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Practice and Procedure

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PRACTICE AND PROCEDURE

I. PRETRIAL

A. Discovery

An important decision in the field of discovery was handed down by the Supreme Court of South Carolina in *Cannon v. Goodyear Tire and Rubber Co.*[1] The plaintiffs in this case brought an action for wrongful death against the estate of Gordon E. Long and others. The defendant, Goodyear Tire and Rubber Co., was joined upon allegations that it had negligently manufactured and sold a defective tire, with which the Long automobile was equipped, and the rupture of this tire was a cause of the fatal collision. Goodyear's request to the executor of the estate of Gordon E. Long for permission to inspect the tire in his possession was refused and the defendant commenced a special proceeding by service of a petition and rule to show cause why inspection should not be allowed. The circuit court granted defendant's petition to inspect the allegedly defective tire.

On appeal the court held that a court of equity had inherent authority in the promotion of justice and in the absence of a statutory remedy to allow inspection of a chattel in possession of an adverse party. The court distinguished the present case from that of *Welsh v. Gibbons*[2] in which the court refused a motion for discovery in an action at law by observing that the motion in this case was framed to invoke the equity jurisdiction of the court. The court opined that although discovery was not allowed in the courts of law, it was an original and inherent power of the courts in equity.[3]

B. Venue

In *Morse v. Moore Sand and Gravel Co.*,[4] the plaintiff brought an action for wrongful death and conscious pain and suffering arising when the defendant-carrier's tractor trailer overturned killing the plaintiff's intestate. Services of the summonses and complaints were made on the Public Service Commission pursuant to section 10-430 of the South Carolina Code. The defend-

1. 248 S.C. 412, 150 S.E.2d 525 (1966).
2. 211 S.C. 516, 46 S.E.2d 147 (1948).
3. For a thorough discussion of this case see 18 S.C.L. REV. 701 (1966).
4. 248 S.C. 380, 149 S.E.2d 907 (1966).

ant moved to vacate the services on the ground that the load of gravel on the trailer at the time of the fatal accident was the property of the defendant and was not being hauled for hire, but for the exclusive benefit of the defendant. The motion was overruled by the lower court.

The supreme court held on appeal that under the plain and unambiguous language of section 58-1470,[5] a carrier licensed to haul supplies in the county in which an accident occurred could not avoid suit in that county even though the load he was hauling at the time was not hauled for hire but for his own benefit. The practical effect of this decision is to make a motor vehicle carrier subject to statutory substituted service any time it is using the public highways, not just when it is hauling for hire.

C. Change of Venue

During the survey period the South Carolina Supreme Court considered the question of change of venue in two cases. In *Oswald v. Southern Farm Bureau Casualty Company*,[6] the defendants moved to have the venue changed to the county of the defendant's residence. The lower court granted the motion. Thereafter, the plaintiff successfully moved to have the venue changed back upon grounds that the convenience of the witnesses and the ends of justice could best be met. On appeal, the court stated that a motion for change of venue is addressed to the sound discretion of the court that hears it, and that the decision will not be disturbed except by a clear showing of abuse. This is a well settled rule in South Carolina.

In *Moulds v. Blitch*,[7] the plaintiff brought action against the defendant seeking damages for personal injuries alleged to have been sustained as the result of a collision. The defendant moved for change of venue under section 10-310(3) of the Code in order to promote the convenience of witnesses and the ends of justice. The plaintiffs contended in opposition to the change of venue that having the trial in Darlington would be to their convenience as well as to that of their relatives who could lend valuable testimony to the trial. The lower court granted the change of venue expressing approval of the rule that the con-

5. S.C. CODE ANN. § 58-1470 (1962) provides: "An action may be brought against a motor carrier licensed under Article 3 of this Chapter in any county through which the motor carrier operated."

6. 248 S.C. 433, 150 S.E.2d 612 (1966).

7. 248 S.C. 459, 150 S.E.2d 917 (1966).

venience of witnesses who are members of a litigant's family are not entitled to the same consideration as that of other witnesses.

The supreme court reversed the lower court's decision. The court reasoned that the rule approved by the lower court was analogous to the rule adopted in some jurisdictions that the convenience of witnesses who are in one of the litigant's employ will not be considered, at least not as strongly as the convenience of other witnesses.[8] The litigant's employee rule, however, has been expressly rejected in South Carolina.[9] The decision points out the court's belief that any rule of this nature which distinguishes merely because of relationship is basically unsound.

