THE SCRIVENER

Opinions That Made A Difference, Part 2

By Scott Moïse

The last *Scrivener* column covered some significant opinions that have made a lasting difference in South Carolina's history. This column covers more decisions, all suggested by readers who have seen the effect of these opinions in their own practices and lives. I have more cases than *SC Lawyer* has space for, so I will return to this to this survey in future columns. Please keep your ideas coming.

The case of the two-judge rule, the scope of appellate review, and the girl who hated pop quizzes. ***Townes Associates, Ltd. v. City of Greenville***, 266 S.C. 81, 221 S.E.2d 773 (1976).

A judicial clerk suggested that the *Townes* case should be included as one of South Carolina's cases that made a difference because it solved the mystery of standards of state court appellate review and created the two-judge rule. The case is important to me personally for another reason. When I was a 3L at the University of South Carolina School of Law, several of my friends and I took a class called Advanced Legal Writing, the same class that I now teach in a different form as an adjunct faculty member. The late Julius B. "Bubba" Ness taught this class, and he had a five-question "pop quiz" every week. The tests were never announced, but we had them every single Thursday of the semester, so it did not take a genius to figure out that the test was coming. Almost every weekly test had a question based on the *Townes* decision, which Justice Ness said was THE most important decision we law students should know and understand because it set forth the standard of appellate review for all civil cases. And, of course, he was right, but I could not seem to force myself to memorize those *Townes* rules. As a result . . . . Well, what happened in Advanced Legal Writing, stays in Advanced Legal Writing.

Although I just assumed that Justice Ness wrote the opinion, it was actually written by Justice C. Bruce Littlejohn (a fact that I would have known had I just read the opinion carefully like we were asked to do). Justice Littlejohn had a long and storied career as an Army veteran, legislator, trial judge, Associate and Chief Justice on the S.C. Supreme Court, and active judge on the S.C. Court of Appeals after his retirement. He wrote *Laugh With The Judge*, a book of anecdotes from his career on the bench that was so funny that my non-lawyer mother gave it to my non-lawyer father as an anniversary present, and it now sits on my office shelf.

Like many of the opinions that have had a lasting impact on our jurisprudence, the underlying case decision (in this case, whether the City of Greenville had breached two construction contracts) was not what made it lastingly important. Instead, *Townes*' importance is that it simply and clearly stated what had formerly been an enigma to appellate lawyers, who frequently misunderstood and misapplied the standards of review for appellate courts:

1. Action at law, tried by jury: The appellate court's jurisdiction extends only to correcting errors of law, and the jury's factual findings will not be disturbed unless a review of the record discloses that there is no evidence that reasonably supports the findings.

2. Action at law, tried without jury: The judge's findings of fact will not be disturbed on appeal unless found to be without evidence that reasonably supports the findings (in other words, the judge's findings are the equivalent of a jury's findings in an action at law). The rule is the same whether the judge's findings are made with or without a reference.

3. Action in equity tried by a judge alone, tried without a reference: The appellate court has jurisdiction to find facts in accordance with its own views of the preponderance of the evidence. Note, however, that an appellate court still affords a degree of deference to the trial court because it was in the best position to judge the witnesses' credibility. *See In re Estate of Kay*, 423 S.C. 476, 480, 816 S.E.2d 542, 544–45 (2018).

4. Action in equity, master and judge concur (two-judge rule): The two-judge rule has been abrogated since *Townes*, which held that in an action in equity, tried first by the master or a special referee and concurred in by the judge, the findings of fact will not be disturbed on appeal unless found to be without evidentiary support or against the clear preponderance of the evidence. Since then, however, the supreme court has modified the two-judge rule to reflect the changed role of masters in equity and the circumstances of when the circuit court is sitting in a purely appellate capacity:

> Under the framework set out in *Townes*, prior to our master in equity system, when circuit judges referred matters to special referees or masters to

> make findings of fact, the limited scope of appellate review over factual findings concurred in by two judges may have been appropriate. However, we hold today that the two-judge rule has no applicability to cases wherein the circuit court, *sitting in a purely appellate capacity*, as here, affirms the findings of a lower tribunal. **Instead, the applicable standard of review is the same as in other equity matters, and the appellate courts of this state may take their own view of the preponderance of the evidence.**

Estate of Kay, 423 S.C. at 481, 816 S.E.2d at 545 (emphasis added).

