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Practice and Procedure

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PRACTICE AND PROCEDURE

I. PERSONAL JURISDICTION

The proper interpretation which should be given South Carolina's long-arm statute[1] remains unclear even though the South Carolina Supreme Court has recently handed down three opinions[2] dealing with the question of personal jurisdiction over nonresident defendants. The statute, reenacted in 1972[3] to cure constitutional deficiencies in the initial version,[4] had been declared

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1. S.C. CODE ANN. §§ 10.2-801 to -801 to -806. S.C. CODE ANN. § 10.2-803 provides as follows:

> **Personal Jurisdiction Based Upon Conduct.** (1) A court may exercise personal jurisdiction over a person [defined in §10.2-801 to include a corporation] who acts directly or by an agent as to a cause of action arising from the person's
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> (a) transacting any business in this State;
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> (b) contracting to supply services or things in the State;
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> (c) commission of a tortious act in whole or in part in the State;
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> (d) causing tortious injury or death in this State by an act or omission outside this State if he regularly does or solicits business or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State; or
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> (e) having an interest in, using, or possessing real property in this State; or
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> (f) contracting to insure any person, property or risk located within this State at the time of contracting; or
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> (g) entry into a contract to be performed in whole or in part by either party in this State; or
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> (h) production, manufacture, or distribution of goods with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed.
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> (2) When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him, and such action, if brought in this State shall not be subject to the provisions of § 10-310(3).

2. Jacobs v. Association of Independent Colleges and Schools, 265 S.C. 459, 219 S.E.2d 837 (1975); Nucor Corp. v. Fanevil Const. Inc., 264 S.C. 458, 215 S.E.2d 634 (1975); Peeler v. South Carolina Helicopters, Inc., 263 S.C. 487, 211 S.E.2d 344 (1975).

3. S.C. CODE ANN. §§ 10.2-801 to 809 (Spec. Supp. 1966) *enacted as* No. 1065 [1966] S.C. Acts & Jt.Res. 4027, *reenacted as* No. 1343 (1972); S.C. Acts & Jt. Res. 2518. The statute was patterned after the Uniform Interstate and International Procedure Act, § 1.03, 9B U.L.A. 307, 310 (1966).

4. In a series of cases after the statute was originally enacted, courts sustained challenges to the act on the ground that it violated art. 3, § 17 of the South Carolina Constitution, which requires that "every act or joint resolution having the force of law shall relate to but one subject, and that shall be expressed in the title." McGee v. Holan Div. of Ohio Brass Co., 337 F. Supp. 72 (D.S.C. 1972); Tention v. Southern Pacific R.R., 336 F. Supp. 25 (D.S.C. 1972). The basis for the challenge was that the long-arm statute appears as one section of the state's version of the Uniform Commercial Code § 10.2-803(1)(c) & (d) dealt with tortious activity unrealted to commercial transactions, the

constitutional by the court in 1974.[5] Unfortunately, the statute was applied in only one[6] of these three most recent cases. The failure of the court to discuss the long-arm statute, despite circumstances which seem to make it clearly applicable, raises perplexing questions as to its meaning. Because the statute is relatively new,[7] few cases have arisen interpreting its provisions.[8] No previous case discusses the statute's provisions for exercising jurisdiction in tort cases. Two of the cases[9] decided during this survey period turned on the question of jurisdiction over non-resident defendants who were alleged to have committed torts against South Carolina residents. Although the supreme court

subject of the act. Additionally, no notice was given by the title to the act that it contained long-arm provisions for causes of action totally divorced from commercial transactions. Therefore, the statute was held to be in violation of the South Carolina Constitution. For a further discussion of the history and problems of the Act, see Comment, "South Carolina's Uniform Commercial Code — The Demise of Its Long-Arm Provisions," 24 S.C.L. REV. 474 (1972).

5. In Thompson v. Hofmann, 263 S.C. 314, 210 S.E.2d 461 (1974), plaintiff brought suit against a non-resident individual for alienation of affection, invoking jurisdiction pursuant to § 10.2-803(1)(c). The defendant appeared specially to contest jurisdiction, contending that the reenacted version of the statute was still in violation of art. 3, § 17 of the South Carolina Constitution. The court, by a 3-2 majority, upheld the act's constitutionality, noting its remedial nature. The court rejected defendant's formalistic argument that the act still related to more than one subject, in violation of art. 3, § 17. The court additionally held the statute to apply to any actions commenced after its passage, regardless of when the cause of action arose. Chief Justice Moss, joined by Justice Littlejohn, vehemently dissented, urging that the attempted curative reenactment had not succeeded. They argued that the act still violated art. 3, § 17 because it related to two subjects and that the title, even after reenactment, gave no notice that tort actions, as distinct from commercial transactions, contracts or documents, were embraced by its procedural sections. The *Thompson* case is discussed more fully in *Practice and Procedure, 1975 Survey of South Carolina Law*, 27 S.C.L. REV. 518 (1975).

6. Nucor Corp. v. Fanevil Construction, Inc., 264 S.C. 458, 215 S.E.2d 634 (1975).

7. *See* cases cited in note 4 *supra*, and cases collected in annotations to S.C. CODE ANN. §§ 10-424, 10.2-801 to -806, and 12-23.14.

8. Thompson v. Hofmann, 263 S.C. 314, 210 S.E.2d 461 (1974), involved the question of the statute's constitutionality, but the court did not discuss the specific application of the statute's provisons. In Engineered Products v. Cleveland Crane & Engineering, 262 S.C. 1, 201 S.E.2d 921 (1974), the court applied and discussed the statute in a contract action. *See* note 31 and accompanying text *infra*. In Solomon v. City Realty Co., 262 S.C. 198, 203 S.E.2d 435 (1974), the court upheld service of process under the statute in a contract action but did not discuss the statutory provisions in detail. In Anderson v. Pou, 262 S.C. 175, 203 S.E.2d 391 (1974), an action for false arrest, the court denied jurisdiction but made only passing reference to the act. In Triplett v. R.M. Wade, 261 S.C. 419, 200 S.E.2d 375 (1973), another tort suit, the court's opinion was based upon §§ 10-424 and 12-23.14 and mentioned the long-arm statute only as indicating a legislative intent to broaden the jurisdiction of state courts.

9. Jacobs v. Ass'n of Independent Colleges and Schools, 265 S.C. 459, 219 S.E.2d 837 (1975); Peeler v. South Carolina Helicopters, Inc., 263 S.C. 487, 211 S.E.2d 344 (1975).

was given an opportunity in both cases to clarify the application of the new long-arm provisions, it declined to do so, leaving the jurisdictional waters in that area as murky as ever.

In *Peeler v. South Carolina Helicopters, Inc.*,[10] the plaintiff sued for personal injuries suffered from the crash of a helicopter in which he was riding. Plaintiff had purchased the helicopter from South Carolina Helicopters, Inc. (hereinafter referred to as "Helicopters"), whose president was piloting the craft at the time of the accident. After commencement of the suit, defendant attempted to join R.J. Enstrom Corp. (hereinafter referred to as "Enstrom"), the manufacturer of the helicopter, as a party defendant and to amend its answer to include a cross-claim against Enstrom.[11]

Enstrom appeared specially to contest jurisdiction, moving to quash service and to dismiss it from the action. Enstrom asserted that it was chartered in Michigan and was not authorized to do business in South Carolina. It additionally alleged that it had no officers, bank accounts or employees in this state and

10. 263 S.C. 487, 211 S.E.2d 344 (1975).

11. Plaintiff originally filed suit in United States District Court for the District of South Carolina against Enstrom alone, but Judge Chapman sustained Enstrom's motion to dismiss the suit for lack of jurisdiction. Plaintiff had served process pursuant to § 10-424 of the S.C. Code of laws, *see* note 22 *infra,* but the court, in an order dated September 26, 1972, found that Enstrom did not have sufficient minimum contacts with this state to support a finding that it was doing business here and thus was not amenable to service of process under § 10-424. Judge Chapman emphasized that

> even though representatives of the defendant have infrequently visited South Carolina in the past few years seeking business, these visits have not been successful in producing orders or sales activity. South Carolina Helicopters, Inc. remains the only customer of the defendant within this state and sales to it are on an order basis and are completely unplanned and unforseeable. The above figures show that the average dollar amount of business done in South Carolina in the past four years is minimal and the cause of action stated in the complaint does not arise out of any of the defendant's activites within the State of South Carolina.

Transcript at 43-44

Plaintiff subsequently instituted this litigation in state court against Helicopters, which had not been aimed as a party defendant in the abortive federal court action. The lower court, Grimball, J. presiding, disagreed with the District Court's decision on several grounds: (1) interpretations of South Carolina jurisdictional statutes by the South Carolina Supreme Court are controlling as to both the Federal and lower state courts and a review of its decisions reveals that jurisdiction is proper; (2) South Carolina Helicopters, Inc., was not a party in the federal court action; (3) the burden of proving jurisdiction in the federal courts is upon the party asserting jurisdiction, whereas in state court it rests upon the party challenging jurisdiction; (4) additional facts are before the state court; and (5) Judge Chapman's order was not appealed and is, in fact, inconsistent with the Fourth Circuit's most recent decision on this question. Transcript at 65-66.

denied that it had any network of customers which it systematically serviced. The Circuit Court of Common Pleas for Richland County denied the motion,[12] and Enstrom appealed. The Supreme court affirmed.

Although the court unanimously held that the exercise of jurisdiction was proper, the justices were divided over the basis upon which to uphold the trial court. Justice Littlejohn, in an opinion in which Chief Justice Moss concurred, made no mention of the long-arm statute, but focused instead upon the four factors set forth in *Boney v. Trans-State Dredging Co.*,[13] a pre-statute case, for determining whether a foreign corporation has sufficient contacts with the forum state such that the exercise of jurisdiction will not offend "traditional notions of fair play and substantial justice."[14] Justice Bussey, writing for two fellow justices and

12. The trial court found that on six specific occasions between 1969 and 1972, and on several other occasions not recorded, officers or agents of Enstrom came to South Carolina in connection with or promotion of its business interests, including the inspection of the wreckage and the site of the crash. Additionally, the trial court found that Helicopters had for a number of years purchased parts on an open account with Enstrom, that it had received promotional materials from Enstrom, and that two officers of Helicopters had been certified by Enstrom to service Enstrom helicopers. Enstrom, after originally manufacturing the helicopter, sold it to a party in Maryland. Helicopters purchased the aircraft after it crashed in Maryland and had then taken it to Enstrom's Michigan plant for repairs. There Helicopters' President and another employee, along with Enstrom's personnel, repaired the helicopter, with Helicopter's paying Enstrom over $20,000 for repair parts and labor. Enstrom then certified the aircraft as "airworthy" and it was taken to South Carolina, where it subsequently crashed.