In the federal court there were two cases decided involving change of venue. In *Mims v. Proctor and Gamble Distributing Company*[10] the court granted a change of venue and restated the guidelines which must be followed in ruling on a change of venue. Among these are the number of witnesses and the quality of their testimony, the accessibility of witnesses and documents, and the private interest of the litigant. The court also stated that the weight to be given to the plaintiff's choice of forum is lessened when the conduct complained of did not occur in the forum selected. Likewise, the fact that the plaintiff may be required to hire additional attorneys in the new forum should be given no weight.

In *Wright v. American Flyers Airline Corporation*[11] the district court granted motions to transfer actions against the defendant airline to the district court in Oklahoma. The court, while holding that the convenience of witnesses and ends of justice could be best met in Oklahoma, also stated that South Carolina has never adopted the new doctrine that has been accepted in other states that the forum state should apply a rule of liability other than that of the place of the accident.[12] The

8. This rule has apparently been adopted in California, New York and a few other states. *See* Annot., 74 A.L.R.2d 16, 95 (1960).

9. *See* Cleland v. Atlantic Coast Line R.R., 245 S.C. 478, 141 S.E.2d 339 (1965); Skinner v. Santoro, 245 S.C. 35, 138 S.E.2d 645 (1964).

10. 257 F. Supp. 648 (D.S.C. 1966).

11. 263 F. Supp. 865 (D.S.C. 1967).

12. For a case showing the fortuitous nature of the place of the accident, see Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 211 N.Y.S.2d 133, 172 N.E.2d 526 (1961). The court in that case stated:

> The number of states limiting death case damages has become smaller over the years but there are still 14 of them. . . . An air traveler from New York may in a flight of a few hours duration pass through several of these commonwealths. His plane may meet disaster in a State he never intended to cross but into which the plane has flown because of bad weather or other unexpected developments, or an airplane's catastrophic descent

rule in South Carolina is that the law of the place where the injury occurred governs with respect to rights of action.[13] Therefore, this doctrine cannot be used as an argument against transfer.

D. Removal of Cases

In *Hildieth v. General Instrument, Inc.*,[14] the plaintiff brought an action for damages by making service in Darlington County on June 27, 1966. On July 1, 1966, the defendant filed a demurrer in the state court. On July 18, the defendant filed petition and bond for removal to the district court. The plaintiff sought to remand the case to Darlington County because the motion to remove had not been made in time and because the defendant had waived his right of removal by filing the demurrer.

The district court held that under the new statute enacted on September 29, 1965, the time for filing a removal had been increased to 30 days.[15] On the second question as to whether the defendant had waived his right to remove the case by demurring in the state court, the court opined that the filing of the demurrer was not a waiver. In so holding the court recognized that to hold otherwise would work a hardship and unjust forfeiture of the defendant's right and would also have the effect of shortening the statutory period. This decision is illustrative of the courts' reluctance in recent decisions to hold that parties have waived their right of removal without a "clear and unequivocal" showing.[16]

In another federal case, *Dawkins v. National Liberty Insurance Co.*,[17] the plaintiff filed action in a state court from which there was removal by the defendants on petition and bond to the district court. Thereafter the defendant moved for a dismissal of the case on the ground that it did not meet the jurisdictional amount. The plaintiff resisted the motion contending that when

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may begin in one State and end in another. The place of injury becomes entirely fortuitous. Our courts should if possible provide protection for our own State's people against unfair and anachronistic treatment of the law suits which result from these disasters.

13. *See, e.g.*, Rauton v. Pullman Co., 183 S.C. 495, 191 S.E. 416 (1937).

14. 258 F. Supp. 29 (D.S.C. 1966).

15. 28 U.S.C. § 1446(b) (Supp. 1965) provides in part: "The petition for removal of a civil action or proceeding shall be filed within thirty days after the receipt of the initial pleading. . . ."

16. *See* Champion Brick Co. v. Signode Corp., 37 F.R.D. 2 (D. Md. 1965). *See also* C. WRIGHT, FEDERAL COURTS § 38 (1963).

