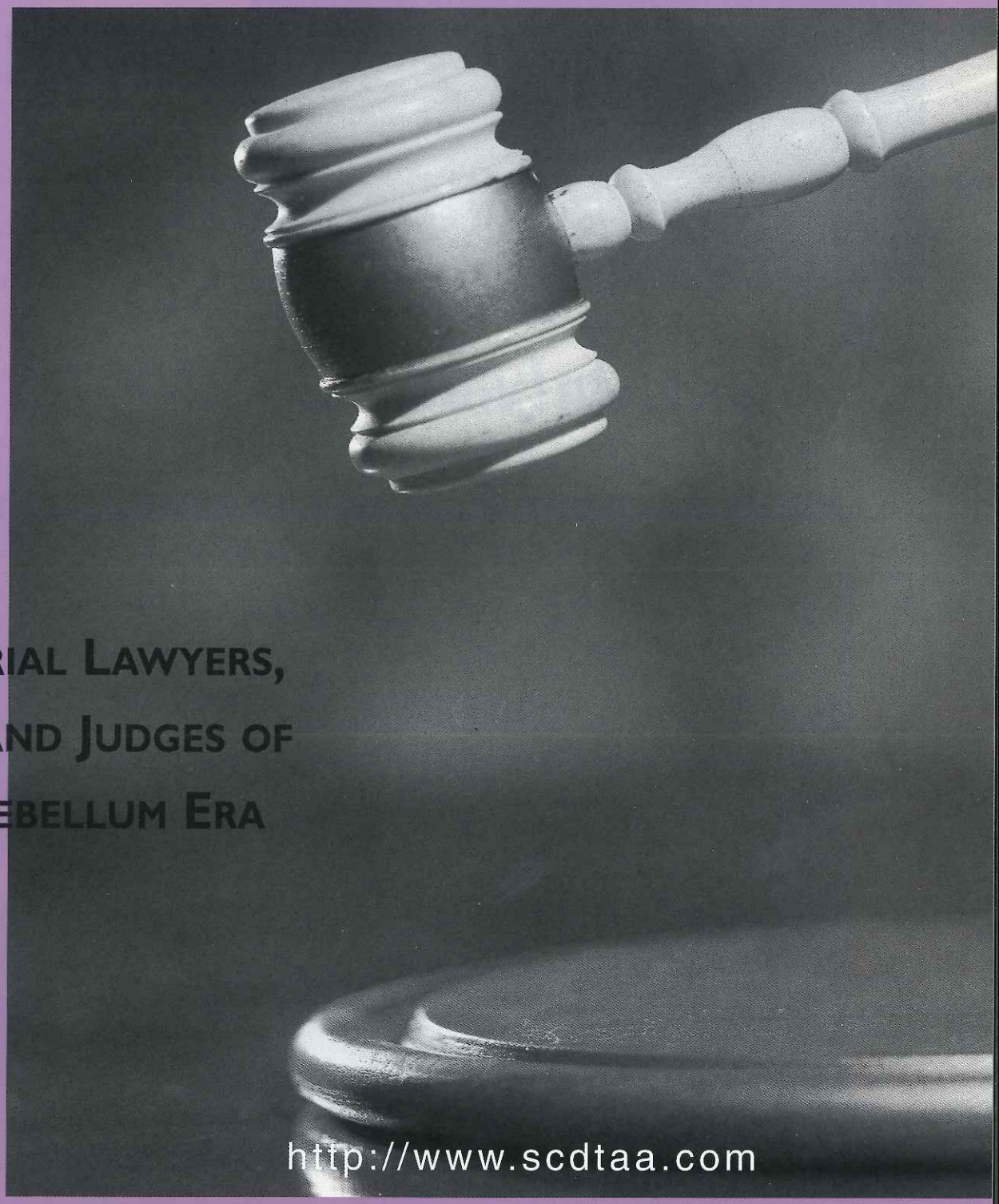
S.C. Defense Trial Attorneys' Association Volume 29 Number 1 • Spring, 2001

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

THE DefenseLINE



TRIALS, TRIAL LAWYERS, JUSTICES, AND JUDGES OF THE ANTEBELLUM ERA

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2001 JOINT MEETING SCDTAA AND CMASC

The Grove Park Inn
Asheville, NC
July 26 - 28, 2001

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

THE DefenseLINE

Joint Meeting July 26-28, 2001

If you missed last year's Joint Meeting, you certainly will not want to make the same mistake again this year. Last year's meeting offered something new. In addition to Justices Toal and Pleicones, we focused on technology advances in our profession. As always, our CLE portion will cover recent developments in the areas of products liability, commercial litigation, employment law, workers' compensation, and, of course, ethics. Many of you have expressed interest in learning more about changes in the Federal District Court Local Rules. Judge Joe Anderson's law clerk, Virginia Vroegop, has traveled the state doing a series of updates on the new Local Rules. She has kindly agreed to make an encore presentation at our meeting. In addition to the claims managers, we are fortunate to be joined this year by representatives from the Risk Managers Association, corporate counsel, and law firm administrators.

