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Practice and Procedure

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PRACTICE AND PROCEDURE

By far the most important development during the survey period was the adoption by the General Convention of Justices and Judges of several new rules which should drastically alter pre-trial practice in the circuit courts. Meeting on May 8, 1969, and acting pursuant to Section 10-16 of the S.C. Code,[1] the circuit court judges and the justices of the supreme court adopted seven new circuit court rules, numbered 43, 44, 45, 46, 87, 88, and 89.[2] The Federal Rules of Civil Procedure served as a model and these new South Carolina rules are very nearly identical to their counterparts in the Federal Rules. This action represents the partial culmination of a movement begun in 1959 by persons interested in seeing South Carolina practice become more modern and efficient.[3] While not all of the Federal Rules were adopted, those which were are among the most important and at the same time most controversial.

No general discussion of the rules will be attempted herein. An excellent short outline is to be found in the July 1969 *Transcript*.[4] Rather than duplicate Mr. McKay's work therein, this article will attempt to point out some of the more important instances where the South Carolina rules diverge from their federal models. Generally, the differences are few in number and of little significance, and reference may be made to the wealth of material available on the construction of the federal rules.[5]

The most important differences are these: none of the seven new rules provides for the physical examination of a party or

1. S.C. CODE ANN. § 10.16 (1962). This statute sets out the method for making of the circuit court rules.

2. The rules which up until now were numbered 43, 44, 45, and 46 were completely rescinded. The new rules numbered 43, 44, 45, and 46 bear no resemblance to the old ones. The text of the new rules may be found in Smith's Advance Sheet Number 19 (May 17, 1969) as well as the July 1969 issue of *Transcript*.

3. H1203, General Assembly of South Carolina (1959). The Judicial Council draft of the Proposed Rules of Civil Procedure, modeled after the Federal Rules of Civil Procedure, was given printer's number 102H and read for the first time on Feb. 11, 1959. The rules were of course not enacted. The actual work was begun earlier than 1959 by Professors Randall and Sloan of the University of South Carolina Law School.

4. McKay, *A New State Judicial Conference And New Rules*, TRANSCRIPT, July 1969, at 5.

5. W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE (Rules Ed. 1960) and J. MOORE, FEDERAL PRACTICE (2d ed. 1968) among other works, have been helpful to this writer. The decisions of the federal courts and of states having rules similar to the federal ones are also good authorities.

witness,[6] nor for the taking of testimony by written interrogatories.[7] These two devices have no doubt at times been abused in the federal courts. Therefore, the provisions were deleted, probably for the better.

THE NEW CIRCUIT COURT RULES

Rule 43

New Rule 43,[8] "A Rule Providing for Pre-Trial Conferences," is intended to facilitate simplification of issues, amendment of pleadings, securing admissions of fact and genuineness of documents in order to avoid unnecessary proof, limiting the number of witnesses, and all other matters to speed the disposition of a court action. The pre-trial conference is not designed to take the place of a trial: rather it is a means whereby the actual trial may be conducted more efficiently.[9]

The wording of its introduction and five enumerated parts is identical to Rule 16 of the Federal Rules of Civil Procedure. But Rule 43 has notably omitted part of the Federal Rule: the provision concerning a pre-trial order following the conference. That omitted part is as follows:

> The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. . . .

There seems to be no good reason for having omitted this section for without the order there will be difficulty in determining exactly what was achieved at the conference.

The comments to Rule 16 of the Judicial Council Draft,[10] which did include the omitted section, described the potential use of the rule in the South Carolina circuits as follows:

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6. F.R. CIV. P. 35.
7. F.R. CIV. P. 31, 33.
8. S.C. CIR. CT. R. 43. The new rules became effective June 1, 1969.
9. 1A W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE (Rules Ed. 1960) § 471-73; Kincaid, *A Judge's Handbook of Pre-Trial Procedure*, 17 F.R.D. 439 (1955); C. WRIGHT, LAW OF FEDERAL COURTS § 91, at 348 (1963).
10. H1203, *supra* note 3.

> The problem of the traveling judge hampers somewhat the usefulness of this Rule in South Carolina, but it has been tested to a considerable extent under the general powers of the court by several State Circuit Judges, all of whom state that they found it most desirable. It has been found possible to apply the rule in at least three situations: (a) by the resident judge prior to trial of matters within his own circuit, or prior to an order of reference; (b) by the presiding judge in those circuits where he will preside for more than one term during a fall or winter series, enabling him to hold pre-trial conferences several weeks prior to an ensuing term; (c) by request of the parties prior to a term during a preceding general sessions court term, or at the county of residence of the judge prior to the common pleas term.

