South Carolina Law Review

Volume 16 | Issue 1 Article 19

1963

Practice and Procedure

Harry Lightsey
Columbia, SC

PRACTICE AND PROCEDURE

HARRY LIGHTSEY*

INTRODUCTION:

As is true in most years, there have been many decisions from the South Carolina Supreme Court during the survey year involving principles of Practice and Procedure. Many of these simply re-affirm and illustrate well established points of law. On the other hand, this survey year has witnessed an unusually large number of cases involving important rulings. Some emphasis will be placed in this article upon the facts of the individual cases involved. This is not done simply to capsulize the decisions for the Bar; it is, however, dictated by the author's belief that the facts of a case often influence to an important degree the rules of law which the court enunciates. Where established principles are involved, the article does not dwell at length upon the individual cases. It should be noted, however, in passing that even these cases should be carefully analyzed from a factual standpoint before they are relied upon as authority in any given situation.

Many of the decisions discussed in this article concern everyday problems which a lawyer must face. This is particularly true where any degree of trial practice is involved. For this reason, the article emphasizes the practical approach to the decisions and no attempt has been made, except in certain irresistible instances, to philosophize or interpret the law.

PARTIES

A. *Standing*:

In four cases, the Supreme Court was presented with problems involving standing. In what is perhaps the most important of these decisions, *Doremus v. Atlantic Coast Line R.R.*,[1] the court recognized the capacity of an assignee of a part interest in a tort claim to join, in his own name, in a legal action brought based on the tort. Recognizing the principle that choses in action are freely assignable under South Carolina law,[2] the court extended a right of action to such assignees in their own capacity. There is a rather respectable body of authority which holds,

* Attorney at Law, Columbia, South Carolina.

1. 242 S.C. 123, 130 S.E.2d 370 (1963).
2. McWhirter v. Otis Elevator Co., 40 F. Supp. 11 (U.S.D.C.S.C.)

even though it admits the assignability of such rights, that such suits should be prosecuted in the name of the assignor.[3] The importance of this decision arises from the context of the problem, however, for in *Doremus*, the assignment would prevent the removal of the case from the state to the federal courts. Under the doctrine of this case, any litigant could preclude federal jurisdiction in a diversity suit by assigning a part of his claim to a citizen from the same state as the defendant. Joined with the already established practice of appointing administrators from the same state as the defendant in actions brought under the Survival and Wrongful Death Acts, this decision may lead to some degree of forum control by the plaintiff. Yet, it must be conceded that under the "party in interest" rule,[4] the decision is sound. Without regard to the *bona fides* of the assignment, it seems reasonable that an assignee should be free to bring suit in his own name.

Two cases involving public agencies arose in Charleston County. In an important decision, the South Carolina Supreme Court, in a case of novel impression,[5] affirmed the ruling of the lower court that a restrictive covenant was such a property right as to be compensable in cases of condemnation where damage was established.[6] The court affirmed the decision below in which nominal damages were awarded and refused to pass on respondent's motion that the appeal be dismissed on the grounds that the interest of the appellant had been divested pending the appeal.[7]

3. See generally 6 C. J. S. *Assignments* § 124, p. 1171. These cases are based to some extent on the desire to prevent a multiplicity of suits, reasoning that through multiple assignments and suits, the holder of a chose in action might seriously vex the other party. Generally, this result has been avoided by requiring that all parties in interest must join in a suit against the other party. South Carolina has always been liberal in recognizing the assignment of such interests, as evidenced by its early recognition of the assignability of expectancies.

4. Ridgeland Box Mfg. Co. vs. Sinclair Refining Co., 216 S.C. 20, 56 S.E.2d 585 (1949).

5. School District No. 3 of Charleston County v. Country Club of Charleston, 241 S.C. 215, 127 S.E.2d 625 (1962).

6. See generally 18 AM. JUR. 88, *Eminent Domain*, § 157.

7. *Supra* notes. The suit involved land which the Country Club had sold to a partnership. The only remaining rights of the Country Club were those which it held as mortgagee and the retained right to enforce certain restrictive covenants imposed on the land in the sale to the partnership. As to the latter, nominal damages were sustained, as has been discussed earlier. The mortgage was fully satisfied during the pendency of the appeal. Under the doctrine of Johnson v. Brandon Corp., 221 S.C. 160, 69 S.E.2d 594 (1952), respondent moved for dismissal of the appeal on the grounds that the appeal was frivolous and without merit, the appellant not being the party aggrieved by reason of the divestment of its interest prior to argument.

In the case of *Dalton v. Town Council of Mt. Pleasant*,[8] the court refused to allow the signatures of certain freeholders on a petition involving a smaller area, to be counted towards the necessary number for the annexation of a larger area in which the smaller area was included. Plaintiff, a registered, qualified elector, but not a freeholder, in the area proposed to be annexed, instituted this action after the annexation had been approved by the majority of voters in the area. On appeal, the defendant challenged plaintiff's capacity to bring the suit since she was not a freeholder. The Supreme Court held that this objection had been waived since it had not been raised by answer or demurrer.[9] Defendant responded that plaintiff's lack of standing deprived the court of jurisdiction of the subject matter. Conceding plaintiff's standing to contest the election, the defendant argued that since only freeholders were signatories of the petition, only they could contest the validity of the petition. The court refused to view so narrowly the rights of the parties involved in an annexation, holding that a voter could contest both the petition and the election and implying that a freeholder would have the same rights.

The Supreme Court in the case of *Martin v. McLeod*,[10] reaffirmed earlier decisions in which it recognized the efficacy of a loan receipt in an insurance case.[11] The defendant had objected to the suit in plaintiff's name on the ground that the plaintiff's loss had been fully satisfied by its fire insurance carrier, in whose name, it contended, suit should be brought. The trial court struck this answer as sham and frivolous when it was established that such payment had been cast in the form of a loan as evidenced by a loan receipt. Like *Doremus*,[12] this case is one in which the legal principle is sound but in which the context may give attorneys some pause. At least the court has avoided Holmes' critical aphorism "Hard cases make bad law."