5. Action in equity, master and judge disagree: In an action in equity where the master, or the special referee, is in disagreement with the judge on a factual finding, the appellate court may make findings in accordance with its own views of the preponderance or greater weight of the evidence, the same as if the case had been tried by the judge without reference to the matter or a referee.

One last thing I would like to say is that after the *Estate of Kay* case, I **might** have gotten more correct answers on Justice Ness's pop quizzes. Maybe I was just ahead of my time.

The case of the king who did wrong.
McCall by Andrews v. Batson, 285 S.C. 243, 329 S.E.2d 741 (1985) (superseded by statute, South Carolina Tort Claims Act, no. 463, 1986 S.C. Acts 3001).

In *McCall*, the plaintiffs sued the School District of Greenville, S.C. (yeah, that Greenville, again) and one of its employees, but the long-standing doctrine of sovereign immunity protected the defendants from tort liability. The sovereign immunity doctrine was introduced in 1788 by an English court when a County employee sued for injuries caused by the County's negligence. The English court dismissed the case on the basis that "[t]he king can do no wrong." (I am not kidding.) *See Russell v. Men of Devon*, 2 T.R. 667, 100 Eng. Rep. 359 ("[I]t is better that an individual should sustain an injury than the public suffer an inconvenience.") In other words, "Pip-pip, Gov'na, we kings cannot be bothered with your little problems." The sovereign immunity doctrine—which was similar to the governmental policies that gave rise to the Revolutionary War—nevertheless crossed the ocean with the colonists and stayed around in South Carolina for almost two hundred years until it ran into Justice Bubba Ness.

Justice Ness authored the *McCall* decision that prospectively abolished the "antiquated" doctrine of sovereign immunity as it applied to the State and all local subdivisions, with some limited exceptions, for all cases filed after July, 1, 1986. Justice Ness believed in succinctness, and indeed he got sovereign immunity abolished in less than four pages, stating, "It is not necessary to laboriously analyze the doctrine and its inequities. Few principles of modern law have been so uniformly criticized." *Id.* at 246, 329 S.E.2d at 742. In fact, the appendix was longer than the opinion, as it listed 122 cases that were overruled to the extent that they held that an action could not be maintained against the State without its consent.

Although sovereign immunity was originally a court-created doctrine, the supreme court noted that it had previously addressed the issue several times and, almost 20 years prior to *McCall*, had expressly suggested that the change of doctrine should come from the legislature and urged the legislature to address the rule. *Id.* at 245, 329 S.E.2d at 742. Also, the court was critical of the legislative exceptions to the doctrine, which resulted in a "scattered patchwork" of the rule that lacked continuity, logic, or fairness. *Id.* Despite its obvious frustration with the legislative process on this issue, the court nevertheless continued to suggest that the legislature "take some action to prepare the state and local subdivisions of government for their new tort liability" and delayed implementation of the new court rule to allow the legislature to address any problems or hardships created by the new rule. *Id.* at 246, 329 S.E.2d at 742.

The South Carolina Legislature, in fact, thereafter pass the South Carolina Tort Claims Act, codifying *Batson*, and allowing a limited waiver of sovereign immunity but retaining the defense for discretionary acts of government officials and expressly excluding liability for punitive damages from its limited waiver of sovereign immunity. In fairness to the legislature, drafting the Tort Reform Act was well underway when *McCall* was issued. But don't cry for *McCall* because the court's work was not in vain. It pressed the legislature into considering the importance of addressing the sovereign immunity doctrine, and despite its legislative abrogation, this case continues to be relied upon and cited by courts today. *See, e.g.*, *Brown v. SC Dep't of Corr.*, No. 820CV01159-TMC-JDA, 2020 WL 3001787, at *3 (D.S.C. May 15, 2020), *report and recommendation adopted*, No. 8:20-CV-1159-TMC, 2020 WL 2994234 (D.S.C. June 4, 2020).