Further comparison of Rule 43 to Federal Rule 16 also reveals two other differences. The federal rule allows the limitation of the number of expert witnesses, while the South Carolina rule allows the limitation of the number of total witnesses, expert and other. Also, Rule 43 makes no specific provision for the appointment of a master, as does the federal rule.

Rule 44

The primary purpose of the "Rule for Summary Judgment" is to strike down sham allegations, leaving only the genuine issues for trial. While the burden is initially upon the moving party, the court may award a summary judgment to whichever party is successful in establishing that there is no issue as to the facts, and that he is entitled to a judgment as a matter of law.[11]

Rule 44 is for the most part identical to Federal Rule 56. Among the differences is the rigid requirement of the South Carolina rule that a party asserting a claim must wait 20 days after the commencement of the action before moving pursuant to the rule, while one against whom a claim is made may move for summary judgment at any time. Federal Rule 56 relaxes this 20-day waiting period and allows a claimant to move for summary judgment in the event that an adverse party makes a motion for summary judgment within that period. This difference should not prove decisive, however, for the party moved against not only *may* but *must* take immediate action in order

11. Commercial Credit Corp. v. California Shipbldg. Corp., 71 F. Supp. 937 (S.D. Cal. 1947).

to establish that his case *needs* to go to trial.[12] Because the court may render a favorable verdict for any party, a claimant may conceivably win a summary judgment within 20 days, although he may not make the motion within that time.

Federal Rule 56 allows the court to consider among other things "answers to interrogatories or admissions on file" when evaluating a motion for summary judgment. Rule 44 does not include these two sources of information. Because the convention did not adopt a rule similar to the Federal Rules 31 and 34, there will be no interrogatories to consider and the omission of "answers to interrogatories" is understandable. However, Rule 89, which allows one party to require another party to admit the truth of matters or the genuineness of documents, was adopted. It is difficult to imagine why admissions given under Rule 89 should not be available for consideration for the purposes of summary judgment. This would appear to be the effect of the deletion of this part of the federal rule.

The South Carolina rule also requires the notice of motion to state the grounds for the motion, which is not true in Federal Rule 56. This was probably added to insure that the court will be aware of the exact reasons why a party feels entitled to a summary judgment.

No counterpart for Federal Rule 56(d) is to be found in the South Carolina rule. Had this been adopted, a kind of partial summary judgement would have been available to the circuit courts. In the federal system, after the court has considered the pleadings and evidence before it and has interrogated counsel, it makes an order setting out the facts which it feels are not controverted. At trial these matters are deemed established, and the trial is conducted accordingly.

Part (e) of Rule 44 provides for a rather liberal use of continuances or other orders "[w]henever it appears necessary to the Court . . . ." While Federal Rule 56(f) also allows continuances, the South Carolina counterpart achieves the same result without attempting to suggest the situations where this action is proper.

Rule 45

Rule 45 governs the taking of a voluntary nonsuit by a plaintiff. Other than the requirement that notice of dismissal not

12. S.C. CIR. CT. R. 44(d).

only be filed but *served*, it is identical to Federal Rule 41(a). The rest of that federal rule concerns the following: involuntary dismissals; dismissals of counterclaims, cross-claims or third-party claims; and costs for previously dismissed actions.

The new state rule allows a plaintiff to dismiss without leave of court and without prejudice so long as this is done early in the proceedings. There is no danger that a plaintiff will use harassing tactics, repeatedly bringing and dismissing actions, for the rule precludes a plaintiff from bringing the same claim more than twice. Dismissals late in the proceedings are permitted only with leave of court, and it is within the court's perogative to dismiss with prejudice.

Rule 46

In the event that parties wish to waive trial by jury, they may do so under Rule 46, which sets out the procedure to be followed.

This provision is unique amongst the new rules for it is not modeled after a federal rule. Federal Rule 38[13] requires that one request a trial by jury or this right is waived. By making it necessary to *request* a trial by the court, Rule 46 eliminates the possibility of an accidental waiver of trial by jury.

Rule 87

South Carolina Rule 87 is a composite of Federal Rules 26, 30, and 37. References to admiralty claims have been deleted and the part of the rule concerning depositions of prisoners has been reworded so as to conform to the structure of the South Carolina penal system. The rule also requires that the deposition of a witness be taken only in the county where he resides, unless the court orders otherwise. While under the federal rules the deposition of a witness may be taken several times, Rule 87 permits only one deposition. But more depositions may be taken if counsel, acting for their parties, agree or if the court allows it after a showing of good cause. In many cases one opportunity to depose will be sufficient. If not, there should be no difficulty in obtaining a second opportunity, either by showing good cause or by a simple agreement with the other counsel. Also, virtually the same protection is to be found under Section H(1) of Rule 87, whereby a party or witness may request the court to order the deposition not to be taken. These two features of Rule 87 should serve to quiet the fears of those who anticipated abuse of the rule.

