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Some Uniques in South Carolina Law

Lanneau D. Lide

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SOME "UNIQUES" IN SOUTH CAROLINA LAW

JUDGE LANNEAU D. LIDE*

It has occurred to me that it might be of interest to give consideration to some phases of our South Carolina law, both adjective and substantive, which may be deemed more or less distinctive of this jurisdiction—hence the title, "Some 'Uniques' of South Carolina Law." In the main the basic and general principles of law are fairly uniform throughout the United States, though in each state there are some concepts that are slight variations from the general rule, and in each state there are some concepts that may be termed unique.

NO OPENING STATEMENT

The first matter for consideration is that we have no opening statement, although the usual practice in other jurisdictions, in civil cases tried by jury, is to precede the introduction of any evidence by an opening statement, that is to say, a statement by counsel for the respective parties, giving briefly the nature of the action, substance of the pleadings, and the points in issue, as well as the substance of the evidence proposed to be introduced. The obvious reason for such a practice is that the jury may have some advance notice of what the case is about, before the evidence is offered. The time-honored practice here, however, is to open the case merely by the reading of the pleadings; and when I first came to the bar this was usually done in a mechanical way, and must have meant very little to the jury. However, in more recent times counsel do occasionally interpose a word of explanation here and there.

*Judge of Circuit Court, Retired. Member of South Carolina Bar, Marion, S. C.

While I see no occasion for modifying our practice to the extent of introducing the opening statement, because this is just another matter about which counsel frequently disagree, that is, as to how far the statement should be allowed to go, I do think that the Court should permit counsel in the reading of the pleadings to translate them into readily intelligible language, and add such words of explanation as are necessary for the understanding of the issues to be tried; and I believe the Judges would be favorable to allowing this to be done, without the adoption of any formal rule on the subject.

Perhaps, however, there is a better method of giving the jury some information about the nature of the case they are about to try, and that would be for the Presiding Judge himself to make a statement, after the pleadings are read, as to the issues for trial. Indeed, I recall before I came to the bar, but while I was a Deputy Clerk of Court at Marion, that Judge Benet was accustomed to make a statement of this character. While as Trial Judge I tried some cases, such as condemnation cases, which I thought required some opening explanation, which was given by me; in general, I did not make such an opening statement as Judge Benet did; one reason for this being that under our very loose system of filing the pleadings, they are frequently not available to the Presiding Judge until the trial actually begins. In other words, in order to make a proper opening statement he should have the pleadings somewhat in advance of the trial.

NO NOTATION OF EXCEPTIONS

There is a phase of South Carolina practice which has grown up, so to speak, during my own recollection, to which attention may be directed, and that is, generally speaking, it is not necessary for exceptions to be noted in the course of the trial, as the foundation of an appeal. Consequently, nowadays the word "exceptions" as used by us really means "assignments of error" in the transcript of record for appeal.

As I recall, in my early days at the bar, where an objection was made to the admission of testimony, and the Court overruled the objection, it was considered necessary for counsel to go further and request the Court to note an exception. That practice, as to the admission of testimony and other matters arising during the trial, however, has certainly been practically abandoned, and I think wisely so. Not only is time

thereby saved, but a note of *irritation* is avoided. It is of course quite necessary that the objection made or point raised be clearly stated and that the ruling of the Court be definite; but if so, the exception follows as a matter of course, and no notation is required.

But a much more important phase of the matter now under discussion relates to the charge to the jury. The well known practice, in the Federal Courts, and in some other jurisdictions, requiring counsel to object or except to the charge before the final retirement of the jury, of course does not prevail in the South Carolina State Courts, although theoretically such a practice might tend to promote the ultimate correctness of the Judge's instructions to the jury. On the other hand, it places a rather "delicate and difficult task" upon counsel in many cases, and I believe our practice is preferable. But it should be borne in mind that counsel cannot escape all responsibility. The rule is well recognized that if the Presiding Judge makes an error in the statement of issues, such a mistake must be brought to his attention by counsel, so that it may be corrected. Furthermore, the duty of the Trial Judge is to charge the general principles of law applicable to the facts of the case, and if more detailed instructions are desired counsel must make timely request for the same. But if the Judge gives an erroneous instruction as to the law in his charge, it is not necessary for counsel to object to the same or to bring the matter to his attention. *Coleman v. Laurey,* 199 S. C. 442, 20 S. E. (2d) 65 (1942).