13. 237 S.C. 54, 115 S.E.2d 508 (1960). In *Boney*, plaintiffs sought to bring a Florida corporation within the jurisdiction of this state in a tort suit arising out of an accident which occurred while defendant was conducting dredging operations on the Savannah River, which forms the boundary between Georgia and South Carolina. The court, finding that defendant's tortious act was committed in South Carolina during the course of continuous business activities over a ten-month period within the state, upheld service of process under S.C. CODE ANN. § 12-722 (current version at S.C. CODE ANN. § 12-23.14). The court cited four factors to be considered in deciding whether the exercise of jurisdiction comports with due process:

(1) The duration of the corporate activity in the state;
(2) the character of the corporate acts;
(3) the circumstances of the corporate acts; and
(4) the inconveniences of the parties which would arise from conferring or refusing to confer jurisdiction over the non-resident corporation. 237 S.C. at 62, 115 S.E.2d at 512.

14. The quoted phrase is taken from the landmark case of International Shoe Co. v. Washington, 326 U.S. 310 (1945), where the Court wrote: ". . . due process requires only that in order to subject a defendant to a judgment *in personam* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." 326 U.S. at 316.

concurring in the court's holding,[15] argued that since the court's decision in *Thompson v. Hofmann*[16] had held the long-arm statute constitutional, jurisdiction should have been sustained by virtue of that statute without resort to prior case law. However, the concurring opinion was brief and did not discuss in detail the application of the long-arm statute.

The difficulty arising from this case stems from the court's failure to apply the long-arm statute prior to engaging in a due process analysis. It has repeatedly been held that questions of personal jurisdiction over non-resident defendants involve a two-fold analysis.[17] First, the court must determine whether there is an applicable state statute authorizing the exercise of jurisdiction. If there is the court must then determine whether the application of the statute to the particular case is consistent with due process. In *Peeler* the court failed to deal with the first question. Justice Littlejohn asserted that the legislature intended to extend the jurisdiction of state courts over foreign defendants to the limits of the Due Process Clause. Thus he apparently assumed that it was sufficient simply to find that the exercise of personal jurisdiction over Enstrom met the requirements of due process.

While both the federal courts[18] and the South Carolina Supreme Court[19] have asserted that this was in fact the legislature's intent by enacting section 10.2-803, it is simply not clear from a close reading of the long-arm statute that the legislature did in fact so extend the jurisdiction of state courts.[20] If the court's as-

15. 263 S.C. 495, 211 S.E.2d 347 (1975) (Bussey, J., concurring).

16. 263 S.C. 314, 210 S.E.2d 461 (1974).

17. *See* Hardy v. Pioneer Parachute Co., Inc., 531 F.2d 193 (4th Cir. 1976); Ratliff v. Cooper Laboratories, Inc., 444 F.2d 745 (4th Cir. 1971).

18. Hardy v. Pioneer Parachute Co., Inc., 531 F.2d 193 (4th Cir. 1976); Bass v. Harbor Light Marina, Inc., 372 F. Supp. 786 (D.S.C. 1974); Deering Milliken Research Corp. v. Textured Fibres, Inc., 310 F. Supp. 491 (D.S.C. 1970).

19. Triplett v. R.M. Wade & Co., 261 S.C. 419, 200 S.E.2d 375 (1973).

20. Section 10.2-803 provides for specific grounds upon which personal jurisdiction may be invoked, and unless one of these grounds is found to apply, the service is void. Subsection (1)(a) requires the "transaction of business," which is a term of art meaning to do *substantial* business, a relatively stringent test. Subsections (1)(b), (1)(e), (1)(f) and (1)(g) pertain to non-residents who enter contracts which have a significant relationship to the state, or to non-residents who possess an interest in realty located within the state. In these types of cases there will not usually be a substantial question as to whether jurisdiction is proper. Subsection (1)(c) requires the commission of a tortious act in whole or in part in the state, and subsection (1)(d) permits jurisdiction over a defendant acting outside the state and causing injury in the state *only* if that defendant also "*regularly* does or solicits business, or engages in any other *persistent* course of conduct, or derives *substantial* revenue from goods used or services rendered, in this state."

sumption about legislative intent were correct, it would not have been necessary for the legislature to specify in detail the grounds for exercising jurisdiction in section 10.2-803.[21] In view of the foregoing discussion, the proper resolution of the issue in *Peeler* would have been to analyze section 10.2-803 in order to determine clearly that its provisions justify the exercise of jurisdiction in this case.

A related question arises in this context concerning proper service of process. The South Carolina Code contains three provisions authorizing service of process on non-resident corporations: sections 10-424[22] and 10-23.14(a)[23] authorize service of process

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Reading subsections (1)(c) and (1)(d) together, it seems reasonable to exclude from the jurisdiction of South Carolina courts those cases where a non-resident manufacturer ships a defective product to a retailer in another state, where it is subsequently purchased by a South Carolina domiciliary who is then injured by the chattel. Some courts, faced with facts similar to those here hypothesized, have held that the manufacturer "committed" a tort in the state where the injury occurred, thus enabling the state court to assume jurisdiction under a provision similar to subsection (1)(c). *See* Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961). This would not appear to be consistent with the language of the South Carolina statute, however, since subsection (1)(d) seems clearly to apply to this type of situation. Unless the manufacturer had reasonably substantial contact with the state other than that occurring with the single allegedly tortious act, jurisdiction would not be proper.

Subsection (1)(h) is the broadest provision of the Act, authorizing jurisdiction when a tort is committed arising from goods which are produced, manufactured or distributed with the reasonable expectation that they will be used or consumed in the state, and when they are in fact so used or consumed. By broadly construing the term "reasonable expectation," the supreme court could extend the jurisdiction of state courts to include a situation such as that posited above. However, until such a construction is given, it is not clear that this subsection justifies the assertion that the legislature intended to extend the jurisdiction of state courts to the limits of due process. Finally, § 10.2-803(2) stipulates that if jurisdiction is based solely on § 10.2-803(1) the cause of action must arise from the acts enumerated therein.

21. For an example of a long-arm statute which clearly extends the jurisdiction of the state's courts to the limits of the due process clause, see CAL. CIV. PROC. CODE § 410.10 (West 1973), which reads: "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."

22. S.C. CODE ANN. § 10-424 (Cum. Supp. 1975) provides in part:

> **Service on foreign corporations generally.** — If the suit be against a foreign corporation . . . the summons and any other legal paper may be served by delivering a copy to any officer, agent or employee of the corporation found at the place within this state designated by the stipulation or declaration filed by the corporation pursuant to § 12-721. [Section 12-721 has been repealed and replaced by § 12-23.2] *But if such foreign corporation transacts business in this state without complying with that section,* such service may be made by leaving a copy of the paper with a fee of one dollar in the hands of the Secretary of State or in his office, and such service shall be deemed sufficient service and shall have like force and effect in all respects as service upon citizens of this state found within its limits if notice of such service and a copy of the paper served are

only where the foreign corporation is transacting or doing busi-

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forthwith sent by registered mail by the plaintiff to the defendant foreign corporation and the defendant's return receipt and the plaintiff's affidavit of compliance therewith are filed in the cause and submitted to the court from which such process or other paper issued . . . .

(Emphasis added.)

23. S.C. Code Ann. 12-23.14 (Cum. Supp. 1975) provides as follows:

Service of process on foreign corporation not authorized to do business in state — (a) *Every foreign corporation* which is not authorized to do business in this state *shall, by doing in this state, either itself or through an agent, any business,* including any business for which authority need not be obtained as provided by § 12-23.1, be deemed to have designated the Secretary of State as its agent upon whom process against it may be served in any action or proceeding arising out of or in connection with the doing of any business in this state.

(Emphasis added).

Subsections (b), (c), and (d) of this section provide for the procedures to be followed in serving process upon a foreign corporation pursuant to subsection (a). Chapter 1.13 of the South Carolina Business Corporation Act of 1962, S.C. CODE ANN. §§ 12-23.1 to -23.11 (1962) deals with foreign corporations. Section 12-23.1 provides that a foreign corporation shall not do business within the state unless authorized to do so (pursuant to § 12-23.2 and 12-23.3) and further specifies certain activities which a foreign corporation may engage in without being deemed to be doing business in this state. Subsection (c) expressly provides that this section has no applicability to a determination of whether a foreign corporation may be subjected to service of process. S.C. CODE ANN. § 7765 (1942) contained the provisions which were codified separately in the 1952 Code as §§ 10-424, 12-721 and 12-722. In Thiel v. Electric Sales & Supply Co., 187 F. Supp. 640 (D.S.C. 1960) and Foster v. Morrison, 226 S.C. 149, 84 S.E.2d 344 (1954) (Stokes, J., dissenting), it was noted that these three sections should be construed together. Since former § 12-721 is now encompassed within S.C. CODE ANN. § 12-23.2, and present § 12-23.14 contains substantially similar provisions to those previously contained in § 12-722, it seems proper to construe present §§ 10-424, 12-23.2 and 12-23.14 in a manner consistent with each other. *See* Triplett v. R. M. Wade & Co., 261 S.C. 419, 200 S.E.2d 375, 378 (1973). Thus, where a foreign corporation, not authorized to do buiness in this state, "transacts" or "does" business so as to establish sufficient minimum contacts with the state, service of process under either § 10-424 or § 12-23.14 would be valid. Although the specific procedures to be followzd are not identical, the provisions of both sections apply in situations where a foreign corporation not authorized to do business (pursuant to §§ 12-23.2 and 12-23.3) can be shown to have conducted sufficient activities within the state such that exercise of personal jurisdiction by this state would not violate the mandates of the Due Process Clause.