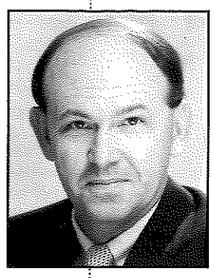
Back by popular demand will be our exhibit hall featuring companies that provide a special service to law firms and the insurance industry. You will not want to miss the many advances in technology that are available to assist you in practice and time management.

As always, a few days in Asheville near the end of July is a wonderful break. In addition to the CLE and exhibit hall, we look forward to social events including cocktail parties on Thursday and Friday nights, golf, tennis, and white-water rafting.

Mark your calendar for July 26-28, 2001.
We look forward to seeing you there.

President's Letter

by H. Michael Bowers



What Does Your Association Do For You?

By the time you read this publication, the new website should be operational. Our goal is to use the site to communicate with other members of the association on topics concerning our various practices and share information. Current plans are to use the Substantive Law Committees for this purpose. Ultimately, we plan to have a expert witness bank and brief bank on the site.

The association employs a lobbyist each year to monitor legislation that may affect the association members, its clients or the practice of law. Unfortunately, lack of funding prevents active lobbying, and these efforts are left to our individual members. Current topics under review include venue and seatbelt legislation. I would urge our members to get involved in this effort. Donna Givens is heading our Legislative Committee.

The Joint Meeting is planned for July 26 through July 28 at The Grove Park Inn in Asheville under the watchful eye of Jay Courie and Jeff Ezell. There will be greater vendor participation this year and invitations will be extended to other groups such as RIMS, Arson Insurance Investigators, and the Self-Insurers Association. We are making all efforts to expand the client base at the meeting.

The Trial Academy will be held in Greenville this year to promote greater Judge and attorney participation from around the state. The date will be set in the near future so be on the look out for the material so you can register young or new attorneys. Call Matt Henrikson or John T. Lay if you are interested in participating as a lecturer or mentor.

Work is in progress to have another great program at the Cloister November 8 through November 11. Rumor has it that there may be discussion of "election law" on the program. Please urge all of our State and Federal Judges to attend. If you have any suggestions for the meeting contact Elbert Dorn or Mark Phillips.

Your Amicus Curiae Committee has already been hard at work. Under Gray Culbreath's guidance, the committee has already filed one brief on an issue involving punitive damages another brief is in process on a Medicare/collateral source issue. If you are interested in becoming involved with our efforts in this area please contact Gray.

The publication you are reading is published four times per year and John Massalon is our editor. If you have recent Orders of interest or other material worthy of publication please send them to John for his consideration. Glenn Elliott has taken over the Internet Committee and if you have suggestions on what you would like to see on the Website or how it could be more beneficial please contact Glenn.

Our substantive Law Committees are in the process of organizing under David Rheney's leadership. He will be contacting members and asking them to chair the various committees.

These groups will be instrumental in developing the breakout sessions at our annual meeting program and will be the conduit for providing new communication between members on our website. If you are interested in serving, please let David know.

The Executive Committee conducted a long-range planning meeting in January. Hopefully, there will be another meeting later in the year in which we will ask for greater member participation in setting our course for the future. Many items were discussed and there were a lot of good ideas to consider for the future. A few of them include the development of a Public Relations/Marketing Committee, consider the establishment of a PAC, expanding our membership to include other types of practice and obtain greater participation of our Past Presidents.

I cannot elaborate in this brief article on everything your association does for you. Suffice it to say that I am proud to be a member of this association and to work with the many fine lawyers who give their time and effort to our organization. Without their help, our organization would not be the success it is. I URGE YOU TO GET INVOLVED AND MAKE IT A GREATER SUCCESS!

Recent Order

In the United States District Court
For the District of South Carolina
Columbia Division
C.A. No. 3:99-3999-19

ALPHONSO BAKER, Plaintiff,
vs.
McLANE/CAROLINA, INC. and
R. J, KING CONSTRUCTION, LTD., Defendants,
McLANE/CAROLINA INC., Cross-claimant,
vs.
R. J. KING CONSTRUCTION, LTD.,
Cross-defendant.

ORDER

This case is before the Court on the cross-claim for indemnity by McLane/Carolina, Inc. ("McLane") against R. J. King Construction, Ltd. ("King").