8. 241 S.C. 546, 129 S.E.2d 523 (1963).
9. S. C. CODE, § 10-647 (1962).
10. 241 S.C. 71, 127 S.E.2d 129 (1962).
11. In the South Carolina cases of Phillips v. Clifton Mfg. Co., 204 S.C. 496, 30 S.E.2d 146, 157 A.L.R. 1255 (1944) and S. C. Elec. and Gas Co. v. Aetna Life Ins. Co., 230 S.C. 340, 95 S.E.2d 596 (1956), the Court had quoted with approval from the leading opinion of Justice Brandeis in Luckenback v. McCahon Sugar Refining Co., 248, U.S. 139, 39 S.Ct. 53, 63 L.Ed. 170 which is the landmark case holding that sums paid under such an agreement should be regarded as loans and not as absolute payment.
12. Doremus v. Atlantic Coast Line R. R., 242 S.C. 123, 130 S.E.2d 370 (1963).

Joinder

In *Player v. Player*,[13] the court refused to consider the question of nonjoinder because this question had not been raised in the trial court. The case is interesting on the facts and contains an able analysis of the general principles governing equitable assignments. The defendant had demurred on the grounds that, insofar as the suit was against him in his representative capacity as executor of the equitable assignor, no relief was sought from him in such capacity. The demurrer was sustained, and no appeal taken on this point. In its brief, plaintiff argued the question of whether the defendant, in his representative capacity, was a necessary or, at least, a proper party to an action to foreclose an equitable lien assigned by the decedant to plaintiff.[14] Since no such question was raised by the demurrer which underlay the present appeal, the court passed it over.

It has recently been established in South Carolina that the State Highway Department remains liable for taking private property without compensation even though this occurs in connection with improvements on highways and streets located within a municipality.[15] Subsequently, and in this case, the Highway Department requires such municipalities to enter into an agreement assuming all liability resulting from damage to property or persons where such work is undertaken. In the case of *Robinson v. S. C. Highway Department*,[16] suit had been brought against the department for damage allegedly caused to land adjacent to a highway as a result of changes in the drainage system. After suit was initiated, the Highway Department moved to have the municipality involved brought in as a party in order that it might file a cross-complaint against it. The trial judge denied the motion and this appeal followed. The court, after noting that the party ultimately liable should, if possible, be made a party to the suit in which the amount of his liability is fixed,[17] noted that whether or not additional parties are proper to a controversy is left to the sound discretion of the trial judge.[18] In this case, no abuse of such discretion was found,

13. 240 S.C. 274, 125 S.E.2d 636 (1962).

14. In Plaintiff's brief, this argument was grounded upon the case of People's Bank of Hartsville v. Bryant, 148 S.C. 113, 145 S.E. 692 (1928).

15. Moseley v. S.C. Highway Dept., 236 S.C. 499, 115 S.E.2d 172 (1960).

16. 241 S.C. 137, 127 S.E.2d 286 (1962).

17. Miller & Barnhardt v. Gulf & Atlantis Ins. Co., 132 S.C. 78, 129 S.E. 131 (1925).

18. Fidelity Fire Ins. Co. v. Windham, 134 S.C. 373, 133 S.E. 35 (1926); Bridges v. Wyandotte Worsted Co., 239 S.C. 37, 121 S.E.2d 300 (1961).

the court concluding that the inclusion of the new party might increase the complexity of the facts and issues the jury must determine. "Even though a multiplicity of actions may be avoided by the joinder of other parties, joinder will not be permitted where plaintiff will be materially prejudiced."[19]

The case of *Collins v. Johnson*,[20] which will be discussed more fully under the following sections because of its important conclusions relative to counterclaims, also presented questions of joinder.

COURTS

Jurisdiction

Three of the four cases involving jurisdiction during the survey year arose in the context of Domestic Relations. In the case of *McCullough v. McCullough*,[21] the court held that the Juvenile and Domestic Relations Court of Lexington County did not have jurisdiction to grant support where the statute creating the court did not specifically confer jurisdiction on the court. In this regard, it is necessary to distinguish between such statutory courts and the courts of general jurisdiction such as Common Pleas and General Sessions, most of the latter having been given constitutional recognition. Insofar as a court is a creature of statue, it must find the source of all of its jurisdiction from the organic act by which it was created. If such jurisdiction is not expressly conferred, then it does not exist and cannot be supplied by implication.

In another case, however, a way around the above result may have been found. When the Civil and Domestic Relations Court of Sumter County held that the act conferring jurisdiction upon it in bastardy cases was unconstitutional because such act was a special law and the general law governing bastardy proceedings could be applied, an appeal followed.[22] While the appeal was pending, the general law was amended and several sections were specifically repealed.[23] The Supreme Court felt that, without

19. Robinson v. S. C. Highway Dep't., *supra* note 16 at page 141, 142, 127 S.E.2d at 287, 288.
20. 242 S.C. 112, 130 S.E.2d 185 (1963).
21. 242 S.C. 108, 130 S.E.2d 77 (1963).
22. Marshall v. Richardson, 240 S.C. 318, 125 S.E.2d 639 (1962).
23. S. C. CODE, § 20-303 (1962) was amended to provide, "Any able-bodied man or man capable of earning or making a livelihood who shall, without just cause or excuse, abandon or fail to supply the actual necessaries of life to his wife or to his minor unmarried legitimate or illegitimate children dependent upon him shall be guilty of a misdemeanor." S. C. CODE. §§ 20-305 through 20-309 (1962) were repealed.

regard to whether or not the trial judge erred in his decision, the decision should be reversed so that the lower court could give consideration to the repeal of the statutes. In doing so, it noted its prior decision to the effect that criminal enforcement of the bastardy act was not the exclusive remedy for the enforcement of the rights of children to support by their parents.[24]

In the important case of *Jackson v. Jackson*,[25] the defendant had been held in contempt of court for failing to comply with a court order requiring him to deliver the child of the parties to plaintiff's parents pending the determination of the divorce action to which the award of the child's custody was incidental. The child had been taken out of state to defendant's parents after the signing of the rule to show cause but before it had been served on defendant. The appeal placed in issue the question of "whether it is essential to the court's jurisdiction to award custody of a child in a divorce action that the child be present within the state or have its legal domicile, as distinguished from actual residence, therein." The court concluded that where both parties were residents of the state and personally before the trial court, the trial court did have jurisdiction to adjudicate the issue of child custody. Several different approaches to this problem have been taken by the authorities. The Restatement of the Law[26] and a considerable body of opinion[27] follow the rule that in such cases jurisdiction is founded upon the child's domicile. This conclusion is based upon the belief that the problem of custody is one of status, similar to the question of divorce, and that jurisdiction should, therefore, be based on domicile.[28] Another theory, reasoning that the court most able to determine the best interest of the child is that of the state where the child is physically present, views the

24. Campbell v. Campbell, 200 S.C. 67, 20 S.E.2d 237 (1942).

25. 241 S.C. 1, 126 S.E.2d 855 (1962).

