than going merely to the accused's propensity for lying.

An additional complication might be presented by the supreme court's decision in *State v. Gregg*,[156] in which an accused was denied the opportunity to testify on redirect examination to certain mitigating details with respect to a prior conviction that was introduced by the prosecution in an effort to impeach the accused's credibility. The decision of the court in *Gregg*, strictly read, would apparently undermine the *Van Williams* decision since the accused in the latter case would not be allowed to go into the "details" of the former conviction in response to the prosecution's introduction of that fact at a later stage. Although the court's opinion in *Gregg* was far from clear, it appears to hold that the accused could not testify as to any details in mitigation with respect to the prior conviction because "[h]e had already been afforded opportunity to defend himself against that charge and his plea of guilty was conclusive."[157] The prohibition against introducing evidence of the "details" of the former crime, however, is directed more to the prosecution in an effort to minimize the amount of prejudice to the accused (as well as distraction from the issues) resulting from similarities between the past and present crime.[158] Moreover, what possible reason could there be for saying that the accused had ample opportunity to defend himself against the former charge and, therefore, has no need for explaining the circumstances of the prior conviction when confronted with that conviction at his present trial? Perhaps the most plausible explanation is that such a statement is "a logical consequence of the premise of conclusiveness of the judgment."[159] However, as Professor McCormick has stated, such a consequence "does not . . . satisfy our feeling that some reasonable outlet for

155. *Id.* at 112-13, 46 S.E.2d at 666.
156. 230 S.C. 222, 95 S.E.2d 255 (1956). *See generally* KALVEN & ZEISEL at 124-62.
157. 230 S.C. at 225, 95 S.E.2d at 257 (citation omitted).
158. *See* 3 WEINSTEIN ¶ 609[03], at 609-79.
159. MCCORMICK § 43, at 89.

the instinct of self-defense by one attacked should be conceded, if it can be done without too much damage to the business at hand."[160] Thus, a court should perhaps indulge in the "harmless charity"[161] of permitting a witness to make a brief and general statement in mitigation or explanation of guilt.[162] Under the federal rules, the scope of such a statement would be delimited by rule 403, which grants discretion to the trial judge to exclude evidence if its probative value is outweighed by considerations of undue delay, confusion or prejudice. Perhaps South Carolina trial judges should recognize and exercise a similar discretion.

A second area of divergence between South Carolina law and federal rule 609 involves the degree of remoteness of the prior conviction. In *Gantt v. Columbia Coca-Cola Bottling Co.*,[163] the supreme court held that in order for evidence of a prior conviction to be admitted for impeachment purposes, it "should not be too remote in time."[164] The *Gantt* opinion did not reveal just how remote the prior conviction was in that case; but in *State v. Van Williams*[165] the court permitted the use of a conviction for housebreaking that had occurred thirteen years earlier.

The preferred view is to limit the use of a prior conviction when it is so remote that its probative value is doubtful. Rule 609(b) expressly incorporates this condition. The justification for such a limitation was aptly explained by a federal court:

> The nearness or remoteness of the prior conviction is also a factor of no small importance. Even one involving fraud or stealing, for example, if it occurred long before and has been followed by a legally blameless life, should generally be excluded on the grounds of remoteness.[166]

The trial court, of course, would have the discretion to consider such factors as the mode of life of the witness since the conviction and the nature of the crime underlying the conviction in deciding whether a conviction before the ten year limitation should nevertheless be admitted. Perhaps, in the case of a prosecution witness

160. *Id.*

161. 4 WIGMORE § 1117, at 251.

162. *See* MCCORMICK § 43, at 89 n. 84.

163. 204 S.C. 374, 29 S.E.2d 488 (1944).

164. *Id.* at 379, 29 S.E.2d at 490.

165. 212 S.C. 110, 46 S.E.2d 665 (1948); *see* notes 154-55 and accompanying text *supra.*

166. *See* 3 WEINSTEIN ¶ 609[03], at 609-69.

for example, a remote conviction should be admitted to obviate any constitutional right to confrontation problem that might present itself.[167]

The third and final divergence between South Carolina law and federal rule 609 concerns the types of crimes that qualify for use in the impeachment process. As discussed previously,[168] the federal rule sets specific guidelines as to the types of crimes that may be used for impeachment, *i.e.*, felony convictions whether or not they involved dishonesty or false statement where the court explicitly finds that the probative value of admitting such evidence outweighs its prejudicial effect to the defendant, and convictions for misdemeanors involving dishonesty or false statement. The relevant South Carolina cases, however, are extremely flexible in delimiting the types of crimes that may be used.[169]

In *State v. Chasteen*[170] the supreme court, in holding that evidence of an accused's prior conviction for sexual assault was admissible for impeachment of his credibility as a witness, concluded that prior crimes which involve the element of "moral delinquency" are relevant and admissible. Similarly, the court had stated in *Gantt* that cross-examination with respect to prior convictions "should be restricted to crimes involving . . . the element of moral delinquency."[171] The accused in *Gantt* had been convicted of violating a federal tax statute that required proof of an intent to defraud as an essential element thereof. Thus, the court felt that the accused's guilty plea to the charge involved the element of moral delinquency, and therefore, evidence of the conviction was admissable for impeachment.

The federal approach embodied in rule 609 is a partial step towards defining the exact nature of admissable prior convictions

167. *Id.* at 609-70; *see* text accompanying note 146 *supra.*

168. *See* text accompanying note 140 *supra.*

169. *See, e.g.*, Gantt v. Columbia Coca-Cola Bottling Co., 204 S.C. 374, 29 S.E.2d 488 (1944); State v. Bing, 115 S.C. 506, 106 S.E. 573 (1919); State v. Wyse, 33 S.C. 582, 12 S.E. 556 (1890). *See also* DREHER at 18.

170. 231 S.C. 141, 97 S.E.2d 517 (1957). The *Chasteen* court gave itself wide leeway in delimiting the type of past conduct that is admissible with the following nonrule verbiage:

> [T]here can be laid down no fixed rule as to what is admissible on cross-examination with respect to the past conduct of a defendant who takes the stand as a witness. That is admissible which fairly tends to affect his credibility as a witness; that which does not is incompetent and may be prejudicial.

Id. at 145, 97 S.E.2d at 519.

171. 204 S.C. at 379, 29 S.E.2d at 489-90.

in order to insure greater relevancy and probative value. The spirit of rule 609 is to provide certain basic safeguards applicable to all witnesses and especially to an accused who elects to testify.[172] The advantage of the federal approach over South Carolina's "moral delinquency" standard is the increased focus on crimes involving dishonesty or false statement. The moral delinquency test seems to assume that because a man is convicted of assault or manslaughter it is also likely that he will lie when on the witness stand. The federal rule, ostensibly cognizant of the fallacy in that reasoning,[173] directs the trial judge to admit only those types of crimes—such as perjury, subordination of perjury, barratry, suppression of evidence, or embezzlement—that clearly involve elements of dishonesty and false statement.[174] Because of the very real danger of prejudice to an accused that exists when evidence of a prior conviction is used for impeachment purposes South Carolina courts should develop a more defined standard[175] for the type of crime that is most relevant and probatively valuable to the issue of credibility.

E. Scope of Cross-Examination

Subdivision (b) of federal rule 611[176] represents the traditional approach of the federal courts (and most of the states) in restricting the scope of cross-examination to those matters brought out during the direct examination, or to facts that tend to discredit the witness. The justifications advanced by Congress for rejecting the wide-open rule of cross-examination (the view preferred by the Advisory Committee) and instead adopting the restrictive rule were basically threefold: (1) restricting the scope of cross-examination to the subject matter of the direct examination will facilitate the orderly presentation of a case by each party at the trial; (2) the expanded scope of modern discovery procedures makes the need for abandoning the traditional restrictive

172. *See, e.g.*, FED. R. EVID. 609(a)(1).

173. *See* 3 WEINSTEIN ¶ 609[02], at 609-57 for criticism of this argument.

174. *Id.* at ¶ 609[03], at 609-64.

175. *Id.* at 609-60 to -62 (listing four different approaches to the determination of what types of crimes should be admitted).

176. FED. R. EVID. 611(b) provides:

> Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

rule less compelling; and (3) the trial judge, under rule 611(b), will have the discretion to permit inquiry into additional matters as the need arises.

South Carolina is among a minority of states that adhere to the orthodox or "open door" rule of cross-examination.[177] In line with this approach, the permissible scope of cross-examination extends to any issue relevant to the case and is not confined to those matters pursued on direct. Any matters affecting the credibility of the witness, of course, are also within the scope of permissible cross-examination. Accordingly, limitations on the scope of cross-examination emanate solely from the trial judge's discretion to proscribe questioning with respect to matters, for example, whose probative value is outweighed by its prejudicial impact, or as to matters that threaten to confuse the issues, waste time, harass the witness, or, in certain instances, conflict with the constitutional privilege against self-incrimination.[178]

Most leading legal authorities support the orthodox rule allowing cross-examination with respect to any relevant matter, incuding matters that can be said to relate strictly to the cross-examiner's case.[179] This rule does indeed have much to commend it, not the least of which is its clear superiority in maximizing the amount of relevant evidence that gets to the jury.[180] Moreover, the

177. *See,* Hanson v. General Insulation & Acoustics, 234 S.C. 177, 107 S.E.2d 41 (1959); Carmichael v. Carmichael, 110 S.C. 357, 364, 96 S.E. 526, 528 (1918) ("The rule in this State is that a party has the right to cross-examine the witnesses of the adverse party on any subject pertinent to the issue."); Bunch v. Charleston & W.C. Ry., 91 S.C. 139, 74 S.E. 363 (1912); State v. McGree, 55 S.C. 247, 33 S.E. 358 (1898) (same rule applies to a criminal accused who takes the stand); Sims v. Jones, 43 S.C. 91, 20 S.E. 205 (1895); Kairson v. Puckhaber, 14 S.C. 626 (1880); Mathews v. Heyward, 2 S.C. 239, 247 (1870); Clinton v. McKenzie, 36 S.C.L. (5 Strob.) 41 (1850); Poole v. Mitchell, 19 S.C.L. (1 Hill) 404 (1833); Browning v. Huff, 18 S.C.L. (2 Bail.) 174, 178 (1831).

178. *See* 3 WEINSTEIN ¶ 611[03] & [04]. The outer limits with respect to an accused in a criminal case may be set by constitutional doctrine as to the extent to which an accused waives his privilege of self-incrimination by taking the stand and testifying. Carlson, *Cross-examination of the Accused,* 52 CORNELL L.Q. 705 (1967).

The two major approaches to setting these outer limits may be stated as follows: (1) Professors Wigmore and McCormick believe that a defendant who takes the stand waives his privilege as to every relevant fact except facts merely affecting credibility (*cf.* FED. R. EVID. 608); (2) Professor Carlson, on the other hand, contends that if there is a good reason why a defendant should not be compelled to be a witness against himself, there is an equally good reason why he should not be compelled to testify against his will respecting matters untouched by his direct testimony.

179. *See, e.g.,* MCCORMICK § 27; MOORE, FEDERAL PRACTICE ¶ 43.10 (2d ed. 1964); MORGAN, BASIC-PROBLEMS OF EVIDENCE 65-67 (1962); WIGMORE §§ 1885-1890.

180. For a consideration of the contrary effect by the restrictive approach, see MCCORMICK § 23, at 49-51.

orthodox rule avoids the fractious controversy arising under the restrictive rule that frequently embroils the trial and appellate courts in the question of whether or not the "scope of the direct" has been exceeded by a particular line of cross-examination.[181] In fact, the Advisory Committee to the federal rules, after reviewing many of the justifications traditionally offered in favor of the restrictive rule,[182] came to the conclusion that the balance in favor of the orthodox rule was significantly enhanced by the considerations of judicial economy in time and energy.[183]

The question that one must surely ask, then, is why Congress, in the face of so much commentary critical of the restrictive rule, decided to retain that very rule in 611(b). Perhaps one explanation is that the restrictive rule

> represents an approach to litigation which was formerly in vogue and has not yet fallen completely into disrepute, an approach which viewed litigation as a game between the parties which could only be won by strict adherence to the rules regardless of whether the rules promoted the ascertainment of truth.[184]

If the purpose of a system of evidentiary rules is the pursuit of truth via maximizing the availability of relevant evidence, the open door policy of the orthodox rule is clearly preferable.

---

181. The rule limiting cross-examination to the precise subject of the direct examination is probably the most frequent rule (except the opinion rule) leading in trial practice today to refined and technical quibbles which obstruct the progress of the trial, confuse the jury, and give rise to appeal on technical grounds only.
63 ABA Reports 587 (1938); *accord,* Report of Committe of S.C. Chapter College of Trial Lawyers 7 (1970).

182. The arguments in favor of the restrictive rule are as follows:
(1) the party vouches for his own witness only to extent of the subject matter he elicits on direct;
(2) unlimited cross-examination will enable a party to make out his case by leading questions;
(3) limited cross-examination promotes continuity and order by keeping the opponent from interrupting the proponent and confusing the jury until the proponent has finished with his presentation of the case.
4 JONES, EVIDENCE § 908, at 1700 (5th ed. 1958).

Each of these arguments is easily dispelled. As to (1), federal rule 607, which abrogates the prohibition on impeaching one's own witness, renders this criticism moot. In addition, while the concept of vouching had some medieval significance, it has no bearing on our system of free evaluation of credibility and probative force. Argument (2) is rendered moot by federal rule 611(c). As to argument (3), one must wonder by what reasoning should the direct examiner be entitled, in all fairness, to the "psychological advantage of presenting the facts in this falsely simple and one-sided way?" MCCORMICK §27, at 31.

183. Advisory Committee's Note to FED. R. EVID. 611, 56 F.R.D. 273-76 (1972).

184. 3 WEINSTEIN ¶ 611[02], at 611-29.