13. F.R. CIV. P. 38(b) & (d).

The protective devices available under Federal Rule 30 are carried over with few changes into the South Carolina rule. Rule 87(H)(1) does not retain that part of Rule 30(b) which allows depositions to be sealed and opened only upon order of the court, or the protection for trade secrets, or the simultaneous exchange of sealed envelopes containing specified documents, not to be opened until so ordered.

Rule 87(7)(b), derived from Federal Rule 37(b)(1) and 37(b)(2)(iii), lists the sanctions which may be imposed by the court upon a party or witness who refuses to obey a discovery order. The South Carolina circuit courts have three fewer alternative sanctions available than do the federal district courts: they cannot rule the subject sought to be discovered to be taken as established in favor of the party attempting discovery; they cannot limit the refusing party's attempts to support, oppose, or introduce evidence regarding a certain claim; and they are not specifically empowered to order the arrest of the reluctant individual. They presumably may order arrest by ruling the individual in contempt of court, however.

Extensive use of the discovery capability made available in Rule 87 in actions where a relatively small amount is in controversy would cause an unnecessary drain on an attorney's most precious resource, time. For this reason $10,000 is the minimum amount which must be in controversy before Rule 87 may be utilized. Exceptions are allowed if the parties or counsel agree or if the court so orders. This is an excellent provision and illustrates the concern of the courts for the practical problems of the attorney.

It is of no little significance that the drafters did not include within the rules themselves any protection for what has come to be known as the attorney's "work product." The federal rules similarly have no such protection written in, but protection is provided by the rationale of the often cited case of *Hickman v. Taylor*.[14] Some other states which have adopted rules based on the federal rules have chosen to include protection for the "work product" within the body of the rules themselves.[15] Because the new discovery rules did not deal with the question, one can only

14. 329 U.S. 495 (1947).
15. Silverstein, *Adoption of the Federal Rules of Discovery in State Practice*, 11 KAN. L. REV. 213 (1962). This artcile lists some of the states which have codified work product protection. Not all have approached the problem in the same manner, but the common goal for most has been to create a facsimile of *Hickman v. Taylor*.

assume that either the rationale of *Hickman v. Taylor* will come to be applied or the state will develop its own standard of protection.

Rule 88

Rule 88, derived from Federal Rule 34, adds the requirement that 10 days notice must be given to all other parties before the discovery commences. Federal Rule 34 specifically incorporates by reference the protections set out in Federal Rule 30(b),[16] but this feature was not carried over into Rule 88. The omission must have been intentional, for, if the format of the other rules is any indication, had the protections been meant to have been included, most of the text of 30(b) would have been placed at the point where the federal rule parallels 30(b); at least H(1) of South Carolina Rule 87 would have been incorporated by reference. This was not done. It therefore must be assumed that whatever protection from Rule 88 discovery is to be forthcoming must be based on the last phrase of Rule 88, that the court "may prescribe such terms and conditions as are just" for the utilization of the rule. Also, Rule 88 requires that the court be convinced that there is a good cause for the use of the rule before discovery purusant to it is to be allowed. Because no court would permit the rule to be used if it sensed possible abuse, the omission should be without consequence. Other than these two minor variations, Rule 88 is copied verbatim from Federal Rule 34.

Rule 89

Rule 89 was created by combining Federal Rules 36 and 37(c), with minor alterations. Rule 89 requires leave of court if the request is made within 20 days while the federal rule requires that leave be given if the request is made within 10 days. The South Carolina rule also specifically provides that an admission made as a result of Rule 89 may not be used in any other proceeding, civil or criminal. The consequences for making a party prove what he requested to be admitted are found in Federal Rule 37(c). These consequences are mirrored in Rule 87(c).

16. The court, after a showing of good cause, may order that the deposition not be taken, or that it may be taken only at some designated place other than the one stated in the notice. It may order the deposition to be taken only by the use of written interrogatories, or it may limit the scope of the examination or the matters which may be inquired into. Rule 30(b) sets out protections not listed here. All are designed to prevent abuse of discovery.

CASES

A. Rules Construed

In *Jones v. Dague*,[17] the defendants attempted to argue that the South Carolina practice of not allowing the life expectancy of a beneficiary in a wrongful death action to be taken into account is unsound and not in accord with the weight of authority. The court conceded that there was some doubt as to the soundness of the rule. Nevertheless it allowed plaintiff the benefit of stare decisis because the defendant had not followed the procedure set out in Rule 8, Section 10.[18] The rule directs that permission must be asked before argument can be directed against a standing case.

