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RECENT DECISIONS

CONFLICT OF LAWS—Choice of Law—Domiciliary law applies to establish host liability for out-of-state automobile accident. *Clark v. Clark* (N.H. 1966).

While traveling in Vermont on a trip from Lancaster, New Hampshire, to Littleton, New Hampshire, the parties were involved in an automobile accident. Seeking damages from her husband for injuries sustained in the accident, the plaintiff moved for a pre-trial order that the substantive law of New Hampshire, the parties' residence, governed their rights. The superior court reserved all questions of law and transferred without ruling. The New Hampshire Supreme Court, *held*, remanded with advice to enter a pre-trial order. Where the host and the guest who were domiciled in New Hampshire and who intended to return to New Hampshire after their trip were involved in an automobile accident in Vermont, New Hampshire law applied, and the guest could recover for injuries caused by the host's ordinary negligence. Clark v. Clark, 222 A.2d 205 (N.H. 1966).

The traditional choice of law rule in the tort field is the law of the place of injury. However, a strict application of this rule has never been recommended, and the courts are tending to let other factors influence their choice.[1] As *Clark* said of this traditional rule, "no conflict of laws authority in America today agrees that the old rule should be retained. . . . No American court which has felt free to re-examine the matter thoroughly in the last decade has chosen to retain the old rule."[2] Even the courts that have kept the place of injury rule do so not because of a belief that the old rule is a good one but because of an unwillingness to overrule established precedent until a better rule is clearly available.[3]

1. The leading authorities in the conflict of laws field have long criticized a blanket application of this *lex loci delicti* rule. See COOK, THE LOGICAL AND LEGAL BASIS OF CONFLICT OF LAW (1942); HANCOCK, TORTS IN THE CONFLICTS OF LAW (1942); Morris, *The Proper Law of a Tort*, 64 HARV. L. REV. 881 (1951); Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361, 383 (1945); Yntema, *The Hornbook Method and the Conflict of Laws*, 37 YALE L.J. 468 (1928).

2. Clark v. Clark, 222 A.2d 205, 207 (N.H. 1966).

3. The South Carolina Supreme Court has chosen to ignore the more recent trend and follow the traditional *lex loci delicti* rule. In the face of Haumschild v. Continental Cas. Co., 7 Wis. 2d 130, 95 N.W.2d 814 (1959), and other cases which adopted and elucidated the grouping of contacts, the South Carolina court thought it wise to wait until this new theory became

It is generally conceded that a strict application of the place of injury rule can lead to some curious and unjust results.[4] For this reason various devices have been employed to avoid application of the old rule. Some cases have used renvoi devices to avoid the application. Others have substituted a characterization approach, whereby the choice of law is determined by the category in which the case falls. If the issue can be termed contract,[5] family law,[6] procedural[7] or if it involves a strong public policy,[8] a choice of law other than the place of injury may be justified. In spite of their use, these devices are not entirely satisfactory, and there has been a definite and substantial trend toward a more preferable approach, commonly referred to as the grouping of contacts. Under this approach a court will consider all the acts of the parties touching the transaction in relation to the several states involved and will apply the law of that state with which the facts are in most intimate contact. This is a qualitative rather than a quantitative consideration of the contacts. The advantage in this approach is that a court is free to recognize special interests that one state may have in a case, and yet it is not free to choose indiscriminately. Further, since it is possible that different states will have the most significant contact with various issues presented in one case, the issues can be split, and the law applied to each issue will be that of the jurisdiction having the most significant contact with that issue.[9]

The grouping of contacts has been rather widely accepted, especially in the area of guest-host liability. The landmark case is *Babcock v. Jackson*[10] where two New York residents were involved in an accident while traveling in Ontario, and the guest sought to recover for the host's negligence. The New York Court

more certain and established. "We do not deem it wise to voyage into such an uncharted sea, leaving behind well-established conflict of laws rules." Osheik v. Osheik, 244 S.C. 249, 255, 136 S.E.2d 303, 306 (1964).

4. See, *e.g.*, Jeffrey v. Whitworth College, 128 F. Supp. 219 (E.D. Wash. 1955); Nadeau v. Power Plant Eng'r Co., 216 Ore. 12, 337 P.2d 313 (1959); Carter v. Tillery, 257 S.W.2d 465 (Tex. Civ. App. 1953).