26. RESTATEMENT, CONFLICT OF LAWS, § 117. See also 17A AM. JUR., *Divorce and Separation*, § 811.

27. Dougherty v. Nelson, 241 Mo.App. 121, 234 S.W.2d 353; Dorman v. Friendly, 146 Fla. 732, 1 So.2d 734.

28. In discussing this view, the writer of one of the leading annotations has stated: "The rationale of this position seems to be that custody is a matter of status and that the state of domicile is the one to properly determine it. Its weakness, in this writer's opinion, is that custody, unlike questions of divorce, does not fit well into the concept of status, as the court is not creating or dissolving a legal relationship, but is making a determination as to which of several contesting parties has the best claim to the child. However, more important from a practical point of view is the objection that the rules relating to domicile of an infant are frequently unrealistic, giving in extreme cases jurisdiction to a court within the territorial limits of which the child has never lived." Annot., 9 A.L.R.2d 434.

issue of custody as in rem, the child being the *res*, holding that the child must be within the jurisdiction of the court.[29] As set forth in a quotation contained in the opinion, "[t]he principal cases and most of the secondary authorities have been concerned less with the question whether a court has jurisdiction than with the other question whether the courts of other states are bound by the particular decision, when that jurisdiction has been exercised."[30] Any attorney who has dealt with domestic relations problems in any number has witnessed the unhappy effects which such a contest may have upon the children of the parties. These are compounded when the children are made active participants in the parents' legal struggles. Too often such parents are more concerned with sowing the bitter seeds of vengeance than with their children's or even their own welfare. It certainly seems that a proper time to determine custody is as an incident to an action for divorce,[31] for one of the most disturbing factors to the parties undergoing the emotional experience of divorce is the uncertainty and ambiguity of their circumstances. In this context, finality and completeness in the adjudication are very desirable. The requirement that both parties be personally subject to the jurisdiction of the court should be reemphasized for it would be unfortunate if a court were to undertake to determine custody where the jurisdiction of the court is not based on personal jurisdiction over the defendant. It should be kept in mind that, while the primary question before the court is one of the child's best interest, the decision will affect important rights of both parents. Custodial rights are important enough to receive statutory recognition in South Carolina,[32] and any parent realizes that such rights are beyond monetary valuation. Like

29. Coble v. Coble, 229 N.C. 81, 47 S.E.2d 798; Sheehy v. Sheehy, 88 N.H. 223, 186 A 1, 107 A.L.R. 635. See discussion in Stumberg, *Children and Conflict of Laws*, 8 UNIV. CHIC. L. REV. 42. Besides being somewhat calloused in its enunciation, the fact that this rule would encourage just such devices as attempted in this case militates heavily against it.

30. Sampsell v. Superior Court, 32 Cal.2d 765, 197 P.2d 739.

31. See S. C. CODE, § 20-115 (1962). "[I]n any action for divorce from the bonds of matrimony the court may at any stage of the cause . . . make such orders touching the case, custody and maintenance of the children of the marriage . . . as from the circumstances of the parties and the nature of the case and the best spiritual as well as other interests of the children may be fit, equitable, and just."

32. S. C. CODE, § 31-51 (1962). In the leading case of Graydon v. Graydon, 150 S.C. 117, 147 S.E. 749 (1929), it was held that the removal of a child from the state by one parent without the knowledge or consent of the other parent was violative of this statute. In many cases, the rationale of the Graydon case might serve as an alternative route to the same result as reached in the principle case.

alimony,[33] such rights should not be determined without personal jurisdiction.

In the only non-domestic case[34] concerning jurisdiction of a court, the Civil and Criminal Court of Charleston was involved. Under the statute creating this court, it is specified that its jurisdiction "shall not extend . . . to cases in chancery . . . ."[35] The action involved the issue of priority between the lien of a conditional sales contract and a distress for rent, but the question arose in the context of an action for claim and delivery, conceded by all to be an action at law. The Supreme Court held that the issues were all legal in nature and, therefore, that the court did have jurisdiction of the matter.

Venue

In the case of *Basha v. Waccamaw Lumber & Supply Co.*,[36] the court reiterated its often stated and well established position that, while the defendant's right in a civil action to a trial in the county of its residence is a substantial one, the convenience of witnesses and the ends of justice may allow such venue to be changed.[37] A motion for a change of venue is addressed to the discretion of the judge and his decision will not be disturbed on appeal except for manifest abuse of such discretion.[38] In the principal case, the Supreme Court affirmed the decision of the lower court granting motion by the plaintiff for change of venue.

Legal or Equitable Nature of Issues

In two cases the court was presented with the question of whether the nature of the issues involved were legal or equitable. In the case of *Britton v. Amos*, the plaintiff moved that the trial proceed on the basis that the issues[40] were equitable in nature and that, therefore, only specific issues of fact should be

33. Matheson v. McCormac, 186 S.C. 93, 195 S.E. 122 (1938).

34. Haverty Furniture Co. of Charleston v. Worthy, 241 S.C. 369, 128 S.E.2d 707 (1962).

35. S. C. CODE, § 15-1502 (1952).

36. 240 S.C. 140, 124 S.E.2d 912 (1962).

37. Dison v. Wimbly, 230 S.E. 187, 94 S.E.2d 877 (1956); King v. Moore, 231 S.C. 421, 98 S.E.2d 849 (1957). See S. C. CODE, § 10-310 (1962).

38. Graham v. Beverly, 235 S.C. 222, 110 S.E.2d 923 (1960).

40. The case involved an action brought to have a deed, absolute on its face, declared to be a mortgage. It was alleged that the deed had been fraudulently obtained. Recent leading South Carolina cases on this cause of action include Howard v. Steen, 230 S.C. 351, 95 S.E.2d 613 (1956); Evans v. Evans, 226 S.C. 451, 85 S.E.2d 726 (1955); Jones v. Eichols, 212 S.C. 411, 48 S.E.2d 21 (1948).

submitted to the jury. The trial judge did not rule specifically against the motion, but the court felt, even if he had, that such ruling would be without prejudice since the judge had concluded that the plaintiff had failed to prove his alleged causes of action. It followed that his decision on the case was as judge, regardless of whether he was sitting in equity, or such determination was made by an order of nonsuit.

