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Opening and Closing

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OPENING AND CLOSING

The right of a party to open and close in introducing evidence is a substantial right, not subject to a court's discretion, and must be distinguished from another substantial right, namely that of opening and closing in argument to the jury. The latter is embodied in circuit court Rule 58 (formerly 59). Either right may be waived but if taken away by the court such ruling would be an error. *Pinson v. Bowles* (1920), 116 S. C. 47, 106 S. E. 775. As to these rights see West's S. C. Digest, Vol. 18, Trial, § 25.

Both of the above rights are very important and may mean the difference between winning and losing, so a trial attorney must see that such a right is exercised at the proper time or else it will be lost by waiver through his conduct. *Sirgany v. Equitable Life Assur. Soc.* (1934), 173 S. C. 120, 175 S. E. 209.

An opening statement such as is permitted in some other jurisdictions, is not allowed in South Carolina. However, some attorneys on either one or both sides, will, after reading a pleading to the jury, put the issues in simple language, devoid of technical phrases, so that the jury will have a clear idea of what the case is about. There is no rule for or against it, but it is practical and the writer understands it is gaining ground in the courts. As a county judge he favored it, especially after asking some jurors if it was helpful to them and they said it certainly was.

At this point attention is called to the fact that *State v. Atterberry* (1924), 129 S. C. 464, 124 S. E. 648, is no longer the law and should not have been annotated under Rule 58 in the 1952 Code. The rule was changed shortly after that decision in accordance with Justice Cothran's dissenting opinion. A solicitor no longer can be required to make an opening argument to the jury on issues of fact.

Yancy et al. v. So. Wholesale Lumber Co. (1924), 129 S. C. 48, 123 S. E. 767, at page 51 lays down the rule regarding argument to the jury:

> This state has followed the weight of authority in holding that the right to open and close the argument to the jury is not a matter within the discretion of the trial Court, but is a substantial right, the denial of which is reversible error. *Addison v. Duncan,* 35 S. C., 165; 14

S. E., 305. *Barnett v. Gottlieb,* 98 S. C., 180; 82 S. E. 406; 38 Cyc. 101. *Brown v. Kirkpatrick,* 5 S. C., 267. The question has arisen in other cases, in all of which the right is recognized as a substantial one. [South Carolina cases cited.]

While it is obvious that rule 59 of the Circuit Court does not control the situation, the decisions construing that rule disclose the reason for the rule, which really would control if there was no such rule:

"The true test is, who would be entitled to the verdict if the case is submitted to the jury simply upon the pleadings, without evidence being adduced by either side? If the plaintiff, then unquestionably the defendant, being the actor, would have the right to open and reply." *Addison v. Duncan, supra.*

After the plaintiffs' cause of action had been eliminated, the defendant became the complainant as to the counterclaim. This was denied by the reply of the plaintiffs, and, if the case had been submitted upon these pleadings without evidence, the verdict should have gone to the plaintiffs. The fundamental rule is that he who alleges must prove; he assumes the burden of conviction and is entitled to the opening and reply.

Floyd v. N. Y. Life Ins. Co. (1918), 110 S. C. 384, 96 S. E. 912, at page 388, gives the rule as to introducing evidence:

The rule of Court provides that the defendant shall begin and close "where he admits the plaintiff's cause by the pleadings, and takes upon himself the burden of proof." The answer nowhere expressly admits the plaintiff's cause. It neither admits, nor does it deny, the allegations of the complaint. It proceeds immediately "answering both causes of action * * * and as a defense" to set forth new matters constituting a defense to the plaintiff's case . . . . The third averment furnishes the only suggestion that the answer admitted the plaintiff's cause. It is true that therein the defendant admits that the assured received the policies; but the allegation goes further and charges that the reception was qualified by the amended application attached to the policies which worked an avoidance of them. The complaint made no reference to the application, or to the amendment of it.

The answer then made not even an indirect admission of the allegation of the complaint, but alleged matter in qualification of the contract the plaintiff set out. This was clearly not such an admission of the plaintiff's case as entitled the defendant to open and close. *Kennedy v. Moore,* 17 S. C. 464; *Boyce v. Lake,* 17 S. C. 481, 43 Am. Rep. 618; *McConnell v. Kitchens,* 20 S. C. 430, 47 Am. Rep. 845.

The offer by the defendant's counsel at the trial to admit the plaintiff's cause came too late; the admission must be by the record. *Johnson v. Wideman,* Dudley 325.

Williams v. Metropolitan Life Ins. Co. (1943), 202 S. C. 384, 25 S. E. 2d 243, in applying the latter rule, states at page 388 when a defendant should open and close:

By reason of the admissions in the answer, the plaintiff was entitled to recover upon his causes of action without first offering any proof at all, if no evidence were offered on either side. It was therefore incumbent upon the defendant to establish its defense in avoidance, and it was upon this theory that it was allowed to open and close. *Burkhalter v. Coward,* 16 S. C., 435.

The alleged clause in the policies relied upon by the appellant to defeat recovery did not relate to a counterclaim, but constituted new matter, which under Section 488 must be taken as having been specifically denied by the plaintiff. This made an issue, and cast upon the defendant the burden of proving that the policies contained the provisions quoted, and that no reference as to medical treatment was endorsed upon the policies. This it failed to do; the policies were never placed in evidence.