F. Prior Statements of Witnesses

Federal rule 613[185] provides the foundational prerequisites for the introduction of prior inconsistent statements, whether oral or written.[186] It represents an effort to strike a balance between two competing theories: one holding that unlimited cross-examination is the best method for exposing false statements; and the other preferring to bring the circumstances of a prior statement to the attention of the witness to refresh his or her recollection of its making and thereby to insure the higher probative value of the testimony before the jury.[187] The latter approach is the orthodox rule and is the rule in a majority of American jurisdictions, including South Carolina.[188]

Rule 613 has made certain fundamental changes in the foundational requirements that prevail under the orthodox rule; basically, it gives greater weight to the element of surprise "as a technique for ferreting out the truth."[189] The orthodox rule, accepting the theory that forewarning a witness of the circumstances of a prior statement before cross-examination will increase the accuracy of his testimony, is composed of two elements: (1) the idea that the proponent of a prior inconsistent statement must produce the contents of such a statement before questioning the witness with respect to any conflict with his present testimony, and (2) the idea that the proponent must ask the witness "*in advance*—i.e., on cross-examination and before any other testi-

185. FED. R. EVID. 613 provides:

(a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

186. Under the principle of *expressio unius,* federal rule 613 does not apply to impeachment by evidence of prior inconsistent conduct; nor does rule 613 restrict defendant's rights under rule 26(b)(3) of the Federal Rules of Civil Procedure (allowing discovery of documents and tangible things) or defendant's rights under Federal Rule of Evidence 612 (allowing examination of writing used to refresh witness' memory).

187. The second theory has the collateral advantage of saving time when the witness simply admits making the prior statement. 3 WEINSTEIN ¶ 613[01], at 613-18.

188. 3 WEINSTEIN ¶ 613[01], at 613-18.

189. *Id.* at 613-19.

mony to the prior self-contradiction is offered—whether he made the contradictory statement which it is designed to prove"[190] and give the specific context in which the statement was made. Thus, under the orthodox rule, before a prior inconsistent statement could be proved against a witness, the proponent must ask the witness about the statement during cross-examination and lay the proper foundation for such proof by informing the witness of "when, where, and to whom" he was supposed to have made the statement. In *Elliott v. Black River Electric Co-op,*[191] the South Carolina Supreme Court stated that

> the purpose of the preliminary questioning (i.e., laying the foundation) of the witness is to adequately apprise him of the particular circumstances on which and the occasion on which it is claimed that he made the former statement, so that he may be prepared to disprove it or explain it away.[192]

As a natural corollary to this rule, the supreme court has also held that if the witness admits making the previous statement, then no further evidence thereof may be received, and the witness must be allowed, if he so chooses, to explain the seeming conflict.[193]

Federal rule 613 unqualifiedly rejects the first element of the orthodox rule as giving too much advantage to the dishonest witness. Thus in federal courts the cross-examiner need not produce the contents of the prior inconsistent statement before question-

190. 3 WIGMORE § 1019, at 691. *See also* State v. Galloway, 263 S.C. 585, 211 S.E.2d 885 (1975) (it is not required that the witness be notified of the cross-examiner's intent to contradict).

191. 233 S.C. 233, 104 S.E.2d 357 (1958).

192. 233 S.C. at 261, 104 S.E.2d at 372.

193. McMillan v. Ridges, 229 S.C. 76, 91 S.E.2d 883 (1956). Furthermore, in State v. Bottoms, 260 S.C. 187, 194, 195 S.E.2d 116, 118 (1973), the supreme court affirmed the rule that "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."

It would seem that this salutary rule could be further relaxed such that the court could give such a "contemporaneous" limiting instruction *sua sponte. cf.* FED. R. EVID. 105. In State v. Galloway, 263 S.C. 585, 211 S.E.2d 885 (1975), the South Carolina Supreme Court took time out to explore the "rather prevalent trial superstition" that before a prior inconsistent statement can be introduced in order to impeach the witness the cross-examining party must *expressly notify* the witness that the cross-examiner is prepared to contradict his statement if he denies making the statement. The court summarily dispensed with this contention, noting that the general law and the law of South Carolina is that notice as to substance, time, place and person is sufficient foundation for contradicting testimony. *Id.* at 591, 211 S.E.2d at 888.

ing the witness with respect to any conflict with his present testimony.[194] However, rule 613 does seek to promote the accuracy of testimony by providing under subdivision (a) for disclosure of the prior statement's contents to the opposing counsel in order to give assurance of the cross-examiner's good faith and to protect the witness from being misled or unfairly discredited by unwarranted insinuations about the statement.

Subdivision (b) of rule 613 preserves the foundation element of the orthodox rule but with certain modifications that noticeably diverge from the usual practice in most states, including South Carolina. Basically, rule 613(b) relaxes the requirement, often inflexibily applied, that the witness' attention be directed to the statement on cross-examination (by enumerating the circumstances of its making). All that rule 613(b) demands is that the witness be given an opportunity to explain and the opposing party an opportunity to examine the statement. It does not, however, specify any particular time sequence for such explanation or examination. This procedure diverges from that required by the orthodox rule by enabling counsel to "surprise" the witness with the prior statement in the hopes of either eliciting an admission or discrediting his testimony in the eyes of the jury. This procedure will have the advantage over the orthodox rule when a dishonest witness is involved.[195]

Perhaps the most important part of rule 613(b), however, is the phrase "or the interests of justice require otherwise," which is a special provision granting discretion to the court to dispense with the witness' right to explain or deny.[196] Such a situation

194. Advisory Committee Note to FED. R. EVID. 613, 56 F.R.D. 183, 273-74 (1972), states in part:

> Rule 613 abolishes the requirement—first espoused in The Queen's Case, 2 Br. & B. 284, 129 Eng. Rep. 976 (1820)—that a cross-examiner, before he can question a witness about his own prior statement in writing, must first adduce the writing and present it for inspection by the witness to be cross-examined. McCormick at § 28 criticizes the rule as a misconception of the notion that required the production of the original document *when its contents are sought to be proved.* It is a misconception because (1) the cross-examiner is not seeking, at this stage, to *prove* the contents of the writing by the witness' answers and (2) the original document rule requires that production of the document as proof of its contents to the judge and the jury, *not* to the witness.

195. The Advisory Committee's note admits that "under this procedure, several collusive witnesses can be examined before disclosure of a joint prior inconsistent statement." *Id.*

196. *See* 3 WEINSTEIN ¶ 613[04], at 613-23; Advisory Committee Note to FED. R. EVID. 613, 56 F.R.D. 278 (1972).

might arise if the prior statement was not discovered by counsel until after the witness had testified and, through no error of counsel, is not available for reexamination. Outside of this situation, however, the court's discretion under rule 613(b) to waive the witness' right to explain or deny should seldom need to be exercised.[197]

In addition, it is interesting to note that the federal rule does not seem to require the proponent of the inconsistent statement to afford the witness an opportunity to explain the inconsistency once he has testified, left the stand, and since become unavailable. The rule merely provides that the witness must have an opportunity. Apparently neither side has the burden of recalling the witness who has left the stand to provide that opportunity, and it is almost certain that the impeaching party will not wish to do so. By informing the court and opposing counsel that he intends to introduce an inconsistent statement, the proponent would apparently satisfy the rule and thereby avoid any problems since the opposing counsel could insure the subsequent availability of the witness if there was a need for explanation.[198]

Both the federal rule and the orthodox rule find support among the legal commentators. To prefer one approach over the other would be precisely that, a preference. Wigmore strongly believed in unlimited cross-examination as the most reasonable and successful method for the discovery of lies. The federal rule apparently leans more in this direction and away from the orthodox rule. Adherents of the orthodox rule, however, do not seek to impose limits on the discovery of lies but rather to protect "the honest but forgetful witness who may be startled or lulled into giving inaccurate testimony and therefore made to appear more discreditable than he really is . . . ."[199] As the middle ground

197. The practicality of recalling the witness, the significance of the issue to which the statement relates, the consequences of not allowing the statement to be used, the efficacy of an instruction if the jury has been made aware of the statement, and all the other factors present must be weighed by the judge in determining whether he will excuse compliance with the requirements of Rule 613(b). In order to prevent counsel from introducing the statement when he has no intention of meeting the foundational requirements, in the hopes of coming within "the interest of justice" clause, the trial court should require him to state, at the time he makes the offer, what his procedure will be if the witness subsequently denies or explains and whether he has any reason to believe the witness will deny or explain.

3 WEINSTEIN ¶ 613[04], at 613-24 (footnote omitted).

198. *Id.* at 613-24 to -25.

199. *Id.* ¶ 613[02], at 613-7 to -8.

between these two opposing views, incorporating the best aspects of each, lies perhaps a subtle but powerful reason for preferring the approach offered in federal rule 613.

G. *Exclusion of Witnesses*

Federal rule 615[200] represents the triumph of the position, vigorously championed by Wigmore, that the exclusion of a witness is a matter demandable by a litigant as of right.[201] Prior to the enactment of rule 615, federal courts had treated exclusion as a matter lying wholly within the trial judge's discretion.[202] According to this practice, followed in South Carolina, a party desiring exclusion or sequestration of a witness had the burden of convincing the court to exercise its discretion and exclude the witness.

In *State v.Sharpe*[203] the South Carolina Supreme Court reaffirmed the principle that the granting or refusing of a motion for separation or sequestration of witnesses lies within the sound discretion of the trial judge. Similarly, in *State v. Homewood*[204] the court noted that the matter of exclusion is not a demandable right of the litigants but is a power residing wholly in the discretion of the judge. In order to move the court to exercise its power to exclude, therefore, the litigant must make a motion particularizing the circumstance or circumstances which justify the exercise of the power.[205]

---

200. FED. R. EVID. 615 provides:

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his case.

201. This exclusionary power is designed to discourage and expose fabrication, inaccuracy and collusion. 3 WEINSTEIN ¶ 613[01], at 615-4.

202. *See, e.g.*, Holder v. United States, 150 U.S. 91 (1893); Taylor v. United States, 388 F.2d 786 (9th Cir. 1967).

203. 239 S.C. 258, 122 S.E.2d 622 (1961).

204. 241 S.C. 231, 128 S.E.2d 98 (1962).

205. State v. Williams, 226 S.C. 525, 85 S.E.2d 863 (1955); State v. Fuller, 227 S.C. 138, 87 S.E.2d 287 (1955). *See also* State v. Taylor, 261 S.C. 437, 200 S.E.2d 387 (1973); State v. Britt, 235 S.C. 395, 111 S.E.2d 669 (1959). In *Taylor*, the court considered the question of whether a defendant may confer with sequestered witnesses. Answering in the affirmative, the court noted, however, that in affording the accused an opportunity for conferring with his witnesses it may be necessary to take "reasonable precaution to see that the purpose of the rule of sequestration is not defeated. . . . [R]equiring the pres-

Obviously, the new federal rule adopts a position that is directly contrary to the practice followed in South Carolina. Rule 615 provides that a motion for exclusion is a matter demandable by a litigant as of right. However, the rule provides two classes of witnesses who may *not* be excluded: (1) a party who is a natural person, and (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney. The reason for providing the nonexcludability of category (1) is to obviate confrontation and due process problems, while category (2) was included in accordance with the existing practice, *e.g.*, courts routinely allow agents in charge of criminal investigations to remain and advise the prosecution during the course of a trial.[206]

It is important to note that rule 615, while making the matter of exclusion a demandable right, does not eliminate the discretion of the trial judge that existed under the practice that was traditionally followed in federal courts. Instead, rule 615 has caused a shift in the burden of proof. Now, exclusion will be granted as a matter of right unless the *party opposing such a motion* can convince the court to exercise its discretion to except a particular witness from its order.[207] The trial judge still has the discretion to either exclude a witness from the separation order or to invoke the separation rule *sua sponte*. The rule seems to assume, however, that the judge should exercise the discretion to refuse an order of exclusion only in cases where the motion was requested

---

ence of defense counsel, who is himself an officer of the court, should be adequate precaution to preserve the purpose of the rule." 261 S.C. at 443, 200 S.E.2d at 389.

In *Britt*, the court cited with approval 23 C.J.S. *Criminal Law* § 1011, at 381:

> The trial court has authority to exempt particular witnesses from the operation of the rule or order for exclusion or sequestration. The question as to what witnesses may be exempted is largely a matter within the discretion of the court, and, even after the granting of the rule or order excluding or sequestering the witnesses, it is within the discretion of the trial court to permit some of them to remain in the court room and afterward to testify if the circumstances require it. Accordingly it is within the sound discretion of the court to permit a limited number of witnesses to remain for the purpose of assisting the prosecution or accused. The discretion of the court with regard to exemptions or exceptions is not, however, an arbitrary one.

The court went on to hold that it was not error for the trial court to refuse to sequester four police officers who remained in the court room and assisted the prosecutor. 235 S.C. at 409-10, 111 S.E.2d at 676 (1959).

206. *See* 3 WEINSTEIN ¶ 615[01], at 615-7.

207. Of course, the witness cannot be excluded if within either of the two nonexcludable categories provided by the rule. FED. R. EVID. 615.

in bad faith.[208] Thus, the federal rule, in making the matter of exclusion a demandable right, has shifted the responsibility of proving that a witness is essential to the party opposing the exclusion order.[209]

The superiority of the approach taken in federal rule 615 over the procedure followed in South Carolina, and many other states, is forcefully illustrated by Wigmore's exhortation which follows:

> [Sequestration] seems properly to be demandable as of right, precisely as is cross-examination. In the first place, it is simple and feasible. In the next place, it is so powerful and practical a weapon of defense that no contingency can justify its denial as being a mere formality or empty sentimentality. In the third place, in the case when it is most useful (namely, a combination to perjure) it is almost the only hope of an innocent opponent. After all is said and done, the fact remains . . . that successful perjury is always a possible feature of human justice. No rule, therefore, should ever be laid down which will by possibility deprive an opponent of the chance of exposing perjury. Finally, *it cannot be left with the judge to say whether the resort to this expedient is needed;* not even that it will do him service; he can merely hope for its success. He must be allowed to have the benefit of the chance if he thinks that there is such a chance. *To require him to show some probable need to the judge, and to leave to the latter the estimation of the need, is to misunderstand the whole virtue of the expedient, and to deny it in perhaps that very situation of forlorn hope and desperate extreme when it is most valuable and most demandable.*[210]

IV. OPINIONS AND EXPERT TESTIMONY[211]

A. *Bases of Opinion Testimony by Experts*

Rule 703[212] provides three permissible bases for expert opin-

208. For example, a refusal might be warranted if the motion was not made in the honest hope of exposing false testimony, but merely to obstruct the trial or embarrass the opponent's management of the case. 6 WIGMORE § 1839, at 468.

