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## Miscellaneous

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## MISCELLANEOUS

CHARLES H. RANDALL, JR.\*

### *Creditors' Rights — Priority of United States*

In *United States v. State of South Carolina*, 227 S.C. 187, 87 S.E. 2d 577 (1955), the Supreme Court of South Carolina rendered an important decision concerning the priority of the federal government against other creditors for taxes owed by an insolvent taxpayer. This decision is discussed in this Survey under the heading "Taxation."

It is believed that the other cases assigned under the heading "Miscellaneous" warrant no more than passing mention.

### *Execution Against the Person*

The Supreme Court points out in *Baker Wholesale Co. v. Fleming*, 227 S.C. 312, 87 S.E. 2d 876 (1955), that statutes authorizing arrest in civil actions and as a means of execution of judgments must be strictly followed and strictly construed. Nonetheless, in the instant case body execution was held proper. Plaintiff brought an action in the Civil and Criminal Court of Charleston, alleging that defendant in a fiduciary capacity had received money from plaintiff which, with intent to cheat and defraud the plaintiff, he converted and embezzled. The complaint was verified by the oath of the president of plaintiff corporation, who swore that the allegations were true of his own knowledge. Judgment was obtained by default. Execution was returned *nulla bona* and plaintiff then applied to the clerk of the court for execution against the person of the defendant. The clerk refusing such execution, plaintiff brought mandamus in the Common Pleas court, Charleston County, to require the clerk to issue body execution. The writ was denied. On appeal, the Supreme Court reversed, holding that civil arrest would have been authorized at the commencement of the action<sup>1</sup> and therefore bodily execution is proper.<sup>2</sup> Arrest would lie under Section 10-802 of the Code of Laws of South Carolina, 1952, because the action is for property embezzled by a person in a fiduciary capacity. The verified complaint alleging personal knowledge of the facts was held to distinguish *Four County Agricultural Credit Corp. v. Matthews*, 199 S.C. 71, 18 S.E. 2d 604 (1942), where body execution was refused. In the latter case the facts bring-

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1. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-802 (1).

2. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-1705.

ing the case within Section 10-802 were stated on information and belief, and the grounds for such belief were not stated.

### *Supplementary Proceedings*

*Lynn v. International Brotherhood of Firemen and Oilers*, 228 S.C. 357, 90 S.E. 2d 204 (1955), involved supplementary proceedings by a holder of a judgment against a parent union brought against a Local to apply dues held by the Local and payable to the parent. Plaintiff recovered a judgment against The International Brotherhood, and execution was returned *nulla bona*. Plaintiff then filed a petition in the Circuit Court alleging that Local 776 was a local union affiliated with the judgment debtor, and was required under the constitution and by-laws of the International to collect dues from its members for the latter's account. The petition prayed that the officers of the Local be made to appear and show cause why the accounts receivable should not be applied to the judgment. The Circuit Court held that it was without power to so apply the funds. This decision was reversed by the Supreme Court, Mr. Justice Legge for the Court holding that the dues payable to the parent were a chose in action, the property of the parent, and that they could be reached and applied under the pertinent Code section.<sup>3</sup>

### *Extraordinary Writs—Mandamus*

In *Godwin v. Carrigan*, 227 S.C. 216, 87 S.E. 2d 471 (1955), the Supreme Court, in an opinion by Mr. Chief Justice Baker, affirmed an order of the common pleas court refusing to issue a mandamus. Plaintiff brought the action against the Mayor and Councilmen of the Town of Summerton, to procure a writ of mandamus compelling them to proceed to condemn certain of plaintiff's lands. His contention was that a sewage system erected by the Town on certain other lands which plaintiff had in the nineteen thirties given to the Town for that purpose was defective, and that the overflow from the system was damaging his retained property. The Town asserted several defenses, one of which alleged prior payment by abatement of certain taxes. The lower court held that where denial of the right to compensation is made and that denial has a *bona fide* factual basis, mandamus does not lie. This decision was affirmed by the Supreme Court. Mandamus will lie to compel the performance by governmental officials of a ministerial<sup>4</sup> duty which they refuse to perform.

3. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-1731.

4. As distinguished from a political duty. The leading case, of course, is *Marbury v. Madison*, 1 Cranch 137, 2 L. Ed. 60 (1803).

However, the asserted right must be clear and certain, there must be a legal and ministerial duty of performance resting on the officials, and the absence of other specific remedy must be shown. The court held that in this case the remedy was not exclusive, since the denial by the Town of the right to compensation removed the issues from the exclusiveness of the condemnation statutes.<sup>5</sup> The plaintiff had available the remedy afforded by Article 1, Section 17, Constitution of 1895.<sup>6</sup> Also, since the right to compensation is denied, there is no ministerial duty which the town officials must perform. Hence the conditions for issuance of the writ of mandamus were found lacking.

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5. CODE OF LAWS OF SOUTH CAROLINA, 1952 §§ 59-201 to 59-211.

6. "... [P]rivate property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made therefor."