Our practice in this respect does not meet with unanimous approval, because it is argued that counsel should rather seek to promote the correctness of the charge. On the other hand, as our Court holds: "To make such requirement might place counsel in an embarrassing position." *Steinberg v. South Carolina Power Co.,* 165 S. C. 367, 163 S. E. 881, 883 (1932).

NO CHARGE ON THE FACTS

We now come to a principle of South Carolina law of very great importance, the same being embodied in our Constitution of 1895; Article V, Section 26, reading as follows: "Judges shall not charge juries in respect to matters of fact, but shall declare the law." This section was substituted for Section 26, Article IV, of the Constitution of 1868, which reads as fol-

lows: "Judges shall not charge juries in respect to matters of fact, but may state the testimony and declare the law."

The practice in the Federal Courts permitting, indeed requiring, the Trial Judge to summarize the testimony, and allowing him also to express his opinion on the facts, conforms in general to the common law practice as it once prevailed in this State. But in the course of time the States generally became considerably agitated on the subject, and many changes were made; the tendency being to limit the power of the Trial Judge and consequently to enlarge the power of the jury. The result has been that there is a wide variance among the States; and it will be observed that there is a distinct variation between the 1868 constitutional provision and the 1895 constitutional provision. Stating the matter another way: The Federal practice may be designated as being to the extreme *right* and our present South Carolina practice to the extreme *left*.

The Constitution of 1868 itself made a radical change in the law, because prior to that time the Circuit Judge had the right to advise the jury on the facts, and there were a good many decisions upon this constitutional provision; but the Constitution of 1895 went much further, and the clause on its face laid down a very hard rule for the Judges to follow, for the declaration of the law in the abstract is difficult to be done, and difficult to be understood, especially by those not trained in legal matters. However, this section of the Constitution has been liberally construed by our Supreme Court, beginning with the noted case of *Norris v. Clinkscales*, 47 S. C. 488, 25 S. E. 797 (1896), in which the opinion was delivered by Judge Benet, Acting Associate Justice, and wherein the rationale of the constitutional provision is luminously stated, including its abrogation of a significant part of the 1868 constitutional provision; and from these decisions it will be seen that the real object is to leave the determination of questions of fact to the jury exclusively, uninfluenced by any expressions of opinion by the Judge, and to this end, he must not even state the testimony. And I may say, from my experience on the bench, that in the exercise of due care the Presiding Judge may, with the aid of the pleadings and the use of hypothetical statements of fact, explain the law to the jury so that it may be understood, provided the abstract formulas of the law are translated into the language of every day life. And in this connection it may be observed that in recent years there have been few reversals based upon an alleged charge on the facts.

Of course, lawyers and judges are quite conservative, and having adjusted themselves to one system would rather not see it changed. My own view is that while the constitutional provision might appear to be unduly drastic, it has worked out very well in practice.

THE SCINTILLA RULE

As somewhat akin to the inhibition against a charge upon the facts, is the *scintilla rule,* which I well remember as one of the significant features of practice, particularly in negligence cases; and it was formerly regarded as meaning just what the words imply, to wit, that a mere *spark* of evidence required the submission of the case to the jury. But in the course of time, it seems to me, there has been a gradual liberalizing of the principle, as indicated by the more recent decisions, the existing rule being "that when only one reasonable inference, not just one inference, but one reasonable inference, can be deduced from the evidence, it becomes a question of law for the court, and not a question of fact for the jury". *Plowden v. Wilson,* 186 S. C. 285, 195 S. E. 847 (1938). And it has been held that the scintilla of evidence must be real, material, pertinent and relevant, not speculative or theoretical deductions. *Johnson v. Metropolitan Life Ins. Co.,* 206 S. C. 415, 34 S. E. (2d) 757 (1945).