17. 263 F. Supp. 119 (D.S.C. 1967).

defendant filed its petition for removal, it alleged that the matter in dispute exceeded the jurisdictional amount. The district court held that the defendant did not waive his right to challenge the jurisdiction of the court at a later time, since there was no mention as to the jurisdictional amount. This procedure would not of itself confer jurisdiction on the court.[18]

E. Joinder of Claims

In *Airfare, Inc. v. Greenville Airport Commission*,[19] the plaintiff brought an action for breach of a lease contract, while also asking for an injunction to prevent the defendant from further interfering with the plaintiff's use of the leased premises. The defendant moved to require the plaintiff to make an election as to whether he was proceeding *ex contractu* or *ex delicto* and to refer the case to the Master in Equity. The plaintiff conceded that he was proceeding *ex contractu*, but resisted the defendant's motion to have the case referred to the Master in Equity. The trial court granted the motion of reference and the plaintiff appealed.

The supreme court held that the main purpose of the suit was to secure money damages for the breach of the contract. Since no accounting was involved, and since the main purpose was to secure money damages, the action did not fall within the compulsory reference of section 10-1402 of the Code. Therefore, the plaintiff was entitled to a trial by jury as a matter of right.[20] The court opined that the logical choice was to try the legal issue first, since if the facts did not show a breach of the contract, then plaintiff would not be entitled to an injunction. The court followed the settled rule that legal and equitable issues should be separated and each tried by the appropriate branch of the court.[21]

F. Election of Remedy

Jacobson v. Yaschik[22] involved an action by the seller of corporate stock against the buyer, who was also president, general

18. *See generally* 76 C.J.S. *Removal of Causes* § 294 (1952).

19. 249 S.C. 265, 153 S.E.2d 846 (1967).

20. S.C. CODE ANN. § 10-1403 (1962) provides that the order of reference in an equitable action or of an equitable issue in an action at law may be general of all issues of both law and fact but that this section shall not be construed so as to deprive any party of a trial by jury of any case or issue upon which he is entitled to a trial by jury as a matter of right.

21. *See* Standard Warehouse Co. v. Atlantic Coast Line R.R., 222 S.C. 93, 71 S.E.2d 893 (1952).

22. 155 S.E.2d 601 (S.C. 1967).

manager, majority stockholder and director of the corporation. The plaintiff alleged fraudulent breach of the fiduciary duty owed by the defendant to reveal that he had previously negotiated to sell the entire capital stock. Plaintiff had sold her stock to the defendant for $30,000, but under the defendant's later contract her stock would have had a value of $36,000. In her first cause of action, the plaintiff asked that defendant be required to account to her for all her proper pro rata share of the full value received by him for the sale of the corporate stock and the distribution of the assets. On the second cause of action, the plaintiff alleged that she had relied on the defendant's representations to her injury and damage in the sum of $100,000. The defendant moved to require the plaintiff to elect whether she would proceed under the first or second cause of action.

The supreme court concluded that the plaintiff had stated only one cause of action, and therefore, although she has two remedies, one in equity and one in law, she was entitled to only one recovery. The court further held in accord with the general rule that when a plaintiff has a remedy at law and one in equity, he may be compelled by court to elect whether he will proceed with one or the other,[23] but he will not be so compelled until the defendant has answered. The rationale used is that the complainant is entitled to all possible information in order that he may make an intelligent election.[24]

G. Impleader

In the federal case of *Sox v. Hertz Corporation*,[25] the administrator of the estate of the deceased brought action against the defendant-automobile rental agency. At the time of the accident the deceased's mother was the driver of the agency's automobile. Hertz sought to make itself a third party plaintiff and to bring in the driver as a third party defendant. The corporation contended that it could have no liability except through the driver,

23. *See* Thackson v. Shelton, 178 S.C. 240, 182 S.E. 436 (1935).

24. The court cites 25 AM. JUR. 2d *Election of Remedy* § 31 (1966), but it is difficult from the court's decision to determine whether the complainant will ever be required to elect before the defendant has answered. *Amercian Jurisprudence* states that "where there is no controversy as to whether the two suits are for the same cause or as to the adequacy of each remedy, or where it appears that the court can ascertain all the material facts from an inspection of the pleadings in an action at law and the bill in equity, an election may be required at any stage of the proceeding." *See also* Fleming v. Courtenay, 95 Me. 135, 49 A. 614 (1901).