5. See Levy v. Daniel's U-Drive Auto Renting Co., 108 Conn. 353, 143 Atl. 163 (1928).

6. See Haumschild v. Continental Cas. Co., 7 Wis. 2d 130, 95 N.W.2d 814 (1959).

7. See Home Ins. Co. v. Dick, 281 U.S. 397 (1930).

8. See Howard v. Howard, 200 N.C. 574, 158 S.E. 101 (1931).

9. Note, 18 S.C.L. REV. 453, 457, 464 (1966).

10. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963). See Cavers, Cheatham, Currie, Ehrenzweig, Leflar and Reese, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212 (1963).

of Appeals rejected the *lex loci delicti* rule because the place of injury was held to be merely fortuitous. In its place the court weighed the interests and policies of the two jurisdictions involved, New York and Ontario, and applied New York law which it determined to be more intimately concerned with the outcome. While the place of the injury was considered, it was merely one factor to be weighed with the others and was not determinative on the question of host liability.[11]

Clark v. Clark[12] also involves the possible application of a foreign guest statute, the spousal relation of the parties being irrelevant to the issues considered. New Hampshire, the forum state, does not have a guest statute, and a guest may recover from a host for injuries caused by the host's ordinary negligence. The Vermont guest statute limits recovery to injuries caused by the host's gross and willful negligence. While the grouping of contacts was not mentioned by name, *Clark* used this kind of approach and cited with approval the principal cases that espouse the new choice.

In determining the proper choice of law, both the place of injury and the straight characterization approaches were rejected. Instead, the *Clark* court set out what it deemed to be five relevant considerations and concluded that "choice of law decisions ought to be based directly upon these relevant considerations, rather than any mechanical rule or technique of *ad hoc* characterization derived indirectly from such considerations."[13] Predictability of legal result in advance of the event was found to be a largely irrelevant consideration in this case "since automobile accidents are not planned."[14] The second consideration was the maintenance of reasonable orderliness and good relationship among the states. The court felt that this consideration in the area of automobile accident litigation required only the application of "the law of no state which does not have substantial connection with the total facts and with the particular issue being litigated."[15] This is the essence of the grouping of contacts. The use of either New Hampshire or Vermont law in this case would affect neither interstate travel nor state sensi-

11. Babcock v. Jackson, 12 N.Y.2d 473, 478, 191 N.E.2d 279, 284, 240 N.Y.S.2d 743, 748 (1963).
12. 222 A.2d 205 (N.H. 1966).
13. Clark v. Clark, 222 A.2d 205, 208 (N.H. 1966).
14. *Id.* at 209.
15. *Id.* at 208.

bilities. Simplification of judicial task was the third consideration, but the court observed that while a mechanical rule would be easier to apply, simplification was not the whole end, and opposing considerations could outweigh it. Further, the court could use either state's law with relative ease. Also considered was governmental interest, and New Hampshire was found to have an interest in applying its law to its own residents. The parties resided in New Hampshire, they maintained their car and insurance under this state's laws, and their trip was to begin and end there. The court felt these factors "would have led them to anticipate application of our law to them."[16] These same factors were present in *Babcock* and persuaded the New York court to apply New York law. Also like *Babcock*, the court distinguished guest-host liability from rules of the road. The latter should be determined by the law of the place of injury because that state has an interest in regulating conduct on its highways. As to guest statutes, "the factors that bear on the guest-host relationship all center in New Hampshire."[17] Lastly, the court must consider its preference for what it views as the sounder rule. If the law of the other state is outmoded, courts have always tried to apply their own law, although usually covering it up by using characterization and renvoi devices. New Hampshire law was preferable to that of Vermont, chiefly because the complexion of automobile accident legislation has changed so much since the guest statutes were enacted in the 1920's and early 1930's. These old guest statutes "contradict the spirit of the times. . . . Unless other considerations demand it, we shall not go out of our way to enforce such a law of another state as against the better law of our own state."[18] Thus, the court held that all the relevant considerations led clearly to the application of New Hampshire law.