In the case of *Winter v. U. S. Fid. and Guar. Co.*,[41] the court recognized that legal and equitable issues and rights could be joined in the same complaint and that legal and equitable remedies could be afforded in the same action. In such cases the trial judge must decide the equitable issues sitting as a chancellor while the legal issues are for determination by the jury.[42] Such causes must be materially allied in substance by the coincidence of time, place and circumstances. Whether there is sufficient interrelation is generally recognized to be a question for specific application to the facts of each particular case.[43] In its desire to avoid a multiplicity of suits, however, the court recognizes that these rules should be given a liberal construction.

Masters and Special Referees

The court once again re-emphasized its acceptance of what is commonly termed the "two-court rule".[44] In equity matters, findings of fact, as determined by a master or special referee and concurred in by the referring court, will not be disturbed on appeal unless they are without evidentiary support or are against the clear preponderance of the evidence.[45] In the *Cox* case,[46] the court also dealt with the requirement that the master should enter his ruling on evidentiary objections so that the reviewing court can determine the manner of arriving at the decision. The Supreme Court ruled that if the objections were made to a certain line of testimony or to all testimony tending to show certain facts, a general statement of his rulings by the referee would suffice. The court, to some extent, qualified its decision by finding that it was unable to conclude that the party

41. 240 S.C. 561, 126 S.E.2d 724 (1962).
42. See Standard Warehouses Co. v. Atlantic Coast Line R.R., 222 S.C. 93, 71 S.E.2d 893 (1952).
43. Ripley v. Rodgers, 213 S.C. 541, 50 S.E.2d 575 (1948).
44. Cox v. First Provident Corp., 240 S.C. 130, 125 S.E.2d 1 (1962).
45. See also Alderman v. Alderman, 178 S.C. 9, 181 S.E. 897, 105 A.L.R. 102 (1935).
46. Cox v. First Provident Corp., *supra* note 44.

had been prejudiced, which brings to mind the ancient English couplet:

> "Every barrister need live in terror of 'lack of prejudice' and 'harmless error.' "

The case of *Hampton v. Dodson*,[47] is an extremely important decision involving an attack on the real estate reassessment program in School District No. 1 of Richland County. Procedurally, the case enunciates two important rules, neither novel but still so crucial as to justify some emphasis. The action was brought to enjoin county officials from proceeding with the reassessment program. After findings and conclusions of the master had been affirmed, with certain modifications, by the circuit court, this appeal was taken. The appellants were not allowed to question the constitutionality of the act because no issue thereabout had been raised before the master.

> It is a general rule applicable in civil cases that a constitutional question must be raised at the earliest opportunity, or it will be considered as waived. 12 C.J. 785; See also 16 C.J.S. Constitutional Law § 96; *Salley v. McCoy*, 186 S.C. 1, 195 S.E. 132; *Hurst v. Sumter County*, 189 S.C. 376, 1 S.E.2d 238.

The above ruling may be tempered where reference is had only for the taking of testimony. In such a case, it would seem that the constitutional attack could be withheld until the trial forum is reached.

Although the court expressly held in *Hampton v. Dodson*[48] that the findings of fact by the master concurred in by the circuit judge were completely supported by the record, it noted that such findings had either not been challenged or that the exceptions thereto had been abandoned. In such a case, a finding to the effect that the reassessment program was valid under the general law, precluded any injunction since the Special Act's constitutionality need not be considered. The court will not pass upon the constitutionality of legislative action unless such is necessary to the decision.[49]

In the case of *School Dist. No. 10 of Charleston County v. Wallace*,[50] the action was one of condemnation. The matter was

47. 240 S.C. 532, 126 S.E.2d 564 (1962).
48. *Ibid.*
49. Bellamy v. Johnson, 234 S.C. 172, 107 S.E.2d 33 (1959).
50. 241 S.C. 323, 128 S.E.2d 167 (1962).

referred to a special referee, who filed his report over six years later, clearly a violation of the thirty day statutory time limit.[51] The court held, however, that the special referee's failure to comply did not automatically end the reference or deprive the special referee of jurisdiction. While he might have been removed or required to make his report upon the application of either party, whether or not the report would be received and considered after the expiration of the statutory time limit was a matter within the discretion of the lower court. The decision of the lower court to receive the report for consideration was affirmed.

The case of *Dalton v. Town Council of Mt. Pleasant*,[52] has been commented upon earlier under the heading of "Standing." The court in this case noted the well established rule that "questions not raised before the master and to which no exception to his report has been filed are not properly before the circuit court for consideration."[53]

Counterclaims

Perhaps the most important decision of the survey year from the standpoint of trial procedure is the case of *Collins v. Johnson*.[54] The issue presented to the court was whether or not the statute governing the filing of counterclaims was mandatory or permissive.[55] Factually, the case arose when the car of Collins was involved in a wreck with a bus. Suit was first filed against

51. An important prerequisite to the court's decision was a determination of which time limit to apply. In the case, the special referee was also the Master for Charleston County. Under the general provisions governing reports of Masters, the time for filing is within sixty days from the time that the action is finally submitted to the Master. S. C. CODE, §§ 10-1413 and 10-1414 (1952). It was on this basis that the trial court had held that the report was timely filed. The Supreme Court held that the Master was in this case a special referee, only, and that the provisions of the Public Works Eminent Domain Law governed under its terms:

> The report of the special master must be filed with the Clerk of Court in which the proceeding is pending within thirty days after the date of the taking of the oath, unless further time is granted by the Court. The Court shall grant additional time for the filing of the report only on a showing that the report cannot, with all due diligence be prepared within the time fixed. S. C. CODE, § 25-123 (1952).

52. 241 S.C. 546, 129 S.E.2d 523 (1963).

53. White v. Livingston, 231 S.C. 301, 98 S.E.2d 534 (1957).

54. 242 S.C. 112, 130 S.E.2d 185 (1963).

55. S. C. CODE §§ 10-657 and 10-705 (1962). After some consideration, the court concluded that the latter statute was applicable.

> In all actions sounding in tort the defendant shall have the right to plead a similar cause of action against the plaintiff by way of counterclaim if the cause of action of the plaintiff and defendant arise out of the same state of facts.