25. 262 F. Supp. 531 (D.S.C. 1967).

that it should be able to recover from the driver any sums it is required to pay, and that therefore the driver should be made a third party defendant in order to avoid a multiplicity of suits. The plaintiff presented to the court an affidavit showing that the driver was virtually impecunious and had no personal automobile liability insurance coverage at the time of the accident.

The district court denied the defendant's motion to implead the driver on the grounds that to do so would necessarily lead to confusion and possibly prejudice. The court followed the rationale stated in *Goodhart v. United States*,[26] that jurors would likely render smaller verdicts where an individual, who is unable to pay a substantial judgment, must be held ultimately liable.[27] The fact that there was sworn testimony of the driver's impecuniosity and her close relationship with the deceased made it apparent that the prejudice feared in the *Goodhart* case might occur.

H. Special Appearance

The plaintiff in *Connell v. Connell*[28] brought an action to have a previous divorce decree modified by changing the visitation rights and by increasing the amount awarded for the support of herself and the children. The defendant filed an "answer and return" objecting to the jurisdiction of the court in this matter. Further allegations were made by the defendant with regard to the method of service of the previous decree. The court held that under section 10-648 of the Code, as well as established case law, a party is allowed to appear for the sole purpose of objecting to jurisdiction over the person, but if he raises any other issues or files an answer before the objection to jurisdiction is overruled, then he has made a general appearance.[29]

26. 26 F.R.D. 163 (S.D.N.Y. 1960). This case dealt with a motion to allow impleader of the defendant's servant where the servant was financially unable to make indemnity. *See also* Annot., 5 A.L.R.3d 71 (1966).

27. More recent decisions have restricted the *Goodhart* decision so that a uniform approach might be kept, but have implied that where there is a special showing of potential prejudice and definite proof of impecuniosity, the court may deny the impleader. *See, e.g.,* Smith v. Moore-McCormack, 31 F.R.D. 239 (S.D.N.Y. 1962).

28. 249 S.C. 162, 153 S.E.2d 396 (1967).

29. *See* S.C. State Highway Dep't v. Isthmian S.S. Co., 210 S.C. 408, 43 S.E.2d 132 (1947). S.C CODE ANN § 10-648 (1962) provides that: "Upon the *overruling* of such objection to the jurisdiction and the giving of such notice such party may *thereafter* appear generally or answer or contest upon the merits . . . ." (emphasis added).

The court, however, went further and added that if the plaintiff were also contesting the court's jurisdiction over the subject matter, such an objection goes to the merits of the case and is considered in law to be a general appearance. This point seems to have been previously undecided in South Carolina. The court in so ruling followed the rule adopted in North Carolina[30] and a majority of the jurisdictions.

I. Declaratory Judgment

During the survey period there were two cases of some importance dealing with declaratory judgments. In *Bank of Augusta v. Satcher Motor Co.*,[31] the plaintiff-bank brought action against the defendants Satcher Motor Co. and others seeking a declaratory judgment to determine the priority of its chattel mortgage on an automobile over the claims of the defendants. The defendants, Satcher Motor Company and Commercial Credit Corporation, demurred to the complaint. The lower court overruled the demurrers and the defendants appealed.

The supreme court in affirming the lower court decision held that a complaint is not subject to demurrer for failure to state a cause of action for declaratory judgment if the facts alleged show the existence of a justiciable controversy between the parties,[32] and the determination of the priority of mortgages on the same chattel is such a controversy. The court also rejected the defendant's contention that the action should be dismissed because the plaintiff had other remedies available, stating that this fact alone does not bar the action under the Code.[33]

In a federal case, *Lumberman's Mutual Casualty Company v. Quick*,[34] the plaintiff insurance company filed suit for a declaratory judgment and also filed a motion with the court to issue an order enjoining the defendant from further proceedings in the state court. The plaintiff contended that the district court has

30. *In re* Blalock, 233 N.C. 493, 64 S.E.2d 848 (1951).

31. 249 S.C. 53, 152 S.E.2d 676 (1967).