But one of the most clarifying decisions of our Supreme Court relating to this matter arises out of the well established doctrine, that in a suit brought under the Federal Employers' Liability Act, the rule prevailing in the Federal Court is applicable upon a State Court trial, to wit, that there must be more than a scintilla before the case may be properly left to the discretion of the trier of facts, but that if only one *reasonable* inference can be drawn from the evidence, the question is one of law for the Court. The case I refer to is that of *Jester v. Southern Railway Co.,* 204 S. C. 395, 29 S. E. (2d) 768 (1944), in which the unanimous opinion of our Supreme Court was delivered by Chief Justice Baker, wherein the Court after stating the Federal rule held that the same "is in line with the rule of law prevailing in this State governing the granting of nonsuits and direction of verdicts, although *theoretically* this Court adheres to the *scintilla* rule". (Emphasis added.) In other words, if I may interpret the decision, the rule of reason as applied in both the Federal Court and the State Court is substantially the same. Hence the scin-

tilla rule can scarcely now be regarded as a part of our law, except in a modified sense.

Apportionment of Actual Damages

We come now to something which may be considered really unique, and that is the South Carolina rule that where joint tortfeasors are sued, the jury may sever the actual damages and apportion them; a rule which scarcely seems logical in view of the general principle that the injured party may sue one or more of the joint tortfeasors for his entire damages; and moreover, there is no contribution between joint tortfeasors. However, the rule is firmly established in this State, as will appear by reference to one of the earliest cases contained in our reports, to wit, that of *White v. M'Neily*, 1 Bay 11 (1784), where it was held that a jury may sever damages and apportion them according to the degree and nature of the offense committed by each offender, that is, by each of the joint tortfeasors. And there is a note to the report of this case to the effect that it may be considered as a part of the common law of South Carolina.

The whole matter was discussed and considered in the case of *Jenkins v. Southern Railway Co., et al.*, 130 S. C. 180, 125 S. E. 912 (1924), in which the leading opinion was delivered by Mr. Justice Cothran. And reference was made by him to the *White v. M'Neily* case, *supra*, and it was held that the rule therein laid down had been too firmly adhered to for it to be abandoned, notwithstanding its departure from the rule of the common law. I quote the following from the opinion by Mr. Justice Cothran:

> "In view, however, of the almost solitary position of this Court upon the question, opposed as it is by the authority of the supreme tribunal of the nation, and by almost every other State Court (and citicized as it has been by the judges who felt imposed to follow it), the rule should be confined to the precise condition which gave it birth."

The *Jenkins* case then before the Court was against a master and a servant for slander, the liability of the master being wholly dependent upon the liability of the servant. Consequently, it was held that in a case of that character there could be no apportionment, and the railroad could not be held liable for more than its agent.

And in the later case of *Johnson v. Atlantic Coast Line Railroad Co., et al.*, 142 S. C. 125, 140 S. E. 443 (1927), which was also a master and servant case, the Court held that while the rule laid down in the *Jenkins* case as to actual damages was correct, punitive damages should be apportioned as between a master and a servant, and inferentially as to joint tortfeasors in general, because of, *inter alia*, the difference in the financial condition of defendants.

I do not now recall trying a case on the bench where actual damages were apportioned, but I did try one at the bar which went to the Supreme Court on other grounds, but no point was made as to the apportionment, in which there were two defendants, only one, however, being represented by me, and the jury divided the large amount of the verdict equally between them. *Miller, Admr., v. Atlantic Coast Line Railroad Co., et al.*, 140 S. C. 123, 138 S. E. 675 (1926).

CONTRIBUTORY WILFULNESS

Our Supreme Court was certainly a pioneer in the promulgation of the doctrine of contributory wilfulness, although there had been in a few other States decisions leaning in that direction. Mr. Justice Fraser in the case of *Spillers v. Griffin*, 109 S. C. 78, 95 S. E. 133 (1918), where the doctrine of contributory wilfulness was first declared in this State, says, speaking for the Court:

> "The Courts, however, are not bound to find legislative authority or the authority of the other cases stating the same facts before they can declare the law in a new aggregation of facts. Law is a science, and it is the duty of the Courts to apply well recognized principles of law to new conditions."
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> "Again, contributory negligence is not a defense to wilfulness, because the parties are not equally to blame. Apply that same rule here, and we find that when a plaintiff wilfully contributes, as the approximate cause to his own injury, he cannot recover, even though the defendant was wilful. If the parties were equally, in the same class, to blame in producing the injury, neither can recover. It was error not to so charge."

The opinion in this case, while brief and citing no authority, announces the principle of contributory wilfulness in the

language I have quoted; and I recall very distinctly that this case was a great surprise to the members of the bar, because it gave to defendants in negligence suits a new defense. At first the defense of contributory wilfulness was set up separately from that of contributory negligence, but more recently it is customary for them to be combined. It will be of interest to refer to the annotation to the report of the *Spillers* case in L. R. A. 1918D 1193, for the annotator says that this case seems to be sound in principle and is supported by the few cases touching the question involved, with the exception of Alabama cases.