Clark tends to eliminate the confusion that could have arisen from such cases as *Freund v. Spencer*.[19] There the court held that the law of Vermont as the place of injury determined the "issue of negligence," while the grouping of contacts rule required application of New York law as the residence of the parties to determine the rights and liabilities stemming from the guest-host relationship. Vermont's guest statute requires a show-

16. *Id.* at 209.
17. *Ibid.*
18. *Id.* at 210.
19. 46 Misc. 2d 472, 260 N.Y.S.2d 149 (Sup. Ct. 1965).

ing of gross negligence to establish the host's liability. The New York law in *Freund* and the New Hampshire law in *Clark* require only ordinary negligence. If, as *Freund* says, the law of the place of injury determines the "issue of negligence," it would seem that the plaintiff is required to meet the Vermont gross negligence rule. However, since this requirement does not seem to have been met, the *Freund* court must have meant the nature of conduct necessary to establish a wrongful act, when it said "issue of negligence." This is similar to what the *Clark* court referred to as "rules of the road." So, suppose Vermont law required that a car merely slow down at a stop sign, and a New York guest was injured in Vermont because the host only slowed down and did not stop. It would be unimportant what New York law said on the subject because the New York court would refer to Vermont law to determine whether the host acted properly. Since he complied with the law of the state in which he was driving, his conduct was free from any taint of negligence. On the other hand, once it can be established under the law of the place of injury that the host's conduct was wrongful, reference will be had to the law of the state most intimately concerned in order to determine the rights and liabilities arising out of the guest-host relationship. Suppose New York law permitted one to merely slow down at a stop sign, but Vermont law stated that such conduct constituted ordinary negligence. If the New York guest was injured in Vermont when the host failed to stop, the host would be guilty of ordinary negligence. The Vermont guest statute, however, requires a showing of gross negligence to establish the host's liability. According to *Clark* and *Freund*, the New York court would refer to Vermont law to establish that the host acted wrongfully. Then it would apply its own law to establish the host's liability, resulting in the guest only having to prove ordinary negligence.

This interpretation of *Freund* and *Clark* squares with the general considerations of the grouping of contacts rule.[20] As

20. *Clark* is also in accord with RESTATEMENT (SECOND), CONFLICT OF LAWS § 379 (Tent. Draft No. 9, 1964).

> Circumstances under which a guest passenger has a right of action against the driver of an automobile for injuries suffered as a result of the latter's negligence will be determined by the local law of their common domicile, if at law this is the state from which they departed on their trip and that to which they intended to return, rather than by the local law of the state where the accident occurred.

RESTATEMENT (SECOND), CONFLICT OF LAWS, *supra* at comment d. See also RESTATEMENT (SECOND), CONFLICT OF LAWS § 379 comment f (Tent. Draft No. 9, 1964).

early as *Babcock*, it was recognized that questions concerning the nature of the defendant's conduct must be distinguished from questions involving the relationship of the parties.[21] The state where the injury occurred has an interest in seeing that its rules of the road are enforced, so that users of its highways will be protected. For this reason, its law will determine the rightness or wrongness of the conduct. Thus, through a grouping of contacts and, as in *Clark*, through an analysis of all relevant considerations, the courts do not seek a complete overturning of the place of injury rule. Rather, the courts are attempting to discourage a mechanical use of this old rule by encouraging consideration of all relevant interests, and in this way are developing a more flexible and just choice of law rule.

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21. Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963). See also Murphy v. Barron, 45 Misc. 2d 905, 258 N.Y.S.2d 139 (Sup. Ct. 1965).

CONSTITUTIONAL LAW—Reapportionment—South Carolina Senate Reapportionment Act acceptable only as an interim measure. *O'Shields v. McNair* (D.S.C. 1966).

The plaintiffs brought an action challenging the constitutionality of the South Carolina Senate reapportionment scheme embodied in the Act of February 3, 1966[1] and seeking an injunction prohibiting further elections to the South Carolina Senate as then apportioned. The District Court, Fourth Judicial Circuit, *held*, that the plan for reapportionment of the South Carolina Senate would be accepted as an interim measure, exclusive of its section providing for a four year term of office. *O'Shields v. McNair*, 254 F. Supp. 708 (D.S.C. 1966).

