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Practice and Procedure

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PRACTICE AND PROCEDURE

I. THE STATUTE OF LIMITATIONS

The only case before the Supreme Court of South Carolina involving this most important of all threshold problems was *State v. Life Insurance Co. of Georgia*[1] involving an action by the state against a foreign insurance company, seeking to recover outstanding license fees allegedly due. The issue presented was in the case of two applicable statutes of limitation, which statute applied? The court held that "[W]here there is any doubt as to which of two statutes of limitation applies, the doubt must be resolved in favor of the longer period."[2]

The defendant insurance company denied the amounts allegedly due for five years between 1958 and 1965 while admitting that certain license fees were due for 1958 and 1961. They grounded their defense, however, upon the statute of limitations, arguing that the six year statute of limitation applied as to actions created by statute.[3] The court disagreed with this contention, however, preferring to adopt the longer ten year provision.[4] Accordingly, the court, speaking through Associate Justice Bussey, stated that such "specific applicable limitation removes the instant case from the application of the ordinary period of limitation applicable to actions upon other liabilities created by statute."[5]

II. JURISDICTION AND PROCESS

The cases grouped in this threshold area dealt with some vital issues of jurisdiction with at least one case setting forth a new trend at the federal district court level.

The first case, *Edwards v. Edwards*[6] involved a divorce action. The husband-appellant proposed a transfer of realty to his wife in exchange for a scheme of decreased support payments. Thereafter, the appellant

1. 254 S.C. 286, 175 S.E.2d 203 (1970).

2. *Id.* at 299, 175 S.E.2d at 209; *accord*, Scovill v. Johnson, 190 S.C. 457, 3 S.E.2d 543 (1939).

3. S.C. CODE ANN. § 10-143 (1962).

4. § 65-2707 (1962) provides in relevant part: "The State may bring suit in court for back taxes at any time within ten years from the date when they should have been paid. . . ."

5. 254 S.C. 299, 175 S.E.2d at 209.

6. 254 S.C. 466, 176 S.E.2d 123 (1970).

challenged the jurisdiction of the court to order such a transfer on the grounds that the court had no subject matter jurisdiction.

The court, speaking through Associate Justice Lewis, found that because the appellant not only proposed the transfer, but further had not refused the benefits accruing to him as a result thereof, he was estopped from challenging the power of the court to authorize the transfer on any grounds. This decision by the court was forthcoming even in the countenance of appellant's further contention that the principle of estoppel did not relate to subject matter jurisdiction. In dealing with this argument, the court felt the estoppel was effective regardless, as jurisdiction was not realized via the estoppel but rather the appellant was estopped from asserting his challenge via his acquiescence to his own proposal. Ergo, it seems apparent that this decision should not be read too broadly.

The second case to fall with the scope of jurisdiction, *O'Neill's Estate v. Toumey*,[7] involved an estate administration proceeding. The decedent, who entered the Navy in 1917, was rendered mentally incompetent during his term of service. He was released from the Navy in 1919 and died in 1968 in Charleston County, South Carolina. The deceased left a will and the instant proceeding was instituted in the Probate Court for Sumter County, the official residence of the deceased when he entered the Navy. Appellants, the sole heirs at law had deceased died intestate, interposed objection to the jurisdiction of the Probate Court of Sumter County on the grounds that it was not in compliance with the statutory requirements.[8] Moreover, appellants requested a jury trial so as to settle the controversy of the decedents residency for purposes of establishing jurisdiction.

Appellants conceded that jurisdiction should be established where the deceased lived upon his entry into military service as he was incapacitated between the dismissal and his death. The supreme court agreed with the decision of the probate court stating two principles: first, that the domicile of an individual in military service remains constant at the place where he entered the service and secondly that an adult who becomes insane retains the domicile he had when he became insane.

7. 254 S.C. 578, 176 S.E.2d 527 (1970).

8. Under the provisions of § 19-401 of the 1962 Code of Laws, the estate of the deceased must be administered in the county in which he was "last an inhabitant."

The court further found that it was in the discretion of the circuit court to allow a jury determination of the oustanding factual issue as to last residency. And as a mere discretionary prerogative, refusal to allow a jury to be empanelled for such purpose was not an abuse of discretion regardless of the importance of the issue to be decided.[9] Finally, the high court stood firmly upon the legal adage that the findings of a lower court will not be disturbed absent a clearly and manifestly erroneous decision.

The third case in this area presented the following question: Does the duty to defend and limit an insured's liability contained in the policy of liability insurance constitute a "debt" owed the policyholder which is subject to attachment, thereby conferring jurisdiction upon the courts of South Carolina? The court, in *Howard v. Allen*,[10] responded in the negative and found for the defendant policyholder. In settling this controversy, the court concluded that the aforementioned duty did not constitute a debt subject to attachment so as to confer jurisdiction, and that a debt per se did not come about until such time as the insured's carrier defaulted in its contractual obligation. The court, accordingly, quashed plaintiff's warrant of attachment deployed solely for purposes of gaining jurisdiction.