Collins on behalf of the busline. He answered but interposed no counterclaim. Thereafter, this action was instituted in his forum. The lower court dismissed the second action on the grounds that there was an abatement by the pendency of the first action. The Supreme Court held that the statute was permissive and, thus, reversed the lower court. The court laid particular stress upon the legislative history of the act.[56] There had been a previous division over this same question centered around Section 10-652 of the 1962 Code. In a concurring opinion in the case of *Kirven v. Virginia-Carolina Chem. Co.*,[57] Mr. Justice Woods had argued for permissive counterclaims. In the same case, the dissent of Chief Justice Pope took the opposite view. It seems to the author that this decision is a needed correction to our trial procedures. Too often, in the past, tort actions have been instituted for the sole purpose of seizing the tactical advantage of making the other party depend upon a counterclaim. This decision will do a great deal to correct this abuse. The critical problem, however, arises when the question is presented as to whether an affirmative defense of contributory negligence will bar a later counterclaim. Certainly, it would put in issue the same questions as would a later action in tort against the plaintiff. Thus, the defendant may have to risk a defense without asserting contributory negligence in order to avoid a later argument of res judicata. At any rate, this decision leaves the matter clearly up to the attorney. It should be regarded as a substantial betterment in the area of trial procedure and seems eminently correct to this reviewer.

PLEADINGS

Timeliness

In the case of *Lee v. Peek*,[58] the defendant failed to demur or answer within the proper time. The defendant had filed a motion for a change of venue in which he had reserved his right to demur or otherwise answer. Of course, this action did not dispense with the necessity for filing an answer or demurrer. Thereafter, the plaintiff filed notice that he would apply for default judgment. The lower court refused to allow default judgment and granted additional time to the defendants to

56. Prior to this statute, our practice did not permit the interposition of a counterclaim in an action ex delicto, Miller v. Johnson, 126 S. C. 321, 119 S.E. 902 (1923).
57. 77 S.C. 493, 58 S.E. 424 (1907).
58. 240 S.C. 203, 126 S.E.2d 353 (1962).

answer or demur. The Supreme Court affirmed, holding that it was a matter within the discretion of the trial judge.[59] The concurring opinion of Mr. Justice Lewis warns, however, against too broad a reliance upon the trial judge's quality of mercy. Where the default has arisen from an attorney allowing his client to get ther through a mistake as to the proper procedure, he would allow relief.[60] Where, however, default results from inaction of counsel on behalf of his client or the failure to exercise due diligence in the protection of the client's interest, this is not sufficient grounds for relief.[61] It should be noted that in this case the defendant had a meritorious defense. In seeking relief, it is necessary for the party seeking leave of court to show a meritorious defense to the action.

Joinder, Misjoinder, Redundancy and Motions to Strike

In the case of *Oxman v. Profitt*,[62] the plaintiff had brought suit to enforce covenants contained in an employment contract. The defendant moved to have the plaintiff state separately his causes of action because there were two covenants involved. The lower court refused the motion. On appeal, the Supreme Court affirmed stating that where the "facts alleged show one primary right of plaintiff and one wrong by defendant which involves that right, plaintiff has stated but a single cause of action."[63] The soundness of the decision under the facts of this case cannot be doubted. The author, however, would caution against too loose practice in the joining of several causes in one cause of action. The trial courts and practicing bar have too often con-

59. The distinction between S. C. CODE §§ 10-609 and 10-1213 should be emphasized. The latter statute deals with relief after judgment or order and requires a showing of mistake, inadvertance, surprise or excusable neglect. The former statute provides for relief before judgment or order and does not require such a showing. A discussion of this important distinction may be found in the case of Roberts v. Drayton, 121 S.C. 124, 116 S.E. 744 (1922). The principal case contains an extensive listing and discussion of the cases dealing with matters of discretion. In a concurring opinion, Mr. Justice Lewis takes issue with the starkness of the distinction drawn by the majority between the two statutes.

60. McGhee v. One Chevrolet Sedan, 235 S.C. 37, 109 S.E.2d 713 (1960); Savage v. Cannon, 204 S.C. 473, 30 S.E.2d 70 (1944); Johnson v. Finger, 102 S.C. 354, 86 S.E. 673 (1915); McSween v. Windham, 77 S.C. 223, 57 S.E. 847 (1907).

61. Strickland v. Rabon, 234 S.C. 48, 107 S.E.2d 344 (1959); Simon v. Flowers, 231 S.C. 545, 99 S.E.2d 391 (1957); Poston v. S. C. Highway Dep't., 192 S.C. 137, 5 S.E.2d 729 (1939); Hartford Fire Ins. Co. v. Sightler, 131 S.C. 241, 127 S.E. 13 (1925); Claussen v. Johnson, 32 S. C. 86, 11 S.E. 209 (1890).

62. 241 S.C. 28, 126 S.E.2d 852 (1962).

63. Holcombe v. Garland & Denwiddie, Inc., 162 S.C. 379, 160 S.E. 881 (1931); Wright v. Willoughby, 79 S.C. 438, 60 S.E. 971 (1908).

fused this area by joining in one stated cause alternative theories for relief. Under our liberal treatment of the doctrine of election of remedies,[64] it is important that distinct causes, although properly joinable, should be separately stated. To confuse the question of "joinder" with the question of "splitting causes of action" is a frequent error. Good pleading requires that the attorney respect the distinctness of the several theories which he follows. Only through such respect for form can we hope to retain the freedom to join varying theories of relief that are now allowed and the author feels that this is one of the most salient practices of our law.

The case of *J.M.S., Inc. v. Theo*,[65] reaffirmed the principle that a motion to strike is addressed to the sound discretion of the trial judge. Where there are allegations in the answer unrelated to the theory of the complaint or the damages thereunder, they should be stricken. In like manner, the court affirmed the lower court's decision striking a defense which was merely a repetition of another defense. The allegations were held to be redundant, i.e. superfluous, superabundant, excessive.