I. Procedural Posture

On August 14, 2000, the jury trial of the underlying personal injury action commenced. After all the parties rested, the plaintiff agreed to settle his claims against McLane and King, leaving only McLane's indemnity claim against King to be decided. McLane and King agreed that the Court, rather than the jury, should decide the indemnity claimed based on evidence introduced at the jury trial and some supplemental filing submitted by McLane and King, which the Court has now reviewed.

II. Background

In January 1996, McLane, a grocery distributor, hired King to build a distribution facility. The contract between McLane and King includes the following indemnity provision:

> To the fullest extent permitted by law, [King] shall indemnify and hold harmless [McLane]...from and against claims, damages, losses, and expenses, including but not limited to attorneys' fees, arising out of resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury..., but only tot he extent caused in whole or in part by negligent acts or omission of [King]..., regardless of whether or not such claim, damage, loss or expenses is caused in part by [McLane].

By January 1997, King had nearly completed construction on the McLane facility. On January 17, Sam Sanders, ("Sanders"), a King employee, was driving a tugger, a forklift-like machine, on the construction site as he checked for roof leaks. McLane owned the tugger. Tuggers are typically used to move freight.

On the same date, Alphonso Baker ("Baker"), the plaintiff in the underlying action, delivered freight to the McLane facility. Baker is a tractor trailer driver who, on the day in question, was also responsible for unloading freight from his trailer.

Baker proceeded to unload several boxes and stacked them in two parallel lines at the back of his trailer. While unloading a pallet, Baker stepped out from between the two stacks of boxes into an aisle. As he stepped into the aisle, the tugger driven by Sanders struck him.

Baker filed suit against King and McLane. He claimed that King was liable because Sanders, its employee, negligently operated the tugger. Baker claimed that McLane was liable because it failed to instruct Sanders how to operate the tugger safely. McLane cross-claimed against King seeking indemnity under the contract.

III. Discussion

In its cross-claim, McLane seeks judgment against King "for any amounts recovered by [Baker] against McLane...and for attorney fees and costs in defending this action..." The Court is not privy to the terms of settlement reached by the parties. In its Memorandum in Support of Damages, McLane does not seek recovery for any settlement it paid Baker. As such, the Court concludes that McLane did not pay Baker any damages, and this portion of McLane's original prayer for damages is moot.

In its most recent memorandum, McLane now seeks recovery for the attorney fees and expenses incurred in defending itself against Baker's claims and in enforcing its indemnity claim against King. In particular, it seeks $36,901.25 in attorneys fees and $10,378.40 in expenses for a total of $47,279.65.

King makes two arguments in response. First, King contends that it should not be required to indemnify McLane for any fees and expenses, because McLane's negligence caused Baker's injuries. Because McLane was negligent, the indemnity provision, which purports to relieve McLane from the consequences of its own negligence, must be strictly construed. *See Federal Pacific Electric v. Carolina Production Enterprises*, 378 S.E.2d 56 (S.C. Ct. App. 1989).

It is unclear whether King is arguing that McLane should be solely liable for Baker's injuries.[1] If so, King's argument is unavailing. The Court heard the testimony at trial and has reviewed the deposition testimony entered into the record. This Court finds by

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Recent Order

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a preponderance of the evidence, that Sander's negligent operation of the tugger accounts for more than 50% of the fault for Baker's injuries.[2]

Having found that King at least partially caused Baker's injuries, the Court must now determine whether McLane is entitled to indemnity for the fees and expenses it incurred defending itself against Baker's claim.[3] There are three prongs which must be met before McLane's right to indemnity is triggered under the contract. First, the particular claim in question must arise out of or result from King's performance of the construction contract.[4] Baker's claim against McLane obviously arose out of King's work, performed by Sanders, at the McLane facility.

As for the second prong, the particular claim in question must be attributable to bodily injury.[5] Baker's claim is clearly attributable to his personal injury.

As for the third prong, McLane is entitled to indemnity from King only if Baker's injuries were caused in whole or in part by King's negligence.[6] This prong is easily met. The Court has already found that King was primarily at fault for Baker's injuries.[7]

McLane meets all three prongs, and the indemnify provision is triggered. King must indemnify McLane for all the fees and expenses it incurred in defending itself against Baker's claims.

For its second argument, King contends that it should not be required to indemnify McLane for fees and expenses associated with pursuing its indemnity cross-claim. King claims that the indemnity provision covers, at most, only tort claims by third parties and not the indemnity claim by McLane as indemnitee against King as indemnitor.