Finally, although Justice Ness did not see the need for laborious analysis of the sovereign immunity doctrine, Justice A. Lee Chandler believed that more discussion was appropriate for a decision of *McCall*'s magnitude, and his concurring opinion takes us on a journey beginning with the origin of the doctrine and continuing through the prevailing view of the doctrine, comparison of the doctrine versus stare decisis, the question of whether sovereign immunity is a legislative matter, and why it was no longer tenable. On behalf of us law nerds who love legal history, thank you, Justice Chandler.

The case of the long and winding road for the education of our state's children.
Abbeville County School District v. State, 410 S.C. 619, 767 S.E.2d 157 (2014), *amended*, 414 S.C. 166, 777 S.E.2d 547 (2015), *order superseded*, 415 S.C. 19, 780 S.E.2d 609 (2015), and *amended*, 415 S.C. 19, 780 S.E.2d

609 (2015).

After 21 years of litigation, the South Carolina Supreme Court ruled that the State of South Carolina had failed to meet its obligation to provide its school children the opportunity to receive a "minimally adequate education," the constitutional standard in the state. The plaintiffs were a group of rural school districts, students, and taxpayers who brought the suit against the State of South Carolina and other governmental officials, challenging the state's funding of South Carolina's public schools and the adequacy of education system overall.

A non-jury trial lasted 102 days in 2003–2004, with Carl B. Epps III and the late Stephen G. Morrison as lead attorneys representing the plaintiffs. Circuit Judge Thomas W. Cooper, Jr. ruled in December 2005 that students in South Carolina school districts were not receiving the constitutionally required educational opportunity, but only because of "the lack effective and adequately funded early childhood intervention programs designed to address the impact of poverty on their educational abilities and achievements." Judge Cooper found that other aspects of the public school system, including teacher quality and facilities, were minimally adequate.

Both sides appealed Judge Cooper's decision, and the South Carolina Supreme Court heard oral arguments in June 2008, but issued no decision at that time.

In November 2014, the supreme court issued its ruling, authored by Chief Justice Jean H. Toal, affirming the trial court's conclusion that the State had failed to meet its constitutional obligation to the students in the plaintiff school districts and found the entire public education system to be constitutionally lacking. Although the court rejected the defendants' argument that the issues in this lawsuit were matters of legislative policy and prerogative, the court declined to dictate the solution to the constitutional shortcomings. Instead, the court instructed the parties to work together to create and "present a plan to address the constitutional violation announced today."

After the decision was rendered in 2014, the South Carolina legislature examined the educational shortcomings identified in the court's opinion in anticipation of passing remedial legislation. Then-Governor Nikki Haley commenced an independent examination of the educational failures. In addition, both the House and the Senate began work on their remedial programs and announced that supporting legislation would be forthcoming. Since that time, the supreme court has relinquished jurisdiction of the case, leaving it to the legislature to handle our state's educational system. The *Abbeville* case put South Carolina's educational system in the national spotlight and illuminated the lasting effect that educational funding, and the lack thereof, has on our state's poorest communities. The case is particularly relevant today, during the coronavirus pandemic, when so many children have missed out on school altogether for months this year because they had no access to computers in their homes for remote learning.

The case of the marriage that wasn't. ***Stone v. Thompson***, 428 S.C. 79, 82, 833 S.E.2d 266, 267 (2019), *reh'g denied* (Oct. 16, 2019).

In what many domestic law practitioners call the most important South Carolina appellate opinion ever issued in their practice area, Justice Kay G. Hearn, a former family law practitioner, did not waste time getting to the monumental result of the court's decision:

> Our review in this case has prompted us to take stock of common-law marriage as a whole in South Carolina. We have concluded the institution's foundations have eroded with the passage of time, and the outcomes it produces are unpredictable and often convoluted. Accordingly, we believe the time has come to join the overwhelming national trend and abolish it.