209. Federal rule 613 is deficient in certain minor conditions: (1) it is silent as to what instructions the court may give witnesses when excluded; (2) it is silent as to the consequences of noncompliance with an order for exclusion (*e.g.*, contempt citation; permitting comment on the witness' noncompliance so as to reflect on his credibility; refusing witness' testimony or striking his testimony), and (3) it is silent as to *when* the demand for exclusion must be made ("It need not be demanded at the very opening of the testimony, at any time later, when the supposed exigency arises, the order may be requested." 6 WIGMORE § 1840, at 472).

210. 6 WIGMORE § 1839, at 467 (emphasis added).

211. Federal rules 701, 702, and 703 are not discussed in the text. Rule 701 abandons

the orthodox rule of excluding lay opinion testimony in favor of a discretionary rule of admission where the witness' opinion is rationally based upon his observations. Despite a recognition that opinion evidence is necessary in certain instances, the rule leans toward a factual account insofar as it is feasible. 3 WEINSTEIN ¶ 701[02]. South Carolina is apparently in agreement with the substance of rule 701 although the breadth of that rule is somewhat greater than South Carolina law.

As noted above, rule 701 places two limitations on the admissibility of lay opinions. The first requirement, that the opinion be based upon the firsthand knowledge or observation of the witness, is apparently adhered to in South Carolina. *See,* Lynch v. Pee Dee Express, 204 S.C. 537, 30 S.E.2d 449 (1944); Rouss v. King, 74 S.C. 251, 54 S.E. 615 (1906); DREHER at 7. As noted in *Rouss,* care must be taken to avoid confusing the personal observation requirement with the hearsay rule. The former requires personal observation and therefore rejects the receipt in evidence of the witness' impressions based on another's information. The hearsay rule would exclude the utterances of third party communication when offered to prove the truth of the matter asserted. *See* 2 WIGMORE § 657, at 766-67.

The second limitation of rule 701—that the opinion be helpful to the trier of fact—has apparently been adopted by a recent South Carolina decision, State v. McClinton, 265 S.C. 171, 217 S.E.2d 584 (1975). Prior to *McClinton* a witness could express an opinion only when the facts could not be so clearly described that the jury could draw its own conclusion from them. Green v. Sparks, 232 S.C. 414, 102 S.E.2d 435 (1958). This inability to convey the necessary facts to the jury, to allow the jury to arrive at its own conclusion was alleviated by the so-called "shorthand rendition" rule. This "exception" to the rule against allowing opinion evidence has been used by the courts of this state to allow a witness to give an opinion when the facts could not be given to the jury in any other comprehensible way. State v. Cain, 246 S.C. 536, 144 S.E.2d 905 (1965) (person's mental condition); State v. Ramey, 221 S.C. 10, 68 S.E.2d 634 (1952) (intoxication); Nelson v. Charleston W.C. Ry., 92 S.C. 151, 121 S.E. 198 (1912) (speed of train as "too fast").

McClinton, however, rejected the standard of admissibility laid down by the earlier cases and set down a "helpfulness" standard, stating that the "opinions of laymen should be rejected only when they are superfluous in the sense that they will be of no value to the jury." 265 S.C. 171, 176-77, 217 S.E.2d 586. As noted by one commentator, "the helpfulness test goes further than allowing inferences and opinions to be expressed only when they are inextricably intertwined with the underlying observations [because it] authorizes the trial judge to permit the witness to express an opinion when a statement of the underlying facts would be a waste of time." 3 WEINSTEIN ¶ 701[02], at 701-13 to -14.

Although the South Carolina rule on lay opinions correctly prefers the concrete, factual descriptions over abstract opinion evidence, the adoption of a rule paralleling rule 701 would tend to eliminate the time-wasting quibbling over trivial objections on the ground of "opinion," which can still be found in the trial courts of this state, and would in its stead admit a broader spectrum of evidence aimed at helping the trier of fact. The emphasis should not be on how the witness is expressing himself but rather on what he knows. Constant interruptions by counsel impair the witness' ability to express himself as well as the jury's ability to properly evaluate his testimony. *See, e.g.,* Central R.R. v. Monahan, 11 F.2d 212 (2d Cir. 1926).

Rule 702 is a codification of preexisting federal law, allowing expert testimony if (1) it will assist the trier of fact, that is, if specialized knowledge is helpful here, and (2) the witness possesses that knowledge. South Carolina follows these requirements. *See* Huggins v. Broom, 189 S.C. 15, 199 S.E. 903 (1939). Under South Carolina law, whether or not both elements have been met is a determination within the discretion of the trial judge. Redman v. Ford Motor Co., 253 S.C. 266, 170 S.E.2d 207 (1969); Jenkins v. Long Motor Lines, 233 S.C. 87, 103 S.E.2d 523 (1958).

The federal rules make provision for court-appointed experts in rule 706. The inherent power of a federal judge to appoint his own expert witness existed before rule 706. 3 WEINSTEIN ¶ 706[01]. In South Carolina there is apparently no express statute or rule

ion. The facts or data underlying an expert's opinion may come from (1) firsthand observation, (2) presentation at trial, or (3) presentation to the expert out of court and other than by his own perception. The first two bases of expert testimony under rule 703, personal observations and conclusions drawn from a hypothetical question, are the only allowable bases of expert testimony in South Carolina.[213] The second sentence of rule 703, however, provides that an expert may base his opinion upon nonadmissible data if it is of the kind that an expert would reasonably rely upon in reaching conclusions in his specialized field.[214]

---

giving the court power to appoint expert witnesses. However, the court has exercised its common law right to call witnesses on at least one occasion. In Elletson v. Dixie Home Stores, 231 S.C. 565, 99 S.E.2d 384 (1957), the supreme court affirmed the trial judge's calling of a witness on its own motion remarking that "it is a matter within the discretion of the trial Judge." *Id.* at 576, 99 S.E.2d at 388. The only case raising the issue of court-appointed experts in South Carolina is an old one which is easily distinguishable. In State v. Pacific Guano Co., 26 S.C. 610, 2 S.E. 265 (1887), the supreme court held that the trial court was in error in submitting some abstracts used at trial to an accountant for *ex parte* verification after the trial judge had left the circuit. The court's concern centered on the fact that the trial court's action was *ex parte* and that the statements of the accountant were unsworn.

The basis of federal rule 706 is the belief that the court's expert will be less partisan than would be the party-controlled expert. Among the stated benefits of such a system are the encouragement of the pretrial disposition of cases, a decrease in party litigational expenses, the alleviation of court congestion and the improvement of relationships between the legal profession and other professions. 3 WEINSTEIN ¶ 706[01]. The most frequent objections to court-summoned experts are:

> 1. The expert deprives the parties of their constitutional right to trial by jury . . . .
>
> 2. Court appointment of experts substitutes an inquisitory approach for the traditional adversary system in which the responsibility for developing facts lies with the parties. . . .
>
> 3. If there is more than one school of thought about the subject of the expert testimony, or the subject involves theoretical approaches as well as factual material, it is impossible to obtain a neutral expert. . . .
>
> 4. A court-appointed expert — especially if the funds for compensation are limited — may do "a kind of routine job" instead of the job in depth that a party's expert would produce.

Id. at 706-9 to -11.

212. FED. R. EVID. 703 provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

213. Bailey v. MacDougall, 251 S.C. 290, 162 S.E.2d 177 (1968); State v. King, 158 S.C. 251, 155 S.E. 409 (1930); Easler v. Southern Ry., 59 S.C. 311, 37 S.E. 938 (1901).

214. The Committee of New York Trial Lawyers felt that it would be too difficult to distinguish between data that could be reasonably relied upon and data that could not

Thus, the rule "recognizes that there may be data which has not yet reached the degree of trustworthiness required by the hearsay rule entitling it to consideration by the jury which nevertheless is sufficiently reliable for an expert to assess."[215] South Carolina does not recognize this basis of expert testimony.[216]

This broadening of the basis for expert opinion by the federal rules is designed "to bring the judicial practice in line with the practice of the experts themselves when not in court."[217] The rejection of testimony by the expert simply because he testifies to facts which are known to him only upon the authority of others either directly or via professional works would be in total disregard of the reality of ordinary scientific inquiry and would be, in Professor Wigmore's terms, "to insist on financial and impossible standards."[218] As noted by one writer, to bar an expert from premising his opinion on the opinion of another expert would be the adoption of a

> wholly unscientific approach, since in all scientific inquiry generally one expert constantly premises an opinion on those of fellow technicians in related or cognate fields of science; and . . . the effect of such a restrictive rule will be to deprive the trier of the fact of the full benefit of the witness' expertise.[219]

The relaxation of the hearsay bases of expert opinion is not a new phenomenon. Many federal and state courts have allowed hearsay bases where expert medical testimony is involved.[220] The rationale behind this particular relaxation has been that hearsay facts must frequently be relied upon and the use to which these facts are put guarantees their reliability.[221] The trustworthiness of these facts led to the hearsay exception found in rule 803(4).[222]

---

be reasonably relied upon. Project of a Committee of New York Trial Lawyers, Recommendation and Study Relating to the Advisory Committee's Preliminary Draft of the Proposed Federal Rules of Evidence 204 (June 1, 1970), *discussed in* 3 WEINSTEIN 703[01], at 703-5. Despite these problems, judges frequently exercise their discretion in other areas of the law of evidence and it is not unreasonable to assume that they could do so here without great difficulty.

215. 3 WEINSTEIN ¶ 703[01], at 703-4.

216. *See* Glenn v. Duncan Mills, 242 S.C. 535, 131 S.E.2d 696 (1963).

217. Advisory Committee's Note to FED. R. EVID. 703, 56 F.R.D. 282, 283.

218. 2 WIGMORE § 666, at 784.

219. Tyree, *The Opinion Rule*, 10 RUTGERS L. REV. 601, 611 (1956), *quoted in* 3 WEINSTEIN ¶ 703[01], at 703-6.

220. 3 WIGMORE § 688, at 803.

221. 3 WEINSTEIN ¶ 703[02], at 703-10.

222. *See* text accompanying notes 291-95 *infra*.

Thus, in *Gentry v. Watkins-Carolina Trucking Co.*[223] the South Carolina Supreme Court affirmed the trial court's ruling which allowed a physician to testify concerning his patient's statements of his present condition and past symptoms since this is "information upon which he has relied in reaching his professional opinions."[224] The court's reasoning was sound. As Professor Wigmore noted,

> Medical science is a mass of transmitted and collated data from numerous quarters; the generalizations which are the result of one man's personal observation exclusively are the least acceptable of all. The law must recognize the methods of medical science. It cannot stultify itself by establishing, for judicial inquiries, a rule never considered necessary by the medical profession itself. It is enough for a physician, testifying to a medical fact, that he is by training and occupation a physician; whether his source of information for that particular fact is in part or entirety the hearsay of his fellow-practictioners and investigators is immaterial . . . .[225]

There is no logical reason why, given the reliability which shows trustworthiness, any expert's opinion based on hearsay information should not be admitted if it is of the type ordinarily relied upon by an expert in his particular field. Indeed, rare is the case where expert opinion would not embody hearsay indirectly.[226] South Carolina should recognize the element of trustworthiness present in expert opinion which is based on the data of the type reasonably relied upon by experts in forming opinions upon the

223. 249 S.C. 316, 154 S.E.2d 112 (1967).

224. *Id.* at 324, 154 S.E.2d at 117.

225. 3 WIGMORE § 687, at 3.

226. In United States v. Williams, 424 F.2d 344 (5th Cir. 1970), *petition for rehearing denied,* 431 F.2d 1168 (1970), *aff'd en banc,* 447 F.2d 1285 (1971), *cert. denied,* 405 U.S. 954, *rehearing denied,* 405 U.S. 1048 (1972), the Fifth Circuit, *en banc,* explained the rationale of rule 703 and noted that an expert's opinion is almost always grounded on hearsay basis:

> The rationale for this exception to the rule against hearsay is that the expert, because of his professional knowledge and ability, is competent to judge for himself the reliability of the records and statements on which he bases his expert opinion. Moreover, the opinion of expert witnesses must invariably rest, at least in part, upon sources that can never be proven in court. An expert's opinion is derived not only from records and data, but from education and from a lifetime of experience.

447 F.2d 1285, 1290 (5th Cir. 1971) (emphasis added).

Quite obviously this reasoning is equally applicable to experts other than physicians.

subject in their particular field of competence and should allow expert testimony when based on this type of information.

B. Opinion on Ultimate Issue

"The basic approach to opinions, lay and expert, in these rules is to admit them when helpful to the trier of fact."[227] Thus, the Advisory Committee noted, the "ultimate issue" rule should be and is abolished by rule 704.[228] This decision is in line with the majority of the recent model acts and codifications.[229] South Carolina has never specifically rejected this rule although the trend in recent decisions has been to lessen its effect.