It may be mentioned in passing that Mr. Justice Fraser stated in the *Spillers* case that the doctrine of the "last clear chance" is not the law in this State; but from a reading of the excellent article by A. L. Hardee, Esq., of the Florence Bar, on this subject,[1] it will appear that the more recent decisions of our Supreme Court approve the last clear chance doctrine, at least in a modified form.[2]

There is yet another subject of some importance in the consideration of distinctive South Carolina doctrines, and that is the award of punitive damages for the fraudulent beach of a contract; but I do not have space for its proper consideration. However, the subject was excellently treated in the December, 1948, issue of the South Carolina Law Quarterly.[3] While the doctrine has been more frequently applied to insurance cases, its origin was far different, as will appear by reference to the primary case of *Welborn v. Dixon,* 70 S. C. 108, 49 S. E. 232 (1904). Let me say this simply—that while I think moderation is essential in the award of punitive damages, a breach of contract accomplished with a fraudulent *intention* and accompanied by a fraudulent *act* reasonably justifies moderate punishment; and that the doctrine as applied by our Courts has in general been beneficial.

STATUTE DE DONIS NOT ADOPTED

The next proposition is indeed rather unique, and relates to an entirely different field of the law from that heretofore dis-

1. The Status of the "Last Clear Chance" Doctrine in the State of South Carolina, 1 S.C.L.Q. 70 (1948).

2. *cf* Scott v. Greenville Pharmacy, Inc., 212 S. C. 485, 48 S. E. (2d) 324 (1948). (Treated as a Case Note, p. 293, post.—Ed.)

3. The Awarding of Punitive Damages for Breach of Insurance Contracts in South Carolina, 1 S.C.L.Q. 150 (1948).

cussed, to wit, the fact that the Statute *de Donis,* relating to real estate, never became a part of the common law of this State, this result being peculiar to South Carolina, Iowa, Nebraska and Oregon. I recall quite definitely that in the study of the law prior to my admission to the bar I was very much surprised to find this to be true, because some of the textbooks made no reference to the failure of South Carolina to recognize the ancient statute passed in 1285 in the reign of Edward I. By this statute *fees conditional* which were limited to the heirs of one's body were made inalienable under any circumstances, and were therefore called estates tail, which, instead of descent to heirs generally, go to the heirs of the donee's body in a direct line, so long as his posterity endures. And in a quite recent case, to wit, that of *Cresswell v. Bank of Greenwood, et al.,* 210 S. C. 47, 41 S. E. (2d) 393 (1947), the Court (opinion by Stukes, J.) calls attention to the fact that the word "entail" is meaningless in South Carolina, because we do not recognize the Statute *de Donis.*

The result is of course that the fee conditional at common law continues to exist in South Carolina, to wit, that an estate limited to the heirs of the body of the grantee, or the issue of his body, becomes alienable upon the birth to the grantee of a child, no matter how brief its life might be, that is to say, alienable by deed, although not devisable, because a devise is effective only after the death of the testator. It is difficult, if not impossible, to conceive that a grantor would deliberately *intend* such a result. But this technical rule of the law prevails as a part of a logical although artificial system. It is of course of importance to observe, however, that the fee conditional estate may perhaps become relatively obsolete, because it often results from the application of the Rule in Shelley's Case, that is to say, where an estate is granted to one for life and after his death to the heirs or issue of his body; and the Rule in Shelley's Case has been abolished by statute as to deeds or wills executed October 1, 1924, and thereafter. See Section 8802, Code 1942.

TRIAL OF EQUITABLE ISSUES

There are other phases of our South Carolina law which might more aptly be considered as covered by my subject than some of those I have mentioned, but space will not permit me to refer to any other, save the trial of equitable causes and

equitable issues in law cases under our practice. And admittedly our practice in this respect could not be considered a *peculiarity* of the South Carolina law. However, it is *characteristic* of our system and is not followed in some jurisdictions. I refer to our practice of trying equity cases by the Court without a jury; and I may say that in my opinion there is no State where the distinction between law and equity is more carefully recognized and observed than in South Carolina, although of course under the Code, and guaranteed by our Constitution, we have but one form of action and enjoy all the benefits of Code procedure; which I think is a highly desirable result.