The fourth case to be decided within this area came from the Federal District Court and is especially noteworthy[11] because of its novel decision regarding what was, until now, a reasonably well settled principle of defeating diversity jurisdiction in federal courts. The case, *Carter v. Seaboard Coast Line Railroad Co.*[12] involved a tort action brought by a minor child via has father as guardian *ad litem*. The defendant was a corporation chartered and doing most of its business in Virginia. The plaintiffs, residents of South Carolina, "hired" a resident of Virginia to act as a party plaintiff and assigned to this individual 1/100th of the interest in the case. Thereafter, when the defendants moved to have the case removed to federal court (as the amount exceeded the minimum jurisdictional requirement and there was, absent the assigned interest, diversity), the plaintiffs moved to have the case remanded arguing that there was by virtue of the assignment no diversity.

9. S.C. CODE ANN. § 7-205 (1962).
10. 254 S.C. 455, 176 S.E.2d 127 (1970).
11. *See*, Comment, 23 S.C.L. REV. 463 (1971).
12. 318 F. Supp. 368 (D.S.C. 1970).

The federal court, however, subsequent to viewing the testimony as provided by depositions taken of the minor plaintiff's father and the assignment plaintiff, decided that the assignment was sham or colorable and did not defeat federal jurisdiction. The court expanded on this conclusion by stating that the evidence indicated manifestly that the Virginia resident was joined without consideration on his part, that he had no determinative position as to the handling of the case and that he was, in fact, ignorant as to fee arrangements, personal obligations pertaining to cost, etc.[13]

Although the judge in this decision, Judge Russell of the Charleston Division, invited an interlocutory appeal to be taken before the fourth circuit bench prior to further litigation, the invitation was not acted upon by the plaintiffs. The motion to remand the case to state court was denied and the case thereafter remained in the federal court.

III. PLEADINGS

A. The Complaint

The only case before the supreme court of South Carolina involving the validity of a complaint was *Wallace v. Wallace*,[14] an action for an accounting of stock allegedly due the petitioner. The complaint, filed in Civil Court in Florence County, alleged that the stock in controversy did not exceed $11,000 in value, the maximum jurisdictional amount allowable in that court.[15] The defendant to the action, the administrator of the estate and guardian of the stocks in question, answered admitting to the allegation involving the amount. Not until the case reached the state supreme court did the defendant challenge the amount as exceeding the heretofore mentioned limit. The court held that the defendant had the duty, if he so desired, to object to the amount allegation at the time of the filing of his answer and his manifest failure to make such a timely objection amounted to a waiver.[16]

13. *Id.* at 374, where the most significant language appears:
> This assignment is manifestly 'colorable' and 'feigned'. The assignee, as we have already indicated, is an 'employed' assignee. When evidence of an assignment of this character . . . is added to the admitted purpose of defeating jurisdiction, the conclusion is inescapable, it appears to this Court, that the assignment must be disregarded for jurisdictional purposes.

14. 182 S.E.2d 60 (S.C. 1971).

15. S.C. CODE ANN. § 15-162 (1962).

16. 182 S.E.2d at 63. The Court stated: "The uncontested allegation of the complaint as to the value of the stock . . . determined jurisdiction."

Another point raised by the *Wallace* case, pertinent to the area of pleadings, involves defendant-appellant's attempt to amend his answer so as to include the defense of estoppel. The court, in denying defendant-appellant's request, stated that the movant knew for more than a year the facts regarding the defense in question and, accordingly, no abuse of discretion resulted with either the Master to whom the factual issues were referred or the trial court judge in refusing to allow the requested amendment.

The final point the court dealt with in this action regarded appellant's charge that the lower court erred in setting the cause for appeal. The actions giving rise to this charge involved appellant's attempt to include a statement of undisputed facts as part of his case and exceptions. The respondent refused to accept the statement as undisputed and the lower court, because of this objection, denied acceptance of the appellant's statement. Appellant thereafter argued that, according to the Rules of the Supreme Court, especially Rule 4, Section 4,[17] the Transcript of Record must include a statement of undisputed facts. The onus, continued appellant's argument, was therefore upon respondent to object to any offensive inclusions in the proposed statement when the statement was introduced before the trial court. Such specific objections would then be decided upon by the court.

The state supreme court concurred with this point holding that the rule did in fact require a statement of the undisputed facts along with the recorded testimony of any disputed facts, the purpose being to eliminate unneeded expense in the printing of undisputed facts. The court, therefore, sustained the appellant's objection as to this point reversing the lower court's order setting the case for appeal.

B. Demurrer

This area was one of the more active during the past survey period. The first case, *Pargas of Loris, Inc. v. Heniford*,[18] involved an oral demurrer to a counterclaim on the ground that the "counterclaim doesn't state facts sufficent to constitute the cause of action or a defense."[19] In a very short opinion, the court here held that the demurrer

17. S.C. SUP. CT. R. 4 § 4 provides in pertinent part: "Undisputed facts must be stated without the testimony, and only the testimony as to disputed facts shall be stated, omitting all that is irrelevant to the issues to be decided."