Prayer

The court reiterated its well established rule that the prayer of a complaint is not a part thereof for the purpose of giving it character or fixing the liability of the parties.[66] By the same rule, the plaintiffs may obtain any relief appropriate to the case as made by the pleadings and the evidence, without regard to the form of the prayer for relief.[67]

Amendment

In two cases the court dealt with amendment of pleadings. The case of *Robinson v. S. C. Highway Dept.*,[68] has been commented on previously. The lower court had allowed plaintiff to file an amended complaint but his order was silent as to defendant's permission to file an answer thereto. The Supreme

64. The Supreme Court has frequently reiterated its rule that only causes which are inconsistent may not be joined. Barnwell Production Credit Assoc. v. Hartzog, 231 S.C. 340, 98 S.E.2d 835 (1956). Even where an election of remedies is made, the plaintiff may later proceed under the alternative theory if the first cause is lost. The court has stated repeatedly that a party is not bound and barred from later action if he erroneously chooses to proceed under a faulty theory.

65. 241 S.C. 394, 128 S.E.2d 697 (1963).

66. Burnett v. Boukedes, 240 S.C. 144, 125 S.E.2d 10 (1962).

67. Sheppard v. Green, 48 S.C. 165, 26 S.E. 224 (1897).

68. 241 S.C. 137, 127 S.E.2d 286 (1962).

Court refused to reverse on this ground but itself granted leave to file.

In the case of *Hicks v. Giles*,[69] the court recognized that the allowance of amendment to pleadings is a matter for the exercise of the trial court's discretion. Such discretion is so broad that, although not unlimited, it will rarely be disturbed. The lower court had refused to allow the defendant to orally amend his answer after there had been considerable progress made into the course of the hearings. One early case had reversed the lower court for allowing an amendment under almost identical circumstances.[70]

Demurrers

In *Player v. Player*[71] and *Oxman v. Profitt*,[72] both of which have been discussed above, the court dealt with a demurrer. Both simply restate the well established rule that the allegations of a complaint will be taken as true and will be liberally construed in favor of the pleader where a demurrer is being passed upon.

TRIAL

Continuance

In one case, the court reaffirmed that a motion for a continuance is addressed to the sound discretion of the trial judge whose ruling will not be disturbed in absence of abuse.[73]

Mistrial

The previous case is more important for its holding that a mistrial need not be granted where insurance is inadvertently injected into a personal injury case. It was noted, however, that the comment was made by the defendant's own witness in response to inquiry by defendant's counsel. The trial judge had instructed the jury to disregard any reference to insurance. The court refused to follow the rule of almost automatic mistrial where plaintiff's counsel deliberately injects information to the effect that the defendant has liability insurance.[74] There can be

69. 241 S.C. 129, 127 S.E.2d 196 (1962).
70. McRae v. David, 7 Rich. Eq. 375.
71. 240 S.C. 274, 125 S.E.2d 636 (1962).
72. 241 S.C. 28, 126 S.E.2d 852 (1962).
73. Norton v. Ewaskio, 241 S.C. 557, 129 S.E.2d 517 (1963).
74. The Court relied heavily on these earlier South Carolina decisions. Vollington v. So. Paving Const. Co., 166 S.C. 448, 165 S.E. 184 (1932); Breazeale v. Piedmont Manufacturing Co., 184 S.C. 471, 193 S.E. 39 (1937); McLeod v. Rose, 231 S.C. 209, 97 S.E.2d 899 (1957).

no quarrel with the court's decision. To hold otherwise would place it within the power of any unconscionable defendant to force a mistrial. It would still remain a matter of discretion for the court and it would seem that some situations might exhibit such great prejudice that a mistrial would be justified. Under these facts, however, the ruling was correct. By way of contrast to the *Norton* case, *supra*, the case of *Crocker v. Weathers*,[75] involved remarks made in argument by plaintiff's counsel. The court reiterated:

> It is highly improper for counsel, in argument, to advise the jury directly or by insinuation that the defendant is covered by insurance. Where it is sufficiently clear that insurance is implied by argument of counsel, this Court will not hesitate to reverse a judgment obtained where such an argument is made.[76]

The trial judge had refused to order a mistrial and the Supreme Court affirmed. The matter is left very much to the discretion of the trial judge and will not be disturbed unless there has been an abuse of discretion.

Burden of Proof

In several cases, which will receive only cursory comment, the court reaffirmed well established principles regarding burden of proof. As to the issues of the action, the burden of proof generally follows the burden of pleading. Thus, the plaintiff has the burden on his action,[77] while the defendant has the burden on affirmative defenses and counterclaims.[78] South Carolina has steadfastly refused to accept the doctrine of *res ipsa loquitor* and there are, therefore, few exceptions to this rule. One exception falls in the area of bailments for hire and was again recognized in the case of *Shorelands Freezers, Inc. v. Textile Ice & Fuel*

75. 240 S.C. 412, 126 S.E.2d 335 (1962).

76. This rule stems from doctrine enunciated by Mr. Justice Woods in the case of Horsford v. Carolina Glass Co., 92 S.C. 236, 75 S.E. 533 (1912). For many years it has received almost mechanical application. It is encouraging to see the courts using some discretion in its enforcement, for a mistrial is a very serious matter to the litigant. Unless the prejudice is undue, and especially in view of the more modern universality of coverage, it would seem that such a harsh purgative might not be prescribed.

77. Garrett v. Pilot Life Ins. Co., 241 S.C. 299, 128 S.E.2d 171 (1962); Coleman v. Palmetto State Life Ins. Co., 241 S.C. 384, 128 S.E.2d 699 (1962).

78. Hoffman v. Greenville County, 242 S.C. 34, 129 S.E.2d 757 (1963); Cox v. First Provident Corp., 240 S.C. 130, 125 S.E.2d 1 (1962).

Co.[70] Under this rule, once the bailor proves delivery of the chattels to the bailee in good condition and their loss or return in damaged condition, he has made a prima facie case and the burden shifts to the bailee to show that he used ordinary care in the storage and safekeeping of the property.

Arguments

The case of *Crocker v. Weathers*[80] has received earlier discussion which will not be repeated here except to note that it dealt with the question of counsel's argument injecting the fact of the defendant's insurance into the case.

In the case of *South Carolina Highway Dept. v. Meredith*,[81] the plaintiff objected strenuously to the argument of defendant's counsel. The record was not complete and the court remanded the case and directed the trial judge to give some settlement to it. It is necessary for the objecting party to make certain that the record clearly reflects the objectionable language.[82]

In any event, the relief for improper argument is left to control of the trial judge to a considerable degree and will not be disturbed unless there has been an abuse of discretion.[83]

Charges

In charging the jury, it is the duty of the trial judge to state the nature of the action and the issues arising thereunder. He may charge as to what is not in issue and give cautionary instructions thereon if such do not prejudice either party.[84] Where there is no proof on an issue, the trial judge should properly refrain from charging as to it.[85] If this is done, however, there will not be a reversal unless the error is prejudicial.[86] Where, however, the trial judge charged that neither of two streets

79. 241 S.C. 537, 129 S.E.2d 424 (1963). The fountainhead of this doctrine may be found in the case of Gilford v. Peter's Dry Cleaning Co., 195 S.C. 417, 11 S.E.2d 857 (1940).