King cites *Smoak v. Carpenter Enterprises*, 460 S.E.2d 381 (S.C. 1995), in support. *Smoak* involved a breach of contract between a buyer and a seller of a business. The plaintiff seller claimed that the buyer had failed to make all the agreed monthly payments to purchase the business.

The purchase contract happened to also contain an indemnity clause. The Supreme Court did not recite the exact words used in the indemnity provision. Instead, in summary fashion the Supreme Court merely said that the provision was limited to reimbursement for damages and costs incurred in third party actions. *Id.* at 383.

Smoak does not support King's position. Unlike the indemnity provision in *Smoak*, the language of the instant indemnity provision is not expressly limited to third party actions.

Nevertheless, the instant indemnity provision is not limitless. Before the Court may award any recovery to McLane relating to pursuing its indemnity claim, it must ensure that it is allowed by the contract adopted by the parties.

The indemnity agreement allows fees and expenses "provided that such claim, damage, loss or expense is attributable to bodily injury...." McLane's indemnity claim is not attributable to bodily injury. Instead, it is an action based solely on the covenant made by King to provide indemnity. Because the indemnity claim is not attributable to bodily injury, McLane may not recover any of the fees and expenses it incurred seeking to enforce King to provide indemnification.

IT IS THEREFORE ORDERED this the 7th day of December, 2000, at Columbia, South Carolina, that the Court finds in favor of McLane as to its cross-claim seeking recovery of all fees and expenses incurred in its defense of the Baker claim. McLane shall file its itemization of all such fees and expenses within ten days from the entry of this Order. King shall have ten days thereafter to respond.[8] The Court also finds in favor of King as to McLane's cross-claim for all fees and expenses in bringing its indemnity claim against King.

DENNIS W. SHEDD
UNITED STATES DISTRICT JUDGE

Footnotes

1 Frankly, King's argument is not entirely clear. Originally, King seems to argue that it should not be required to indemnify, because "cross claimants are jointly and severally liable for nay negligence to the plaintiff..." King then appears to argue that McLane is not entitled to indemnification "for its own negligence." Whether King is arguing that McLane was solely or partially liable for Baker's injuries does not matter. Under the Court's reading of the indemnity provision, King must indemnify McLane because King is at least partially at fault for Baker's injuries.

2 The Court need not specify the exact percentages of fault among the parties. Under the Court's interpretation of the indemnity provision, King would be required to indemnify McLane even if McLane was 99% at fault and King was 1% at fault.

3 McLane actually seeks indemnity for two claims: expenses and fees incurred in defending itself against Baker's claim and expenses and fees it incurred in litigating its indemnity claim against King. The Court will address the latter claim in its discussion of King's second argument.

4 "[King] shall indemnify and hold harmless [McLane]... from and against claims, damages, losses and expenses...arising out of or resulting from performance of the Work..." The Court presumes the "Work" is a defined term under the contract. The Court, however, does not have a copy of the contract. Based on how both parties briefed the cross-claim, the Court assumes that the "Work" means the McLane facility construction project.

5 "[King] shall indemnify...[McLane]...provided that such claim...is attributable to bodily injury..."

6 "[King] shall indemnify...[McLane]...against claims...provided that such claim...is attributable to bodily injury...but only to the extent caused in whole or in part by negligent acts or omissions of [King].

7 The indemnity provision requires King to indemnify McLane, even if McLane is also partially responsible for the underlying personal injury. It states that McLane is entitled to indemnity "regardless of whether or not such claim, damage, loss, or expense is caused *in part* by [McLane]. (emphasis added). King could avoid indemnifying McLane only if McLane was *solely* at fault for Baker's injuries or if King was not at fault, neither of which applies in this case.

8 King's response shall be limited to whether any of the itemized fees and expenses were legitimately incurred in defense of the Baker claim. McLane previously filed documents supporting the hourly rates charged. King did not object to these rates, and it shall not be allowed to raise any such objection now.

Evidence Matters

E. Warren Moise
Grimball and Cabaniss, L.L.C.

Trials, Trial Lawyers, Justices, and Judges of the Antebellum Era

Trial lawyers today often are so caught up in our world of e-mails, internet research, faxes, copiers, and cellular telephones that we seldom have time to think of the "old days" only a few decades ago when none of these innovations existed. But let your mind drift back 140 years ago to a time when James Buchanan was President, William H. Gist was Governor, and every legislator in Congress was reputed to carry one or two revolvers and a knife. Imagine a time when the entire federal judiciary in South Carolina consisted of a single man, when bull whippings were done in front of courthouses, and when thousands of spectators sometimes attended public hangings. Picture yourself walking across a dusty dirt square to a trial past a man locked in a pillory.