18. 254 S.C. 344, 175 S.E.2d 391 (1970).

19. *See*, S.C. CODE ANN. § 10-643 (1962).

to the counterclaim did not fail because it was oral, but rather because it wasn't specific as to the grounds for demurrer. The court, however, left unanswered whether the demurrer may have been less effective than a written counterpart.

Two cases heard by the South Carolina Supreme Court reiterated the above principle, and its application to written demurrers. In *Seaboard Coast Line Railroad v. Ward*,[20] an action at equity, the plaintiff railroad sought an injunction against the defendant, adjacent landowner, for alleged misuse and trespass upon plaintiff's right of way. The defendant's answer alleged plaintiff's interference with defendant's right of way over the road, denied unlawful trespass and sought to recover damages for the alleged interference. In rejecting plaintiff's demurrer to the answer (albeit it was uncertain whether defendant's answer sufficiently alleged facts constituting one or more defenses) the court made evident its sentiment that the ends of justice would better be served by a trial on the merits. Speaking through Associate Justice Bussey, the court repeated the proposition that "[p]leadings, for the purpose of demurrer, have to be liberally construed in favor of the pleader and a demurrer cannot be sustained if facts sufficient to constitute a cause of action, or a defense, can be fairly gathered from the pleading, however uncertain, defective or imperfect the allegations may be."[21]

The second case, *Lawson v. Citizens and Southern National Bank of South Carolina*,[22] mirrored the language of the first, but may be considered a bit more expansive. The two things the court did point out here was that the plaintiff need not label his cause of action and that a complaint must be liberally construed and sustained if not only facts alleged but inferences reasonably drawn therefrom are present entitling plaintiff to any relief on any theory of the case, albeit different from that on which he may have supposed himself entitled to recovery.

In another case involving a demurrer, *Galbraith v. City of Spartanburg*,[23] the defendant, the City of Spartanburg, instituted condemnation proceedings to, in its words, acquire property that was

20. 255 S.C. 127, 177 S.E.2d 479 (1970).

21. *Id.* at 129, 177 S.E.2d at 479-80; *accord*, Coral Gables v. Palmetto Brick Company, 183 S.C. 478, 191 S.E. 337 (1937).

22. 180 S.E.2d 206 (S.C. 1971).

23. 255 S.C. 380, 179 S.E.2d 37 (1971).

"immediately necessary for highway purposes."[24] This proceeding was settled and more than two years thereafter, the plaintiff herein, one of the landowners directly affected by the condemnation, commenced the instant action alleging that (1) the condemnation proceeding (already settled) was wholly premature and far in advance of proper timeliness and that (2) this unreasonable delay in demolition deprived plaintiffs of the benefits accrued from the use of their land which had remained vacant for more than two years.

The defendants demurred as to both points, and the Common Pleas Court of Spartanburg, Judge Badger Baker presiding, sustained the demurrer as to the first cause of action. Judge Baker found that the complaint actually requested the court to set aside the previous judgment (the settlement) without benefit of a formal request to set aside that judgment.[25] Consequently, the Common Pleas court held that the settlement was tantamount to a judgment and that such judgment, regular on its face, was immune from attack, except when fraud or lack of jurisdiction come to light.[26] The Supreme Court, upon appeal, upheld, per curiam, the lower court decision and printed Judge Baker's order in the opinion.

In overruling the demurrer as to he second cause of action, the Common Pleas Court of Spartanburg held that the alleged deprivation of benefits was, in fact, a sufficiently stated cause of action and that it was, accordingly, not demurrable, but must be considered upon the merits. This matter was not appealed to the Supreme Court.

The final case involving a demurrer, *Berry v. Lindsay*,[27] involved a proceeding against the state Chief Insurance Commissioner to obtain a Writ of Prohibition "restraining the issuance of additional rate increases for automobile liability insurance so long as the insurance industry as a whole is showing a profit."[28] The proceeding was a class

24. *Id.* at 381, 179 S.E.2d at 38.

25. *Id.* at 382, 179 S.E.2d at 39. As the court stated this point: "What plaintiffs are now seeking is a determination of necessity of acquisition through review of a judgment which they have not asked to set aside. An attack is made thereon for the purpose of obtaining additional compensation or an unlawful and premature condemnation."

26. *Id.* at 382, 179 S.E.2d at 39. The court emphasized the point by stating:

> A litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former action. Any question of necessity could have been determined in the original action.

27. 182 S.E.2d 78 (S.C. 1971).

28. *Id.* at 79. For more specifics as to the substantive issues in this case, see the article *Insurance, 1971 Survey of S.C. Law*, elsewhere in this Survey Issue.

action. The defendant-respondent demurred to the complaint on the grounds that (1) it failed to state facts sufficient to constitute a cause of action; (2) there was a defect of parties and finally (3) there was a lack of jurisdiction in the Richland County Court.