80. 240 S.C. 412, 126 S.E.2d 335 (1962).

81. 241 S.C. 306, 128 S.E.2d 179 (1962).

82. State v. Robinson, 238 S.C. 140, 119 S.E.2d 671 (1961); Lawrence v. Southern Ry., 169 S.C. 1, 167 S.E. 839 (1933); Tunstall v. Lerner Shops, Inc., 160 S.C. 557, 119 S.E. 671 (1923).

83. Shearer v. DeShon, 240 S.C. 472, 126 S.E.2d 514 (1962).

84. *Ibid.* In this case, the judge had charged that an action for wrongful death was a civil case for damages and that verdict had no criminal implication. The charge was held proper.

85. Hoffman v. County of Greenville, 242 S.C. 34, 129 S.E.2d 757 (1963).

86. Doremus v. Atlantic Coast Line R.R., 242 S.C. 123, 130 S.E.2d 370 (1963). Guthke v. Morris, 242 S.C. 56, 129 S.E.2d 782 (1963).

was a through street and failed to charge as to the rights and duties of two motorists meeting at such an intersection, the Supreme Court reversed the lower court.[87]

EVIDENCE

Experiments

Today, experiments are becoming an important weapon in the arsenal of the trial attorney. Increasingly this form of demonstrative evidence is finding use to bring to the jury a better understanding of difficult factual or mechanical concepts. In the case of *McDowell v. Floyd*,[88] the Supreme Court refused to allow the introduction of testimony resulting from such an experiment where such experiment was made under conditions or circumstances not similar to those prevailing at the time of the occurrence involved in the controversy.[89] The case seems to be sound in law and principle.

Res Ipsa Loquitor

In the case of *Bellamy v. Hardee*,[90] the court again restated that South Carolina does not follow the doctrine of *res ipsa loquitor*. This rule has been relaxed only in the area of the bailment cases which have been discussed above.

Negligence per se

"The violation of an applicable statute is negligence *per se*, and whether or not such breach contributed as a proximate cause to plaintiff's injury is ordinarily a question for the jury."[91]

Exceptions to the hearsay rule

There were four cases involving this area which will undoubtedly be considered individually in the article on evidence. Two involved the admission exception,[92] one involved an extensive discussion of the related res gestae exception,[93] and one concerned testimony taken at a former trial.[94]

87. Eberhardt v. Forrester, 241 S.C. 399, 128 S.E.2d 687 (1962).
88. 240 S.C. 158, 125 S.E.2d 4 (1963).
89. 20 AM. JUR. 628, *Evidence*, § 756.
90. 242 S.C. 71, 129 S.E.2d 905 (1963).
91. Hicks v. Coleman, 240 S.C. 223, 125 S.E.2d 470 (1962).
92. Eberhardt v. Forrester, 241 S.C. 399, 129 S.E.2d 687 (1963); Marshall v. Thomason, 241 S.C. 84, 127 S.E.2d 177 (1962).
93. Marshall v. Thomason, *supra* note 92.
94. Gaines v. Thomas, 241 S.C. 412, 128 S.E.2d 692 (1962).

Stipulations

If a case is submitted upon a factual stipulation, the court may draw any reasonable and legitimate inferences therefrom.[95]

DIRECTED VERDICTS AND NEW TRIALS

The law in this area has been long settled and, therefore, only a general summary will be included. It is clear that motions of this type are addressed to the sound discretion of the court and the exercise of that discretion will not be disturbed unless it has been abused.[97] The trial judge, however, may not direct a verdict where there are questions of fact, and if the evidence is conflicting or different inferences can reasonably be drawn therefrom, the issue should be submitted to the jury.[98] On motions for nonsuit and/or directed verdict for defendant, the evidence must be viewed in the light most favorable to the plaintiff.[99]

It is important, however, that the trial attorney take such steps as are necessary to preserve his grounds for a new trial. He should see, where his grounds are based upon unfair or improper argument, that the objectionable language used, at least in substance, is preserved in the record.[100]

In perhaps the most important case of the survey period involving this topic, *Brown v. Finger*,[101] the court also dealt with the question of remittitur. The case involved a suit brought by a husband for loss of consortium as a result of defendant's allegedly having willfully and maliciously administered narcotics to his wife. A substantial verdict was rendered in the trial court. On motion for a new trial, the trial judge ordered a remittitur and plaintiff complied. Thereafter, defendant appealed. The Supreme Court reversed on the grounds that testimony of the wife's

95. Garrett v. Pilot Life Ins. Co., 241 S.C. 299, 128 S.E.2d 171 (1962).
96. *Id.*; Bruce v. Blalock, 241 S.C. 155, 127 S.E.2d 439 (1962).
97. Norton v. Evaskio, 241 S.C. 557, 129 S.E.2d 517 (1963). Shearer v. DeShon, 240 S.C. 472, 126 S.E.2d 514 (1962).
98. Coleman v. Palmetto State Life Ins. Co., 241 S.C. 304, 128 S.E.2d 699 (1962); Horton v. Greyhound Corp., 241 S.C. 430, 128 S.E.2d 776 (1962); Johnston Cotton Co. v. Cannon, 242 S.C. 42, 129 S.E.2d 750 (1963); Norton v. Evaskio, *supra* note 97; Shearer v. DeShon, *supra* note 97; Guthrie v. Morriss, 242 S.C. 56, 129 S.E.2d 732 (1963); McDowell v. Floyd, 240 S.C. 158, 125 S.E.2d 4 (1962).
99. Bellamy v. Hardee, 242 S.C. 71, 129 S.E.2d 905 (1963); Young v. Bost, 241 S.C. 289, 128 S.E.2d 118 (1962); Barnhill v. Bankers Fire & Marine Ins. Co., 240 S.C. 325, 125 S.E.2d 809 (1962); Hicks v. Coleman, 240 S.C. 223, 125 S.E.2d 470 (1962).
100. S. C. Hiway Dep't. v. Meredith, 241 S.C. 306, 128 S.E.2d 179 (1962).
101. 240 S.C. 102, 124 S.E.2d 781 (1962).