Section 593, Code 1942, provides that an issue of fact in actions for the recovery of money only or specific real or personal property must be tried by a jury, unless a jury trial be waived; that is to say, actions at law must be tried by a jury.

It is indeed provided in this section that in equity causes, upon a timely motion, the Presiding Judge may, *in his discretion,* cause to be framed an issue or issues of fact to be tried by a jury; and that the findings of fact upon *such* issues by the jury shall be conclusive of the same, just as in law cases. This provision of the statute might be considered as a definite change in the equity practice, but it will be observed that the granting of such a motion is in the discretion of the Presiding Judge; and moreover, the Court has held that this statute does not abrogate the rule that the Judge sitting as a Chancellor may submit issues of fact to the jury solely for the enlightenment of his conscience. And it may further be observed, as will appear by reference to the case of *Momeier v. John McAlister, Inc., et al.,* 190 S. C. 529, 3 S. E. (2d) 606 (1939), that the Supreme Court has held that even where issues had been framed for a jury trial under the statute, the Presiding Judge had the right to withdraw the case from the jury before the findings were made, and decide the issues for himself, or have the jury make findings on the issues solely for his enlightenment in determining the judgment to be rendered. In other words, the whole matter is left in the discretion of the Trial Judge.

I believe the wisdom of the practice thus established by the Court has the approval of the bar, for during my entire experience on the bench a motion to frame issues under the

statute has been very rare indeed, and I do not now recall trying a single equity case with the aid of a jury.

I am strongly of opinion, based on my experience at the bar and on the bench, as I said in a brief editorial published in the American Bar Association Journal, June, 1948, "that in general the jury performs its functions well and in furtherance of justice, in those cases which are appropriate to that method of trial, that is to say, in (law) cases involving issues not unduly complex, and where there is careful instruction on the law by the Judge". On the other hand, however, there are few equity cases in which, in my judgment, issues should be submitted to the jury; and if issues are submitted, I think in most cases they should not be submitted under the statute but under the time-honored rule, for the enlightenment of the Chancellor.

I had the honor to be the secretary of Judge Woods upon his elevation to the South Carolina Supreme Court, and I am sure that he is regarded as one of its most celebrated members throughout its entire history. He was a profound student of the law, believing, however, that it might be improved in many ways. I have often heard him say in effect that the high praise speakers and writers give to the common law of England seems rather peculiar in view of the fact that the system of equity had to be devised to relieve the law of some of its defects and injustices. At all events, equity, even in the technical meaning of that word, has been a great liberalizing agency, because it arises out of the consideration of "whatsoever things are just". And in its larger sense it is, and should be, the heart of our judicial system.

I had the pleasure of hearing Lord Hugh Pattison Macmillan's address at the meeting of the American Bar Association at Cleveland in 1938, in which he spoke of his service on the Judicial Committee of the Privy Council, the court of appeal for the British Empire, with a wider territorial jurisdiction than any court of any country in the world. He stated that of course in passing upon appeals from the colonies and dominions and other parts of the Empire, including mandated territories, it was their duty to administer the law in conformity with the local system, but that in some cases there was no local system or at least no local law applicable. However, they were instructed by their letters patent "to do what is just and equitable in such cases". And I quote the following from Lord Macmillan's interesting address:

"So in many cases which come before us, where we have liberty to administer an equitable jurisdiction, what has struck me so much is this—and this is the text to which I alluded—the essential *unity* of the *principles of justice* through the ages.

"Studying, as one has to, all these manifold and various systems, they are seen to differ enormously in their procedure. They differ in their approach to their questions. But when one comes at the end of the day to do, as we are bound to do, justice, isn't it striking, gentlemen (and you from your experience I am sure will bear me out) how simple and how fundamental are those real essential principles of justice?"

Mr. Justice Holmes, one of America's truly great jurists, took a highly pragmatic view of the law, holding that it is merely the process of predicting what the judgment of the Court upon a given state of facts will be; but we cannot escape the conviction that there are certain fundamentals of right and justice, "the same yesterday, today and forever". Hence, the final test of our practice is not whether it be unique or not, but whether it conforms, as Lord Macmillan says, to "what is just and good and fair, and somehow or other a man of good will knows what is just and good and fair".