32. *See* Hardwick v. Liberty Mut. Ins. Co., 243 S.C. 162, 133 S.E.2d 71 (1963); Plenge v. Russell, 236 S.C. 473, 115 S.E.2d 177 (1960); Dantzler v. Callison, 227 S.C. 317, 88 S.E.2d 64 (1955).

33. S.C. CODE ANN. § 10-2002 (1962) provides: "Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations *whether or not further relief is or could be claimed* and a declaratory judgment will be refused only where the other remedy would be more effective or appropriate" (emphasis added). For a detailed discussion of this case see 19 S.C.L. REV. 451 (1967).

34. 257 F. Supp. 252 (D.S.C. 1966).

under certain conditions and circumstances the power to enjoin proceedings in the state court,[35] and that it would be necessary to enjoin the state proceeding in this case to protect or effectuate the declaratory judgment. The court rejected these arguments citing *Aetna Casualty and Surety Co. v. Yeatts*[36] to the effect that each of the courts may proceed with the case before it without reference to the other, except insofar as a prior decision in one tribunal may constitute res judicata on one or more questions involved in a later trial. Furthermore, the court opined that where a suit could not have been brought originally in the district court except by declaratory judgment action[37] and that where no explanation is given as to why the declaratory judgment is equally available and equally efficacious in the state court, the district court will dismiss the case without prejudice.

II. TRIAL

A. Jury Trial

The case of *Southern Railway Company v. Surety Insurance Company*[38] raised an interesting question for the court. The defendant automobile insurer moved for a directed verdict on the ground that the insured failed to comply with its obligation to cooperate in the defense of the case by refusing to appear in court as required by the provisions of the policy. The plaintiff, thereafter, also moved for a directed verdict. The trial court then ruled in favor of the defendant. The plaintiff appealed arguing that concurrent motions by plaintiff and defendant for directed verdicts does not take the case from the jury and submit all issues of fact and law to the court. Although the court agreed with the plaintiff's argument, it nevertheless ruled that litigants and counsel by their acquiescence had waived the right of a jury trial and submitted all questions of fact and law to the

35. 28 U.S.C. § 2283 (1964) provides: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgment."

36. 99 F.2d 665 (4th Cir. 1938).

37. In the original action in tort brought in the state court, diversity of citizenship was lacking, and thus it could not have been brought in the district court, nor was it removable to the district court. Therefore, the only means of getting into the district court was by filing a declaratory judgment. The court quoted American Automobile Ins. Co. v. Freundt, 103 F.2d 613, 617 (7th Cir. 1939) as follows: "The wholesome purposes of the declaratory acts would be aborted by its use as an instrument of procedural fencing either to secure delay or to choose a forum."

38. 154 S.E.2d 561 (S.C. 1967).

court. The rule of imputed waiver arising from the request of each of the parties appears to have been the majority rule at one time in the United States.[39] While this rule has lost much of its support, it is still adhered to by thirteen jurisdictions. However, this form of procedure appears never to have been adopted by the courts of South Carolina.[40]

In *Baughman v. South Carolina Insurance Company*,[41] the minor plaintiff brought action for injuries which he sustained while a passenger in an automobile which collided with a school bus at an intersection. The supreme court held that even though a request for a charge to the jury is granted, a party cannot complain of the court's failure to reopen arguments to the jury where the refusal was invited by the party's failure to present his contentions prior to the commencement of arguments to the jury.

B. Nonsuit

In *Gary v. Nationwide Insurance Company*,[42] the plaintiff brought an action against two insurers to recover the amount of a judgment against a third party. Upon conclusion of the evidence, the defendant moved for an involuntary nonsuit, which was denied, and the defendant proceeded to offer certain evidence in support of his defenses. Thereafter, the plaintiff sought to call one of the defendant's subpoenaed witnesses as a reply witness, but he was not in the court room. The plaintiff's counsel was aware that the witness had been subpoenaed, and the witness had promised plaintiff's counsel that he would be in the court at 10 o'clock, having been subpoenaed for 11 o'clock.

On appeal the supreme court held that granting the plaintiff's motion for voluntary nonsuit without prejudice left the parties precisely where they would have been had the defendant's motion for an involuntary nonsuit been granted. The granting of an involuntary nonsuit for insufficiency of evidence is not a decision on the merits and is not res judicata; therefore, the plaintiff could have brought the action again. This is settled law in South Carolina.