Although this column has absolutely nothing to do with evidence, it does take a look at trial practice many, many years ago. Those of you who have a sense of history might enjoy a trip back in time to courtrooms and the practice of law 140 years past.

The United States Court for the District of South Carolina

In 1787 South Carolina's delegates at the Constitutional Convention in Philadelphia had voted unanimously against creation of *any* federal trial courts.[1] However, once our delegates conceded this minor point, the United States Court for the District of South Carolina was created and functioned quite well. Andrew Gordon Magrath, a native Charlestonian educated at Harvard Law School, was the sole federal district judge in this State in the years preceding the War Between the States. Terms of court were held at his pleasure, usually in Charleston. United States Attorney James Conner was the voice of the Government. Judging by his writings, his employment as the United States Attorney was a part-time job. The United States Supreme Court was far away and seldom a factor in this State's courts. It had no appellate jurisdiction in criminal trials.

The main federal courthouse, now unmarked and forgotten by Charlestonians, was at 23 Chalmers Street in a rented two-story building. Court proceedings often had to be stopped because the jurors could not hear the judge, lawyers, or witnesses above the heavily loaded wagons clattering outside on the cobblestone street.[2] On warm days, the scent from the stables next door no doubt captured the jurors' attention more so than counsels' arguments. The jurors complained that the "[j]ury-rooms [were] destitute of every convenience" and that accommodations for the court officers were unsuitable.[3] It is unknown where the United States Court met in Columbia and Greenville. However, the Richland and Greenville District Courthouses are likely the most sites, neither of which exists today.

Shortly before secession, Judge Magrath closed the federal Temple of Justice (actually South Carolina's first act of disunion with the United States Government), and when it reopened the next year as the Confederate States Court for the District of South Carolina, he was the presiding judge. He later was elected Governor and was imprisoned when the federal troops entered the State. In his later years, he resumed his trial practice and was elected President of the South Carolina Bar. James Conner returned from the war with an amputated leg, and eventually became South Carolina Attorney General.

The South Carolina State Courts

The South Carolina Court of Appeals was the primary appellate court in this State in 1860, although the Court of Errors (comprised of all the appellate and trial judges) could be convened to determine constitutional questions. Law and equity courts were entirely separate, with different judges (equity jurists were called chancellors) and different court terms. A lawyer appearing in equity court was referred to as a "solicitor," but he was called an "attorney" when in a law court.

Bar exams were short and sweet, done before the justices inside the court of appeals' courtroom and taking only a few hours. The bar examinations consisted of: (A) *Law Courts*: (i) Constitutional Law; (ii) Contracts and Evidence; and (iii) Pleading, Practice and Criminal Law; and (B) *Equity Courts*: (i) Jurisdiction of the Court; and (ii) Pleading and Practice.[4] James Conner's *The History of a Suit at Law*[5] was an important manual for law students in this State, many of whom had read the law instead of

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formally attending law school.

But everyone was not allowed to enter the Bar. It was exclusively white and male, and there certainly was no equal protection of the laws. Women could not even appear in court as parties except through a guardian or "next friend," much less as lawyers. Neither women nor blacks were allowed to be jurors. In fact, blacks were *presumed* to be slaves, and the burden was on them to prove otherwise in a court of law.[6] If an unaccompanied black man entered the state by land or by sea, he was to be arrested and jailed immediately.[7]

The Justices and Judges of the State Courts

Not a great deal has changed as far as the judiciary is concerned. They were sometimes cranky and had their quirks, but just as today, the jurists were able, well-read, conscientious, and respected by the Bar. And just as today, many first served in the General Assembly before election to the Bench.

Presiding over the South Carolina Court of Appeals in its December 1860 term was the venerable Chief Justice John Belton O'Neall. O'Neall had been speaker of the house and major-general in the state militia before entering the judiciary. He apparently had become wealthy, both through the practice of law and by inheritance. In the latter years of his life, O'Neall summered at his farm on the South Tyger River near Greenville and wintered on his plantation in the Newberry District. He was a devout Baptist who preached fervently against the evils of strong drink. Justice O'Neall was 67 years old in 1860, and the thirty year veteran of South Carolina's appellate courts had recently published *Biographical Sketches of the Bench and Bar of South Carolina*,[8] still a milestone in the State's legal history. But in his earlier days as a trial judge, O'Neall could be a trial lawyer's nightmare. No one, including the jury, ever "doubted which side he took in the trial of a case."[9] Benjamin F. Perry knew the sting of O'Neall's summary courtroom manner all too well. At the beginning of one trial, Perry rose and gave his opening statement to the jury. No sooner had he finished than Judge O'Neall retorted, "'If that is your case, it is not worth while to introduce any testimony[.] I charge the jury to find against you.'"[10]