In a sister case, the constitutionality of the provisions of the South Carolina Constitution of 1895[2] requiring periodic reapportionment of the House of Representatives was challenged.[3]

After *Reynolds v. Sims*,[4] which held that the equal protection clause of the fourteenth amendment requires that the seats in both houses of a bicameral state legislature be apportioned on a population basis, it was evident that South Carolina's Senate apportionment did not meet the test of constitutionality. The South Carolina Senate undertook the task of reapportioning itself and the Act of February 3, 1966 represents the fruits of that endeavor. Embodied in sections 1 and 2 of the Act were two reapportionment plans. The court considered the section 1 plan in the present case.[5]

The plan met its first difficulties in regard to the South Carolina Constitution. The court noted that it was in violation of Article III, Section 8[6] in that the Act provided for election of Senators for four-year terms. The desirability and need for a constitutional amendment was indicated in order for the General Assembly to be competent to effectuate the Act. The plan also conflicted with Article III, Section 6 of the Constitution of

1. Act of February 3, 1966, 54 Stat. 2016.

2. S.C. CONST. art. III, §§ 3, 4 (1895).

3. Mungo v. McNair, 254 F. Supp. 708 (D.S.C. 1966). The court here held that South Carolina's apportionment of the House of Representatives among counties was not inconsistent with the federal requirement of apportionment on a population basis.

4. Reynolds v. Sims, 377 U.S. 533 (1964).

5. Act of February 3, 1966, 54 Stat. 2016.

6. S.C. CONST. art. III, § 8 (1895), which provides that: "Senators shall be so classified that one-half of their number, as nearly as practicable, shall be chosen every two years."

South Carolina.[7] Here, again, the court advised use of the amendment procedure.

Aside from state constitutional considerations, the true test of the apportionment scheme's validity would be the requirements of the Federal Constitution. In considering the constitutionality of the Act of February 3, 1966, the district court could have followed a path marked by precedent through the political thicket of reapportionment.

The decision of the United States Supreme Court in *Baker v. Carr*[8] indicated that the task of effectuating reapportionment of the state legislatures was on the near horizon.[9] It was in the leading case of *Reynolds v. Sims* that the problem of determining standards and guidelines for implementing the *Baker v. Carr* decision was met.[10] Here, the court, guided by the principle of equal representation for equal numbers of people, held that the equal protection clause required the utilization of a population basis in apportioning state legislatures.[11] The Court acknowledged that some deviation from the equal-population principle is permissible if such deviation is based on legitimate considerations in relation to a rational state policy; thus, mathematical preciseness was not demanded.[12]

A United States District Court, in holding Georgia reapportionment plans unconstitutional, indicated that a variance of more than fifteen percent with the one man-one vote principle would be difficult to justify.[13] However, the United States Supreme Court, while upholding the district court's invalidation of Delaware apportionment schemes, stated that the apportionment problem did not lend itself to a uniform mathematical formula; rather, the test should be a good faith effort to effectuate a plan of population based representation.[14] Thus, variances

7. S.C. CONST. art. III, § 6 (1895) which reads:
> The Senate shall be composed of one member from each county, to be elected for the term of four years by the qualified electors in each county, in the same manner in which members of the House of Representatives are chosen.

The court here noted that the numbers of counties fixed the number of Senators. O'Shields v. McNair, 254 F. Supp. 708, 711 (D.S.C. 1966).

8. Baker v. Carr, 369 U.S. 186 (1962).

9. McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 MICH. L. REV. 645 (1963).

10. Reynolds v. Sims, 377 U.S. 533 (1964).

11. *Id.* at 568.

12. *Id.* at 577.