The primary issue centered around the request for a Writ of Prohibition as the device to thwart the Commissioner in his anticipated rate increase. In deciding the case, the supreme court adopted the opinion of Judge Mason from the lower court. Judge Mason's order traced carefully the history and purpose of the Writ of Prohibition concluding that it was not, in fact, usable in situations not involving a judicial function; the argument here being that the rate increase determination was an administrative function. Also as to the Writ, the plaintiffs had alleged an abuse of discretion on part of the Commissioner which, as stated in the demurrer and as sustained by the trial court, was likewise an improper foundation for the Writ.

The defendant further argued that the Writ did not lie as the plaintiffs had available to them an adequate remedy within the state Code of Laws.[29] In opposing the demurrer, petitioner's counsel argued that the case involved a novel legal issue and ought not be decided on demurrer and that, further, the demurrer admitted, by way of a pregnant negative, the allegations of "quasi-judicial" function and "inadequate remedy."

Judge Mason, in refuting this argument, cited the recent case of *Vickers v. Vickers*,[30] in which the supreme court held that a demurrer does not admit the inferences, either factual or legal, drawn by a party in the pleading under attack, but is for the court to determine whether such inferences are justified. With this statement as a foundation, Judge Mason took the view that the demurrer did not admit the allegations as contended by petitioner, but that the only issue was whether the Writ would lie to prohibit respondent from approving such an increase.

As alluded to previously, the Richland County Court judge found conclusively that the Writ did not lie as the job of rate making is at best a legislative function and therefore not subject to the Writ of Prohibition, a document aimed and prosecuted for the restraint of the judiciary.

29. S.C. Code Ann. §§ 37-701, 37-70 to 74 and 46-719 (1962).
30. 255 S.C. 25, 176 S.E.2d 561 (1970).

IV. JOINDER

In the only case pertinent to this subject, *Whitney Trading Corporation v. McNair*,[31] the court consolidated two cases involving violation of "Sunday Closing Laws."[32] In this case, an injunction against the corporate operator of a large store was properly granted, concluded the state supreme court, notwithstanding the fact that several departments of the store were sublet. Consolidation of this case with one involving the operator of a separate department was not improper where evidence indicated that the corporate operator retained and operated several departments of the large store complex himself while also determining the store hours, store policy, and especially whether the store would be open for business on Sunday and what items would be sold on that day. Further, the two cases presented identical issues.

V. DECLARATORY JUDGMENT

The first case in this category, *City of Greenville v. Bozeman*,[32] had to do with an action seeking a declaration as to the validity of an agreement between the City of Greenville and a bank. The controverted agreement provided for the redevelopment of a certain three block area in downtown Greenville. The supreme court held that there had been a proper hearing on the redevelopment issue and that the circuit court had had both subject matter and personal jurisdiction. This was true because the defendants were previous or current owners of property either in the project area or abutting the area on a street at the commencement of the action. Of further importance was the fact that one defendant was a non-contiguous landowner representing the interests of all members of that class.

The second case, *Power v. McNair*,[34] was an action for a declaratory judgment brought for the purpose of determining whether holding the offices of city policeman and state constable simultaneously, offended the dual officeholder provision of Article 2, Section 2 of the South Carolina Constitution. The supreme court found no justiciable controversy and dismissed the appeal.

The plaintiffs in this action requested appointment as state con-

31. 255 S.C. 8, 176 S.E.2d 572 (1970).
32. S.C. CODE ANN. §§ 64-2 to 25 (Supp. 1970).
33. 254 S.C. 306, 175 S.E.2d 211 (1970).
34. 255 S.C. 150, 177 S.E.2d 551 (1970).

stables in accordance with South Carolina Code Section 53-3 to enlarge their jurisdiction thereby enabling them to venture outside the city limits of Laurens to investigate crimes and apprehend criminals. The plaintiffs were the chief of police and city patrolman of Laurens who could not, as part of their authority, venture outside the city limits in the furtherance of crime control.

Prior to the commencement of the suit, the plaintiffs sought gubernatorial approval for their appointments, but had failed when the Governor revealed feelings of doubt concerning the constitutionality of such an appointment. Consequently, this action was brought. The court, by its own motion, thereafter raised the issue of whether a justiciable issue was realized via the complaint, it being the law that a declaratory judgment cannot be granted absent a requisite dispute.

In reply to this motion, the court held that sufficient issue had not been raised as a result of plaintiff's attempt to merely gain an advisory opinion. While the court did recognize that the remedy of a declaratory judgment did, in fact, live in South Carolina,[35] it also realized that a justiciable controversy is a prerequisite to the deployment of the declaratory judgment.[36]

In the only other case seeking a declaratory judgment that eventually was presented to the South Carolina Supreme Court, *Notios Corporation v. Hanvey*,[37] plaintiff had moved for a declaratory judgment involving certain interests in land. The facts were that plaintiff and defendant owned adjoining lots in downtown Charleston, each owning a building on his respective lot, and each building sharing a common wall with the other. Plaintiff had long since decided, because of delapidation, to tear his building down, and while he did not know the exact boundaries of the common wall, he was more than willing to deed same to the defendant so long as the defendant would shore up the wall. The defendant, however, refused to enter and shore up the common wall albeit delay in so doing created a constant danger to the residents of the remaining building as well as the general public.