In its most recent pronouncement on this issue, *Redman v. Ford Motor Company, Inc.*,[230] the South Carolina Supreme Court rejected the defendant's arguments that the response of an expert witness to a hypothetical question was a "conclusion on the very issue before the jury and thus . . . [an invasion of] the jury's province."[231] It held, relying upon an earlier case,[232] that the "trial judge has the discretion to permit expert testimony on the ultimate issue before the jury."[233] The court correctly stated that in such a situation "[t]here is no invasion of the province of the jury, for the jury retains its power and duty to judge both the credibility of the witness and the weight to be given his opinion."[234] As one commentator has astutely noted, this reasoning "would, of course, be true in every case."[235] Nevertheless, the court did not completely "seal the coffin," as Professor Dreher intimated, since it left the issue subject to further distinctions should the case arise involving a lay opinion on the ultimate issue.[236]

---

227. Advisory Committee's Note to FED. R. EVID. 704, 56 F.R.D. 284 (1972).

228. FED. R. EVID. 704 provides:

> Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

229. *See* 3 WEINSTEIN ¶ 704[01], at 704-3.

230. 253 S.C. 266, 170 S.E.2d 207 (1969).

231. *Id.* at 278, 170 S.E.2d at 213.

232. O'Kelley v. Mutual Life Ins. Co. of N.Y., 197 S.C. 109, 14 S.E.2d 582 (1941).

233. 253 S.C. at 278, 170 S.E.2d at 213.

234. *Id.*

235. DREHER at 99.

236. Professor McCormick notes that in such a case the general rules of admissibility of lay opinions might preclude opinions of laymen on the ultimate issue. However, under rule 701 of the federal rules, the only excluding factor would be the general requirement

The reasons for the rule against opinions on the "ultimate issue" frequently have been taken to issue by the commentators. The arguments, that such opinions "usurp the function of the jury" or "touch the very issue before the jury," are properly termed "mere bit[s] of empty rhetoric [and are] impracticable and misconceived utterances which lack any justification in reason."[237] The efforts of the courts to comply with the rule led to the development of "odd verbal circumlocutions which were said not to violate the rule."[238] Thus

> witnesses were sometimes required to couch their opinions in cautious phrases of "might or could," rather than "did," though the result was to deprive many opinions of the positiveness to which they were entitled, accompanied by the hazard of a ruling of insufficiency to support a verdict. In other instances the rule was simply disregarded and, as concessions to need, opinions were allowed upon such matters as intoxication, speed, handwriting, and value, although more precise coincidence with an ultimate issue would scarcely be possible.[239]

South Carolina is among those courts which have engaged in those "circumlocutions."[240]

The better reasoned approach to the problem of a witness' "conclusions" is to abandon altogether the rule prohibiting opinions on the ultimate issue. This would not result in the admission of all opinions since they would still have to be "helpful" to the trier of fact.[241] Legislative or judicial abrogation of this unwieldly and burdensome rule would have numerous advantages over what is still a potentially live issue in this state. Its abolition would

> [eliminate] quibbles over the meaning of the ultimate fact, and the distinction between fact and law . . . , [lend] the spectacle of courts endorsing a principle which they cite only as a precur-

---

of "helpfulness." The South Carolina approach in this regard is the same. *See* note 211 *supra.*

237. 7 WIGMORE § 1921 at 17, § 1922 at 19.

238. Advisory Committee's Note to FED. R. EVID. 704, 56 F.R.D. 284 (1972).

239. *Id.*

240. *See, e.g.,* Seaboard Coast Line R.R. v. Harrelson, 262 S.C. 38, 202 S.E.2d 1 (1974) (opinion on value of land allowed); State v. Cain, 246 S.C. 536, 144 S.E.2d 905 (1965) (lay witness' opinion as to person's sanity allowed); State v. Moorer, 241 S.C. 487, 129 S.E.2d 330 (1963) ("it seems like" allowed); State v. Ramey, 221 S.C. 10, 68 S.E.2d 634 (1952) (lay witness' opinion on issue of intoxication allowed); Nelson v. Charleston & W.C. Ry., 92 S.C. 151, 121 S.E. 198 (1911) (lay witness' testimony as to speed termed "too fast" allowed).

241. *See* note 211 *supra.*

> sor to applying an exception . . . , [stop] the resort to indirect means to bring the prohibited matter to the jury's attention, and most importantly, it [would allow] the jury to receive the full benefit of the witness' judgment. Both lay and expert witnesses [could] testify in a more natural manner uninterrupted by technical objections which interfere with the flow of the trial but do not further the cause of truth.[242]

C. *Disclosure of Facts or Data Underlying Expert Opinion*

Prior to rule 705,[243] an expert's opinion, if not based on his own perception, had to be based on a preliminary statement of the underlying facts or data upon which he relied. The method designed to accomplish this requirement was the hypothetical question. Rule 705 eliminates the requirement of using a hypothetical question when the expert's opinion is not based on personal observation but yet accords the offering party the option of using it. The only basis of expert opinion testimony in South Carolina other than personal observation is the hypothetical question.[244]

The use of the hypothetical question to expose each and every fact relied upon by the expert in giving his opinion has been severely derided by those who have discussed its use. Professor Wigmore called it a device which is "misused by the clumsy and abused by the clever [and which] has in practice led to intolerable obstruction of truth."[245] He warned that "its abuses have become so obstructive and nauseous that no remedy short of extirpation will suffice."[246] Professor McCormick deemed it to be "a failure in practice and an obstruction to the administration of justice."[247] Judge Learned Hand labeled it "the most horrific and grotesque wen on the fair face of justice."[248] In the face of such

---

242. 3 WEINSTEIN ¶ 704[01], at 704-10.

243. FED. R. EVID. 705 provides:

> The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise. The expert may in any event be required to disclose the underlying facts of data on cross-examination.

244. Bailey v. MacDougall, 251 S.C. 290, 162 S.E.2d 177 (1968); State v. King, 158 S.C. 251, 155 S.E. 409 (1930).

245. 2 WIGMORE § 686, at 812.

246. *Id.*

247. MCCORMICK § 16, at 36.

248. New York Bar Association Lectures on Legal Topics 1921-22 (New York 1926), *quoted in* MCCORMICK § 17, at 37 n.9. A good example of the ludicrous lengths to which

vituperative criticism, rule 705 proves the generally advocated expedient of dispensing with the required hypothesis and has placed in its stead a permissive rule allowing the use of the hypothetical question if the proponent so elects or if the trial judge requires it. The cross-examiner may bring out the bases of that opinion if he so desires. This the approach specifically advocated by Wigmore[249] and which is gaining acceptance in various states by judicial[250] or legislative action.[251]

This method is without question superior to the previous rule of making preliminary disclosure in the form of a hypothetical question mandatory. It greatly simplifies the examination of an expert and decreases the likelihood that the jury will be misled by what have grown to be stereotyped, belabored, and nonsensical hypothetical questions. Yet its function — that of enabling the jury to apply the expert's scientific knowledge to the facts of the case — is not trod under foot but merely transferred to the hands of the cross-examiner. South Carolina should adopt a rule patterned along the lines of rule 705 abandoning the compulsory use of hypothetical questions. By doing so, the theoretical object of its use — the avoidance of misunderstanding[252] — will be retained and the expert will not be prohibited from explaining his reasoning in a manner that is intelligible to the ordinary jury.

V. HEARSAY[253]

A. *Prior Statement by a Witness*

Under the definitional rule of article VIII, rule 801(d)(1)[254]

---

the use of hypothetical questions may be taken is found in Ingram v. McCuiston, 261 N.C. 392, 134 S.E.2d 705 (1964). The hypothetical question used in *Ingram* consists of 23 paragraphs and covers more than three pages of text. *Id.* at 394-99, 134 S.E.2d at 707-10.

249. How can the extirpating operation be performed? By exempting the offering party from the *requirement* of using the hypothetical form; by according him the *option* of using it, both of these to be left to the trial court's discretion; and by permitting the opposing party, *on cross-examination,* to call for a hypothetical specification of the data which the witness has used as the basis of the opinion. The last rule will give sufficient protection against a misunderstanding of the opinion, when any actual doubt exists.

2 WIGMORE § 686, at 813.

250. *See, e.g.*, Rabata v. Dohner, 45 Wis. 2d 111, 172 N.W.2d 409 (1969).

251. *See, e.g.*, KAN. CIV. PRO. STAT. ANN. § 60-458 (Vernon 1965); N.Y. CIV. PRAC. LAW. § 4515 (McKinney 1963); WIS. STAT. ANN. § 907.05 (West 1975).

252. 2 WIGMORE § 672.

253. Omitted from textual discussion are the definitional provisions of rule 801. Subsection (a) provides that a "statement" as an element of hearsay can be oral, written

or nonverbal conduct of a person if intended by him as an assertion. South Carolina is in accord except that the courts have yet to consider the issue of nonverbal conduct as hearsay. Subsections (b) and (c) of rule 801 establish the traditional definitions of "declarant" and "hearsay," respectively. *See* MCCORMICK § 246, at 584; 6 WIGMORE § 1766, at 177-78. South Carolina is in accord. *See* Player v. Thompson, 259 S.C. 600, 193 S.E.2d 531 (1972); State v. James, 255 S.C. 365, 179 S.E.2d 41 (1971).

Also omitted from textual discussion are the nonhearsay provisions of rule 801(d)(2)(A) and (B) which provide that an admission of a party opponent is not hearsay if made by the party himself or by his representative or if adopted by him either expressly or by his acquiescence. An admission is therefore admissible to prove the truth of the matter asserted.

South Carolina law allows admissions to be introduced as evidence under the foregoing conditions. Eberhardt v. Forrester, 241 S.C. 399, 128 S.E.2d 687 (1962); Llewellyn v. Atlantic Greyhound Corp., 204 S.C. 156, 28 S.E.2d 673 (1944) (admissions made by a party himself); Keen v. Army Cycle Mfg. Co., 124 S.C. 342, 117 S.E. 531 (1923); Hendrickson v. Miller, 4 S.C.L. (1 Mill) 296 (1817) (acquiescence in declaration made in presence of a party). The admission involved in *Hendrickson* could not be used against an accused in a criminal proceeding in contravention of his constitutional right to remain silent. *See* State v. Bishop, 256 S.C. 158, 161, 181 S.E.2d 477, 478 (1971) ("The product of . . . [an] interrogation is admissible in evidence, provided the . . . admission was freely and voluntarily made, and the procedural safeguards against involuntary or unwitting self-incrimination required by Miranda v. Arizona . . . were observed.") (citation omitted).

Another area of confusion exists with regard to whether or not admissions must be made against one's own interest. *See* Llewellyn v. Atlantic Greyhound Corp., 204 S.C. 156, 28 S.E.2d 673 (1944). Neither the federal rule nor the orthodox view requires that the admission be against one's own interest. 4 WEINSTEIN ¶ 801[01], at 801-116. However, admissions have often been confused with declarations against interest.

> The latter, coming in under a separate exception to the hearsay rule, to be admissible must have been against the declarant's interest when made. No such requirement applies to admissions. If a party states that a note or deed is forged, and then later buys the note or the land, and sues upon the note or for the land, obviously the previous statement will come in against him as an admission, though he had no interest when he made the statement. Of course, most admissions are actually against interest when made, but there is no such requirement. Hence the common phrase in judicial opinions, "admissions against interest," is an invitation to confuse two separate exceptions to the hearsay rule and to engraft upon admissions a requirement without basis in reason or authority. Other apparent distinctions are that admissions must be the statements of a party to the lawsuit (or his predecessor or representative) and must be offered, not for, but against him, whereas the declaration against interest need not be and usually is not made by a party or his predecessor or representative, but by some third person. Finally, the declaration against interest exception admits the declaration only when the declarant, by death or otherwise, has become unavailable as a witness, whereas obviously no such requirement is applied to admissions of a party.

MCCORMICK § 263, at 630-31 (footnotes omitted). *See also* 4 WIGMORE §§ 1048 & 1049; Randall, *Evidence, 1961 Survey of South Carolina Law*, 14 S.C.L.Q. 44, 46 (1961). The adoption of a uniform rule would clarify this point and help dispense with this erroneous notion.

Rule 801(d)(2)(E) also allows the statement of a co-conspirator to be admitted against a defendant as substantive evidence under the guise of an admission by a party-opponent if made "during the course and in furtherance of the conspiracy." This is the law in South Carolina although courts speak of it in terms of an exception to the hearsay rule rather than not being hearsay at all. *See* State v. Crowe, 258 S.C. 258, 188 S.E.2d 379 (1972), *cert. denied*, 409 U.S. 1077 (1972); State v. Mikell, 257 S.C. 315, 185 S.E.2d 814 (1971).

provides that under certain circumstances a prior statement made by a witness is not hearsay. The preliminary requirement is that the declarant be testifying at the trial or hearing and subject to cross-examination on the statement. Three types of prior statements may then be admitted: (1) one which is inconsistent with his present testimony if at the time it was given it was made under oath; (2) one which is consistent with his present testimony if offered to rebut a charge of recent fabrication or improper influence or motive; and (3) one which pertains to the identification of a person the witness perceived.

South Carolina follows the orthodox approach which is contrary to the federal rule since it rejects all prior statements of a witness when offered substantively. The use of such evidence is limited most frequently to impeachment purposes when they are inconsistent with the testimony given at trial.[255] The reasoning behind this approach is that the value of the statements depends upon the credit of a declarant not under oath, who was not subject to demeanor observation by the trier of fact, and who was not subjected to contemporaneous cross-examination.[256] Under rule 801(d) prior statements of a witness are substantively admissible in large part because the purposes of the hearsay rule are ultimately satisfied—the declarant is present under oath, subject to

---

As previously noted, this categorization is of little practical significance since "the practical consequences in any event is to admit the party's extrajudicial statement." 4 WEINSTEIN ¶ 801(d)(2) [01], at 801-111.

254. FED. R. EVID. 801(d) provides:

A statement is not hearsay if —

(1) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or

(2) *Admission by party-opponent.* The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

255. *See* State v. Miller, 262 S.C. 369, 204 S.E.2d 738 (1974); State v. Bottoms, 260 S.C. 187, 195 S.E.2d 116 (1973).