13. Toombs v. Fortson, 241 F. Supp. 65 (N.D. Ga. 1965).

14. Roman v. Sincock, 377 U.S. 695, 710 (1964).

with the equal population norm do not automatically invalidate an apportionment scheme.[15] A gross deviation should, however, prove fatal.[16]

As the law now stands, rationality and legitimate state interest coupled with the equal population principle form the controlling criteria and point of departure in legislative apportionment controversies.[17] It was within this framework of the law that the district court endeavored to place its decision in *O'Shields v. McNair.*

The court, while indicating that some variance is permissible,[18] pointed out that the South Carolina Senate plan entailed substantial departures from the fifteen percent norm.[19] The district court also expressed grave doubts as to the validity of the "negative residence" requirement in the section 1 plan. This residence requirement provides that no more than one Senator may be a resident of a county in a multi-county, multi-Senator district unless that county's population is 175% or more of the population base per Senator.[20] Thus, some small counties would be guaranteed a resident Senator while, because of the districting, larger counties would have no such right. Considered in the light of population differences among the counties such a provision would, to some extent, restrict the rights of voters in a multi-county district.[21]

While not expressly ruling as to whether the variance in equal population among the counties and the residence requirement would invalidate the reapportionment plan, the court felt that the record provided insufficient justification for the measures and did not dispel doubts as to their constitutionality. The record, as viewed by the court, did not foreclose the inference

15. See Roman v. Sincock, *supra* note 14; Lucas v. Forty-Fourth General Assembly, 377 U.S. 713, 727, 730 (1964); Sims v. Baggett, 247 F. Supp. 96 (M.D. Ala. 1965); Schoefer v. Thomson, 240 F. Supp. 247 (D. Wyo. 1964).

16. See Maryland Committee for Fair Representation v. Tawes, 377 U.S. 656, 673 (1964).

17. Annot., 12 L. Ed. 2d 1282, 1284, 1285 (1963).

18. Toombs v. Fortson, 241 F. Supp. 65 (N.D. Ga. 1965). *But see* Roman v. Sincock, 377 U.S. 695 (1964).

19. With an average population for each Senator of 47,652 people, four of twenty-seven districts vary from the population norm by more than the presumptive maximum. Berkeley County is over-represented by 17.42%, Oconee by 15.63% and Calhoun and Orangeburg by 15.20%. Charleston is under-represented by 13.52%, Darlington by 11.08% and Greenville by 10.06%.

20. Act of February 3, 1966 § 1(e), 54 Stat. 2016.

21. O'Shields v. McNair, 254 F. Supp. 708, 713-14 (D.S.C. 1966). *But see* Fortson v. Dorsey, 379 U.S. 433 (1965).

that the population basis had been diluted by efforts to preserve the old power structure.[22]

Expressing doubt as to the constitutionality of Section 1 of the Act of February 3, 1966, the court accepted it as an interim measure. This was done because of limited time remaining before the 1966 elections and in hopes that an acceptable plan would be forthcoming from the Senate.[23]

It is questionable whether postponement of acceptable reapportionment in the Senate until the general elections of 1968 would meet with Supreme Court approval.[24] Yet, a longer period of delay could not be justified. Hopefully, by the end of the 1967 session of the General Assembly, South Carolina will have an acceptable plan for Senate apportionment.

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22. O'Shields v. McNair, *supra* note 21, at 713.

23. *Id.* at 716.

24. See Sevanson v. Adams, 382 U.S. 210 (1966). The Supreme Court reversed, per curiam without a hearing, acceptance of Florida's legislative reapportionment as an interim plan.

EVIDENCE—Discovery—Deposition of an Adverse Witness—No showing of good and sufficient cause is required for the pretrial examination of an adverse witness. *Proctor v. Corley's Garage* (S.C. 1965).

The plaintiff brought an action to recover damages for alleged personal injuries sustained while at the defendant's place of business. The defendant, pursuant to section 26-701 of the South Carolina Code,[1] made written application to the clerk of court for an order requiring the physician who treated the plaintiff subsequent to the injuries sustained, to appear before the clerk and give testimony on oral examination to be conducted by the attorney for the defendant. The clerk issued the order, and the plaintiff moved for dismissal on the grounds that there was no showing that an examination of the physician is required by the defendant pursuant to section 26-701, and that no good and sufficient cause was shown for the necessity of the examination. The lower court dismissed the order, after a finding that the purpose of section 26-701 is to preserve and perpetuate a party's own testimony and not that of an adverse party or witness. On appeal, the Supreme Court of South Carolina, *held*, reversed. No showing of good and sufficient cause was required as a condition of application for the examination of a witness. *Proctor v. Corley's Garage*, 246 S.C. 478, 144 S.E.2d 285 (1965). (5-to-0).