Plaintiff, thereafter, sought a declaratory order that he was not

35. S.C. CODE ANN. § 10-2001 (1962).

36. By the S.C. Supreme Court for definitions of justiciable controversy see Guimarin & Doan v. Georgetown Textile & Mfg. Co., 249 S.C. 561, 155 S.E.2d 618 (1967); Dantzler v. Callison, 227 S.C. 317, 88 S.E.2d 64, 65 (1955).

37. 182 S.E.2d 55 (S.C. 1971).

responsible for the security of the wall and that he had the right to complete the demolition with all future responsibility for the wall lying with the defendant. The defendant demurred to the complaint alleging that no justiciable controversy was presented, that no concrete issues either as a legal right in plaintiff or a legal duty in defendant were present, and that plaintiff sought the declaratory judgment as a vehicle to require the defendant to share expenses in a project initiated soley by the plaintiff.

The trial court sustained the demurrer on the grounds that even though a controversy was presented, the granting of declaratory judgment would render unanswered many other potential issues. Upon appeal to the state supreme court, the trial court's decision was reversed based on the belief by the higher court that while the contention of the lower court would be valid per se, the granting of the declaratory judgment would not prevent these questions from being presented later. The supreme court would not accept defendant's contentions that the plaintiff was seeking an advisory opinion and thereupon held that a justiciable issue is any issue which is appropriate for judicial determination concluding that, *inter alia*, the instant case easily fell within this gamut.

In dealing with the lower court's contention that the declaratory judgment was blind to later issues, the supreme court stated that the relief sought was not at all improper and, in fact, neatly terminated the uncertainty giving rise to the proceeding.[38]

The last case in this area, *Johnson v. Tamsberg*,[39] is a Fourth Circuit Court of Appeals decision regarding administrative procedures in the eviction of tenants in a public housing project. The case was a class action by certain public housing tenants challenging the administrative procedures by which city houing authority officials in Charleston decided to remove a certain tenant from her premises. The justifications for the attempted eviction were allegations of vandalism and destruction of property by the tenant's minor children.

38. S.C. CODE ANN. § 10-2007 (1962), provides in relevant part:
When declaratory judgment may be refused.—The court may refuse to render or enter a declaratory judgment or decree when such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

39. 430 F.2d 1125 (4th Cir. 1970).

The defendant, director of the Housing Authority of the City of Charleston, notified plaintiff-tenant that he had received the aforementioned complaints of vandalism and that as a result, she would have to vacate her premises. This notification was informally made over the telephone. Forty-eight hours later, the defendant sent a notice to plaintiff to officially terminate and vacate her premises under threat of dispossession. The plaintiff thereafter caused a federal suit to be brought; the defendant countered the next day by instituting eviction proceedings against her in state court. The state proceeding was heard and when the defendant-tenant in this case (the plaintiff-tenant in the federal action) failed to deny the Housing Authority charges (coupled with her counsel's stipulation as to the factual issues) the judge directed a verdict for the landlord-plaintiff.

Upon completion of the state suit, the proceedings in the federal court commenced. The district court judge took notice of the previous state action and found that plaintiff had been afforded full opportunity to contest the factual basis for eviction. Accordingly, the district court held that the claim of denial of a previous, administrative evidentiary hearing was insubstantial.

In affirming the district court's decision, the Fourth Circuit Court of Appeals, via Circuit Court Judge Sobeloff, stated that the plaintiff had, in fact, by way of the state court hearing, been afforded the basic due process requisites and was not ejected until after these requisites had been satisfied.[40] Accordingly, the fourth circuit denied plaintiff's request for a declaratory judgment and injunction against the Director of the Charleston Housing Authority.

V. TRIAL

In the first case, *South Carolina Highway Department v. Wilson*,[41] the appeal was grounded upon an abuse of discretion charge resulting from the trial court judge allowing into evidence certain disputable testimony. The specific abuse of discretion charge came from the court's permission to admit into evidence the testimony of former property owners regarding the price of land in a condemnation case.

40. *Id.* at 1127. As the court stated: "Any substantial due process grievance that plaintiff might have had when she filed her complaint was mooted by the plenary hearing that she was afforded."

41. 254 S.C. 360, 175 S.E.2d 391 (1970).

The testimony in question went to the issue of land prices in the condemnation area in 1959, the staleness of these prices being the main point of contention by the movants. The court felt, however, that because none of the witnesses had been able to discover any fairly recent sales of comparable property in the area, the testimony would stand as being consistent with the court's discretionary prerogative and not an abuse of its discretion to admit evidence.[42]

Sellers v. Public Savings Life Insurance Co.[43] involved a charge, in an action by the insured's widow, beneficiary of a life insurance policy, that the jury might infer, from failure of insurer to call a witness who was with the insured at the time shortly before his accidental death, that that party's testimony probably would have been adverse.