256. 3A WIGMORE § 1018.

demeanor observation, and amenable to thorough cross-examination.[257] Strong arguments can be made against the orthodox rule. Noncontemporaneous cross-examination has repeatedly been quite effective and the passage of time does not necessarily cause a witness to harden and adhere to his uncross-examined statement. In fact, a statement which is prior in time may be more trustworthy since, as one authority has noted, "memory hinges upon recency."[258] An additional reason exists for allowing the admission of a prior statement for substantive purposes when it is inconsistent with that given at trial. Since under South Carolina law juries may consider these statements for impeachment purposes,[259] it is quite realistic to assume that despite limiting instructions, the jury, consciously or subconsciously, will decide which statement is true and consider it as such rather than simply concluding that the witness' credibility is impaired.[260] The approach taken by rule 801(d)(1)(A) seems to be preferable since it not only requires that the purposes of the hearsay rule be ultimately satisfied but it also limits the use of a prior inconsistent statement to one given under oath. It thus adds a safeguard to the use of statements currently not present in the state system where juries have, in all probability, been considering these statements substantively without regard to the legal limitation to impeachment use only.[261]

257. 4 WEINSTEIN ¶ 801(D)(1)[01].

258. MCCORMICK § 251, at 602.

259. State v. Bottoms, 260 S.C. 187, 193-94, 195 S.E.2d 116, 118 (1973).

260. MCCORMICK § 251, at 604.

261. The same arguments can be advanced with respect to the use substantively of prior consistent statements offered to rebut a charge of recent fabrication or motive. *Id.* South Carolina would apparently follow the rule set forth regarding prior inconsistent statements, *see* note 258 and accompanying text *supra,* and limit their use to rehabilitative purposes. Professor McCormick succinctly stated the reasoning against this position:

> No sound reason is apparent for denying substantive effect when the statement is otherwise admissible. The witness can be cross-examined fully. No abuse of prepared statements is evident. The attack upon the witness has opened the door. The giving of a limiting instruction is needless and useless. The trend is in accord with these suggestions.

MCCORMICK § 251, at 602 (footnote omitted).

Finally, under rule 801(d)(1)(C) a prior statement made by a witness identifying another is admissible substantively since as pointed out by the Advisory Committee, "identification in the courtroom is a formality that offers little in the way of reliability and much in the way of suggestibility. The experienced trial judge gives much greater credence to the out-of-court identification." 56 F.R.D. at 298 (1972); *accord,* 4 WIGMORE § 1130, at 210. The advantages of a uniform rule in the area of prior statements made by a witness are numerous and rule 801(d)(1) offers a sound basis for constructing a state counterpart for South Carolina.

B. Authorized and Vicarious Admissions

If a party authorizes another to make a statement, then the statement, if made, is treated as an admission of such party under rule 801(d)(2)(C). The facts of agency and the fact that the agent was acting within the scope of the agency by rendering the report must be proven. This is the familiar "speaking authority" requirement.[262] Subsection (C) is a restatement of the traditional viewpoint and that adhered to in South Carolina.[263] The federal rule, however, departs from the orthodox practice and broadens the ambit of admissibility in rule 801(d)(2)(D) by characterizing as an admission a statement made by an agent if it concerns a matter within the scope of his employment and is made while the relationship exists. The most frequent occasion to apply this variation arises where the principle-master is subject to tortious liability for the acts of his agent-servant and the latter makes a statement highly probative on the issue of liability. The traditional, "speaking authority" rule would require exclusion of the servant's statement since the employer had not authorized the agent-servant to make damaging remarks about him.[264] South Carolina currently follows this viewpoint.

In *Marshall v. Thomason,*[265] a majority of the supreme court held as error the admission of a statement of defendant's truck driver made to a highway patrolman investigating an accident in which the truck and driver were involved. The majority based its reasoning primarily upon the ground that "post accident declarations or admissions [are] not within the scope of the agency of one employed to drive a . . . vehicle."[266] Justice Lewis in a lucid dissent advocated the viewpoint currently followed by the federal rule, pointing out that the appropriate inquiry is "whether the driver in making the statements at the scene of the collision was acting in the course of his employment,"[267] and not whether he had the authority to speak. As Justice Lewis aptly observed, "[i]t is unrealistic, to say the least, to hold that the driver was the agent of the employer for every purpose in connection with

262. MCCORMICK § 267, at 641.

263. Williams v. Western Union Telegraph Co., 138 S.C. 281, 136 S.E. 218 (1927); *accord*, Hunter v. Hyder, 236 S.C. 378, 114 S.E.2d 493 (1960); 4 WIGMORE § 1078.

264. 4 WEINSTEIN ¶ 801[01], at 801-134. *See also* 4 WIGMORE § 1078, at 166.

265. 241 S.C. 84, 127 S.E.2d 177 (1962).

266. *Id.* at 92, 127 S.E.2d at 180.

267. *Id.* at 94, 127 S.E.2d at 181.

the operation of the vehicle, except to truthfully relate the manner in which he operated it."[268] Since frequently the agent will be the only one who knew what happened,[269] rule 801(d)(2)(D) represents an enlightened expansion in the area of vicarious admissions following the modern trend of authority.[270] As Professor McCormick has noted:

> [T]he assumption that the test for the master's responsibility for the agent's *acts* should be the test for using the agent's statements as *evidence* against the master is a shaky one. The rejection of such post-accident statements coupled with the admission of the employee's testimony on the stand is to prefer the weaker to the stronger evidence. The agent is well informed about acts in the course of the business, his statements offered against the employer are normally against the employer's interest, and while the employment continues, the employee is not likely to make the statements unless they are true. Moreover, if the admissibility of admissions is viewed as arising from the adversary system, responsibility for statements of one's employee is a consistent aspect.[271]

VI. HEARSAY EXCEPTIONS[272]

Federal Rule 803 lists 24 exceptions to the rule against hear-

268. *Id.* at 95, 127 S.E.2d at 182.

269. For some examples of this situation *see* 4 WEINSTEIN ¶ 801[01], at 801-135.

270. MCCORMICK § 267, at 641.

271. *Id.*

272. Rules 803(1), (2), (4), (5), (6), (9), (18), and (22) are discussed in the text of this note. The remaining hearsay exceptions are not significantly different from the law in South Carolina and will be considered seriatim as follows: **Rule 803(3)—Then existing mental, emotional, or physical condition**; *accord,* Gentry v. Watkins-Carolina Trucking Co., 249 S.C. 316, 154 S.E.2d 112 (1967) (statements as to present condition made by a patient to a physician consulted for treatment are generally admitted as evidence of the facts stated); Corley v. South Carolina Tax Comm'n, 237 S.C. 439, 117 S.E.2d 577 (1960); Ervin v. Myrtle Grove Plantation, 206 S.C. 41, 32 S.E.2d 877 (1945) (declarations made by a party since deceased, at or about time of his departure, are admissible to establish destination or purpose of journey). **Rule 803(7)—Absence of entry in records kept in accordance with the provisions of paragraph (6)**; *see* text accompanying notes 306-21 *infra.* **Rule 803(8)—Public records and reports**; *accord,* State v. Pearson, 223 S.C. 377, 76 S.E.2d 151 (1953); *see* State v. Fowler, 264 S.C. 149, 213 S.E.2d 447 (1975); Peagler v. Atlantic Coast Line R.R., 234 S.C. 140, 107 S.E.2d 15 (1959). **Rule 803(10)—Absence of public record or entry**; *see* People's Nat'l Bank of Greenville v. Manos Bros., 226 S.C. 257, 84 S.E.2d 857 (1954) (nonexistence of an entry in a record book is admissible to prove the truth of the matter asserted therein). **Rule 803(11)—Records of religious organizations**; no comparable South Carolina rule can be found. **Rule 803(12)—Marriage, baptismal, and similar certificates**; *accord,* Williams v. Metropolitan Life Ins. Co., 116 S.C. 277, 108 S.E. 110 (1921) (certificate of death is admissible in

say. The rule is phrased in terms of nonapplication of the hearsay rule, rather than in positive terms of admissibility, in order to avoid any implication that other potential grounds for exclusion are eliminated from consideration. The rule proceeds upon the general theory that under appropriate circumstances an otherwise inadmissible hearsay statement may possess circumstantial

---

evidence to establish the matters therein required to be recorded *when within the knowledge of the person making the certificate*). **Rule 803(13)—Family records**; *see* Dobson v. Cothran, 34 S.C. 518, 13 S.E. 679 (1891); Taylor v. Hawkins, 12 S.C.L. (1 McCord) 164 (1821). **Rule 803(14)—Records of documents affecting an interest in property**; there is no comparable rule in South Carolina. *But see* S.C. CODE ANN. § 26-105 (1962). **Rule 803(15)—Statements in documents affecting an interest in property**; there is no comparable rule in South Carolina. **Rule 803(16)—Statements in ancient documents**; there is no comparable rule in South Carolina. *But see* Goings v. Mitchell, 110 S.C. 380, 96 S.E. 612 (1818) (authentication of ancient documents). **Rule 803(17)—Market reports, commercial publications**; *accord*, People's Nat'l. Bank of Greenville v. Manos Bros., 226 S.C. 257, 84 S.E.2d 857 (1954) (city directory admissible to prove domiciliary); Culbreath v. Investors Syndicate, 203 S.C. 213, 26 S.E.2d 809 (1943) (where articles not traded on regular market, witness familiar with sales prices at time may testify to establish the correct market price); Kirkpatrick v. Hardeman, 123 S.C. 21, 115 S.E. 905 (1923) (published quotation of market price of stocks and bonds and of commodities traded on a regular market may be introduced as they appear in newspapers and trade journals). **Rule 803(19)—Reputation concerning personal or family history**; *accord*, Hazelwood v. Mayes, 111 S.C. 23, 96 S.E. 672 (1918); Brown v. Foster, 41 S.C. 118, 19 S.E. 299 (1894); **Rule 803(20)—Reputation concerning boundaries or general history**; *accord*, Sexton v. Hollis, 26 S.C. 231, 1 S.E. 893 (1887); Speer v. Coate, 15 S.C.L. (3 McCord) 227 (1825). **Rule 803(21)—Reputation as to character**; *accord*, State v. Outen, 237 S.C. 514, 118 S.E.2d 175 (1961); State v. Logue, 204 S.C. 171, 28 S.E.2d 788 (1944); State v. Merriam, 34 S.C. 16, 12 S.E. 619 (1891). **Rule 803(23)—Judgment as to personal, family or general history, or boundaries**; there is no comparable rule in South Carolina. **Rule 803(24)—Other exceptions**; although there is no comparable rule in South Carolina, it is believed that the trial court would have the inherent common law power to fashion special exceptions to the rule against hearsay in individual cases. **Rule 804(b)(1)—Former testimony**; the use of former testimony in court has long been recognized as an exception to the hearsay rule. 5 WIGMORE § 1370. Its trustworthiness lies in the facts that it was given under oath, is frequently in writing, and was subject to an opportunity to cross-examine. Rule 804(b)(1) sets out these requirements. *See generally* 4 WEINSTEIN ¶ 804(b)(1)[01] to [05]. South Carolina follows this viewpoint and, like the federal rule, does not require that the former action have been between the same parties so long as there was an opportunity to cross-examine by the party against whom it was offered. Gaines v. Thomas, 241 S.C. 412, 128 S.E.2d 692 (1962); State v. Steadman, 216 S.C. 579, 59 S.E.2d 168, *cert. denied*, 340 U.S. 850 (1950). **Rule 804(b)(2)—Statement under belief of impending death**; an old South Carolina case recognized the "necessity principle" of this exception — that since the witness had died, there was a necessity for using the only available trustworthy statements, his dying declarations. State v. Ferguson, 20 S.C.L. (2 Hill) 619 (1835). The South Carolina Supreme Court has not considered the issue in recent times. Although such declarations are limited in this State to homicide prosecutions arising out of the declarant's death, the necessity principle does not need to be so limited since the unavailability of the declarant may, although infrequently, be for other reasons. *See* note 273 and accompanying text *infra*.

guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available.[273] As in rule 804, the declarant is treated as a witness and must therefore possess firsthand knowledge as to the matter upon which his statement was made, which may be shown by his statements or may be inferred from the circumstances.[274] Rule 804 lists five exceptions to the hearsay rule which are premised on a preliminary showing that the declarant is unavailable.[275]

A. Present Sense Impression and Excited Utterance

Rule 803(1)[276] is the basic hearsay exception for statements made while perceiving an event. There are three basic conditions for meeting this exception: (1) the statement must be made while the event or condition is being perceived by the declarant or "immediately thereafter;"[277] (2) it must be established that in fact the declarant perceived the event about which his statement was made; and (3) the statement must describe or explain the event or condition.

The rationale for the exception is that statements of perception that are contemporaneous with an event are highly trustworthy because: (1) there is no memory problem since the statement is simultaneous with the event; (2) there is little or no time for calculated misstatement; and (3) the statement is usually made to one who has equal opportunity to observe and check for misstatements.[278]

---

273. Advisory Committee's Note to FED R. EVID. 803, 56 F.R.D. 303 (1972).

274. *See* FED. R. EVID. 602.

275. *See* note 353 *infra.*

276. FED. R. EVID. 803(1) provides:

> The following are not excluded as hearsay even though the declarant is available as a witness:
>
> (1). . .A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

277. The Advisory Committee's Note states:

> With respect to the *time element*, Exception (1) recognizes that in many, if not most, instances precise contemporaneity is not possible, and hence a slight lapse is allowable. Under Exception (2) the standard of measurement is the duration of the state of excitement. "How long can excitement prevail?" Obviously there are not pat answers and the character of the transaction or event will largely determine the significance of the time factor." Slough, Spontaneous Statements and State of Mind, 46 IOWA L. REV. 224, 243 (1961); McCormick § 272, at 580.

278. 4 WEINSTEIN ¶ 803(1)[01], at 803-74. *See also* E. MORGAN, BASIC PROBLEMS OF EVIDENCE 340-41 (1962).