The court further held that where there was no prejudice on the part of the trial judge in granting the plaintiff's motion

39. *See* 53 AM. JUR. *Trial* § 342 (1945).

40. *See* Holliday v. Atlantic Coast Lumber Corp., 171 S.C. 250, 172 S.E. 219 (1933). *See also* Annot., 68 A.L.R.2d 300, 303 (1959).

41. 249 S.C. 105, 152 S.E.2d 733 (1967).

42. 249 S.C. 101, 152 S.E.2d 689 (1967).

for a voluntary nonsuit. The court distinguished the present case from that of *Romanus v. Bigg*,[43] on which the defendants relied. In that case, which was brought for a partnership accounting, it appeared that large losses had already occurred because of the bringing of the suit and that a final decision was necessary in order that the defendant might wind up his business without fear of further interference and also to prevent further losses. In *Gary*, the court followed the rule stated in *Ralston Purina Co. v. O'Dell*, "that a plaintiff is entitled to a voluntary nonsuit without prejudice as a matter of right unless there is a showing of legal prejudice to the defendant . . . . Legal prejudice cannot be deduced from the fact that the granting of the motion for a voluntary nonsuit would impose upon defendant the necessity of defending another suit."[44]

C. New Trial

In *Mutual Savings and Loan Ass'n v. Monarch Insurance Co.*[45] the mortgagee-beneficiary brought action against the insurer to require payment under a fire policy, when the insured property was destroyed by fire. Judgment was rendered for the plaintiff in the lower court and the defendant gave notice of appeal. The defendant in the lower court had pleaded that the owner of the insured premises had obtained an additional policy from another insurer, but the policy had never been introduced into evidence. Sometime after the Master's report had been filed and judgment rendered for the plaintiff, the defendant discovered that the other insurance company had made a settlement with the plaintiff. The defendant moved for a new trial on the ground of after-discovered evidence. The motion was granted. The supreme court in a split decision (4 to 1) held that defendant had not used due diligence to bring the second policy before the court so that the question of whether other insurance existed could be decided, and was therefore not entitled to a new trial.[46]

43. 217 S.C. 77, 59 S.E.2d 645 (1950).

44. 248 S.C. 37, 148 S.E.2d 736 (1966).

45. 248 S.C. 272, 149 S.E.2d 633 (1966).

46. The court in Ortowski v. Ortowski, 237 S.C. 499, 117 S.E.2d 860 (1961) stated that in a motion for new trial based upon after-discovered evidence,

> the moving party must show (1) that the evidence is such as will probably change the result if a new trial is granted (2) that it has been discovered since the trial (3) that it could not have been discovered before the trial by the exercise of due diligence (4) that it is material to the issue, and (5) that it is not merely cumulative or impeaching.

In *Mims v. Coleman*[47] the court restated the settled rule that an order granting a new trial on factual grounds is not appealable, but the question of existence or nonexistence of evidence is one of law, and to that extent such an order is subject to review.

D. Inconsistent Verdicts

In *Rhodes v. Winn-Dixie Greenville, Inc.*[48] the plaintiff brought an action for personal injuries received while shopping in the defendant's store; and, in a separate suit, her husband sued for the medical bills and loss of consortium. The case was submitted to the jury who returned a verdict in favor of the plaintiff wife but against the plantiff husband. The trial judge held that the verdicts were inconsistent, allowing the wife's verdict to stand and ordering a new trial as to the husband's case.

The supreme court held that a new trial should have been ordered in the wife's case as well as the husband's, stating that "the two verdicts neutralize, nullify and destroy each other and must be disregarded."[49] There seems to be a split authority in the United States on the question of inconsistent verdicts. Some jurisdictions hold that where a verdict is rendered in favor of the plaintiff wife for injuries, but denies recovery to a husband in the same action for his expenses, the verdicts are absolutely irreconciliable and require a new trial on both claims.[50] Other jurisdictions have taken the opposite view that a new trial is needed in only one of the cases.[51] The court adopted the former position because it was consistent with their prior rulings that when "a verdict is so confused . . . that it is not absolutely clear what the jury intended, the safest and best course for the court to pursue is to order a new trial,"[52] and to hold otherwise would require the court to pass upon the evidence.