The *Proctor* case did not overrule earlier decisions, but it did clarify previous misconceptions and end confusion by setting out the court's interpretation of section 26-701. One of the questions which *Proctor* settled was the meaning of the section's designation of "any witness." It was contended by the plaintiff and determined by the lower court that "any witness" did not refer to adverse witnesses, but only to those of the party applying for the deposition. At first consideration it seems that *Cook v. Douglas*[2] substantiates this contention in that the court did not allow the defendant to take the testimony of an adverse witness pursuant to section 26-701. Upon closer examination, however, a different result becomes apparent. The defendant attempted to take the testimony of two passengers in an automobile, each of whom was suing the defendant for damages arising out of the same accident. The court held that there was such a substantial identity of interests between each plaintiff as a witness in

1. S.C. CODE ANN. § 26-701 (1962).
2. 243 S.C. 201, 133 S.E.2d 209 (1963).

the case of the other and as an actual party in his own case, that each of them occupied, in effect, the position of adverse parties; therefore, any taking of their testimony under section 26-701 was precluded. This section " 'provides a mode by which a party to an action may preserve and perpetuate his own testimony or that of any *witness* in the cause,' but an adverse party is not a *witness* within the meaning of that section."[3]

The *Proctor* case also clarified the question of whether or not a showing of "good and sufficient cause" is necessary for taking a deposition pursuant to section 26-701. In *Fox v. Clifton Mfg. Co.*[4] the court held that a party had an absolute right to examine an adverse party without procuring an order from the court or assigning any reason. The legislature, in 1923, in response to the *Fox* decision, amended the statute upon which section 26-503[5] was based, so as to require a showing of "good and sufficient cause" to take the deposition of an adverse party.[6] Determination of whether sufficient cause has been shown is a matter addressed to the discretion of the circuit judge.[7]

No such amendment was made to section 26-701. The two code sections are of different origins and deal with distinctly different subjects. Sections 26-501 through 26-512 "provide the exclusive method for obtaining a pretrial examination of an adverse party, but may not be invoked for the purpose of securing the examination of any other witness."[8] Section 26-701 provides for the taking of the depositions of "any other witness."

The Supreme Court of South Carolina has often stated that counsel cannot engage in "fishing expeditions" under the guise of discovery.[9] It seems, however, that the court in *Proctor* has backed away from this proposition and, in regard to the taking of depositions of adverse witnesses, has opened the "fishing season."

The attitude of the court in *Proctor* has subsequently been demonstrated in the more recent case of *Ex parte* Goodyear Tire

3. Cook v. Douglas, 243 S.C. 201, 203-04, 133 S.E.2d 209, 210 (1963) quoting in part from Cook v. Douglas, 240 S.C. 373, 126 S.E.2d 20 (1962).

4. 122 S.C. 86, 114 S.E. 700 (1922).

5. S.C. CODE ANN. § 26-503 (1962).

6. Proctor v. Corley's Garage, 246 S.C. 478, 144 S.E.2d 285 (1965).

7. Williams v. Southern Life Ins. Co., 224 S.C. 415, 79 S.E.2d 365 (1953); Planter's Fertilizer & Phosphate Co. v. McCreight, 187 S.C. 483, 198 S.E. 405 (1938).

8. Proctor v. Corley's Garage, 246 S.C. 478, 144 S.E.2d 285 (1965).

9. *E.g.*, Royster v. Unity Life Ins. Co., 193 S.C. 468, 8 S.E.2d 875 (1940); Mahaffey v. Southern Ry., 175 S.C. 198, 178 S.E. 838 (1935).

& Rubber Co.[10] which allowed inspection by the defendant of a chattel in the possession of an adverse party. These decisions are indicative of the court's willingness to liberalize discovery procedures to a similar end as the Federal Rules of Civil Procedure.

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10. *Ex Parte* Goodyear Tire & Rubber Co., 150 S.E.2d 525 (S.C. 1966); See 18 S.C.L. REV. 701 (1966).