Rule 803(2)[279] excludes from the hearsay objection statements made while under the influence of an exciting event or condition. The underlying assumption for this exception "is that a person under the sway of excitement precipitated by an external startling event will be bereft of the reflective capacity essential for fabrication and that, consequently, any utterance he makes will be spontaneous and trustworthy."[280]

There are several important aspects or conditions to rule 803(2). First, the proponent must as a preliminary matter prove that a "startling" event took place. This is usually satisfied by the testimony of a witness other than the declarant or by other circumstantial evidence. In some instances, where there is a lack of circumstantial evidence to show that something out of the ordinary occurred, the declarant's statements may sufficiently establish that an event occurred and that it was of a startling nature.[281] Second, since the rule requires that the declarant's excitement be "caused" by the event or condition, it must be shown that the declarant perceived the event. This does not mean, however, that the declarant must be a participant in the event or that his perception thereof must be proven by direct evidence. Perception may be clear from the surrounding circumstances or from the nature of the statement. Third, it must be shown that the declarant was "under the stress of excitement,"

---

279. FED. R. EVID. 803(2) provides:

The following are not excluded by the hearsay rules even though the declarant is available as a witness:

. . . .

(2). . . A statement relating to a startling event or condition made while the defendant was under the stress of excitement caused by the event or condition.

280. 4 WEINSTEIN ¶ 803(2)[01], at 803-80. Professor Wigmore stated that:

The general principle is based on the experience that, under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock. Since this utterance is made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy (or, at least, as lacking the usual grounds of untrustworthiness), and thus as expressing the real tenor of the speaker's belief as to the facts just observed by him; and may therefore be received as testimony to those facts.

6 WIGMORE § 1747, at 195.

281. Advisory Committee's Note to FED. R. EVID. 803, 56 F.R.D. 303, 304 (1972).

i.e., that the declarant was excited *because* of the event and was still excited when he made the statement. Fourth, it should be noted that the federal rule, following Professor Wigmore,[282] does *not* require that the statement explain or elucidate the event, although use of the word "relating" will limit the subject matter of admissible statements to some degree.[283]

The law in South Carolina comparable to federal rules 803(1) and (2) is the familiar res gestae[284] exception. The South Carolina Supreme Court has described the exception as follows:

> To make declarations a part of the *res gestae,* they must be contemporaneous with the main fact, not, however, precisely concurrent in point of time. If they spring out of the transaction, elucidate it, and are made at a time so near to it as reasonably to preclude the idea of deliberate design, they are then regarded as contemporaneous.[285]

In another decision, the court stated that the 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 designed to make false or self-serving declarations.[286]

The requirement that the declaration "elucidate" the transaction is similar to the federal rule although care should be taken not to apply the requirement so strictly as to exclude relevant evidence from the jury's consideration.[287] The federal rule appar-

---

282. 6 WIGMORE §§ 1750 & 1754.

283. *Id.*

284. *See generally* DREHER at 76-79.

285. Van Boven v. F.W. Woolworth Co., 239 S.C. 519, 524, 123 S.E.2d 862, 864 (1962).

286. State v. Long, 186 S.C. 439, 195 S.E. 624 (1938). *See also* Bagwell v. McLellan, 216 S.C. 207, 57 S.E.2d 257 (1949); Marks v. I.M. Pearlstine & Sons, 203 S.C. 318, 26 S.E.2d 835 (1943).

287. In Bagwell v. McLellan, 216 S.C. 207, 217, 57 S.E.2d 257, 262 (1949), the court held that the statement must "unfold" the event or transaction. Consequently, the court held that after the plaintiff had fallen, an excited witness' statement that the supermarket floor was oily and slick was inadmissible under *res gestae* because it did not "unfold" the event.

This requirement is far too restrictive. If the subject matter of the *res gestae* statement is such as would likely be evoked by the event, the statement should be admitted. *See* Sanitary Grocery Co. v. Snead, 90 F.2d 374 (D.C. Cir. 1937) (clerk's statement, "That has been on the floor a couple of hours," made after customer fell, held admissible). Furthermore, as Professor Dreher has observed: it may be hard to distinguish "that floor

ently contemplates some flexibility in the scope of permissible subject matter of the statement: rule 803(1) requires the statement to "describe or explain" the event, whereas rule 803(2) requires only that the statement "relate" to the startling event.[288]

Moreover, the South Carolina requirement that the statement be "substantially contemporaneous" with the event and that the declarant's mind be under the "active, immediate influence" of the event is essentially concordant with the federal rule. Both 803(1) and (2) require a showing of "perception" by the declarant. Rule 803(1), recognizing that "precise contemporaneity" is impossible, permits a slight time lapse while rule 803(2) measures the permissible time lapse by the duration of the state of excitement which will depend largely on the character of the event.[289]

The requirement that the declaration not be "self-serving" has no counterpart in the federal rule. This additional requirement seems unwarranted. "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."[290]

B. Statements for Purposes of Medical Diagnosis or Treatment

Rule 803(4)[291] excludes from the operation of the hearsay rule statements of present or past "symptoms, pain, or sensations" made for purposes of medical diagnosis or treatment or statements describing the nature and cause of the injury insofar as they bear on treatment. This exception is based on the rationale that the declarant "would want to disclose the truth to the examiner since his treatment would depend in part upon what he said."[292] This is believed to be a sufficient guaranty of the trustworthiness of such statements. In addition, there is a practical

---

is slick" from "that truck is speeding." DREHER at 79.

288. *See* Advisory Committee's Note to FED. R. EVID. 803, 56 F.R.D. 303, 305 (1972).

289. Advisory Committee's Note to FED. R. EVID. 803, 56 F.R.D. 303, 304 (1972).

290. DREHER at 78-79.

291. FED. R. EVID. 803(4) provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (4). . .Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

292. *See* Meaney v. United States, 112 F.2d 538 (2d Cir. 1940).

evidentiary need for such statements "because medical science is unable to determine the existence of subjective symptoms without indications by the person experiencing them."[293]

The federal rule does not restrict this exception from the hearsay rule to statements made to a physician. Statements to hospital attendants, ambulance drivers, or even members of the family may be admissibles if "made for the purpose of diagnosis or treatment."[294] In addition, the federal rule rejects the "treating-nontreating" physician distinction. In the words of the Advisory Committee:

> Conventional doctrine has excluded from the hearsay exception, as not within its guarantee of truthfulness, statements to a physician consulted only for the purpose of enabling him to testify. While these statements were not admissible as substantive evidence, the expert was allowed to state the basis of his opinion, incuding statements of this kind. The distinction thus called for was one most unlikely to be made by juries. The rule accordingly rejects the limitation. This position is consistent with the provision of Rule 703 that the facts on which expert testimony is based need not be admissible in evidence if of a kind ordinarily relied upon by experts in the field.[295]

The rule in South Carolina is contrary to that contemplated by the federal rule.[296] In a 1967 case, *Gentry v. Watkins-Carolina Trucking Co.*,[297] the supreme court held that statements by a patient to his physician with respect to the patient's medical history and past symptoms are admissible to prove their truth provided the statements were made with a view to treatment. However, if the patient consulted the physician after suit had commenced, as a prospective witness rather than for treatment, the statements of present conditions or past symptoms are not admissible as substantive proof of the facts so stated; but, in the absence of fraud or bad faith, they are admissible "as information upon which [the physician] has relied in reaching his profes-

293. Note, *Medical Testimony and the Hearsay Rule*, 1964 WASH. U.L.Q. 193, 199.

294. Advisory Committee's Note to FED. R. EVID. 803, 56 F.R.D. 303, 306 (1972).

295. *Id.*

296. South Carolina is in agreement with that part of the federal rule permitting a physician to testify to what the patient told him concerning the "inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." *See* Code's Next of Kin v. Anderson Mills, 191 S.C. 458, 4 S.E.2d 908 (1939).

297. 249 S.C. 316, 154 S.E.2d 112 (1967).

sional opinions."[298] The *Gentry* court went on to state that "[t]he parties are entitled to have the jury instructed as to the aforesaid limitation upon such testimony."[299]

As the Advisory Committee's note points out, however, it is unrealistic to expect the jury to make the distinction called for under the foregoing rule. The federal rule, therefore, seems preferable and is likely to maximize the availability of relevant evidence before the jury.

C. *Recorded Recollection*

An extrajudicial statement used to prove the truth of the facts asserted is hearsay; correlatively, a recorded recollection of extrajudicial statements used to prove the truth of the matters asserted therein is also hearsay. Rule 803(5)[300] excepts the latter from the exclusionary effect of the hearsay rule provided certain conditions are met. The rule first requires that the testifying witness have "insufficient recollection to enable him to testify fully and accurately" before the content of the recorded recollection is admissible.[301] If the witness' memory is only slightly vague, the trial judge should exercise his discretion by admitting only those portions of the recorded recollection which bear thereon. Rule 803(5) also requires that the recorded recollection concern a matter "about which a witness once had knowledge." This is in conformity with the basic personal knowledge requirements for a testifying witness under rule 602. Since by definition under exception (5) the witness is unable to directly testify to his perceptions, the federal rule seeks to ensure the reliability of the memorandum by requiring that it be "made or adopted by the witness

298. *Id.* at 324, 154 S.E.2d at 117.

299. *Id.*

300. FED. R. EVID. 803(5) provides:

> The following are not excluded as hearsay, even though the declarant is available as a witness:
>
> . . . .
>
> (5). . .A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

301. However, it may be admitted under other rules even if the witness does have adequate knowledge. *See* FED. R. EVID. 801(d)(1)(A) (prior inconsistent statements), 801(d)(2) (admissions), 803(6) (record of regularly conducted activity).

when the matter was fresh in his memory" and the memorandum must "reflect that knowledge correctly." This latter requirement, ensuring that the transcription was carried out correctly, can be satisfied by having the witness testify as to its accuracy (circumstances of its making) or testify that although he is now unable to remember his state of mind while making the record, he would not have made it unless it was correct (evidence of his habit or practice to record such matters accurately).[302]

The federal rule does not require the witness to be the person who made the record; a witness who saw the memorandum made when the matter it concerned was fresh in his memory and who knew it to be correct may testify. Rule 803(5) also adopts the position that the memorandum may be read into evidence but cannot be taken as an exhibit to the jury room unless offered by an adverse party or by stipulation of the parties. Of course, since the document's contents are being proved, the best evidence rule applies and the original must be produced.[303]

The law in South Carolina is basically concordant with the federal rule except that (1) the memorandum must have been made by the witness himself; (2) the memorandum itself is admissible in evidence as an exhibit and may be taken to the jury room; and (3) the document must have been made "contemporaneously" with the transaction.[304]

The third requirement probably differs from the federal rule in degree only. Rule 803(5) requires the matter to be "fresh" in the witness' memory; the South Carolina rule follows the more restrictive tradition in requiring substantial contemporaneity of the event and the witness' transcription thereof. The second distinction in which South Carolina permits the memorandum to go to the jury represents the view advocated by Professors Wigmore and McCormick.[305] The Advisory Committee apparently believed that to allow the document to enter the jury room would be to give it greater credence than oral testimony—which obviously cannot be taken into the jury room—and would be unduly emphasized in relation to other testimony. Both positions appear justifiable. As for the first distinction, the better approach would

302. 3 WIGMORE § 747.

303. *See* FED. R. EVID. 1002.

304. Gwathmey v. Foor Hotel Co., 121 S.C. 237, 113 S.E. 688 (1922); O'Neal v. Walton, 30 S.C.L. (1 Rich.) 234 (1845).

305. *See* 3 WIGMORE § 754; MCCORMICK § 278.

be to not require the witness to be the maker of the document so long as the other conditions of reliability and accuracy are satisfied. This would assure that the jury would have the benefit of all the available relevant evidence.

D. Records of Regularly Conducted Activity

Rule 803(6)[306] is the well known "business records" or "regular entries" exception to the rule against hearsay. The general rule in the federal courts and in a majority of the states is that records prepared in the *course* of a *regular* business[307] are of sufficient reliability and trustworthiness that they should be accepted in evidence without a requirement that the person who observed the recorded event or the maker of the record be available for cross-examination. The federal rule generally provides that records prepared in the course of a regular business may be admitted as substantive evidence of the facts recited therein without regard to the type of transaction and without regard to whether the records are those of a party or of a third person.[308] "The element of unusual reliability of business records is said variously to be supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business is relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation."[309] Rule 803(6) contains the following specific requirements: (1) each participant in the chain producing the record—from the initial ob-

306. *See* FED. R. EVID. 803(6) which provides:

> The following are not excluded as hearsay, even though the declarant is available as a witness:
>
> . . . .
>
> (6). . .A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

307. *See* Advisory Committee's Note to FED. R. EVID. 803, 56 F.R.D. 303, 308 (1972). "The rule. . . adopts the phrase 'the course of a regularly conducted activity' as capturing the essential basis of the hearsay exception as it has evolved and the essential element which can be abstracted from the various specifications of what is a 'business.' "

308. *See generally* 4 WEINSTEIN ¶ 803(6)[01] to [05].

309. Advisory Committee's Note to FED R. EVID. 803, 56 F.R.D. 303, 308 (1972).

server reporter to the final entrant—must be acting in the course of this regularly conducted business;[310] (2) the record must be made "at or near the time" of the events recorded; (3) no distinction is to be made between recorded facts or opinions provided there are sufficient indicia of trustworthiness.[311]

The law with respect to business records in South Carolina was established in *Seaboard A.L. Ry. v. Railroad Commrs.*,[312] involving the admissibility of "tables made in the office of the [Seaboard Railway] from the records of the company by clerks employed for that purpose, and also of books of the company, which showed in tabulated form its receipts and expenditures."[313] The supreme court admitted the reports, stating that a party

> may introduce books of account, kept in the regular course of business, upon identification of the account by the persons who made and entered the transactions there recorded. But where the person who made the sale or other transaction and entered it is dead, or is for any other cause unavailable as a witness, on the principle of necessity, the books may be introduced upon the introduction of the best available proof of their verity. . . . Obviously there can be no fixed rule as to what circumstances establish such necessity, and what is sufficient proof of the verity of the books. These questions must be left almost entirely to the discretion of the trial court.[314]

The essence of the court's holding in *Seaboard* is that records are admissible as substantive evidence when the trial court finds "necessity" and "verity"—necessity because of the unavailability of the persons who made the report and verity because the circumstances under which the records are made and kept assure their trustworthiness.