The insured drowned accidentally and the factual issue involved was whether the deceased had been under the influence of any intoxicating stimulants at the time of his death, sufficient cause for release from liability of the insurance company. The insurance company failed to call the one individual last known to be with the deceased before the accident. As a result, the court charged that from this the jury could infer that had that witness been called the testimony would probably be unfavorable to the insurer.

In reversing the lower court decision and allowing a new trial, the court pointed out that the fallacy in the lower court's reasoning regarding the failure of the insurer to call the witness in question was that the witness was as available to the widow as to the insurer and there was no evidence to suggest that the insurer had any degree of control over that witness.

South Carolina Highway Department v. Nasim[44] concerned a land condemnation case. The attorney for the condemnee made such flagrant and prejudicial remarks in his argument to the jury following culmination of evidence that the attorney for the highway department moved for a new trial following an adverse verdict. The trial court refused this motion for a new trial, because it was offered too late.

42. *Id.* at 369, 175 S.E.2d at 396, the Court states: "Admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and in the absence of a clear abuse of such discretion, amounting to error of law, his ruling will not be disturbed."

43. 255 S.C. 251, 178 S.E.2d 241 (1970).

44. 179 S.E.2d 211 (S.C. 1971).

The supreme court, in overturning the trial court's decision, stated that the landowner's counsel's argument was so prejudicial that a new trial was mandated albeit the objection was not interposed until after the verdict. This case, however, should not be read too broadly. The general rule states that objections must be made at the time of the infraction, in this case when the attorney made his argument to the jury. There is, however, within that rule an exception to the effect that the timeliness of the objection becomes less significant as the severity and prejudicial nature of the comments gain in force. Accordingly, the court here held that the motion for a new trial should have been granted because of the exceptional nature of the violation.

The argument involved the testimony of a former county agent who was currently employed as a real estate broker. This individual stated that, in his opinion, the worth of the property was far less than what plaintiff had contended it to be worth. It was later, in plaintiff's counsel's closing argument, that the alleged infraction transpired. Counsel attacked the testimony as ridiculous and requested that the Clerk of the Court should have returned the Bible to the witness when he stated the figure so that the witness "could take his hand back off." The counsel also, in a very thinly veiled manner, called the witness in question a thief, underhanded and crooked.

In light of the aforementioned exception to the general rule, this was grounds enough for a new trial and, ergo, not to be considered a revamping of the general rule, but a case which does, in fact, clearly reside within the exceptional language.

The final case in this area is *Small v. Mungo*[45] involving a dismissal and nonsuit. The plaintiff and his counsel were present in court on Monday morning, at which time cases listed on the trial roster were called and ten cases were noted for jury trial ahead of plaintiff's litigation. Consequently, when the case was called for trial at 10:15 A.M. Tuesday, the plaintiff and his counsel along with all their witnesses were at work. The Clerk of Court reached counsel whose only reply was that he could not appear until 2P.M.

The court immediately granted a dismissal on grounds of failure to prosecute. Upon appeal, the supreme court upheld that decision as within the discretion of the trial judge since unreasonable neglect was

45. 254 S.C. 438, 175 S.E.2d 802 (1970).

inferable. The supreme court, however, did modify the dismissal so as to delete the "with prejudice" entry.[46]

VI. JURY

The only case touching upon this area, *Gore v. Skipper*,[47] has to do with the right of trial by jury. In this case, the pleadings admitted that the corporate defendants were owners of land upon which the plaintiffs alleged an easement or prescriptive right to the use of the roads. The court held that, in such a situation, the action was not one for recovery of money only or for specific real or personal property and that the plaintiffs were not seeking legal relief, but only a mandatory and prohibitory injunction. Therefore, the action was one in equity and the trial judge did not violate the plaintiff's right to a trial by jury when he granted a compulsory order of reference.[48]

VII. JUDGMENT

A. Partial Summary Judgment

The one action to fall within this very unique procedural category was also the case noted as the largest tort recovery in the history of South Carolina, *Mickle v. Blackmon*.[49]

The plaintiff in this action for personal injuries, resulting from an automobile collision, was awarded $468,000 actual damages against the defendant car dealer and $312,000 actual damages against the defendant manufacturer. The latter, Ford Motor Company, however, obtained a judgment *non obstante veredicto* from the trial judge and both decisions were appealed.

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46. S.C. CIR. CT. R. 86 provides that the arrangement of the trial and roster and time set for trial of cases are binding on the litigants and their counsel and the trial judge has authority to enforce compliance therewith. Further, the court in the instant case placed the burden of proof with the plaintiff who was seeking to overturn the dismissal. Such burden, according to the court, should include showing that the case was not properly called or set down for trial in accordance with the circuit court rules and that the plaintiff (petitioning party) could not reasonably have ascertained when the case would be called.

47. 255 S.C. 18, 176 S.E.2d 569 (1970).

48. BLACK'S LAW DICTIONARY 1445 (4th ed. 1951), defines reference as:
> The act of sending a case pending in court to a referee for his examination and decision.

49. 255 S.C. 136, 177 S.E.2d 548 (1970).