Rule 4, Section 6 of the Supreme Court Rules,[19] governing the assignment of error, is not in every case strictly adhered to by the supreme court, as was shown in *State v. Funderburke*.[20] The appellant had been convicted of rape, and sought a new trial on the basis of alleged prejudicial error in the admission into evidence of a coat and mask. These, the court held, were clearly the product of an illegal search and their admission into evidence should not have been allowed in view of *Mapp v. Ohio*.[21] While the exception was not drafted in strict compliance with the rule, the court considered the case to be of such gravity, and the error in the lower court to be so patent, that a refusal to honor it would not have been justified merely on the basis of form. The case was reversed and remanded for a new trial.

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17. 166 S.E.2d 99 (S.C. 1969), further discussed in the *Survey of Appeal.*
18. S.C. SUP. CT. R. 8(10):
Counsel desiring to attack or argue against a decision of this Court, with a view to asking the Court to review, modify, or overrule the same, must petition the Court in writing, at least four days before the call of the case in which such argument is sought to be made, asking permission to do so, and set forth the reasons why the decisions in question should be reviewed, modified or overruled.
19. S.C. SUP. CT. R. 4(6):
Each exception must contain a concise statement of one proposition of law or fact which this Court is asked to review, and the same assignment of error should not be repeated. Each exception must contain within itself a complete assignment of error, and a mere reference therein to any other exception then or previously taken, or request to charge will not be considered. The exceptions should *not* be long or argumentative in form.
20. 164 S.E.2d 309 (S.C. 1968).
21. 367 U.S. 643 (1961). *See also* State v. Hill, 245 S.C. 76, 138 S.E.2d 829 (1964).

B. Venue

In *Lott v. Claussens*,[22] the unqualified right to use bread racks was held to be sufficient property, within the meaning of Section 10-421,[23] for the purpose of sustaining venue. Claussen's admitted transacting business within Barnwell County, but appealed the lower court's ruling that it owned property within that county. Certain bread racks situated in various grocery stores within the county, although not owned by Claussen's, were owned by the South Carolina Bakers Council, an eleemosynary corporation of which Claussen's was a dues-paying member. The racks were provided by the council for the exclusive use of its members.

In *Pell v. Ball*,[24] the court long ago defined property for the purpose of determining venue as "a general term to designate the right of ownership; and [one which] includes every subject, of whatever nature, upon which such a right can legally attach." The court has also held that contract rights, more specifically insurance contracts[25] and extermination contracts,[26] were property for the purpose of establishing venue. Claussen's, by virtue of its membership in the council, had a legally enforceable right to the use of the racks, and had enjoyed this right for some time. The court thought this right to exclusive use to be closely akin to the rights conferred in the above mentioned contracts, which had been treated as property. For this reason it held that Claussen's did own property as contemplated by Section 10-421, and that this, plus the admitted transaction of business, was sufficient to sustain venue.

In another case involving venue, *Burris Chemical Co. v. Daniel Construction Co.*,[27] the court upheld the lower court's refusal to honor Daniel's "objection to jurisdiction." Prior to the commencement by Burris of an action for declaratory judgment, brought in Colleton County, Daniel had filed a mechanic's lien on a York County plant site belonging to Burris. Subsequent to the commencement of the Colleton County action, Daniel began foreclosure proceedings on this lien. It was argued on behalf of

22. 251 S.C. 478, 163 S.E.2d 615 (1968). This decision is further commented upon in the *Survey of Appeal*.
23. S.C. CODE ANN. § 10-421 (1962).
24. Speer's Eq. 48, 83 (1843).
25. Gibbes v. National Hospital Service, Inc., 202 S.C. 304, 24 S.E.2d 513 (1943).
26. Peeples v. Orkin Exterminating Co., 244 S.C. 173, 135 S.E.2d 845 (1964).
27. 251 S.C. 483, 163 S.E.2d 618 (1968).

Daniel that this action in York County divested the Colleton Court of its jurisdiction.

The supreme court noted that South Carolina's venue statute provides that actions involving real estate should be tried in the county where the land is located,[28] and also that mechanics' liens are to be enforced in the court of common pleas where the building or land is situated.[29] In spite of this the court declined to rule that the Colleton County court had been divested of its jurisdiction. Daniel was instead instructed to seek a change of venue in the event that the case did not proceed to final adjudication in Colleton County.