Seaboard and subsequent cases,[315] therefore, stand for the general proposition that entries made in the regular course of business activity are admissible as exceptions to the hearsay rule. In two relatively recent cases, however, the South Carolina Supreme Court has added some additional limitations.

---

310. 4 WEINSTEIN ¶ 803(6)[02], at 803-147.

311. *Id.* at ¶ 803(6)[04], at 803-165.

312. 86 S.C. 91, 67 S.E. 1069 (1910).

313. *Id.* at 92, 67 S.E. at 1069.

314. *Id.* at 93, 67 S.E. at 1069-70.

315. *See* Currie v. Davis, 130 S.C. 408, 126 S.E. 119 (1923); United Grocery Co. v. Dannelly & Son, 93 S.C. 580, 77 S.E. 706 (1913).

In *Wells v. Hays,*[316] a case involving a demand on a due bill, the court held that books or records of businessmen are admissible to "prove accounts for goods sold and delivered, services rendered, work and labor done, and materials furnished" but such records are *not* admissible "for the purpose of proving special contracts, such as are not shown by or to be inferred from the entries alone."[317] *Wells* apparently stands for the rule that account records are inadmissible to prove matters other than the amount of the account.[318]

Finally, the court held in *Watson v. Little*[319] that "a person's books of account cannot be used as evidence upon issues between third persons." The court considered such entries in a book of account to be *res inter alios acto* with respect to third persons and therefore inadmissible against them unless their intended use was only to impeach the person recording or keeping the books of account.

Thus the law of South Carolina[320] apparently adopts the business records exception to the rule against hearsay but carefully restricts the exception to records of open accounts among parties to the controversy.[321] These latter restrictions are not found in the more liberal federal rule which favors increased admissibility "unless the source of information or the method or circumstances of preparation indicate lack of trustwothiness."

316. 93 S.C. 168, 76 S.E. 195 (1912).

317. *Id.* at 171, 76 S.E. at 196.

318. The *Wells* case was cited with approval in Green v. McDaniel, 168 S.C. 533, 168 S.E. 197 (1933), which held that books of account are only admissible to prove open accounts between parties.

319. 229 S.C. 486, 490, 93 S.E.2d 645, 647 (1956).

320. A bill, number H. 2597, was recently introduced in the South Carolina General Assembly proposing the adoption of the Uniform Business Records As Evidence Act. This Act provides:

> The term "business" shall include every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not.
>
> A record of an act, condition or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.
>
> This section may be cited as the Uniform Business Records as Evidence Act.

321. *But see* Currie v. Davis, 130 S.C. 408, 126 S.E. 119 (1923) (business record admitted to prove time and place of train arrival).

E. Records of Vital Statistics

Federal rule 803(9)[322] sanctions the admission of records of vital statistics—*e.g.*, birth, marriage, and death reports—as an exception to the rule against hearsay. Such records, usually made by physicians, undertakers, and ministers performing an official duty, have a guaranty of trustworthiness similar to the official records excepted under rule 803(8). The federal rule only requires that the maker of the record do so according to the requirements of local law, and, therefore, a preliminary showing must be made that such requirement was fulfilled.

South Carolina has acknowledged a similar exception. In *Williams v. Metropolitan Life Insurance Co.*,[323] the supreme court ruled that a death certificate is admissible to establish the matters asserted therein required to be recorded. This mirrors the federal rule, and it can be assumed that the court would rule similarly with respect to marriage or birth certificates if such were completed in accordance with applicable law.

The last phrase of the court's holding, however, creates an interesting, if minor, problem. The words "required to be recorded" would apparently serve to exclude information mistakenly included in a record from being admitted as proof of the truth of such facts. Such an exclusionary limitation seems prima facie correct "since the rationale of reliability furnished because the recording was being done pursuant to a requirement of law is absent."[324] This would not necessarily be true, however, if the person making the report or issuing the certificate *believed* that, in fact, he was under a legal duty to include such information. The federal rule would probably not preclude a proponent of such a record from producing preliminary proof that the recorder throught he was under a duty and could therefore be assumed to have acted with the requisite care in making the record.[325]

Another potential distinction between the federal rule and

322. FED. R. EVID. 803(9) provides:

The following are not excluded as hearsay, even though the declarant is available as a witness:

. . . .

(9). . .Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

323. 116 S.C. 277, 108 S.E. 110 (1921).

324. 4 WEINSTEIN ¶ 803(9)[01], at 803-189.

325. Advisory Committee's Note to FED. R. EVID. 803, 56 F.R.D. 303, 313 (1972).

South Carolina law stems from the language in *Williams* that a record or report of vital statistics would *not* be admissible if the matters contained in the report were not within the personal knowledge of the reporter or if it "plainly appear[ed] impossible to have been within his knowledge."[326]

Although the Advisory Committee's note states in general with respect to rule 803 that "[i]n a hearsay situation, the declarant is, of course, a witness, and neither this rule nor Rule 804 dispenses with the requirement of firsthand knowledge,"[327] exception (9) to rule 803 is silent as to any firsthand knowledge requirement. To exclude statements in the report because of the absence of personal knowledge on the part of the person making the report is probably an unwarranted restriction. In the words of Professor Wigmore:

> It is sensible to admit all such entries for what they may be worth; in the occasional controverted cases, other evidence is usually available. A main purpose of the system would be defeated if the records were not liberally available in litigation.[328]

It is here suggested that the South Carolina Supreme Court abandon the firsthand knowledge requirement stated in *Williams* in view of the practical realization that "persons required by statute to make reports on death [and a fortiori birth and marriage] are usually professionals who presumably perform their duties scrupulously and impartially.[329]

F. Learned Treatises

Rule 803(18),[330] admitting learned treatises as substantive evidence, requires two initial conditions to be met: (1) the trea-

---

326. 116 S.C. at 279, 108 S.E. at 110.

327. Advisory Committee's Note to FED. R. EVID. 803, 56 F.R.D. 303 (1972).

328. 5 WIGMORE § 1646, at 713.

329. 4 WEINSTEIN ¶ 803(9)[01], at 803-191.

330. FED. R. EVID. 803 (18) provides:

> The following are not excluded as hearsay, even though the declarant is available as a witness:
>
> . . . .
>
> (18). . .To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

tise must be disclosed while an expert is on the stand, either by the expert during direct examination or by the opponent during cross-examination; (2) it must be established as reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. In addition, the federal rule provides that statements in the treatise may be read into evidence but may not be taken into the jury room as exhibits. This latter limitation is based on the fear that to permit otherwise would increase the likelihood that the jury could give the treatise greater weight than it deserves.[331] However, it should be noted that the parties may stipulate to send the treatise into the jury room if they so desire.

The law in South Carolina with respect to the admissibility of learned treatises as substantive evidence—as established by legislative and judicial fiat—is considerably narrower than that contemplated by rule 803(18). South Carolina has long permitted portions of "medical or scientific works . . . to be read before the court or jury" in any civil or criminal proceeding where "the question of sanity or insanity in the administration of poison or any other article destructive to life is involved."[332] It is immediately clear that while the South Carolina statute addresses "medical or scientific" works, the federal rule is not so limited, providing for the admission of "statements contained in published treatises, periodicals or pamphlets on a subject of history, medicine or other science or art."[332.1]

In addition, the supreme court has interpreted the statute as precluding the reading of medical or scientific works in court *except* when the issue is one of insanity or the administration of poison.[333] "The restriction of their use to such cases is irrefutable argument that they cannot be used in any other cases."[334] This was clearly an unduly restrictive reading of the statute since it would also appear to preclude the introduction of learned treatises for purposes of impeachment.[335] The supreme court, however, has recognized the distinction between the use of treatises as direct proof of an issue in controversy (an exception to the

331. Advisory Committee's Note to FED. R. EVID. 803, 56 F.R.D. 303, 316-17. *See also* Comment, *Evidence-Products Liability*, 27 S.C.L. REV. 766 (1976).

332. S.C. CODE ANN. § 26-142 (1962).

332.1. FED. R. EVID. 803 (18).

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

334. *Id.*

335. DREHER at 11.

hearsay rule) and their use as a method of impeachment on cross-examination (which is not substantive and therefore is *not* hearsay).[336]

Thus the law in South Carolina is that a medical or scientific treatise can only be admitted *substantively* if it relates to a question of sanity or insanity in the administration of poison; otherwise, a learned treatise may be admitted or judicially noticed only for the limited purpose of impeachment on cross-examination.[337]

The federal rule's more liberal approach is clearly preferable. Treatises are a needed source of evidence and also possess the requisite indicia of reliability.[338] To conform the South Carolina practice with that envisioned by the federal rule would (1) accord with the realities of actual practice since all experts largely rely upon the works published by authorities recognized in their field and (2) obviate the unreality of expecting jurors to adhere to the court's instructions to consider a treatise only for impeachment purposes and not as substantive evidence. In the words of Professor Morgan, "it is absurd to listen to testimony based upon assertions by the treatise writer while refusing to admit the assertions."[339]

G. *Judgment of Previous Conviction*

Rule 803(22)[340] provides that evidence of a prior *criminal*

336. *See, e.g.*, Baker v. Port City Steel Erectors, Inc., 261 S.C. 469, 470, 200 S.E.2d 681, 682 (1973); LaCount v. General Asbestos & Rubber Co., 184 S.C. 232, 234, 192 S.E. 262, 263 (1937).

337. Baker v. Port City Steel Erectors, Inc., 261 S.C. 469, 200 S.E.2d 681 (1973); Benford v. Berkeley Heating Co., 258 S.C. 357, 360, 188 S.E.2d 831, 833 (1972) (taking judicial notice of learned treatise on heat transfer).

338. *See* 4 WEINSTEIN ¶ 803(18)[01], at 803-214 *to* -216 (reciting numerous indicia of reliability).

339. MORGAN, BASIC PROBLEMS OF EVIDENCE 366 (1962), *quoted in* 4 WEINSTEIN ¶ 803(18)[01], at 803-217.

340. FED. R. EVID. 803(22) provides:

> The following are not excluded as hearsay, even though the declarant is available as a witness:
>
> . . . .
>
> (22). . .Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of *nolo contendere*) adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

judgment may be offered in evidence at a subsequent *civil or criminal* proceeding "to prove any fact essential to sustain the judgment."[341] Since the judgment represents the opinion of twelve uncross-examined persons, it is excludable hearsay. Most commentators consider this objection to the admission of judgments a "purely technical obstacle"[342] and records of a previous conviction are clearly admissible in any case under the public records exception of rule 803(8).

The judgment of conviction or guilty plea must be of a felony grade ("punishable by death or imprisonment in excess of one year")[343] and may be admitted in either civil or criminal litigation except that judgments against third persons are only admissible by the government for purposes of impeachment in criminal cases.[344]

Rule 803(22) does not make the prior conviction conclusive as to the facts determined therein and, consequently, the accused may endeavor to offer a satisfactory explanation. Moreover, it is within the discretion of the trial judge, regardless of the judgment's conclusiveness, to determine which facts were "essential" to the prior judgment and are not admissible in evidence. Finally, the federal rules allow the pendency of an appeal to be shown for the jury to evaluate as they wish but such a showing does not affect the admissibility of the judgment of conviction.[345]

The leading case in South Carolina on this matter is *South Carolina State Board of Dental Examiners v. Breeland,*[346] in which the supreme court recited the general rule that a judgment of conviction in a criminal prosecution is not an adjudication binding the defendant in a subsequent civil action. The rule is justified on the ground that

> [t]he want of mutuality, arising out of the fact that the parties to the record are not the same, and the fact that the course of

341. Prior civil judgments are inadmissible because the lower applicable burden of proof makes them less reliable than criminal judgments.

342. Note, *Judgments as Evidence* 46 IOWA L. REV. 400 (1961), *quoted in* 4 WEINSTEIN ¶ 803(22)[01], at 803-229.

343. This is based on the theory that when crimes of a lesser magnitude are involved, the motivation to defend may be concomitantly lessened. *See* Advisory Committee's Note to FED. R. EVID. 803, 56 F.R.D. 303, 319 (1972).

344. *See* Kirby v. United States, 174 U.S. 47 (1899).

345. *See generally* 4 WEINSTEIN ¶ 803(22)[01], at 803-229 to -238.

346. 208 S.C. 469, 38 S.E.2d 644 (1938).

> the proceedings and the rules of decision in the two courts are different.[347]

However, the *Breeland* court went on to conclude that in public or quasi-public actions an exception to the general rule will be recognized and previous judgments of conviction will be admitted.[348] Thus in actions for the revocation of a professional license, evidence of facts contained in a prior judgment of conviction is admissible.

The court's justification for the general rule is based on the common law maxim, *res inter alios acta alteri nocere non debet,* that an action between two parties ought not operate to the detriment of a third.[349] The mutuality objection, however, is off the mark:

> The appropriate question in deciding whether the hearsay objection should be sustained in this context is not the party's opportunity to have been present at the official investigation but rather whether the investigation provided adequate assurance of reliability.[350]

Furthermore, the trial judge has discretion (in the federal courts pursuant to rule 403 and in South Carolina as an inherent common law power) to exclude evidence unfairly prejudicial or evidence whose probative value is substantially outweighed by the danger of delay, thereby overcoming objections that the jury might "misuse" evidence of prior judgments of conviction or that the trial will be unduly protracted by efforts to rebut or explain the prior judgment. The federal rule, therefore, represents the better approach since it recognizes "that the law's fact-finding process leads to decisions sufficiently reliable so that they should be given weight," particularly since a law of exclusion would deprive the jury of valuable, highly relevant evidence.[351]

---

347. 208 S.C. at 471, 38 S.E.2d at 646, *quoting* Fonville v. Atlantic Coast Line R.R., 93 S.C. 287, 75 S.E. 173 (1912).