Upon the initial appeal to the South Carolina Supreme Court, the decision against the defendant car dealer was affirmed and the judgment was entered thereon. The judgment *n.o.v.* in favor of Ford was reversed. The supreme court, however, at that appeal, due to faulty instructions in the lower court regarding the manufacturer's duty in the design of the automobile, remanded the case to the circuit court and ordered a trial *de novo* as between plaintiff and defendant Ford.

Both defendants had requested a rehearing, but were denied and remittitur was issued. Thereafter, in circuit court, the plaintiff moved for "partial summary judgment" pursuant to Rule 44 of the Circuit Court Rules requesting judgment as to damages leaving only the issue of liability as to Ford remaining. The circuit court denied the motion on the grounds that the supreme court's decision on the first appeal demanded a complete new trial covering all the issues.

The plaintiff made a second appeal before the South Carolina Supreme Court pursuant to the circuit court's denial of his motion for partial summary judgment. Plaintiff argued that the defendant Ford had had a fair and impartial trial as to damages thus setting up res judicata, or estoppel, or law of the case, as to that issue actually litigated, stating, in conclusion that Rule 44 "is a proper vehicle for enforcing such principles."[50] The court, however, found this contention lacking concluding that the mere occurence of a trial without benefit of a judgment against Ford either as to liability or damages, did not amount to res judicata, etc., without some former, outstanding determination of the issues relevant to the request for summary judgment.

B. Summary Judgment

Under this topic comes the case of *Elmwood Cemetery v. South Carolina Tax Commission*.[51] This case involved the payment of back taxes by the Elmwood Cemetery Association (reportedly an eleemosynary corporation), because they had lost their tax-free status when they allegedly returned to certain stockholders a portion of the corporation's net earnings.

The back income tax was, according to the Tax Commission, due since 1949. The respondent, Elmwood, paid the taxes due for 1949 and

50. 255 S.C. at 141, 177 S.E.2d at 549.
51. 179 S.E.2d 609 (S.C.1971).

then, in accordance with the statutory provisions, sought a declaratory judgment on all subsequent years along with a request to have refunded the back tax money already paid. The court held that it had no jurisdiction as to the declaratory judgment for the years after 1949, as the taxes allegedly due for those years remained outstanding, and therefore, jurisdiction to render a decision regarding those years had not accrued.

Elmwood also moved for summary judgment as, they contended, there remained no factual dispute and they were entitled to judgment as a matter of law. In response to this motion, the supreme court felt that the affidavit submitted in support of the motion (by plaintiff's counsel to the effect that to his personal knowledge the cemetery was and had been since 1949 a charitable corporation entitled to tax exemption) did not meet the standards necessary for summary judgment. The court held that the affidavit did no more than restate the general allegations in the complaint, and that it lent no evidentiary support to the motion and was, therefore, insufficient to warrant the granting of a summary judgment.[52]

VIII. DIRECTED VERDICT

Two cases fell within the scope of this area. The first, *Richardson v. Williamson*,[53] was an action for personal injuries resulting from an automobile accident. The lower court, Aiken County's Court of Common Pleas awarded a directed verdict for the defendant and the plaintiff appealed. The grounds stated for appeal were that the granting of the directed verdict was improper as the evidence was sufficient to bring the issues to trial and that, if as defendant alleged, there was no evidence of actionable negligence on part of defendant, the proper motion was for a nonsuit rather than a directed verdict.

The supreme court agreed fully with plaintiff's argument, further stating that when considering whether a defendant is entitled to either a nonsuit or a directed verdict, the evidence and all the inferences reasonably deducible therefrom have to be viewed in the light most favorable to the plaintiff.

The other case involving a directed verdict, *Campbell v. Robbins Tire and Rubber Co., Inc.*,[54] went one step further than the previous

52. *See*, CIR. CT. R. 44.
53. 181 S.E.2d 262 (S.C. 1971).
54. 182 S.E.2d 73 (S.C. 1971).

case and said that where there is more than one reasonable inference the case must go to the jury, but where the evidence is susceptible of only one reasonable inference, the question is no longer one for the jury, but one of law for the court.[55]

Campbell involved a personal injury sustained when the plaintiff purchased a tire tube from co-defendant Kar Kare, Inc. which, upon inflation, exploded injuring the plaintiff. The plaintiff, in his complaint, alleged three things: (1) failure to inspect, (2) defect in the tube and (3) failure to warn the plaintiff of the defect. The court, however, pointed out that the plaintiff failed to prove his case, that he had not shown a defect and that expert testimony established to the court's satisfaction that there was no defect in the product.

The court concluded that since the plaintiff failed to prove his allegations, there remained only the single inference that there was no negligence on part of the defendants (distributor and/or manufacturer) and that the motions for directed verdict should have been granted and the defendant was entitled thereto as a matter of law.

IX. MISCELLANEOUS

The first case in this broad category, *Smith v. Hawkins*,[56] involved counsel's failure to appear at a judicial proceeding, although he had due notice of the hearing. According to the supreme court's opinion, counsel refused to appear (with no accompanying explanation) and as a result, waived his right to cross-examine the adverse party's witnesses who had properly appeared.