The long-arm provisions of the Uniform Commercial Code, S.C. CODE ANN. § 10.2-803 to -806 also apply to non-resident corporations not authorized to do business in South Carolina. If such a corporation is found to be "transacting any business" in the state, § 10.2-803(1)(a), service of process may be made upon it pursuant to § 10.2-804 and § 10.2-806. However, if § 10.2-803(1)(a) is the sole basis for such exercise of jurisdiction, § 10.2-803(2) requires that the cause of action arise from such transaction of business. The test of whether the foreign corporation is "transacting any business" in the state would be governed by the same due process standards as the tests for § 10-424 and § 12-23.14, *viz.* sufficient minimum contacts such that the exercise of jurisdiction by this state will not offend traditional notions of fair play and substantial justice. Similarly, where jurisdiction is sought to be conferred upon a non-resident corporation under any of the other subsections of § 10.2-803(1), this standard will apply.

ness in the State; section 10.2-804[24] provides for service of process upon such corporation if jurisdiction is authorized pursuant to any of the provisions of the long-arm statute. Section 10.2-803(1)(a)[25] authorizes the exercise of personal jurisdiction when the corporation transacts business in the state. Clearly then, the court must find that the non-resident corporation is transacting business pursuant to section 10.2-803(1)(a) before service of process can be upheld under either sections 10-424 or 12-23.14. Although the *Peeler* court found that Enstrom had sufficient contacts with the state that would justify requiring it to defend the suit here, the court did not first determine that the exercise of jurisdiction was authorized pursuant to section 10.2-803.

Several provisions of the long-arm statute appear as possible bases for sustaining jurisdiction in this case. The court might have found that Enstrom transacted business in the state (section 10.2-803(1)(a)); or contracted to supply services or things in the state (section 10.2-803(1)(b)); or committed a tortious act in whole or in part in the state (section 10.2-803(1)(c)); or caused tortious injury in the state by an act or omission outside the state while regularly doing or soliciting business in the state (section 10.2-803(1)(d)); or produced, manufactured, or distributed goods with the reasonable expectation that the goods would be and were used or consumed in the state (section 10.2-803(1)(h)). Unless the court found one or more of these sections applicable to Enstrom's conduct, it should have reversed the trial court. The failure of the court to discuss and apply section 10.2-803 renders the decision in *Peeler* confusing and unpersuasive.

In *Nucor Corp. v. Fanevil Construction Co., Inc.*,[26] handed down five months after *Peeler,* the court unanimously affirmed a finding by the circuit court that a foreign corporation was amenable to suit in this state under the provisions of section 10.2-803(1)(g).[27] Plaintiff, a Delaware corporation with a division located in Florence, manufactured steel joists to be used by defendant, a Massachusetts corporation, in the construction of a school building in Massachusetts. Defendant returned the steel joists to

24. S.C. Code Ann. § 10.2-804 (1962) reads as follows: **"Service outside the state.** — When the exercise of personal jurisdiction is authorized by this section, service may be made outside the state." S.C. Code Ann. § 10.2-806 (1962) prescribes the manner and proof of such service.

25. For the text of this provision see note 1 *supra.*

26. 264 S.C. 458, 215 S.E.2d 634 (1975).

27. For the text of this provision see note 1 *supra.*

plaintiff upon receiving them, claiming they were not satisfactory. When the rebuilt joists proved unsatisfactory, defendant refused further payment. Plaintiff served process upon defendant pursuant to section 10-424 of the Code[28] and brought this action to recover the amount due on the contract. Defendant appeared specially to contest jurisdiction, alleging that it did no business, had no agents and owned no property in this state, nor has conducted any activity which could properly subject it to the jurisdiction of a South Carolina court.[29] The Court of Common Pleas, Florence County, ruled that it had jurisdiction, and defendant appealed.

In a brief opinion, Chief Justice Moss held that section 10.2-803(1)(g) conferred jurisdiction over defendant since the parties knew that significant portions of the contract were to be performed in this state. The court's opinion relied upon *Engineered Products v. Cleveland Crane and Engineering,*[30] decided January 7, 1974, which held that if significant events take place in this state in the performance of a contract, and if this was contemplated by both parties when they entered into the contract, jurisdiction may be exercised pursuant to section 10.2-803(1)(g).[31] The court's unanimous opinions in *Engineered Products* and *Nucor Corp.* have clearly established the parameters of personal jurisdiction under section 10.2-803(1)(g) for a cause of action arising from a breach of contract.

In *Jacobs v. Association of Independent Colleges and Schools,*[32] plaintiffs brought a class action for negligent accreditation against defendant (hereinafter referred to as "AICS"), a non-

28. For the text of this provision see note 22 *supra.*

29. The plaintiff conceded this to be true. In addition the court made no mention of any other contacts which defendant may have had with this state. Thus the decision in this case arguably stands for a broad exercise of jurisdiction by the courts of this state where a non-resident defendant enters into a contract which comtemplates significant performance in South Carolina, even where such defendant has no other contacts with the state. The United States Supreme Court, in McGee v. International Life Ins. Co., 355 U.S. 220 (1957), upheld a similar exercise of jurisdiction by another state court.

30. 262 S.C. 1, 201 S.E.2d 921 (1974).

31. Neither in *Engineered Products* or *Nucor Corp.* did the court discuss what constitutes performance of a significant portion of a contract. From the court's decisions in the two cases, the rule would appear to involve a two-fold test: 1) did the contract result in *significant* performance in this state, and 2) did the parties *contemplate* or reasonably foresee that such performance would take place here. Additionally, § 10.2-803(2) requires that if jurisdiction is invoked pursuant to § 10.2-803(1)(g) solely, the cause of action must have arisen from the contract. *See* note 1 *supra.*

32. 265 S.C. 459, 219 S.E.2d 837 (1975).

profit corporation chartered in the District of Columbia was brought on behalf of former students of Draughon's Business College (hereinafter referred to as "Draughon's"), a school which went bankrupt in April 1973. Service of process was accomplished pursuant to section 10-424,[33] and defendant moved for dismissal of the action for lack of personal jurisdiction or alternatively to quash the return of the summons and complaint. The Circuit Court of Common Pleas, Greenville County, denied the motion, and defendant appealed. The supreme court unanimously affirmed. The court found that defendant's principal and sole place of business is located in Washington, D.C. and that it neither has South Carolina employees nor owns or controls property within the state, nor has ever had a telephone number, bank account, office or other place of business in South Carolina. Nevertheless its activities relating to the accreditation of Draughon's and other educational institutions in this state[34] were sufficient to satisfy due process requirements in subjecting it to the jurisdiction of the South Carolina courts.

Due to the unusual nature of defendant's corporate activities,[35] the court did not rely on prvious cases[36] dealing with this question in the context of ordinary commercial transactions. Since section 10-424 authorizes service of process upon a foreign corporation only where such corporation is "transacting business" in this state, however, the court was compelled to interpret

33. *See* note 22 *supra.*

34. AICS makes an initial inspection of each school seeking accreditation, and upon the basis of the information gathered from such inspection, together with other data submitted to Washington by the school, makes its decision to accredit or not accredit the institution. Accreditation enables the school to use the AICS seal on publicity materials and is a substantial factor in a school's ability to obtain funding as well as to attract students. Each school pays an initial fee for AICS' services and an annual fee based upon a fixed minimum ($275.00) plus a percentage of gross receipts. Draughon's annual fee for 1962 was $850.00. A fee is also charged for re-inspections, which AICS requires whenever a school is sold or its business structure changes substantially. AICS listed six South Carolina schools in its directory for May 1973. AICS conducts inspections of currently listed schools every six years, and more frequently when re-inspections are required. ACIS had sent inspection teams to Daughon's in 1970 and 1972, and in 1974 conducted two inspections in South Carolina. The court held such activities to be substantial enough to satisfy the requirement under § 10-424 that a foreign corporation be "transacting business" within the state, and to also establish the minimum contacts required by the due process clause.

35. *See* note 34 *supra.*

36. See cases collected in the annotation to S.C. CODE ANN. §§ 10-424 (Cum. Supp. 1975), 10.2-801-803 (Cum. Supp. 1975) and 12-23.14 (1962). "The non-commercial character of AICS and the nature of the service it renders makes much precedent in the cases concerning commercial corporation inappropriate." 265 S.C. at 465, 219 S.E.2d at 840.

the activities of AICS as analogous to "transacting business" in order to uphold service of process upon it.[37] The court recited the general rule applicable to suits involving the question of *in personam* jurisdiction of state courts over nonresident defendants[38] and proceeded to an analysis similar to that made in *Peeler*.[39]

As in the latter case, however, the court made no reference to section 10.2-803, and consequently the *Jacobs* decision suffers from the same infirmities discussed earlier with regard to the *Peeler* decision. Since section 10-424 is not a long-arm statute, the court should have first determined that jurisdiction could be obtained under section 10.2-803(1)(a) before proceeding to a due process consideration.[40]

In light of the foregoing discussion, two additional points are worth noting. First, it no longer appears necessary to rely on sections 10-424 and 12-23.14 to serve process upon nonresident defendants. Section 10.2-804 authorizes service upon nonresidents whenever jurisdiction can be invoked pursuant to section 10.2-803; consequently, subsection (1)(a) of the long-arm statute, taken together with section 10.2-804, authorizes service of process upon foreign defendants "transacting any business" in South Carolina. Thus sections 10-424 and 12-23.14 are merely cumulative provisions, and no good reason appears to justify their retention in the South Carolina Code. This becomes even more evident in view of the second consideration. If a party accomplishes services pursuant to sections 10-424 or 12-23.14, the court must be able to find that the defendant is "doing" or "transacting"

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37. Although AICS is not transacting business in the commercial sense, it nevertheless 'transacts business' within the meaning of that term in § 10-424 when it conducts activity in promotion of the purposes for which it was organized, whether or not those purposes are for pecuniary gain, and when it carries on transactions constituting a regular, systematic and continuous course of conduct to accomplish its objectives.

265 S.C. at 465-66, 219 S.E.2d at 840.

38. *See* International Shoe Co. v. Washington, 326 U.S. 310 (1945) and note 14 *supra*.

39. Citing the *Boney* test, *see* note 13 *supra*, the court found that in analyzing these four factors, the due process requirements were satisfied on the facts of this case by the exercise of jurisdiction over AICS. 265 S.C. at 462-65, 219 S.E.2d at 838-40.