The fact that two actions were pending in two different courts had not been before the lower court and thus the issue was not properly before the supreme court. The matter was left open for settlement by the two courts involved.

C. Service of Process and Jurisdiction

The court ruled in *Burris Chemical Co. v. Daniel Construction Co.*,[30] *supra*, that service upon a supervisor in charge of 16 men at a construction site in Colleton County met the requisites of South Carolina's service of process statute.[31] Such service did give notice to the corporation of the proceedings against it.

> It cannot be logically argued that the superintendent in charge of all of the remaining employees at a project of this magnitude [between $400,000 and $600,000 estimated cost] is not such a representative of the corporation as contemplated by the legislature to apprise the corporation that an action had been commenced . . . . [T]he service could reasonably be expected to result in prompt notice to the corporation with adequate opportunity to defend.[32]

The court also held that Daniel was transacting business as contemplated by Section 10-421. *Atkinson v. Korn*,[33] where a

28. S.C. CODE ANN. § 10-301 (1962):
> [T]hat, in the case of domestic or foreign corporations, service as effected under the terms of this section shall be effective and confer jurisdiction over any domestic or foreign corporation in any county where such domestic or foreign corporation shall own property *and* transact business, regardless of whether or not such domestic corporation maintains an office or has agents in that county. (Emphasis added.)

29. S.C. CODE ANN. § 45.264 (1962).
30. 251 S.C. 483, 163 S.E.2d 618 (1968).
31. S.C.CODE ANN. § 10-421 (1962).
32. 251 S.C. 483, 478, 163 S.E.2d 618, 620 (1968).
33. 219 S.C. 102, 65 S.E.2d 465 (1951).

logging contract was held to be "transacting business", was considered as controlling rather than *Seegers v. WIS-TV*,[34] and *Thomas & Howard Co. v. Marion Lumber Co.*,[35] which had involved only occasional solicitation and deliveries within the county.

The property requirement of Section 10-421 was said to have been met by the presence at the construction site of a mobile office trailer and various pieces of construction equipment. The court considered the facts of the present case dissimilar to those in two cases argued on behalf of Daniel Construction, where the "property" had been within a county only while in transit.

In *Ballew v. Ballew*,[36] it was held that service of process had been made upon the nonresident members of a partnership by the delivery of a summons and complaint to an employee at the partnership's place of business in South Carolina. The defendants contended that Section 10-438[37] did not authorize such substituted service upon an employee. The court disagreed, and explained that

> [w]hile the *presence* of a defendant within the State is required in order to make Section 10-438 available, this does not necessarily mean physical presence. Under the statute a defendant is present within the State when he . . . (2) has a place of residence or business within the State, in which event substituted service may be had on a person of discretion residing at the place of business.[38]

In *Ballew* the defendants had stipulated that they transacted business and maintained an office within the state. This was

34. 236 S.C. 355, 114 S.E.2d 502 (1960).
35. 232 S.C. 304, 101 S.E.2d 848 (1958).
36. 251 S.C. 496, 163 S.E.2d 622 (1968).
37. S.C. CODE ANN. § 10-438 (1962):
> In all cases other than those mentioned in this article the summons shall be served by delivering a copy thereof to the defendant personally or to any person of discretion residing at the residence or employed at the place of business of the defendant.

38. 251 S.C. 496, 499, 163 S.E.2d 622, 623-24 (1968). In Armstrong v. Brant, 44 S.C. 177, 21 S.E. 634 (1895), the court did not uphold service made upon a relative of the defendant, although of adequate discretion, because the *person served* was not within the state. In Brays Island Plantation, Inc. v. Harper, 245 S.C. 399, 140 S.E.2d 781 (1965), there was an unsuccessful attempt to serve an agent, only temporarily within the state, whose employer had no place of business within the state. § 10-438 has been held to include nonresidents as well as residents. Ford v. Calhoun, 53 S.C. 106, 30 S.E. 830 (1898).

sufficient *presence*, for the reasons given by the court above, to make service upon the employee proper.

Carnie v. Carnie[39] raised the question of the validity of constructive service of process by mail upon a nonresident defendant in a divorce action. The plaintiff-respondent sought a divorce after four years of legal separation. At the time of the commencement of the action her husband was stationed in Iran and had no property within the state. While the actual decree of divorce was not contested by the husband, it was argued on his behalf that the lower court had erroneously denied his motion to strike those provisions of the decree relating to alimony, attorney's fees, and child support. The appeal was brought on the issue of lack of in personam jurisdiction, which jurisdiction the appellant argued was necessary for the provisions in question, and which he argued had not been obtained by the attempted service by mail.