Tall, dignified, and extremely able Associate Justice Job Johnstone sat beside O'Neall on the bench. He had been born in the Chester District on June 6, 1793. Like O'Neall, he had become wealthy in the practice of law. His law teacher and law partner had been none other than Justice O'Neall himself. However, after an acrimonious breakup of the partnership, they could be less than cordial toward one another. In his early years on the equity circuit, Chancellor Johnstone's greatest horror had been bedbugs, and he was known to stay awake until well past midnight in upstate hotels doing battle with the creatures.[11] The jurist also was nervous about runaway horses, and he always had the lawyers ride ahead of him in case they lost control of their mounts. Nor did he like traveling by rail, thinking trains inherently unsafe.

Associate Justice Francis Hugh Wardlaw had been an ardent states' righter for decades, unlike his brethren O'Neall who was a strong Unionist. He would become actively involved in the Secession Convention where he was on the committee to draft a summary of causes to justify severing ties with the United States. Although some sources believe South Carolina's Ordinance of Secession to have been authored by Justice Wardlaw, secession soon would take its toll upon him and his family. A little over six months after he signed the Ordinance of Secession, Justice Wardlaw's son Thomas would die from the explosion of a Confederate cannon at Fort Moultrie.[12]

South Carolina had a strong and well-respected trial bench. In the years immediately preceding and during the Civil War, the law judges were Joseph N. Whitner, Thomas W. Glover, Robert Munro, and David L. Wardlaw. The equity chancellors at the beginning of the war were Benjamin F. Dunkin, John A. Inglis, and James P. Carroll.

They also were colorful characters. For example, Judge David Lewis Wardlaw's sensitivity to pain and suffering was legendary in those days. Once when presiding in Anderson Court House, the judge listened to a lawyer question a medical expert in minute detail about a painful disease and wound. After hearing the expert for a while, the judge fainted dead away on the bench. Presumably the defendant settled. Judge Joseph Newton Whitner (a founder of the Town of Anderson) was a kindly gentleman in his 60s in 1860. His face was dominated by a generous proboscis behind which lay large, pensive eyes. Hot-blooded and fiery in his youth (as a schoolboy he almost shot and killed a sheriff who intended to arrest him over a minor infraction), he was a trial lawyer's dream in his later years, kind and courteous to all before him. Space does not allow vignettes of all of them, but the trial bench was a truly remarkable group.

Trial Practice in the Middle of the 1800s

The practice of law in 1860 was far different than the hurried, computerized business of today. Simply getting from one district courthouse to another was a major trial in itself. When steady rains fell, flooding could temporarily seal off towns from the rest of the State. Travel between the larger cities such as Columbia and Greenville could be done by rail. Judges and attorneys traveling from Anderson Court House to Greenville might do so by stagecoach;[13] however, the judges and lawyers often simply traveled together on horseback in small parties, literally "riding the circuit." Trials and court matters extending past sundown had to be done by candlelight or gaslight. According to the *Rules of the Courts of General Sessions and Common Pleas[, and the] Court of Equity* [14] published in 1836, lawyers were required to be dressed in black gowns and coats. The sheriff had to wear a black coat, military hat, and sword.[15] Lawsuits were begun by posting a "rule to plead" on the courthouse door.

There were both benefits and detriments to riding the circuit. On a pleasant day, the trial lawyers and judges might sometimes delay their journey to the next courthouse by pausing at a nice spot in the countryside for lunch, claret, and good conversation.[16] For example, one day a trial lawyer recalled riding the equity circuit from Pickens Court House to Greenville with Chancellor Benjamin Faneuil Dunkin. He and Chancellor Dunkin decided to take a break and enjoy a drink beside a pleasant brook. After relaxing for an hour or two (and finishing the bottle of wine) in this fashion, the judge observed, "'I do not know . . . that I am a better man than when we first came to this spring, but I *feel* a great deal better.'"[17]

Because the circuit judges and out-of-town attorneys often could not return to their homes during trials, they would rent rooms at local inns such as Colonel Maybin's hotel in Columbia. After-hours socializing between the lawyers and judges probably led to a closely knit bar.