40. Since service in *Jacobs* was effected pursuant to § 10-424, the court needed only to consider whether AICS was "transacting business" in order to decide whether the service should be sustained. As discussed *supra*, § 10-424 is not a long-arm statute, and thus § 10.2-803(1)(a) should have been regarded as the statute to apply. However, had plaintiff served process pursuant to § 10.2-804, several other provisions of § 10.2-803(1) could have served as a basis for sustaining jurisdiction, in addition to "doing business" under § 10.2-803(1)(a).

business. Otherwise, the service can be quashed. But if the plaintiff serves process pursuant to section 10.2-804, any of the grounds specified in 10.2-803 can be relied upon to uphold service, including, but not limited to the fact that the defendant was "transacting business." Since it would be unnecessary for an attorney to rely only upon section 10-424 or 12-23.14 when section 10.2-804 is much broader, it seems equally pointless to retain these two more limited and redundant provisons.

The court has held that the long-arm statute is constitutional and fully effective.[41] The settled law requires the court in every case to find that there is a long-arm provision which authorizes the exercise of jurisdiction.[42] Although the result reached by the court in both *Peeler* and *Jacobs* may be sound, in view of the broad expansion of long-arm jurisdiction nationally,[43] the court's failure to construe and apply section 10.2-803 in either case leaves the case law surrounding this issue "an enigma wrapped in a puzzle."

II. DISCOVERY

A. *State Court*

In *Jackson v. H&S Oil Co.*[44] the court handed down a judicial interpretation of Circuit Court Rule 90(c) which requires a party to supplement its answers to interrogatories when appropriate during the course of litigation.[45] In this suit for personal injuries arising out of an automobile accident, newly-associated counsel for plaintiff sought an examination of his client by a physician two days before trial. The doctor, however, was unable to complete his examination until the morning of trial. Previously, in answer to defendant's interrogatories, plaintiff had listed seven

41. Thompson v. Hofmann, 263 S.C. 314, 210 S.E.2d 461 (1974); *see* note 5 *supra*.

42. *See* note 17 *supra* and accompanying text.

43. For an excellent discussion of the cases since *International Shoe Co. v. Washington*, see *Developments in the Law, State-Court Jurisdiction*, 73 HARV. L. REV. 909 (1960). *See also* von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966); Comment, *In Personam Jurisdiction Over Nonresident Manufacturers in Product Liability Actions*, 63 MICH. L. REV. 1028 (1965).

44. 263 S.C. 407, 211 S.E.2d 223 (1975).

45. S.C. CIR. CT. R. 90 Rule for interogatories

(c) The interrogatories shall be deemed to continue from the time of service until the time of the trial of the case, so that information sought, which comes to the knowledge of a party, his representative or attorney after answers to interrogatories have been submitted, shall be promptly transmitted to the other party.

physicians as witnesses but had not included the name of Dr. Solomon, the physician conducting the eleventh-hour examination. At the pre-trial conference, counsel for plaintiff informed opposing counsel that he planned to call Dr. Solomon as an expert witness. Defendant's counsel made no formal objection to the trial judge at this time, nor did he move for a continuance or other appropriate relief.[46] However, when plaintiff called Dr. Solomon on the second day of trial, counsel for defendant objected, arguing that plaintiff had violated rule 90(c). The trial judge offered counsel for the defendant a chance to confer with the physician at that time. He refused and Dr. Solomon proceeded to testify. After a verdict was returned for plaintiff, defendant appealed alleging, *inter alia,* that the failure of the trial court to exclude the testimony of Dr. Solomon or take any action to protect appellant's right constituted error.

The supreme court, with Justice Brailsford writing for a 4-1 majority, held that counsel for plaintiff had complied with the requirements of rule 90(c) by notifying opposing counsel at the pre-trial conference of the examination by Dr. Solomon and of plaintiff's intention to call him as an expert witness. Furthermore, the court noted that even if counsel for plaintiff had violated rule 90(c), automatic exclusion of Dr. Solomon's testimony would not necessarily follow. The proper sanction, pursuant to the rule established in *Laney v. Hefley,*[47] rests within the discretion of the trial judge.[48] The court added that defendant, by entering upon trial of the case without objecting to the fact that Dr. Solomon would be called as a witness, had effectively waived any right he might otherwise have had to appeal the trial court's ruling.

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46. The opinion of the case is conflicting as to whether any objection at all was made, but at most it would appear that defendant's counsel objected only to plaintiff's attorney out of the judge's presence.

47. 262 S.C. 54, 202 S.E.2d 13 (1974). In *Laney,* the plaintiff's attorney clearly violated the terms of rule 90(c), but since counsel for defendant had known of the witness' presence near the scene of the accident and had made no attempt to question the witness prior to trial, and in view of the weakness of the witness' testimony, which counsel for defendant conceded was not prejudicial to defendant, the court ruled that the trial court had not abused its discretion in permitting the witness to testify.

48. The *Laney* court stated:

> Numerous other courts have been concerned with the question of what sanctions, if any, are to be imposed where there is a failure to fully comply with the rule. . . . The weight of authority is to the effect that such matters, of necessity, have to be left largely to the discretion of the trial court.

Id. at 58, 202 S.E.2d at 14.

Justice Littlejohn, in dissent, argued vehemently that Dr. Solomon should not have been permitted to testify and that a new trial was warranted. Citing the tremendous expenses already incurred by defendant in discovery[49] and the crucial nature of Dr. Solomon's testimony,[50] Justice Littlejohn asserted that allowing the doctor to testify on such scant notice to defendant's counsel violated both the letter and spirit of rule 90 and deprived defendant of a fair trial on the critical issue in the case.[51]

Circuit Court Rule 90 affords to litigants in South Carolina only a limited use of interrogatories in pre-trial discovery. Interrogatories are limited to six standard questions which are set out in the rule itself,[52] as opposed to the broad-ranging inquiries permitted under the Federal Rule of Civil Procedure.[53] Subsection (c) of the South Carolina rule clearly indicates that these standard interrogatories are to continue until trial and that any new information with regard thereto shall be "promptly transmitted" to the opposing party. But as the court noted in *Jackson*, no cutoff point is provided for transmitting the names of newly-discovered witnesses or experts.[54] Even more significantly, the rule makes no provision for the imposition of sanctions should new information not be promptly transmitted. Subsection (f) of rule 90[55] provides

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49. Counsel for defendants had deposed 36 witnesses, including seven medical doctors, in preparing for trial. 263 S.C. at 415, 211 S.E.2d at 226-27.

50. Justice Littlejohn stated:

> If the actual damages verdict is justifiable it is solely because of the testimony of Dr. Solomon. Apparently none of the other seven doctors would testify that this plaintiff was totally and permanently disabled. Certainly none of the three other doctors who were called would testify to that effect.

Id. at 416, 211 S.E.2d at 227 (Littlejohn, J., dissenting).

51. The court in its opinion stated:

> Clearly, the plaintiff received some injuries in the collision. It cannot be seriously questioned but that appellant is liable. The key to this entire case is the amount of damages which should be paid, and for this reason the testmony of Dr. Solomon was extremely important.

Id.

52. *See* S.C. CIR. CT. R. 90(e).

53. FED. R. CIV. P. 33(b) provides that "[i]nterrogatories may relate to any matter which can be inquired into under Rule 26(b). . . ." FED. R. CIV. P. 26(b) provides that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. . . ."

54. 263 S.C. at 410, 211 S.E.2d 225.

55. S.C. CIR. CT. R. 90(f) provides:

> **Failure to Answer Interrogatories—Sanctions** If a party fails to respond to interrogatories propounded under this rule, the party seeking discovery may apply to the Court for an order compelling compliance therewith. Thereafter the authority of the Court to enforce this rule and any order directing compliance

for sanctions in cases where there is a failure to respond to interrogatories, and the sanction provisions of Circuit Court Rule 87[56] are made to apply if a party refuses to obey a court order compelling a response. But neither of these sanctions govern the particular problem involved in this case.[57]

A similar problem has arisen in the federal courts since no provision is made for the application of sanctions in cases of a failure to supplement answers to interrogatories under the Federal Rules of Civil Procedure.[58] The answer of the federal courts to this question[59] has been identical to that of the South Carolina Supreme Court—that it is within the discretion of the trial judge to determine what, if any, sanctions should be applied.[60] This appears to be a workable, common-sense approach. However, a more reliable means of insuring fairness to all parties in this situation would be the amendment of subsection (f) of rule 90 to provide specifically for this contingency.[61]

The decision of the majority in *Jackson* seems to violate the underlying purposes of discovery.[62] In focusing on the good faith of plaintiff's counsel and the strategy employed by counsel for defendant, the court overlooked the consideration which ought to be controlling, *viz* justice to both parties. On the facts of this case, where the paramount issue, as Justice Littlejohn pointed out,[63]

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therewith shall be as prescribed in Rule 87(H)(7) (a &b) of the Rules of the Circuit Court.

56. S.C. CIR. CT. R. 87(H)(7)(a) provides for the imposition of sanctions on a party who moves for a court order compelling discovery or resists such a motion, if the motion or refusal to answer was without substantial justification. The sanction is payment of the expenses of the party making or defending against the unjustified motion.

S.C. CIR. CT. R. 87(H)(7)(b) provides that failure of a party to comply with an order of court directing an answer may be considered a contempt of court and specifies sanctions for a willful failure to appear for a deposition.

57. In *Jackson,* there was no failure to *answer,* nor was there a motion for an order compelling supplementation of the answer.

58. *See* FED. R. CIV. P. 33 and 26(e). *See generally* 8 C. WRIGHT & A. MILLER FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2050 (1970) [hereinafter cited as WRIGHT & MILLER].

59. *See, e.g.,* Washington Hosp. Center v. Cheeks, 394 F.2d 964 (D.C. Cir. 1968); Halverson v. Campbell Soup Co., 374 F.2d 810 (7th Cir. 1967); Clark v. Pennsylvania R. Co., 328 F.2d 591 (2d Cir. 1964).

60. *See* note 48 and accompanying text *supra.*

61. Professor Wright has asserted that this would be the preferable solution to this problem in the federal courts. *See* 8 WRIGHT & MILLER § 2050, at 326 (1970).