The court noted, without so holding, that it was doubtful whether such constructive service on a nonresident was sufficient for *any* of the provisions of the divorce decree. The court did not so hold because it feared that one of the parties might have relied to his detriment upon the decree by the lower court. The court did specifically hold that such service was insufficient to bestow upon the lower court the necessary in personam jurisdiction to award the alimony, child support or attorney's fees.[40]

D. Pleadings

In *Wilson v. American Casualty Co.*,[41] the plaintiff had in the lower court succeeded in an attempt to recover from the insurance company mortgage payments past due under a disability insurance policy and also the amounts expended for attorney's fees in prior suits for the same purpose. The defendant was unable to secure reversal of the lower court's refusal to exclude parts of the plaintiff's pleadings. These parts made reference to the prior actions and past difficulty the plaintiff had had with the insurance company. The supreme court did agree, however, that the attorney's fees for those earlier actions were not connected with the present claim, and ordered the

39. 167 S.E.2d 297 (S.C. 1969).
40. *Id.* Had the defendant owned land within the state, that land could have been subjected to the payment of alimony, for such an action would have been an action in rem, for which no personal service is necessary.
41. 166 S.E.2d 797 (S.C. 1969).

admitted amount of those fees eliminated from the judgment. The court left open the question of whether those fees could be recovered in an appropriate action.

E. Declaratory Judgment

In *Park v. Safeco Insurance Co. of America*,[42] Park sought a declaratory judgment to determine whether Safeco had successfully denied having coverage of McCall, a tort-feasor in an accident with Park. If so, Southern Home Insurance Co., Park's own insurer, was liable to him pursuant to the Uninsured Motorist Law.[43] McCall was not a party to the declaratory judgment action. Plaintiff no doubt merely hoped to determine the proper source to which to look for the recovery of the damages resulting from the accident.

The South Carolina Supreme Court refused to overrule the lower court's decision sustaining the defendant's demurrer, primarily because the question of McCall's liability had not been established. The heart of the court's opinion is the statement that "there is presently between plaintiff and Safeco no justiciable issue ripe for judicial pronouncement, because the possible issues are not sufficiently immediate and real to warrant action by the court."[44]

The court disagreed with the plaintiff's contention that an injured party ought to have the right to have the validity of the tort-feasor's insurance policy determined. That party would have standing to request such a determination only after the question of liability between himself and the tort-feasor was determined.

F. Motion to Strike

In *Huggins v. Winn-Dixie Greenville, Inc.*[45] the circuit court refused to grant the defendant's motion to strike portions of an amended complaint when the motion was made four days before a scheduled retrial. In the original trial the plaintiff had sued on two causes of action: abuse of process and malicious prosecution. The jury found for the plaintiff on the former and for the defendant on the latter. On appeal, the supreme court reversed

42. 251 S.C. 410, 162 S.E.2d 709 (1968).
43. S.C. CODE ANN. § 47-750.33 (Supp. 1968).
44. 251 S.C. 410, 415, 162 S.E.2d 709, 711 (1968).
45. 166 S.E.2d 297 (S.C. 1969).

and remanded for a new trial on only the cause of action for abuse of process. Five days prior to the second trial the defendant sought to have the plaintiff amend his complaint to delete all references to the cause of action for malicious prosecution, which had already been decided in favor of the defendant. The plaintiff served his amended complaint four days prior to the tentative date for trial, and the defendant moved to have striken, as provided in Circuit Court Rule 20,[46] parts of the complaint which he argued were pertinent only to an action for malicious prosecution. The circuit court refused to honor this motion.

The supreme court held that the letter as well as the spirit of Rule 20 precluded the granting of this particular motion due to the time at which it was made. The court pointed out that the case had been remanded on March 23, 1967 and that it had not been scheduled to come to trial before June 5, 1967. The defendant had known throughout this period the contents of the original complaint as to the single cause of action remaining. Had he had objections to any portion of that complaint, the proper action would have been to move promptly to have them striken and not to wait until the eve of the trial to do so.

The lower court and supreme court were also in agreement in their construction of Section 10-629,[47] which details the procedure for various amendments. The plaintiff had been allowed to amend his complaint at the conclusion of argument so that it coincided with facts brought out during the trial. The supreme court concluded that this did not substantially change the complaint, that it did not state a new and independent cause of action, and that it did not surprise the defendant. Thus the amendment was held to be a proper exercise of discretion by the trial judge.