348. *See also* Globe & Rutgers Fire Ins. Co. v. Foil, 189 S.C. 91, 200 S.E. 97 (1938); Keels v. Atlantic Coast Line R.R., 159 S.C. 520, 157 S.E. 834 (1931).

349. *Id.* at 472, 38 S.E.2d at 647-48.

350. 4 WEINSTEIN ¶ 803(22)[01], at 803-230.

351. MCCORMICK § 318, at 739. The argument in favor of evidence of prior judgments has been persuasively stated as follows:

> The judgment possesses great probative force, since it manifests persuasion of the jury beyond a reasonable doubt. The convicted party has had his day in court. Assuming the criminal charge was serious enough to motivate him to put forth his best efforts and to motivate the jury to put forth their best efforts, no

H. Statement Under Belief of Impending Death

Rule 804(b)(2)[352] is an expanded version of the common law dying declaration exception to the hearsay rule. It differs from the common law rule, however, in two primary respects — the rule's scope has been broadened by allowing its use in civil cases as well as the traditional homicide case and in no longer limiting the reason for unavailability to death.[353] South Carolina recognizes this exception to the hearsay rule but differs from rule 804(b)(2) in at least one of the two areas of the rule's expansion.[354]

South Carolina limits the use of such declarations to criminal cases of homicide by requiring that "the 'subject of the charge' must be the death of the declarant."[355] The birth of this "heresy"

---

unfairness results in using the judgment as evidence against him in another case.

4 Calif. Rev'n. Comm'n, Reports, Recommendations and Studies, A Study Relating to the Hearsay Evidence Article of the Uniform Rules of Evidence 401, 540 (1962), *quoted in* 4 WEINSTEIN ¶ 803(22)[01], at 803-231 n.12.

352. FED. R. EVID. 804(b)(2) provides:

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

. . . .

(2). . .In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.

353. For the exceptions embodied in rule 804 to be available to a proponent it must be found as a preliminary fact that the declarant is unavailable. Rule 804(a) specifies five instances in which a declarant is "unavailable": (1) a successful claim of privilege prevents the declarant from testifying about his statement; (2) the declarant refuses to testify despite judicial pressure; (3) the declarant establishes as a witness a lack of memory on his part concerning the statement; (4) the declarant is dead or has an existing infirmity; (5) the declarant is absent and the proponent has been unable to compel his attendance. If the proponent's wrongdoing is the cause of the declarant's unavailability under any of these provisions, the declarant is not considered unavailable.

South Carolina recognizes the requirement of the declarant's unavailability when dealing with these hearsay exceptions, but it has infrequently enumerated those instances in which a declarant is unavailable. The most frequently accepted reason is that the declarant is dead. Gaines v. Thomas, 241 S.C. 412, 128 S.E.2d 692 (1962). Other instances have been enumerated in a case involving the use of former testimony — the declarant's insanity, his absence from the jurisdiction, and where the declarant's attendance has been somehow prevented by a contrivance of the opposite party. State v. Steadman, 216 S.C. 579, 59 S.E.2d 168, *cert. denied*, 340 U.S. 850, *rehearing denied*, 340 U.S. 894 (1950).

354. State v. Bethea, 241 S.C. 16, 126 S.E.2d 846 (1962).

355. Rule 804(b)(4) codifies one of the oldest exceptions to the hearsay rule by allowing a statement of personal or family history to be admitted. 5 WIGMORE § 1480. It differs from the common law view in three major respects: (1) the *ante litem motam* requirement is dropped; (2) death is not the only means of unavailability; and (3) declarations of *nonfamily* members are admissible if they were intimately associated with the family to provide the necessary trustworthiness.

as it is called by Professor Wigmore[356] came about in the misconstrued words of an old English treatise writer.[357] The principle rests upon incorrect assumptions since

> it is of as much consequence to the cause of justice that robberies and rapes be punished and torts and breaches of trust be redressed as that murder be detected; the notion that a crime is more worthy of the attention of courts than a civil wrong is a traditional relic of the days when justice was administered in the royal courts as a purchased favor, and criminal prosecutions in the king's name were zealously encouraged because of the fines which they added to the royal revenues. The sanction of a dying declaration is equally efficacious whether it speaks of a murder or a robbery or a fraudulent will; and the necessity being the same, the admissibility should be the same.[358]

Many jurisdictions have abandoned these common law limitations by judicial or legislative decision.[359] One limitation of rule 804(b)(2) is that it differs from the version promulgated by the Supreme Court in that all criminal cases except homicides are excluded. The stated reason for this Congressional limitation was that dying declarations were not considered to be the most reliable forms of hearsay, but since the need for such declarations was greater in homicide prosecutions[360] they should be admissible in

---

South Carolina follows the general rule admitting statements of personal family history, even to the extent of admitting declarations of non family members in accordance with rule 801(b)(4). McLain v. Allen, 95 S.C. 152, 79 S.E. 1 (1913). "Unavailability" other than death is also recognized in this state. Robinson v. Blakely, 38 S.C.L. (4 Rich.) 586 (1851). It is uncertain whether this state still adheres to the *ante litem motam* requirement — that the declarations must have been made before the controversy arose. Nevertheless, the sufficient degree of trustworthiness to satisfy the hearsay rule rests on the assumption that the type of declarant specified by rule 801(b)(4) would not make a statement about the type of fact covered by the rule unless it were true.

356. 5 WIGMORE § 1431, at 277.

357. Sergeant East in 1803 stated that:

> Besides the usual evidence of guilt in general cases of felony, there is one kind of evidence more peculiar to the case of homicide, which is the declaration of the deceased, after the mortal blow, as to the fact itself, and the party by whom it is committed. Evidence of this sort is admissible in this case on the fullest necessity; for it often happens that there is no third person present to be an eyewitness to the fact; and the usual witness on occasion of other felonies, namely, the party injured himself, is gotten rid of.

Sergeant East, 1 Pleas of the Crown 353 (1803), *quoted in* 5 WIGMORE § 1431, at 277-78.

358. 5 WIGMORE § 1436, at 285.

359. *Id.* at 287 n.4.

360. REPORT OF THE HOUSE COMM. ON THE JUDICIARY, FEDERAL RULES OF EVIDENCE, H.R. Doc. No. 93-650, 93d Cong., 1st Sess. 15 (1973).

that criminal context but not others. This reasoning appears weak, since carried to its logical end, this would limit their use solely to criminal homicide prosecutions where the "necessity" is ostensibly the greatest, disregarding their equally efficacious application to all cases, criminal or civil.

I. Statements Against Interest

A declaration against one's pecuniary or proprietary interest or one which would subject the declarant to criminal liability is made generally admissible by rule 804(b)(3).[361] Rule 804(b)(3) broadens the common law rule on statements against interest by allowing the admission of a declaration against one's penal interests. The logic of this welcomed change is based upon the underlying principle of this exception — that persons are not likely to make damaging statements against themselves unless they are true.[362] A person, therefore, is considered just as unlikely to make a statement which would subject him to criminal liability as he would be to damage his pecuniary or proprietary obligations.

South Carolina's most recent pronouncement on this issue was in the case of *McLain v.Anderson Free Press.*[363] The court there recognized the doctrine as it applies to statements against one's pecuniary and proprietary interests but split on whether it also applied to the admission of declarations against one's penal interest. Two justices felt that the exception does not extend to delcarations against one's penal interest.[364] The majority opinion

---

361. FED. R. EVID. 804(b)(3) provides:

> The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> . . . .
>
> (3). . .A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

362. 5 WIGMORE § 1457, at 329:

> The basis of the exception is the principle of experience that a statement asserting a fact distinctly against one's interest is unlikely to be deliberately false or heedlessly incorrect, and is thus sufficiently sanctioned, though oath and cross-examination are wanting.

363. 232 S.C. 448, 102 S.E.2d 750 (1958).

364. Justice Taylor concurred in the portion of Justice Moss' opinion dealing with declarations against one's penal interest. Two others, Justice Oxner and Justice Stukes, concurred in the result.

based its decision on a series of treatises and cases which stated that most American courts have held the same.[365] The one dissenting justice found it "difficult to perceive sound reason for excluding a declaration against penal interest while admitting one against pecuniary interest."[365] A dissenting opinion by Justice Holmes in the case primarily relied upon by the *McLain* majority betrays the faulty logic of this rule. In one of his more vituperative and cogent dissents, the late Justice Holmes, in voicing his position on the question of admitting the confession of a murderer, stated that

> [t]he rules of evidence in the main are based on experience, logic and common sense, less hampered by history than some parts of the substantive law. There is no decision by this court against the admissibility of such a confession, the English cases since the separation of the two countries do not bind us, the exception to the hearsay rule in the case of declarations against interest is well known; no other statement is so much against interest as a confession of murder, it is far more calculated to convince than dying declarations, which would be let in to hang a man, Matloy v. United States, 146 U.S. 140; and when we surround the accused with so many safeguards, some of which seem to me excessive, I think we ought to give him the benefit of a fact that, if proved, commonly would have such weight.[367]

Another argument frequently advanced against the admission of statements is that the "floodgates" will be opened to witnesses falsely testifying to confessions that were never made.[368] The weakness of this argument is readily apparent since the danger of perjured testimony is present with all human testimony. Additionally, Professor Wigmore was probably correct in concluding that "any rule which hampers an honest man in exonerating himself is a bad rule, even if it also hampers a villain in falsely passing for an innocent."[369]

Depsite the opinion of what appears to be a majority of the court, three justices felt that declarations against one's penal interest should be admissible. Justice Legge argued for their

365. 232 S.C. at 459, 102 S.E.2d at 756.
366. 232 S.C. at 469-70, 102 S.E.2d at 761 (Legge, J., dissenting).
367. Donnelly v. United States, 228 U.S. 243, 277-78 (1913) (Holmes, J., dissenting).
368. MCCORMICK § 278, at 674.
369. 5 WIGMORE § 1477, at 359.

general admissibility[370] while Justices Oxner and Stukes felt that these declarations should be admitted but in a *limited* fashion. The latter two felt that a declaration against one's penal interest while admissible against the declarant could not be admitted against a third party.[371] This reasoning is illogical, and it confuses the doctrine admitting declarations against interest with that admitting admissions of a party. Obviously, if admissible only against the declarant, the statement would be admissible anyway as an admission of a party. Thus the court has created the appearance of adhering to the rule admitting penal declarations but has in reality created only an illusion with the limitations placed upon its use.

Should the South Carolina Supreme Court be called upon to consider this issue again, it is hoped that they will adhere to the logic of the growing number of decisions abandoning this misguided rule.[372]

> The only practical consequences of this unreasoning limitation are shocking to the sense of justice; for in its commonest application it requires, in a criminal trial, the rejection of a confession, however well authenticated, of a person deceased or insane or fled from the jurisdiction (and therefore quite unavailable) who has avowed himself to be the true culprit. The absurdity and wrong of rejecting indiscriminately all such evidence is patent. . . .
>
> It is therefore not too late to retrace our steps, and to discard this barbarous doctrine, which would refuse to let an innocent accused vindicate himself even by producing to the tribunal a perfectly authenticated written confession, made on the very gallows, by the true culprit now beyond the reach of justice.[373]

VII. CONCLUSION

As noted at the outset,[374] our fundamental objective has not been to survey the law of evidence in South Carolina but rather to emphasize to the legal community and to the legislature the

370. For citations to those courts abandoning the rule applied by the *McClain* majority, *see* MCCORMICK § 278, at 674 nn. 36, 37. *See also* CAL. EVID. CODE § 1230 (West 1975); KAN. EVID. ANN. § 60-460(j) (Vernon 1965).

371. 5 WIGMORE § 1477, at 359-60.

372. 232 S.C. 469, 102 S.E.2d 750, 761-62 (1958).

373. *Id.* at 470, 102 S.E.2d at 760-61.

374. *See* note 4 and accompanying text *supra.*

superiority of a uniform code of evidence over the current *ad hoc* method of creating and expounding rules of evidence on a case-by-case basis. The adoption of a uniform code would force creative thought into the areas where outdated rules still exist and because of the controversy stirred by debate, the true reasons and policies underlying specific rules would more likely be articulated. Additionally, a carefully formulated codification of the rules of evidence would provide the judiciary and the bar with more workable and more easily accessible authority for their positions.

A number of jurisdictions in the United States have adopted a uniform code of evidence,[375] many paralleling the federal rules.[376] We do not advocate the verbatim adoption of the federal rules. We do offer them as an example, probably the best, of a workable formulation of the rules of evidence due to the fact that they are the product of much judicial and legislative debate thereby producing well-reasoned and well-articulated rules of evidence. It is our hope that South Carolina will not be long in following the lead of other states and of the federal system in adopting a uniform code of evidence.

William B. Chandler III
C. Alan Runyan

375. As of July 1, 1976, six states have adopted various forms of the Federal Rules of Evidence: Arkansas, ARK. STAT. ANN. §§ 28-1001 *et seq.* (Supp. 1976) (based on the 1974 Uniform Rules of Evidence, which in turn, are based on the Final Draft of the Federal Rules of Evidence, 56 F.R.D. 183 (1973)); Maine, ME. REV. STAT. ANN., Maine Rules of Evidence (Supp. 1975) (based on the final version of the federal rules approved by Congress); Nebraska, NEB. REV. STAT. §§ 27-101 *et seq.* (Supp. 1975) (based on the final version of the federal rules approved by Congress); Nevada, NEV. REV. STAT. §§ 47.020 *et seq.* (1973) (based on the Preliminary Draft of the Federal Rules of Evidence, 46 F.R.D. 161 (1969)); New Mexico, N.M. STAT. ANN. §§ 901.01 *et seq.* (Interim Supp. 1976) (based on the final version of the federal rules approved by Congress); Wisconsin, WIS. STAT. ANN. §§ 901.01 *et seq.* (1975) (based on the Final Draft of the Federal Rules of Evidence promulgated by the Supreme Court, 56 F.R.D. 183 (1973)).

376. *See* note 375 *supra.*