62. *See* Hodge v. Myers, 255 S.C. 542, 545, 180 S.E.2d 203, 205 (1971), where the court quoted the trial court with approval: ". . . the entire thrust of these rules *[i.e.,* Circuit Court Rules 43, 97, 88, 89] is for full and fair disclosure to prevent a trial from becoming a guessing game or one of surprise for either party."

63. *See note 50 supra.*

was the extent of plaintiff's employability, the trial court should have been required to do more than merely offer defendant's counsel a brief opportunity to question Dr. Solomon immediately prior to his testifying. The physician's testimony was virtually determinative on the issue of damages, the only real issue in the case. Therefore, it would seem that by granting a continuance to enable defendant's counsel the opportunity to depose the doctor and provide sufficient time to prepare to meet his testimony, the trial court could have provided a solution fair to both parties. In view of the good faith of counsel for plaintiff, and in consideration of the facts of the case, exclusion of the physician's testimony would have been inordinately harsh. However, the court's decision unduly penalized defendant whose counsel was faced with two equally tenuous alternatives.[64] In light of this case, it seems clear that rule 90 should be amended to set forth clear guidelines for resolving the problem of late supplements to interrogatories. If the violation of the rule is due to attorney error or neglect, the amendment should provide for imposition of sanctions upon the attorney.[65] In a case similar to *Jackson*, where neither attorney is at fault, a continuance of the trial should be mandated by the rule.

B. Federal Court

In *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*,[66] the Fourth Circuit held that an attorney's mental impressions, conclusions, opinions or legal theories developed in prior terminated litigation are protected absolutely against discovery in subsequent litigation. In this factually and procedurally complex case,[67] plaintiffs (hereinafter referred to as the throwsters)

64. The court's opinion shows the strategic dilemma which defendant's counsel faced. Counsel correctly inferred from the late addition of Dr. Solomon to the list of expert witnesses that his testimony would go beyond other witnesses and strongly argue for plaintiff's total disability. Therefore counsel for defendant was faced with a dilemma. He could proceed with the trial and seek, in the event of an unfavorable verdict, a reversal on appeal on the ground that defendant's interrogatories were not properly supplemented. On the other hand, he could seek a continuance, thereby giving up that potential ground for appeal, and risk being unable to counter the physician's damaging testimony during a brief continuance.

65. This can be accomplished under Circuit Court Rule 87(H)(7)(a & b),where an attorney advises a motion for a court order or advises resisting such a motion to compel discovery.

66. 509 F.2d 730 (4th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975).

67. *See* 522 F.2d 809 (4th Cir. 1975); 487 F.2d 480 (4th Cir. 1973); 397 F. Supp. 1146

brought a suit charging defendants (Chavanoz) with antitrust violations. Plaintiffs furthermore sought a declaratory judgment decreeing that 21 patents owned by Chavanoz are not valid, not enforceable, and therefore had not been infringed.[68] The discovery dispute arose when the throwsters sought access to work product material developed by Chavanoz's attorneys in connection with settlement agreements with another corporation in 1964.[69]

Chavanoz claimed that the work product materials were subject to discovery only upon a showing by the throwsters that they were in substantial need of the materials and were unable without undue hardship to obtain the substantial equivalent of the materials by other means.[70] The district court initially held that the

(D.S.C. 1974); 370 F. Supp. 790 (D.S.C. 1973); 370 F. Supp. 769 (D.S.C. 1973); 370 F. Supp. 761 (D.S.C. 1973).

68. For a detailed exposition of the facts of this litigation, see cases cited at note 67 *supra.*

69. Leesona Corporation instituted a series of lawsuits against Chavanoz in the early 1960's, alleging that one of Chavanoz' licenses was infringing several United States patents which Leesona owned. Those suits were settled in 1964. The throwsters were apparently seeking to prove in the present action that these prior settlements between Leesona and Chavanoz included illegal agreements, the intent of which were to gain a monoply, and also that the prior dealings of Chavanoz with the patent office concerning the Leesona litigation had been inequitable. The district court in this case initially considered 683 documents, 116 photographs, and 176 pages of reported experiments, all of which Chavanoz claimed were produced in anticipation of the earlier litigation with Leesona. These were sought by the throwsters for the purpose of determining the prior knowledge of Chavanoz as to the invalidity of certain patents Chavanoz is now claiming to be infringed by the throwsters.

70. *See* FED. R. CIV. P. 26. The rule was completely revised in 1970, and the amended version now contains the following language in subdivision (b)(3):

> Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without due hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.
>
> A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written state-

qualified immunity of work product materials does not extend beyond the immediate case for which they were developed, and ordered Chavanoz to produce the documents.[71] The circuit court reversed,[72] holding that the qualified immunity extends to subsequent litigation as well. On remand, the district court, after reviewing the disputed documents, ordered Chavanoz to produce 105 of them. Chavanoz produced 58 of these documents but claimed the remainder were absolutely immune from discovery since they contained mental impressions, conclusions, opinions and legal theories developed by attorneys and other Chavanoz representatives in connection with the earlier litigation.[73] The district court held that the immunity of these opinion work product materials, although absolute as to the litigation for which they were prepared, becomes merely a qualified immunity once that litigation terminates, and therefore subject to discovery upon a showing of "substantial need" and "undue hardship."[74]

The circuit court, with Judge Widener writing for a three-judge panel, unanimously reversed. The court first analyzed the

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ment signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

71. Duplan Corp. v. Deering Milliken, 61 F.R.D. 127 (D.S.C. 1973).

72. Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 487 F.2d 480 (4th Cir. 1973).

73. Note that rule 26(b)(3) *see* note 70 *supra*, deals with two related but distinct matters. The initial dispute in this case was over *documents* which were prepared by Chavanoz in the prior litigation with Leesona. *See* note 68 *supra.* The rule provides that such documents, if otherwise discoverable pursuant to subsection (b)(1), are subject to discovery upon a showing of substantial need and undue hardship by the party seeking the materials. The rule further provides that once the requisite showing has been made, the court *shall* protect against disclosure of the mental impressions, opinions or legal theories of an attorney or other representative. Chavanoz argued that even though the throwsters had made the requisite showing and were entitled to access of 58 of the disputed documents, 47 of these documents were *absolutely* immune from discovery because they contained mental impressions, opinions, and legal theories of its attorneys and other representatives.

74. Duplan Corp. v. Deering Milliken, 397 F. Supp. 1146 (D.S.C. 1974). Judge Hemphill reasoned that since the documents sought and the opinions contained therein were highly relevant to issues in the present litigation, the mental impressions and opinions of Chavanoz' attorneys in the earlier litigation, were now "operative facts" as to the motives and intent of Chavanoz in the alleged antitrust conspiracy with Leesona and the alleged fraud upon the United States Patent Office. *See* note 68 *supra.* He asserted that where opinion work product becomes an operative fact in a subsequent lawsuit, it is no longer absolutely immune from discovery but may be ordered produced upon the requisite showing by the party seeking discovery.

amended version of rule 26[75] and found that work product materials containing attorney's opinions were intended to be absolutely protected from discovery. The circuit court rejected the district court's attempted formulation of an exception to this immunity.[76]

Although the rule itself is silent on this exact question,[77] the court relied upon the Supreme Court's rationale in the celebrated case of *Hickman v. Taylor,*[78] and found the district court's holding at odds with the policies underlying that decision. In the court's view, the main thrust of the Supreme Court's holding in *Hickman* was concerned with the protection of lawyers' thought processes and the adversary system's integrity. To allow opinion work product materials to be discoverable in subsequent litigation would undermine the adversary system and be detrimental to the interests of justice, the court asserted. Acknowledging the beneficial purposes of the liberal discovery provisions in the federal courts, the court argued that the absolute immunity of opinion work product materials would, in the end, better serve the interests of justice than the qualified protection allowed under the district court's formulation.[79]

Despite the proliferation of litigation concerning work product discovery in general, the amended version of rule 26[80] has not been extensively considered by the courts.[81] It is clear that, as to the particular litigation for which they are developed, opinion work product materials are absolutely immune from discovery. The Fourth Circuit is the only appellate court since the amendment of the Federal Rules[82] to have considered the question of

75. *See* note 70 *supra.*

76. *See* note 74 and accompanying text *supra.*

77. Although the rule flatly states that where a court orders discovery of work product materials, it *shall* protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney, there is no reference to subsequent litigation. FED. R. CIV. P. 26(b)(3); *see* note 70 *supra.*

78. For a thorough discussion of the *Hickman* decision and developments since, *see* 8 WRIGHT & MILLER § 2022, at 183-90, and commentators cited therein.

79. The court stated: "We know that our adversary system of justice relies heavily on the attorneys for its very functioning. . . . In every instance in which an attorney is consulted . . . 'in anticipation of litigation' he must be free to give his candid, dispassionate opinion, and equally free to record."

80. *See* note 70 *supra.*

81. *See* cases collected in 8 WRIGHT & MILLER, § 2026, 229-32, and 1974 supp. at 33, and cases cited by the *Duplan* court, 509 F.2d at 735.

82. The court in *Duplan,* citing WRIGHT & MILLER, noted that cases decided prior to the amendment of rule 26 must be viewed with extreme care, despite the fact that the amendment was substantially a codification of the existing case law. 509 F.2d at 735 n. 8, and 8 WRIGHT & MILLER 193. Since rulings on motions concerning discovery are not final

whether these materials may later be subject to discovery once the immediate litigation terminates. The Supreme Court's denial of *certiorari*[83] would seem at least implicitly to signal its approval of the Fourth Circuit's holding.

Professors Wright and Miller have asserted that a literal reading of the rule would lead to unsatisfactory results, protecting work product materials prepared in anticipation of *any* litigation by or for a *party,* regardless of whether the subsequent law suit is closely related, and providing no protection for similar materials prepared by or for a *non-party* even though the prior suit is closely connected to the subsequent one. To avoid such an anomalous application of the rule they suggest the use of protective orders[84] and/or a liberal view of the showing required to overcome the work product immunity.[85] A stronger argument can be made for absolute immunity of opinion work product in subsequent litigation, even though the later action is not related to the lawsuit for which the attorney's work product was developed. Despite the fact that such a construction might result in an occasional inequitable result, as Professors Wright and Miller postulate, allowing discovery of opinion work product would almost ineluctably lead to the abuses which the Supreme Court in *Hickman v. Taylor* and the drafters of Rule 26(b)(3) sought to avoid.[86] Considering both the underlying premises of the federal discovery provisions and the rationale supporting the work product immunity, the result in *Duplan Corp.* appears sound. The Fourth Circuit's resolution of this question in favor of absolute immunity for opinion work product will provide predictability of results and prevent tactical and strategic abuses of the discovery process.