On the other hand, travel on the frontier circuit had its pitfalls also. Lawyers with cases up for trial had to ride through the rain, sleet, or cold, and attorneys sometimes developed colds and illness from exposure.[18] There was one major concession to the seasons and the weather: because South Carolina was an agricultural state, court was held less frequently (or not at all) during the summer growing season. Another reason for this custom was the heat. Even as late as the 1950s, courtrooms in this State generally had no air conditioning.[19]

On the circuit, there was great danger that horses would throw their riders after tripping over fallen trees and limbs across the road, especially at night. When the horses injured themselves, the lawyers had to walk. Runaway horses and kicks from the carriage teams were a constant danger. One attorney traveling from Greenville to Laurens Court House broke his wrist when he slipped on a rock while crossing a stream.

The bumpy roads were uncomfortable while traveling by stagecoach and sometimes presented other problems: Judge Frost, traveling between Newberry and Laurens, had his clothes trunk fly off the rear of a stagecoach. Unfortunately he did not discover the loss until at his destination. The judge was forced to hold court in Laurens for a week in a shabby suit and a single shirt which he washed daily.

Courtroom trials in the mid-1800s could be as heated and unpredictable as those of today. Unlike contemporary trials, however, one element of danger lurked beneath the surface - dueling. An overly zealous advocate who caused another lawyer to feel that his honor had been impugned might find himself challenged to a duel by his opponent. In fact, duels were considered by some to be rites of passage for young men in South Carolina.

Few citizens today take notice of a term of court; in the largest counties, terms run almost continuously year around. In 1860 however, court weeks, especially in the smaller towns, were major events. Traveling salesmen arrived in town to hawk their merchandise. Circuit judges arriving in towns sometimes were escorted to the courthouse by the district sheriff.

One description of the nineteenth-century Darlington District Courthouse shows that it had a sawdust-covered floor and a gallery where boys ate peanuts. Only officers of the court and important local citizens were permitted in the bar. The lawyers' desks were arranged in a circular form, and the sheriff escorted the circuit judge up to the bench. In front of the red, brick courthouse with its circular stairs was a horse trough and a well for drinking.[20]

Justice was swift, up close, and personal. Take Warsaw Sanders for instance. He was convicted of murder in the 1860s, and his appeal was denied. Sanders was brought into the South Carolina Court of Appeals' courtroom, and Justice Wardlaw read him his fate: "[T]hat you be taken to the place whence you were brought . . . and that you be taken to the place of public Execution for the Richland District, and there be hanged by the neck until your body be dead, and may God have mercy on your Soul!"[21] A few days later, Warsaw Sanders was swinging from a tree.[22]

In Conclusion

Times have changed, in many ways for the better. Equal protection under the law, then merely hollow

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words for many South Carolinians, is now closer to a reality. The courts are open to all Americans, and the rules are the same for all of us. Lawyers today need only complain about jammed copy machines rather than sickness from riding a horse down a dark forest path on a rainy night. However, the mutual respect between the judges and the lawyers, the thrill of the jury trial, and the emotion of the impassioned closing argument are things that have never, and will never, change.

Footnotes

1 James Madison, *Notes of Debates in the Federal Convention of 1787* at 71-72 (Adrienne Koch ed. 1987).

2 *Charleston Daily Courier*, Oct. 18, 1859, at 1.

3 *Charleston Daily Courier*, Oct. 14, 1859 at 3; *id.* Oct. 18, 1859, at 1.

4 These were the law and equity bar examinations for November 28, 1865. The bar examinations held four years earlier were identical.

5 James Conner, *The History of a Suit at Law* (2d edition 1860).

6 John Belton O'Neall, *Negro Law of South Carolina* Section 21, at 8 (1848). A copy of this publication may be found at the South Carolinian Library. The nineteenth-century rule of law provided that whether a person was mulatto or white was "a question for the . . . jury." *See id.* at 5, Section 6.

7 This did not apply to sailors aboard ships flying flags of the United States Navy or foreign navies friendly to the United States.

8 I & II John Belton O'Neall, *Biographical Sketches of the Bench and Bar of South Carolina* (reprinted by The Reprint Co., Spartanburg, S.C. 1975)(1859). *See generally* J. Carwile, *Reminiscences of Newberry* 165-67 (reprinted by the R.L. Bryan Co., Columbia, S.C. 1970)(1890) (discussing Justice O'Neall); I Benjamin F. Perry, *Reminiscences of Public Men* 201-07 (1883)[hereinafter I Perry *Reminiscences*](recollections of O'Neall).

9 I Perry, *Reminiscences, supra* note 8, at 203.

10 *Id.*

11 Benjamin F. Perry, *Reminiscences of Public Men With Speeches and Addresses* 132-33 (2d series Shannon & Co., Greenville, S.C. 1889)[hereinafter II Perry, *Reminiscences*].

12 Justice Wardlaw died at the home of Major Theodore Stark in Columbia on May 29, 1861 while still a member of the Secession Convention. John May & Joan Faunt, *South Carolina Secedes* 224 (U. S.C. Press, Columbia 1960)[hereinafter *South Carolina Secedes*].