separate earnings should not have been admitted.[102] The remittitur in the lower court had been based on this factor. The Supreme Court, recognizing the right of the trial court to order a new trial *nisi*, unless the plaintiff remit a portion of his verdict,[103] held that this was not proper where the error was the submission or an improper element of damage and the effect of such error was incapable of calculation.[104] In such cases, the new trial must be granted unconditionally.[105]

RES JUDICATA AND LAW OF THE CASE

Res Judicata

Three cases were decided involving principles of *res judicata*. In the case of *Lancaster v. Smithco, Inc.*,[106] the plaintiffs had brought a previous action for fraud and deceit in which they had taken an involuntary nonsuit.[107] The present action was brought on the theory of breach of warranty. The lower court had granted judgment on the pleadings upon the grounds of res judicata and election of remedies. The court held that although the facts alleged were substantially identical to those in the earlier action, the earlier judgment was not *res judicata*. Where the former judgment involves nothing more than a judgment of nonsuit for failure of evidence to establish one of the material allegations of the complaint, it would not amount to a judgment on the merits of the action and would not support a plea of *res judicata*.[108] Although there is some loose language in the decision, the court, in substance, is stating that where the former suit was lost for want of proof of one element, that judgment is not *res*

102. While it may be regarded as settled that South Carolina recognizes that a husband may sue for loss of consortium, Cook v. Atlantic Coast Line R.R., 196 S.C. 230, 13 S.E.2d 1, 133 A.L.R. 1144 (1941), the Supreme Court had earlier held that the South Carolina Married Women's Acts, S. C. CODE §§ 20-204 (1952), removed her separate earnings from the elements of damages under that cause of action. Bryant v. Smith, 187 S.C. 453, 198 S.E. 20 (1938). The remedy for the wife's loss of earnings is in the form of a separate suit brought by her. S. C. CODE § 10-216 (1952).

103. Anderson v. Aetna Casualty & Surety Co., 175 S.C. 254, 178 S.E. 819 (1935).

104. Where the effect of the error can be segregated or calculated, the court will allow a remittitur. For cases allowing this, see: Johnston v. Bogger, 151 S.C. 537, 149 S.E. 241 (1929); Currie v. Davis, 130 S.C. 408, 126 S.E. 119 (1923); Tucker v. Buffalo Cotton Mills, 76 S.C. 539, 57 S.E. 626 (1907).

105. See 66 C.J.S., *New Trial*, § 209.

106. 241 S.C. 451, 128 S.E.2d 915 (1962)

107. The previous action was the subject of an appeal in Lancaster v. Smithco, Inc., 238 S.C. 15, 119 S.E.2d 145 (1960).

108. Whetsell v. Sovereign Corp. W. O. W., 188 S.C. 106, 198 S.E. 153 (1938); McCown v. Muldrow, 91 S.C. 523, 74 S.C. 479.

judicata unless the same element of proof is required to substantiate the second cause of action. Only in such a case could the former action be said to have been a determination on the merits of the second cause.

In the case of *Hicks v. Giles*,[109] the question of res judicata was dealt with obliquely when the trial court refused to allow the defendant to amend his answer in the middle of a second reference. The matter had already been adjudicated and determined by an earlier order of the court. This case has been discussed more fully under Pleadings, Amendments.

Finally, in the case of *Kinard v. Polk*,[110] the Supreme Court held that a judgment against the drivers of two automobiles involved in an accident did not bar a later action by one against the other. The case was one of novel impression. The rule accords with the weight of authority elsewhere,[111] although the statutes in South Carolina do allow a permissive cross suit.[112] It appears to be a sound principle to follow, although in some cases it could well result in a multiplicity of suits. Such a consideration, however, should not prevent the party, through his attorney, from choosing his forum and the posture of his case.

Law of the Case

In the case of *Commercial Credit Corp. v. McAdams*,[113] the court reiterated the rule that contentions which are decided by an order from which no appeal has been taken become the law of the case and are not reviewable in the Supreme Court when a subsequent appeal is brought following trial judge's refusal to dismiss the complaint.

In the case of *Corster v. Wilson*,[114] the court continued its adherence to its well-established rule that the conclusions of law and findings of fact of a special referee become the law of the case if not properly excepted to,[115] and, thus, will not be reviewed by the Appellate Court.

109. 241 S.C. 129, 127 S.E.2d 196 (1962).
110. 241 S.C. 555, 129 S.E.2d 527 (1963).
111. 50 C.J.S., *Judgments*, § 819; 30 AM. JUR., § 411; RESTATEMENT OF JUDGMENTS, § 82; See Annot. 152 A.L.R. 1066.
112. S.C. CODE, § 10-707 (1962).
113. 241 S.C. 532, 129 S.E.2d 429 (1963).
114. 241 S.C. 516, 129 S.E.2d 431 (1963).
115. See S.C. CODE, §§ 10-1412 and 1511 (1962). Also CIRCUIT COURT RULE 16. The recent leading case of Kerr v. City of Columbia, 232 S.C. 405, 102 S.E.2d 364 (1957) fully in accord with the present case.

CONCLUSION

This concludes the survey of decisions in South Carolina involving practice and procedure that were determined by the state Supreme Court. As is so often true, there are many cases of only passing or individual interest. There are a few of general interest and one or two that establish important new principles of law. But there are altogether too many cases where the rights of the litigants were lost through inept or careless use of procedure. While it is easy to lose sight of the requirements of our code of practice, even fashionable to sneer at the technicalities of this non-substantive part of the law, attorneys should not lose sight of the fact that it is only within the framework of these rules that the principles of substantive decisions absorb meaning. Rules of law are, as has been well said, "secreted in the interstices of procedure." It is the author's opinion that these facts of legal life, the every day tools of the practicing attorney, have been too long slighted both in our legal education, and, as inexorably follows, in our subsequent service at the bar. It has been said of our sister profession, medicine, that the discovery of the life-saving but panacean anti-biotics destroyed the art of diagnostics. Might it not also be said of law that we, in the revolution against the overly technical concepts of common-law pleading, stand in danger of annihilating our legal procedure. To do so might prove fatal, because law finds its justification only in the ordering of the rules of conduct of society and the individual, and there can be no order where there is no well-defined procedure.