III. JURY TRIAL

In two 1975 cases dealing with the right to jury trial, the South Carolina Supreme Court handed down two apparently irreconcilable opinions which deal with the same legal issue. In

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orders, and hence will generally not be appealable, few cases reach the courts of appeal on this point. The only other case on the circuit court level dealing with this question since 1970 did not address rule 26(b)(3). United States v. Brown, 478 F.2d 1038 (7th Cir. 1973).

83. 420 U.S. 997 (1975).

84. Protective orders are provided for by FED. R. CIV. P. 26(c).

85. *See* 8 WRIGHT & MILLER § 2024, at 196-210 (1970); *cf.* Note, *Discovery of an Attorney's Work Product in Subsequent Litigation,* 1974 DUKE L.J. 799.

86. *See* note 76 *supra,* and Advisory Committee Note to the 1970 amendments of Rule 26(b)(3), 48 F.R.D. 499 (1970).

Williford v. Downs,[87] the court held that a jury trial does not exist as a matter of right in an action to partition real estate under South Carolina Code section 19-238[88] even though the defendant's answer raises an issue of title to the property.[89] Despite the fact that appellant (defendant) did not properly present the issue on appeal,[90] the court reached the merits and held simply that suits under section 19-238 have long been regarded as suits in equity,[91] therefore, the case would not require trial by jury. Justice Bussey vehemently dissented,[92] arguing that the real question before the court was one of title to real property. Consequently, he asserted that the issue must as a matter of law be tried to a jury, unless of course the parties waive that right. Justice Bussey additionally contended that the court should look beyond the immediate question of the heir's legitimacy and recognize the question for what it actually is, namely, a question of title to real property.

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87. 265 S.C. 319, 218 S.E.2d 242 (1975).

88. S.C. CODE ANN., § 19-238 (1962) provides:

Excessive legacies to bastards of women living in adultery.—If any person who is an inhabitant of this State or who has any estate therein shall beget any bastard child or shall live in adultery with a woman, such person having a wife or lawful children of his own living, and shall give, by legacy or devise, for the use and benefit of the woman with whom he lives in adultery or of his bastard child or children, any larger or greater proportion of the real clear value of his estate, real or personal, after paying of his debts than one-fourth part thereof, such legacy or devise shall be null and void for so much of the amount of value thereof as shall or may exceed such fourth part of his real and personal estate.

89. The testator, Press Williford, devised a ninety-seven acre tract of land in Anderson County to plaintiff, his wife, for life, remainder to the defendant (appellant), who was referred to in the will as his "adopted daughter." Plaintiff sought to have the land partitioned, asserting that defendant was testator's illegitimate child and thus entitled to only one-fourth of his estate. The defendant demurred and specifically denied that she was an illegitimate child of the testator, alleging that she had a valid title to the remainder in fee simple.

90. In its brief, appellant's counsel made no argument that she was entitled to a jury trial as matter of right, but argued merely that the issue of legitimacy is such a serious one that it is an abuse of discretion for the trial court to order a reference of that issue. Counsel for appellant did not argue that an issue of title to land was raised by her answer and conceded that both an action for partitioning of real property and the issue of legitimacy were matters properly referable to a master. Since the court has held that the granting of a motion for compulsory reference is appealable only where such would operate to deprive a party of a mode of trial to which he is entitled as a matter of law, *see* Rainwater v. Merchants & Farmers Bank of Cheraw, 108 S.C. 206, 93 S.E. 770 (1971), it was incumbent upon appellant to show that a jury trial was *required,* not simply that it was *permitted* in this type of case. Thus the appeal could properly have been dismissed on this basis without any discussion on the merits.

91. *See* Williams v. Newton, 84 S.C. 98, 65 S.E. 959 (1909); Williams v. Halford, 64 S.C. 396, 42 S.E. 187 (1902).

92. 265 S.C. 319, 323-27, 218 S.E.2d 242, 244-46 (1975).

Barely two months later in *Van Every v. Chinquapin Hollow, Inc.*,[93] the supreme court held that, when the defendant's answer raises an issue of title to land in an action to quiet title,[94] that issue must be tried to a jury.[95] The court affirmed the trial court's denial of plaintiff's motion for a compulsory order of reference. As in *Williford,* the action was clearly equitable,[96] and defendant's answer put in issue the question of the title to the real estate. However, the court in this case unanimously held that the state constitution[97] provides a right to jury trial whenever the issue of title arises,[98] unless waived. Noting that a jury verdict would leave no equitable issues to be decided, the court held that the legal issue of title should be decided first, since it would render unnecessary any further consideration of the equitable issue.[99]

No rational basis appears upon which these two cases can be distinguished. Both involve virtually identical questions—namely, whether a right to jury trial attaches in an equitable action when the answer puts the issue of title to real property in dispute. The failure of the court in *Van Every* even to refer to its holding in *Williford* is baffling, for the later decision would seem either to overrule the former *sub silentio* or to provide

93. 265 S.C. 474, 219 S.E.2d 909 (1975). This case was decided November 25, 1975, and *Williford* was decided September 15, 1975.

94. Plaintiff sought to have the court remove a cloud on his title by declaring that one particular survey had correctly fixed the boundary lines between his property and that of defendant. Defendant's answer alleged that he was the owner of the disputed land, either via deed or alternatively by adverse possession.

95. *See* Bryan v. Freeman, 253 S.C. 50, 168 S.E.2d 793 (1969).

96. *Id. See also* Cathcart v. Jennings, 137 S.C. 450, 135 S.E. 558 (1926).

97. Art. 1, § 25 of the South Carolina Constitution provides that "[t]he right of trial by jury shall be preserved inviolate."

98. In State v. Gibbes, 109 S.C. 135, 95 S.E. 346 (1918), the court laid down the rule that this provision (Art. 1, § 25) guarantees only a right to jury trial in those cases in which the right obtained at the time of adoption of the South Carolina Constitution. An action to determine title to real property was one in which the right to jury trial was afforded at common law. *See* Frazee v. Beattie, 26 S.C. 348, 2 S.E. 125 (1887). The court has held that an issue of title to real estate may be raised either in the complaint or by answer. Barnes v. Rodgers, 54 S.C. 115, 31 S.E. 885 (1898).

S.C. Code Ann. § 10-1056 provides that "[a]n issue of law must be tried by the court, as also must cases in chancery, unless they be referred as provided in Chapter 16 of this Title. An issue of fact in an action for the recovery of money only or of specific real or personal property must be tried by a jury, unless a jury trial be waived as provided in § 10-1209 or a reference be ordered." In Hutto v. Hutto, 189 S.C. 26, 199 S.E. 909 (1938), the court construed the predecessor of this section (section 593 of the 1932 Code) to require that an issue of title to real property is a purely legal issue, or a fact issue, and as such must be decided by a jury, unless the party entitled to assert the right has waived it. *See* cases cited *supra.*

99. *See* Rush v. Thompson, 203 S.C. 106, 26 S.E.2d 411 (1943).

attorneys with authority on both sides of the same question. The source of the conflict between these two decisions stems perhaps from the confusing interaction of the code-pleading system with the historical tests used by the court in determining when to grant or deny jury trials. With the enactment in 1870 of the modern code of procedure, the South Carolina legislature abolished the formal dichotomy between actions at law and suits in equity. All courts of general jurisdiction were thereby enabled to hear actions which involved both legal and equitable issues and to grant both types of relief. However, due to the interpretation given to article 1, section 25 of the South Carolina Constitution, i.e., that the right to trial by jury is preserved only in those actions in which the right was afforded at common law, the courts have been constrained to adhere to the law-equity dichotomy in determining whether such a right attaches in each one. The problem has been further complicated by the attempt in the 1870 Code to specify those types of actions in which the right to a jury trial may be demanded. Section 10-1056 limits the right of jury trial to those actions involving issues of fact in suits for the recovery of money or the recovery of specific real or personal property.

The court in *Willford* focused on the historical treatment of section 19-238 cases and did not discuss the provisions of section 10-1056, which guarantee a jury trial when the issue is one of title to real property. Reasoning that an action under section 19-238 has traditionally been regarded as equitable and that there is no right to jury trial in an equitable action, the court concluded that the case was properly tried without a jury. In his dissenting opinion, Justice Bussey relied upon both the constitutional and statutory provisions, viewing them as a mandate that the traditionally legal issue of title must be tried to a jury. He distinguished those cases relied upon by the majority as not specifically addressing the question of title to real property. Moreover, the dissenting Justice cited other cases which hold that where an issue of title is raised in a suit to partition real property, such an issue *must* be determined by a jury. His analysis is more persuasive than that of the majority, which failed to confront squarely the fact that this was an issue of title to real estate. Although the majority addressed the merits, its opinion was short, merely noting that this was an action to void a will. As Justice Bussey maintained, such an approach failed to recognize the real question which underlay the action. The appeal should have either been dismissed

on procedural grounds without discussion of the merits,[100] or the appellant should have been granted a jury trial as to the legal issue of title to the property.[101]

In *Van Every* the court re-affirmed the right to jury trial when the title to real property is at issue and held that the defendant's answer raising the issue of title to the land entitled him to a jury trial, notwithstanding the fact that actions to quiet title, like actions to partition real estate, have long been considered equitable in nature. The court again did not refer to section 10-1056, but instead held that Article I, section 25 of the South Carolina Constitution required that the issue of title be tried to a jury. In addition the *Van Every* court relied upon previous cases holding that when the defendant's answer raises an issue of paramount title, which, if established, would defeat plaintiff's action, that issue must be submitted to a jury.[102] The court's approach in this case is analogous to that of Justice Bussey in his dissent in *Williford.*

The divergence in the result reached by the court in these two cases may likely be explained by the supreme court's view of section 19-238 as inherently equitable. Hence the court in *Williford* did not apply the constitutional and statutory provisions which the *Van Every* court deemed controlling. The preferred disposition would have been to treat all cases raising the issue of title to real property as triable to a jury. This approach would prmote internal consistency in the code and safeguard the citizens' right to trial by jury when asserting title to real property.