13 *Letters of Gov. Benjamin Franklin Perry to His Wife* 24 (2d series, Elizabeth F. Perry, ed., Shannon & Co., Greenville, S.C. 1890).

14 *Rules of the Courts of General Sessions and Common Pleas, of the Court of Equity, and of the Court of Appeals of South Carolina* (W. Riley publisher 1836). It is unknown whether these rules were still in use by 1860; however, they had been compiled in 1814, probably as a "codification" of prior practice rules.

15 *Id.* at Rs. XIII-IV (circuit court practice rules).

16 Perry, *Reminiscences, supra* note 8, at 210-11.

17 Id. at 211 (emphasis added).

18 Perry often wrote to his wife of colds and other ills suffered from riding the circuit. *See, e.g., id.* at 31.

19 Bruce Littlejohn, *Littlejohn's Half Century at the Bench and Bar* (1936-1986) 60 (S.C. Bar Foundation, Columbia, S.C. 1987).

20 W.A. Brunson, *Glimpses of Old Darlington, in Darlingtonia* 23 (Eliza Cowan Ervin & Horace Fraser Rudisill eds., Darlington County Historical Soc'y, Darlington, S.C. 1964).

21 *S.C. Court of Appeals Minute Book* (1864).

22 The favorite spot for hangings in Columbia was Potter's Field. Columbia Sesqui-Centennial Comm'n, *Columbia: Capitol City of South Carolina* (Helen Kohn Hennig ed., reprint The State-Record Co., Columbia, S.C. 1966)(1936).

2001 Hemphill Award

CALL FOR NOMINATIONS

CRITERIA

1. Eligibility.

(a) The candidate must be a member of the South Carolina Bar and a member or former member of the South Carolina Defense Trial Attorneys' Association. He or she may be in active practice, retired from active practice or a member of the judiciary.

(b) The current officers and members of the South Carolina Defense Trial Attorneys' Association Executive Committee at the time the award is made are not eligible.

2. Criteria/Basis for Selection

(a) The award should be based upon distinguished and meritorious service to legal profession and/or the public, and to one who has been instrumental in developing, implementing and carrying through the objectives of the South Carolina Defense Trial Attorneys' Association. The candidate should also be one who is or has been an active, contributing member of the Association.

(b) The distinguished service for which the candidate is considered may consist either of particular conduct or service over a period of time.

(c) The candidate may be honored for recent conduct or for service in the past.

3. Procedure

(a) Nominations for the award should be made by letter, with any supporting documentation and explanations attached. A nomination should include the name and address of the individual, a description of his or her activites in the Association, the profession and the community and the reasons why the nominee is being put forward. Nominations should be directed to the President of the Association prior to the joint meeting each year.

(b) The Hemphill Award Committee shall screen the nominees and submit its recommendation to the Executive Committee of the Association at its meeting immediately preceding the Annual Meeting of the Association. "The Hemphill Award Committee shall be comprised of the five (5) officers of the Association, and chaired by the immediate Past President."

(c) The Hemphill Award shall be made in the sole discretion of the Executive Committee, when that Committee deems an award appropriate, but not more frequently than annually.

4. Form of Award

(a) The recipient shall receive an appropriately engraved plaque commemorating the award at the annual meeting.

(b) The family of the late beloved Robert W. Hemphill; in the person of Harriet Hemphill Crowder of Mt. Pleasant has consented to having the award named for the late United States District Judge, Robert W. Hemphill. When possible, the Association shall have a member of the Hemphill family present whenever this award is presented.

PLEASE SUBMIT NOMINATIONS BY JULY 16, 2001 TO

SCDTAA HEADQUARTERS • 3008 MILLWOOD AVE. • COLUMBIA, SC 29205 • OR FAX (803) 765-0860

I NOMINATE _____

OF THE FIRM OF _____

_____

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CITY and STATE _____

BECAUSE _____

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(ATTACH A SHEET OF PAPER IF NECESSARY)

UPCOMING SCDTAA EVENTS

This Summer
Trial Academy
Greenville, SC

July 26 - 28, 2001
Joint Meeting
The Grove Park Inn
Asheville, NC

November 8 - 11, 2001
Annual Meeting
The Cloister
Sea Island, GA

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

Visit your Website at: http://www.scdtaa.com

Suggestions on what you would like to see on the Website or how it could be more beneficial are welcome and appreciated.

South Carolina Defense Trial Attorneys' Association
3008 Millwood Avenue
Columbia, SC 29205

Address Service Requested