G. Res Judicata

In *Bell v. Boyd*,[48] the court followed the general rule "that a judgment rendered by reason of defective pleadings is not con-

46. S.C. CIR. CT. R. 20 provides:
Motions to strike out of any pleading matter alleged to be irrelevant or redundant, and motions to correct a pleading on the ground of its being 'so indefinite or uncertain that the precise nature of the charge or defense is not apparent,' must be noticed before demurring or answering the pleading, and within twenty days from the service thereof.
47. S.C. CODE ANN. § 10-629 (1962).
48. 166 S.E.2d 104 (S.C. 1969).

sidered on the merits within the operation of the doctrine of res judicata."[49] The case arose when Bell brought an action for a declaratory judgment to determine the rights of the parties with respect to two tracts of land. Boyd asserted the defense of res judicata, citing an earlier injunctive action in the Court of Common Pleas involving herself and a party different from the present plaintiff, and successfully moved for judgment on the pleadings.

The supreme court concluded that there was no identity of subject matter between the injunctive proceeding and the action in *Bell* sufficient for the purposes of res judicata. An analysis of that action revealed only that "the return had failed to allege sufficient facts to constitute a defense."[50] There was no need to determine precisely what had been adjudicated previously, it being sufficient for the court to decide "that the precise issues involved in this case were not adjudicated on the merits in the former proceeding."[51] Therefore, the lower court was reversed.

In the second case surveyed involving res judicata, *McConnell v. Williams*,[52] the committee for a person non compos mentis sought an order directing the defendant to give an accounting for rents and profits and to reconvey some parcels of land to the ward of the committee. Without waiting for this litigation to be concluded the committee brought a second action, this one in tort, seeking actual and punitive damages for breach of contract to collect rents and for wrongful appropriation of money due the committee's ward.

When the defendant Williams filed an accounting in connection with the first action, the trial court neither approved nor disapproved it but in effect continued the proceedings so that the committee could examine its contents. Later, at the defendant's request, the court issued an order dealing with both the original accounting action and the subsequent tort suit: the court enlisted a referee to evaluate the accounting and abated the tort action. The committee, thinking its $175,000 tort claim jeopardized by the abatement, appealed.

The supreme court noted language in the trial court's order characterizing the suits as closely related, then agreed with com-

49. *Id.* at 106, citing 30A AM. JUR. *Judgments* § 351 (1958).
50. 166 S.E.2d at 106.
51. *Id. See generally* Whetsell v. Sovereign Camp, W.O.W., 188 S.C. 106, 198 S.E. 153 (1938); Roberts v. Jones, 71 S.C. 404, 51 S.E. 240 (1905); Gist v. Davis, 11 S.C. Eq. (2 Hill's Eq.) 335 (1835).
52. 167 S.E.2d 429 (S.C. 1969).

mittee's counsel that the actions were not absolutely identical. Conceding the fact that abatement is usually appropriate only when parties, causes of action, issues, and relief sought are identical — which here they were not — the court nevertheless affirmed the abatement of the tort claim. Justice Littlejohn, speaking for the court, seemed to appreciate the trial court's sensible solution to this unusual problem. Perhaps the nebulous litigation below did fail to conform to the classic requirements for abatement,[53] yet "the ends of justice [would] be best served by allowing the first suit to proceed and by withholding action in the second suit."[54] Furthermore, nothing in the trial court's order precluded revival of the tort claim at the proper time.

H. Jury Instructions

In *Smith v. Winningham*,[55] the trial judge felt it necessary to instruct the jury on the standard of care required of a motorist in an area known to be frequented by children. It was urged on appeal that there was error in a part of these instructions. In answering this contention the supreme court held that no part of the charge would be read out of context for the purpose of determining error. The charge as a whole was found errorless.

I. Conditional Remission

The plaintiff's strategy in *Sellers v. Sears Roebuck and Co.*[56] with respect to the use of a conditional remission was thwarted when the conditions specified in the remission were realized. The trial judge instructed the plaintiff to remit $1,500 of a $5,000 judgment or have the defendant's motion for a new trial granted. The plaintiff remitted but attempted to discourage any appeal by the defendant by conditioning the remission upon the defendant's acceptance of the court's order without appeal and by reserving the right also to appeal if the defendant appealed.

The defendant did appeal, and the South Carolina Supreme Court ruled that this in effect nullified the remission.

> We have held that, when a plaintiff fails to remit *in accordance with* the order granting a new trial nisi, the effect of the order is to grant a new trial absolute. When

53. *See* 1 C.J.S. *Abatement and Revival* § 39 (1936) (cited by the court).
54. 167 S.E.2d at 432.
55. 166 S.E.2d 825 (S.C. 1969).
56. 166 S.E.2d 1 (S.C. 1969).