47. 248 S.C. 235, 149 S.E.2d 623 (1966).

48. 155 S.E.2d 308 (S.C. 1967).

49. *Id.* at 310.

50. This is apparently the rule in New York, New Jersey, Pennsylvania, and Tennessee. *See, e.g.*, Coleman v. New York Transit Authority, 28 Misc. 2d 694, 208 N.Y.S.2d 186 (1960); Watkins v. Myers, 12 N.J. 71, 95 A.2d 705 (1953); Elser v. Union Paving Co., 167 Pa. Super. 62, 74 A.2d 529 (1950); Berry v. Foster, 199 Tenn. 352, 287 S.W.2d 16 (1955).

51. This view has been adopted in California and Florida. *See, e.g.*, Chance v. Lawry's, Inc., 24 Cal. Rptr. 209, 374 P.2d 185 (1962); Thieneman v. Cameron, 126 So. 2d 170 (Fla. 1961).

52. Lorick & Lowrance, Inc. v. Julian H. Walker & Co., 153 S.C. 309, 150 S.E. 789 (1929).

III. APPEAL AND ERROR

A. Notice of Motion

The plaintiff in *Galloway v. Galloway*[53] had been granted a divorce in 1955 and had since remarried. In April 1962, the grandparents, who were the defendants in this case, instituted an action for the adoption of the child. Approximately three and one-half years after the rendering of the adoption decree, the plaintiff brought this action by motion to have the adoption decree set aside on several grounds, among which was that the minor child had not been personally served, pursuant to the adoption statutes then in effect. The record indicated that appearances had been made in behalf of the minor but that no notice of the proceeding had been served upon her. The trial court found as a fact that the minor had been properly served in the preceding action, and therefore denied the plaintiff's motion.

On appeal, the plaintiff challenged the lower court's findings. The defendants asserted several sustaining grounds including the claim that the minor had not been made a party to the action to set aside the decree and that no notice thereof had been given to her or her guardian ad litem. The defendants, however, failed to argue this point in their briefs. The supreme court stated that although sustaining grounds not argued in briefs are usually considered abandoned, "[t]he duty to protect the rights of minors has precedence over procedural rules otherwise limiting the scope of review and matters affecting the rights of minors can be considered by the court *ex mero motu*."[54] However, the court, in a somewhat inconsistent manner, refused to pass upon the issues affecting the rights of the minor, because notice of the motion to set aside the adoption decree had not been given to the minor.

B. Time for Appeal

In *Thomas v. Rambler Center, Inc.*,[55] judgment was rendered against the defendant in the county court of Charleston County. Notice of intention to appeal to the circuit court was given by the defendant seven days later. Upon motion by the plaintiff, the judge of the county court dismissed the appeal as untimely

53. 249 S.C. 157, 153 S.E.2d 326 (1967).
54. *Id.* at 160, 153 S.E.2d at 327.
55. 154 S.E.2d 833 (S.C. 1967).

because notice was not given within five days after judgment as required by section 7-302 of the South Carolina Code. The defendants contended that section 15-629.30 (1966 Supplement)[56] of the Code made section 7-405 and not section 7-302 applicable to appeals from the county court to the circuit court, and that under its provisions notice of appeal must be given within ten days.

The supreme court held that section 15-629.30 provides that any civil matter may be appealed from the county court where the amount of the judgment appealed from is three thousand dollars or less. However, the failure to include specifically procedures for appeal to the circuit court in that section, showed the intention that such appeals were to be controlled by the general rules and practice already governing appeals from county courts to circuit courts established in section 7-302.

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56. S.C. CODE ANN. § 15-629.30 (Supp. 1966) provides:
In all civil actions and criminal proceedings and any special proceedings of which the county court shall have jurisdiction, the right of appeal shall be to the Supreme Court in the same manner and pursuant to the same rules, practices and procedure as now govern appeals from circuit courts, except that civil matters where the amount of the verdict or judgment appealed from is three thousand dollars or less may be appealed to the circuit court. *Provided* any such civil action, in which a notice of appeal to the Supreme Court has been filed and where the brief of the respondent has not been filed, may be transferred to the circuit court upon notice to the respondent from the appellant.