The remaining case likewise involved the actions of counsel. In this case, *Frist v. Leatherwood, Walker, Todd and Mann*,[57] the plaintiff had retained the defendants to represent her in a divorce action. She was granted a divorce, but denied alimony. Through her attorneys, (the defendants in this action), she filed a notice of intent of appeal. Thereafter, time expired for filing the appeal, and she commenced this action

55. *See* Still v. Blake, 255 S.C. 95, 177 S.E.2d 469 (1970). In the opinion filed immediately preceeding the instant case, involving a question of contract and the statute of frauds requirement therein, the court restated the same point. DeWitt v. Kelly, 182 S.E.2d 65, 66 (S.C. 1971) *where the Court stated*: "When evidence is susceptible of more than one reasonable inference, the issues must be submitted to the jury."

56. 254 S.C. 423, 175 S.E.2d 824 (1970).

57. 433 F.2d 11 (4th Cir. 1970).

for malpractice. The district court directed a verdict for the defendants at the close of plaintiff's evidence. The time for appeal expired without printing of the record. However, the attorney did everything necessary to perfect the appeal up to the point of sending the record to the printer. The main fault causing the expiration of time for appeal was with the client-plaintiff who had failed to advance funds for the printing of the record although repeated requests were made for her to do so.

X. CIRCUIT COURT RULES

A series of events occurred in this area to include some cases which have already been surveyed, two cases to be discussed here and three rule changes promulgated by the supreme court in August of 1970.

The first case, *Perry v. Minit Saver Food Stores of South Carolina, Inc.*[58] involved Rule 87. The defendant served upon the party plaintiff and his two brothers notice of depositions and paid only the brothers' expenses as provided for under the "witness" provision of Rule 87. The supreme court, thereafter, pursuant to plaintiff's motion, affirmed the lower court's decision and forced defendant to make payment to the plaintiff for his appearance at the deposition. The court expressed, in its opinion, the new view that the word "witness" as intended by the rule meant any witness whether perchance a party or not.

The second case, *Hodge v. Myers*,[59] had to do with pretrial conferences and an interpretation of Circuit Court Rule 43. This case was a tort action where plaintiff's attorney requested certain admissions and defendant's attorney objected. The Greenville Court of Common Pleas ordered both plaintiff and defendant to provide the other with a list of names and addresses of all persons known or reasonably believed to have knowledge concerning the tortious event and any injuries involved.

The plaintiffs complied, and the defendants appealed the order. The defendants argued that absent a rule providing for interrogatories, the trial judge erred in deciding for plaintiffs. While the supreme court recognized defendants argument as true, they stated that Rule 43 applies instead and that such discovery should be allowed under the Rule.

The court, in this opinion, construed Rule 43 very liberally. "Since dockets must be kept current largely by settlements, litigants

58. 255 S.C. 42, 177 S.E.2d 4 (1970).
59. 180 S.E.2d 203 (S.C. 1971).

and attorneys should be allowed liberal discovery. It would appear that the trial judge concluded that the exchange of lists of potential witnesses would help the parties in their quest of the whole truth."[60]

Under Circuit Court Rule 43 providing for pretrial conferences, the judge and counsel may consider the "limitation of the number of witnesses"[61] and the trial judge, as a matter of discretion, is entitled to require the names and addresses of persons who have information helpful to the disposition of the case. Counsel, according to the court's interpretation of the rule, is likewise entitled to such information.

Therefore, according to this decision, the pretrial conference stage vests in the trial judge a broad authority both inherent and under Rule 43, providing not only for the conference itself but also for any device necessary to accomplish those things enumerated in the rule to expedite the case.

The Circuit Court Rule revisions involved three rules: 44, 87 and 89. The revisions made are as follows:

First, 44. Paragraph (e) of Rule 44 was amended by adding the following: "Any depositions taken may be opened by the Court and considered relative to a motion under this Rule."[62]

Second, 87. The following was added at the end of the first paragraph of Section (A): "Depositions under this rule may be taken before a Notary Public or any other officer authorized under the law of the jurisdiction where taken to administer oaths."[63] Further, in the second paragraph after the second word "witness" and "(excluding a party)".[64] The third paragraph of Rule 87 was amended by adding after the third word "any party or."[65] Also, the third paragraph was further amended by adding the following: "Notice of the deposing of any party or witness shall be given to each adversary party through counsel as provided in G hereof."[66]

Third, 89. Paragraph (d) was added to Rule 89 and it reads:

60. *Id.* at 206.
61. *Id.* at 205.
62. *Amendment to Circuit Court Rules*, Smith's Adv. Sht. (Sept. 19, 1970).
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*

"Counsel for the requesting party shall endorse at the foot of the written request the following or an equally inclusive certification: 'This request is made in good faith; the subject hereof is genuinely relevant to this case; and evidence of the subject hereof is necessary to the establishment of my client's cause of action or defense.' "[67]

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67. *Id.*