> defendant appealed, *there was no remission because* the plaintiff specifically conditioned his acceptance of the reduction in the amount of the verdict upon the absence of an appeal by defendant.[57]

Plaintiff faced a new trial, the very thing which he had sought to avoid from the first.

J. Ancillary Jurisdiction

Andrews v. Central Surety Insurance Co.[58] presented the federal district court, Judge Simons sitting, with an interesting problem of jurisdiction involving contingent fee contracts. Andrews' insurance companies deposited $160,517.76 into the registry of the federal court after a jury determined that the companies had acted negligently or in bad faith by not settling a claim for the wrongful death of Allen T. Green within the limits of Andrews' liability policy. The wrongful death action, brought in a South Carolina court, resulted in a judgment $134,000 above the policy limits. That figure plus interest from the date of judgment plus court costs were deposited with the federal court.

The court offered two alternative plans in an attempt to settle upon a fee schedule; however, neither of these was suitable to counsel. At this point spokesmen for all interested attorneys requested that they be allowed to withdraw their petitions, arguing that all involved were South Carolina residents and for that reason there was not the requisite diversity for jurisdiction.

After stating that research had revealed no case precisely in point, the court announced that

> there is much authority which supports the principle that once federal jurisdiction has properly attached in a primary cause of action, the federal court also has ancillary jurisdiction over certain subsidiary or subordinate disputes including attorneys fees even though it might not be independently able to proceed to adjudicate them.[59]

Once jurisdiction was determined, the court felt compelled to continue with the case rather than to allow the difficult task of set-

57. *Id.* at 2 (emphasis added).
58. 295 F. Supp. 1223 (D.S.C. 1969).
59. *Id.* at 1227. The court cited numerous authorities, including WRIGHT, *supra* note 9, at § 9.

tling the disputed fees fall upon a state court which would have been unfamiliar with the character of the case.[60]

K. Miscellaneous

In *Williams v. South Carolina Farm Bureau Mutual Insurance Co.*[61] a new trial was ordered on the basis of errors found in the admission of testimony in questions put by the trial judge to a witness, and in part of the plaintiff's counsel's closing arguments alluding to the wealth and evils of insurance companies.

When plaintiff Williams sought recovery on a fire policy carried by Farm Bureau, he also joined as a defendant his lessee, Hamilton, in order to protect any interest which Hamilton might have in the same policy. Hamilton, from whom no relief was sought, thereupon cross claimed against the insurance company. The cross claim was non-suited, yet Hamilton's attorney remained active in the case, apparently for the sole purpose of assisting plaintiff's attorneys.

Neither Williams nor the insurance company called Hamilton as a witness during the presentation of their cases. His own counsel called him in reply, however, and following lengthy testimony he was cross-examined by counsel for the defense. A cross-examination by the plaintiff was also allowed despite defendant's objections. The trial judge overruled the objection apparently because he considered Hamilton still to be in the case as a defendant.

The supreme court ruled this cross-examination by counsel for the plaintiff to be prejudicial error. The court reasoned that in effect, though not explicitly, Hamilton had already been a witness for the plaintiff. Although the plaintiff had not actually called Hamilton as his witness, he became such when called by his own counsel to testify at length in a fashion favorable to the plaintiff. The result of all this was that the plaintiff had the opportunity to cross-examine his own witness.

Reversible error was also found in the trial judge's handling of questions which he presented to Hamilton. After recognizing the broad discretion allowed the trial judge in questioning, the court expressed concern that the form of these questions might have misled some members of the jury into believing that the trial judge was of the opinion that the insurance company's

60. *See* Bounougias v. Peters, 369 F.2d 247 (7th Cir. 1966).
61. 251 S.C. 464, 163 S.E.2d 212 (1968).

agent had not correctly recorded answers given him for the policy by Hamilton. The court reiterated the necessity for any such questions to be carefully put so as to avoid any appearance of partiality. The trial judge

> should be cautious to see that such questions are propounded in a fair and impartial manner, and should not express or indicate to the jury [his] opinion as to the facts of the case or the weight or sufficiency of the evidence.[62]

Although the record failed to contain the closing argument of plaintiff's counsel, the court was satisfied that it sounded substantially like the paraphrase contained in opposing counsel's indignant objection:

> [T]he Insurance Company owns the skyscrapers, they have all the finances and they take money from people like . . . Charlie Williams.[63]

The court was convinced that the argument had been improper and that the trial judge erred in failing to instruct the jury to disregard the remarks and in not reprimanding the attorney.

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62. *Id.* at 472, 163 S.E.2d at 216. *See also* State v. Chasteen, 228 S.C. 88, 88 S.E.2d 880 (1955).
63. *Id.*