IV. VENUE

In *Holson v. Gosnell,*[103] the South Carolina Supreme Court handed down an extremely liberal and forward-looking opinion,

100. *See* note 90 *supra.*

101. If defendant in *Williford* was in fact the legitimate child of the testator, then she was the owner in fee simple of the remainder and partitioning would not be proper. It would clearly seem that defendant's answer in *Williford* places the title to real property in issue as effectively as the answer in *Van Every,* and no real distinction can be made on this ground.

102. This finds a parallel in the so-called equitable "cleanup doctrine", which, prior to the merger of law and equity, enabled courts sitting in equity to grant legal relief when such relief was incidental to the equitable cause which formed the main subject of the action. This doctrine tended to reduce the burden which would otherwise have been placed on the courts if a separate action at law should have been required in order to dispose finally of all the issues in the case.

103. 264 S.C. 619, 216 S.E.2d 539 (1975).

unanimously holding that a national bank is *located* within any county in which it operates a branch and that the bank may consequently be sued in any such county. The court was faced with the question of the proper construction to be given a federal statute which deals with the proper venue of suits against national banks.[104] The statute specifies the venue for suits both in federal court, as well as in state courts, as follows:

> Actions and proceedings against any association under this chapter may be had in any district or territorial court of the United States held within the district in which such association may be established, or in any state, county or municipal court in the county or city in which said association is *located* having jurisdiction in similar cases.[105]

Plaintiffs brought suit in Saluda County under the state court venue provision of the above statute, against several defendants, one of whom was a national bank. First State National (Bank) alleging fraudulent sales of securities. Although some of the securities were sold in Saluda County, the parties stipulated that the action was a transitory one not involving the defendant bank's transactions at its Saluda branch. The bank, which was chartered and established in Aiken County, argued that the suit was improperly instituted in Saluda County, because the federal statute requires that it be sued only in Aiken County. The Common Pleas Court of Saluda County denied defendants' motion for a change of venue, and the bank appealed. On appeal plaintiffs urged that the bank had waived its statutory privilege by establishing and operating a branch office in Saluda County.

The supreme court, per Justice Ness, after noting the origin and purpose of the federal venue provision,[106] cited recent criticisms of the statute which argue that that section has become increasingly outmoded and excessively restrictive in view of mod-

104. 12 U.S.C. § 94 (1970). What is now 12 U.S.C. § 94 is derived from the National Bank Act, ch. 58, § 59, 12 Stat. 681, Feb. 25, 1863, which was amended by the National Bank Act, ch. 106, § 57, 13 Stat. 116-17, June 3, 1864, and later incorporated into the National Bank Act, ch. 80, § 5198, 18 Stat. 320, Feb. 18, 1875. *See* Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555, 567-72 (1963), which contains a compilation of the pertinent national bank legislation.

105. 12 U.S.C. § 94 (1970) (emphasis added).

106. 264 S.C. at 621; *see* note 104 *supra*. The court noted that "[t]he purpose of such a restrictive provision is to prevent interruption in their business that might result from . . . [the banks'] books being sent to distant counties in obedience to process from state courts." First Nat'l Bank v. Morgan, 132 U.S. 141, 145 (1889).

ern banking practices.[107] Since it is well settled that the requirements of section 94 are mandatory when a transitory cause of action is involved, despite the permissive language of the statute, the court faced the sole issue of whether a national bank is located in a county wherein it is operating a branch office.[108] In answering this question in the affirmative, the court shrugged aside the view of most lower federal and state courts that a national bank is not located in a county for venue purposes merely because it operates a branch office there.[109] "While we take cognizance of these deci-

107. The statute under consideration in this case was enacted at a time when banks kept only one set of records and branch banking was unknown. The commentators have argued that in view of the widespread use of computers and duplicate records, and the proliferation of branch banking, the procedural advantages which the act provides national banks, *see* note 106 *supra,* are no longer necessary. *See* ALI STUDY OF DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 77, 412-13 (1969); Note, *An Assault on the Venue Sanctuary of National Banks,* 34 GEO. WASH. L. REV. 765 (1966); Comment, *Venue Sanctuary of National Banks — The Proper Construction of 12 U.S.C. Section 94 Places the Venue of Actions Against a National Bank in Any County in Which the Bank Operates a Branch Office,* 26 S.C.L. REV. 643 (1975); Comment, *Venue — In an Action Against a National Bank Section 27 of the Securities Exchange Act Supersedes the Venue Provisons of the National Bank Act,* 52 TEX. L. REV. 124 (1974); Comment, *Restricted Venue in Suits Against National Banks: A Procedural Anachronism,* 15 WM. & MARY L. REV. 179 (1973).

108. In Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555, 567-72 (1963) the court held that a national bank can be sued *only* in the county wherein it is located, despite the fact that the statute employy the word "may". That case involved a state court action, and the issue before the court was whether or not the language of the statute was permissive or mandatory. The court in *Mercantile Nat'l Bank* was not faced with the question of whether a national bank is "located" in a county where it opeates a branch office and has never reached the precise issue facing the South Carolina Supreme Court in *Holson.*

109. The lower federal and state courts which have faced this question have generally defined "located" and "established" interchangeably, and these cases do not distinguish between suits in federal or state forums in construing the application of 12 U.S.C. § 94. Helco, Inc. v. first Nat'l City Bank, 470 F.2d 883 (3d Cir. 1972); First Nat'l Bank v. United States Dist. Court, 468 F.2d 180 (9th Cir. 1972); United States Nat'l Bank v. Hill, 434 F.2d 1019 (8th Cir. 1970); Buffum v. Chase Nat'l Bank, 192 F.2d 58 (7th Cir. 1951); *cert. denied,* 342 U.S. 944 (1952); American Sur. Co. v. Bank of Cal., 133 F.2d 160 (9th Cir. 1943); Leonardi v. Chase Nat'l Bank, 81 F.2d 19 (2d Cir. 1936), *cert. denied* 298 U.S. 677 (1936); Odette v. Shearson, Hammill & Co., 394 F. Supp. 946 (S.D.N.Y. 1975); Kader v. First Nat'l Bank of Fort Myers, 387 F. Supp. 535 (W.D. Pa. 1975); Tanglewood Mall, Inc. v. Chase Manhattan Bank, 371 F. Supp. 722 (W.D. Va. 1974), *aff'd,* 508 F.2d 838 (4th Cir. 1974), *cert. denied* 421 U.S. 965 (1975); Staley v. Homeland, Inc., 368 F. Supp. 1344 (E.D.N.C. 1974); Southeast Guaranty Trust Co. v. Rodman & Renshaw, Inc., 358 F. Supp. 1001 (N.D. Ill. 1973); Reaves v. Bank of America, 352 F. Supp. 745 (S.D. Cal. 1973); General Elec. Credit Corp. v. James Talcott, Inc., 271 F. Supp. 699 (S.D.N.Y. 1966); Malaker Corp. Stockholders Protective Comm. v. First Jersey Nat'l Bank, 133 N.J. Super 462, 337 A.2d 390 (1975); Security First Nat'l Bank v. Tattersall, ___ La. ___, 311 So.2d 218 (1975); Weichart v. American Nat'l Bank & Trust Co., 39 A.D.2d 819, 333 N.Y.S.2d 94 (1972); Murphy v. First Nat'l Bank of Chicago, ___ Iowa ___, 228 N.W.2d 372 (1975).

sions, we do not think their logic is sound,"[110] the court stated. The court went on to note that the National Bank Act had been amended to allow banks to establish a statewide system of branches[111] and that the courts should thus consider this question in light of these revisions rather than by "arbitrary and antiquated concepts."[112] Relying upon recent state court decisions from California[113] and North Carolina,[114] the court held that "when a bank operates a branch in a county other than that of its organizational charter, it is present there physically, organizationally and transactionally. We think the conclusion is impelling that it is located there within the meaning of the statute."[115] The court further drew upon the policies underlying the liberal venue provisions of the 1933 and 1934 Federal Securities Acts[116] to buttress its conclusion, notwithstanding the fact that the instant suit was not brought under those statutes, since activities similar to the type proscribed by the Acts were involved and the purity of the securities market place was allegedly infringed.[117]

Although Justice Ness' opinion lacked a detailed discussion of this controversial issue, the court's conclusion appears eminently sound. The restrictive interpretation given the federal statute has been vigorously assailed, as the court noted, because it provides national banks unwarranted protection against legitimate suits and unduly hampers plaintiffs in bringing such ac-

110. 264 S.C. at 622, 216 S.E.2d at 540.

111. *Id.* at 623. The amendments alluded to were implemented by the McFadden Act, 44 Stat. 1228 (1927), *as amended by* 12 U.S.C. § 36 (1970), and by 48 Stat. 189 (1933), *as amended by* 12 U.S.C. § 36 (1970). *See* Note, *An Assault on the Venue Sanctuary of National Banks, supra* note 106, at 769.

112. 264 S.C. at 623, 216 S.E.2d at 540.

113. Central Bank v. Superior Court, 30 Cal. App. 3d 962, 106 Cal. Rptr. 912 (1973).

114. Security Mills of Asheville, Inc. v. Wachovia Bank & Trust Co., 281 N.C. 525, 189 S.E.2d 266 (1972).

115. 264 S.C. at 623, 216 S.E.2d at 540-41.

116. The Federal Securities Act of 1933, 48 Stat. 74, *as amended by* 15 U.S.C. § 77(a) to -77(aa) (1970), and the Federal Securities Exchange Act of 1934, 48 Stat. 881, *as amended by* 15 U.S.C. § 78(a) to -78(hh) (1960) both contain much broader venue provisions than 12 U.S.C.] 94. Recent cases in the federal courts do not agree as to the application of these conflicting sections to cases in which a national bank is being sued for fraudulent sale of securities. *Compare* Ronson Corp. v. Liquifin Aktiengesellschaft, 483 F.2d 852 (3d Cir. 1973) *and* Lavin v. Great Western Sugar Co., 274 F. Supp. 974 (D.N.J. 1967) *with* United States Nat'l Bank v. Hill, 434 F.2d 1019 (9th Cir. 1970) and Bruns, Nordeman & Co. v. American Nat'l Bank & Trust Co., 394 F.2d 300 (2nd Cir. 1968). *See also* Comment, *Venue—In an Action Against a National Bank Section 27 of the Securities Exchange Act Supercedes the Venue Provisions of the National Bank Act,* 52 TEX. L. REV. 124 (1974).