Id. at 82, 833 S.E.2d at 267. After almost 200 years of recognizing marriages that were made without benefit of a license and ceremony, South Carolina left the small group of 11 remaining states in the country that still recognized common-law marriages. Justice Hearn's opinion detailed how the court got to this point, beginning with "informal marriage" recognized in Europe prior to the Reformation, which then migrated to the United States through colonization. The reason for allowing common-law marriages back then was based mostly on logistics—procuring officiants to perform marriage was difficult because America was sparsely populated, and travel was onerous—with other reasons being legitimizing "subversive relationships and the children from them, as well as directing women to their family, not the public, for financial support." *Id.* at 83, 833 S.E.2d at 268. We've come a long way, baby.

In one of the earliest cases addressing common-law marriage in South Carolina, the Court of Appeals of Law and Equity of South Carolina held that marriage was a contract that could be oral or written:

> Marriage, with us, so far as the law is concerned, has ever been regarded as a mere civil contract. Our law prescribes no ceremony. It requires nothing but the agreement of the parties, with an intention that that agreement shall, per se, constitute the marriage. They may express the agreement by parol, they may signify it by whatever ceremony their whim, or their taste, or their religious belief, may select: it is the agreement itself, and not the form in which it is couched, which constitutes the contract. The words used, or the ceremony performed, are mere evidence of a present intention and agreement of the parties.

Fryer v. Fryer, 9 S.C. Eq. 85, 92 (S.C. App. L. & Eq. 1832). The *Fryer* court acknowledged a major problem with the unwritten marriage contract, which is the same problem that was facing the *Stone* court hundreds of years later: proving the existence of the contract.

> The contract of marriage, when completely entered into, is a fact. Like every other fact, it is susceptible of an infinite variety of proof. It may be proved by those who witnessed it when it took place. It may be proved by the subsequent declarations or acknowledgements of the parties. It may be evidenced by their conduct, and the attitude they maintain towards each other and the world. But there is a clear distinction between the fact, itself, of marriage, and the evidence of that fact.

Id. In 2019, the problem of proof had not abated, and the logistical and social reasons behind common law marriage had gone the way of the horse and buggy. The court noted that today, the "paternalistic motivations" for common law marriage no longer outweigh the offenses to public policy engendered by the doctrine. *Id.* First, single women without children are no longer dependent on a husband to survive financially. Also, women with children now have access to child support, and the children's inheritance rights are not dependent on the parents' marital status. *Id.* at 268–69, 833 S.E.2d at 84–85. Further, in general, society no longer conditions acceptance upon marital status or legitimacy of children, and non-marital cohabitation is common and increasing. *Id.* at 269, 833 S.E.2d at 85. Although the right to marry is a fundamental right, the right to remain unmarried is equally important, and a person should not enter into marriage accidentally. Finally, as evidenced by the many cases that come before the courts on this issue, the court noted that common-law marriage requirements remain a mystery to most people. *Id.* And with that, the court abolished this doctrine, to be applied prospectively, ruling that no individual may enter into a common-law marriage in South Carolina after the date of the opinion, July 24, 2019.

What about the underlying case in which the putative husband alleged the existence of a common-law marriage and sought divorce? The Supreme Court—illustrating the perils and mystery of entering into a common-law marriage—held that the evidence was insufficient to establish that the marriage existed. In the future, except for common-law marriages that were in existence before the *Stone* opinion, the parties and the courts will no longer need to contend with the uncertainty of whether marriages existed without benefit of a license.

CALENDAR

July

All July meetings will be held by conference call and/or via virtual platforms.

1 **Dispute Resolution Section Council**

7 **SC Lawyer Editorial Board**

16 **Board of Governors**

17 **Consumer Law Section Meeting and Lunch and Learn**

Ethics Advisory Committee Meeting

Professional Responsibility Committee Meeting

24 **Alternative Dispute Resolution Commission**

August

7 **Practice and Procedure Committee, virtual meeting**

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