117. 264 S.C. at 623-24, 216 S.E.2d at 541.

tions.[118] The court's emphasis on the legislative history of the Act and on modern banking practices, although not set forth in depth, is well-placed and led to a fair and reasonable construction of the statute. In following the lead of California and North Carolina,[119] the court placed itself firmly in the forefront among those courts which have faced this issue in abandoning out-moded conceptions of banking and an overly conservative adherence to questionable legal precedents. However, the court could have more adequately set forth the rationale for its decision, rather than disposing of the question in such a summary fashion. In view of the numerous decisions by courts coming to an opposite conclusion on this question,[120] and the far-reaching nature of the court's decision,[121] a more painstaking analysis seems warranted than that given by the Court.

In *Security Mills of Asheville, Inc.*,[122] the North Carolina Supreme Court focused on the different wording employed by Congress when it amended 12 U.S.C. § 94 to locate venue for suits brought in state courts. Specifically it noted that venue would lie where the bank was "located" rather than, as for venue in fedeal courts, where the bank was "established."[123] From this is gleaned an intent for a different rule to apply in state courts than the one applied in federal tribunals.[124] Together with the revision of the National Bank Act to allow branch banking, argued the court, the difference in language reasonably mandates a more liberal con-

118. *See* note 107 *supra*.

119. *See* notes 113-14 *supra*.

120. *See* note 109 *supra*.

121. The court held that a national bank may be sued in a county where it operates a branch office, regardless of whether the suit involves transactions arising from that branch and irrespective of the number of branch banks established within the forum county. The parties here stipulated that the plaintiff's cause of action was transitory and did not arise from the defendant bank's transactions at the Saluda County branch office. The only exceptions to the narrow construction given 12 U.S.C. § 94 recognized by most other courts have been in cases involving local actions and in those instances where the actions of the defendant bank, either before or after suit, have been held to amount to a waiver of its statutory privilege against being sued in jurisdictions other than the one in which it is chartered. For a detailed discussion of these exceptions and cases which have propounded them, see the commentators cited in note 107 *supra*. Plaintiffs in *Holson* apparently argued that the bank had waived its statutory privilege by establishing and operating a branch office in Saluda County, but the court concluded that there was no privilege to be waived. Although this interpretation has been urged by several commentators, few courts have subscribed to such an expansive reading of the statute.

122. 281 N.C. 525, 189 S.E.2d 266 (1972).

123. 281 N.C. at 529-30, 189 S.E.2d at 469-70.

124. *Id.* at 530, 189 S.E.2d at 270.

struction of the venue provision when suit is brought in a state forum.[125] The North Carolina court asserted that other courts which have held that a national bank may not be sued in a county wherein it operates a branch bank have failed to give adequate consideration to the actual wording of the statute, rendering those contrary decisions unpersuasive.[126]

Similarly, in *Central Bank v. Superior Court*[127] the California Court of Appeals carefully scrutinized prior cases on this question and criticized their reasoning.[128] Furthermore, it found them not directly dispositive of the precise question facing the California court,[129] as well as not directly dispositive of the question addressed in *Security Mills* and *Holson.* These cases, reasoned the California judges, missed the real point of the federal venue statute, and the validity of those cases was undercut by their failure to analyze properly the legislative history of the Act or to understand sufficiently the modern commercial practices of national banks.[130]

An analysis along the lines of the North Carolina and California courts would have been more authoritative and persuasive than the unduly truncated rationale set forth by Justice Ness. Nevertheless, the opinion is noteworthy, since it stripped national banks in South Carolina of their archaic immunity from suits brought in counties in which they operate only a branch office. The court, in so doing, placed South Carolina in step with the enlightened minority of jurisdictions which have decided this question against narrow venue restrictions.

V. SUPPLEMENTAL PLEADINGS

Brown v. Coastal States Life Ins. Co.[131] involved an interest-

125. *Id.* at 530-33, 189 S.E.2d at 270-71.
126. *Id.* at 530-32, 189 S.E.2d at 270-71.
127. 30 Cal. App. 3d 962, 106 Cal. Rptr. 912 (1973).
128. 30 Cal. App. 3d at 967-68, 106 Cal. Rptr. at 915-16.
129. *Id.* at 967-68, 106 Cal. Rptr. at 915-16.
130. The California court stated:

> There is nothing in section 94 or the accompanying legislation which places venue in one place to the exclusion of all others. The *Leonardi* case and its progeny . . . fail to recognize that location of the banking business, not location of headquarters, is the venue statute's prime concern; fail to appraise the statute in the light of the associated legislation enacted in 1927; turn, instead, to the dim light of an 1871 decision handed down in the era and formulated in the context of single-office banking. They frustrate congressional intent to allow national banks to be sued where they establish their banking business.

Id. at 970-71, 106 Cal. Rptr. at 918.

ing question related to supplemental pleadings. Plaintiffs filed six actions against defendant insurance companies alleging that defendants wrongfully, illegally and fraudulently cancelled or lapsed their policies. The action was commenced by service of summonses upon the Chief Insurance Commissioner of South Carolina on October 17, 1968. The complaints were not acually served until August 27, 1969.[132] Shortly after the summonses were served and prior to service of the complaint defendants reinstated plaintiff's policies unconditionally. The plaintiffs, however, failed to pay the premiums upon reinstatement, and the policies lapsed on November 25, 1968. In their answers, defendants made a general denial and additionally alleged as a defense the reinstatement of the policies, annexing to the answer copies of four letters sent to plaintiffs' attorney pertaining to the reinstatement and lapse of the policies. Plaintiffs moved to strike from the answers the allegations referring to the reinstatement and the letters. The trial court granted the motion and defendants appealed from this order.

The supreme court, per Justice Littlejohn, reversed, holding that there was an error of law in the trial court's grant of the motion to strike.[133] The high court ruled that the allegations of defendants should have been permitted as a supplemental pleading. The court acknowledged that the case did not technically involve supplemental pleadings since the facts alleged by defendants occurred prior to the service of the complaint.[134] The court felt, nevertheless, that the rationale for allowing supplemental pleadings applied in this case and that the matter alleged by defendants was clearly not irrelevant and immaterial. Thus, the court believed, the interests of justice dictated that defendants be

131. 264 S.C. 190, 213 S.E.2d 726 (1975).

132. This procedure is authorized pursuant to S.C. CODE ANN. § 10-633 (1962).

133. In Simonds v.Simonds, 232 S.C. 185, 101 S.E.2d 494 (1958), cited in the majority opinion, the court stated that "[t]he refusal of a motion to file a supplemental answer is ordinarily within the discretion of the Circuit Court and will not be reversed by this Court except for an abuse of such discretion, or unless the action of the trial Judge was controlled by some error of law, or unless some substantial right is thereby lost or impaired." *Id.* at 196, 101 S.E.2d at 499. *See also* J.M.S., Inc. v. Theo, 241 S.C. 394, 128 S.E.2d 697 (1962), which applies a similar rule for motions to strike.

134. S.C. CODE ANN. § 10-610 (1962) provides in part that "[t]he plaintiff and defendant, respectively may be allowed on motion to make a supplementary complaint, answer or reply alleging facts material to the case occurring after the former complaint, answer or reply, or of which the party was ignorant when his former pleading was made. . . ."

allowed to set up the subsequent matter in their answer.[135] Justice Bussey, with whom Justice Lewis concurred, filed an opinion in which he concurred in part,[136] agreeing with Justice Littlejohn that the motion should not have been granted, but urging that it should not properly be considered as a supplemental pleading, but rather should be allowed only because it relates to the issue of mitigation of damages.[137]

Under the terms of § 10-610 of the Code, a supplemental pleading is proper only upon a motion to the court which establishes a *prima facie* showing that facts which are relevant and material to the issues in the case have arisen after the making of a complaint, answer or reply, or that the party was ignorant of the additional facts at the time the former pleading was made.[138] Technically the matter alleged by the defendants could not properly be considered as a supplemental pleading, since the defendants had not previously answered. However, as both the majority and concurring opinions pointed out, the unusual delay between the commencement of the action and the filing of the complaint brought about a unique situation. Upon the particular facts of this case, the result reached is more just, as well as more efficient, than would have been the alternative of granting the motion to strike. However, the concurring opinion seems more persuasive than the majority's overly liberal construction of the

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135. The court stated:

> Had the complaints been served along with the summonses it would have been in order for Coastal to have moved under Section 10-610 for permission to plead these matters which occurred after the commencement of the action. As it developed, the Complaints were not served until almost a year after the facts which appellants seek to plead occurred.

264 S.C. at 194.

136. 264 S.C. 190, 195, 213 S.E.2d 726, 729 (1975) (Bussey, J., concurring in part).

137. Justice Bussey wrote:

> In my opinion the striken factual matters had no relevance whatever to any issue in the case save possibly mitigation of actual damages sustained by plaintiffs. Under this decision of this Court in *Latimer v. York Cotton Mills,* 66 S.C. 135, 44 S.E. 559, a defendant is apparently required to plead factual matters which tend to mitigate actual damages sustained by a plaintiff. Since there was a great delay on the part of the plaintiff in serving the complaint, justice requires that the defendant be allowed to allege and prove, if it can, facts occurring after the service of the summons which tend to mitigate the actual damages sustained.

Id.

138. Simonds v. Simonds, 232 S.C. 185, 197, 101 S.E.2d 494, 500 (1957).

statute. Such construction seems likely to produce confusion in subsequent cases.[139]

W. Howard Boyd, Jr.

139. The concurring opinion rests upon a sounder premise than does that of the majority. Justice Lewis more clearly emphasized that a supplemental pleading was not involved in this case and based his opinion upon an alternative ground, while Justice Littlejohn simply drew an attenuated analogy between a fact situation properly giving rise to a motion for leave to file a supplemental pleading and the facts involved in the case at bar. The majority's approach to the case will leave courts and lawyers uncertain as to what the decision portends for similar cases in the future, while the concurring opinion is unambiguous and would provide clarity and predictability in future cases involving this and similar issues.