South Carolina Law Review

Volume 11
Issue 5 *SPECIAL ISSUE 3-A*

Article 9

Spring 1959

Service of Process

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Recommended Citation

Whaley, Marcellus S. (1959) "Service of Process," *South Carolina Law Review*: Vol. 11 : Iss. 5 , Article 9.
Available at: https://scholarcommons.sc.edu/sclr/vol11/iss5/9

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SERVICE OF PROCESS

This topic, like that of courts and jurisdiction, covers much territory. So, again only those phases bearing upon the average case will be highlighted. One should be familiar with Code Sections 10-401 to 10-473 and their annotations, as this subject is purely statutory.[1]

A summons is necessary to obtain jurisdiction of a defendant in an action under the mandatory provisions of Section 10-401, and though such provisions must be *strictly complied with*, as regards the original summons, the same strictness is not applicable to the copy wherein for example, the name of the defendant in the title appeared as "J. F. Storfer", while on the back it was "S. J. Storfer". As said in *Lee v. Storfer* (1930), 159 S. C. 70, 156 S. E. 177, at page 74:

> In *Heyward v. Williams*, 48 S. C., 564, 26 S. E., 797, 798, speaking for this Court, Mr. Justice Jones said: 'The whole spirit of the Code is opposed to the disposition of a cause upon mere technical errors and irregularities, and seeks a fair hearing on the merits; hence the very ample powers of amendment conferred on the trial Courts.'
>
> Speaking of the process by which a defendant is brought within the jurisdiction of the Court, Cyc. says this: 'The copy should be substantially correct, but is not to be construed with the same strictness as the original. The copy need not contain any endorsement by the Sheriff, but is sufficient if it contains all that was put on the summons by the Clerk. Clerical errors in the copy delivered will not affect the jurisdiction of the Court, where defendant has not been misled thereby.' 32 Cyc., 459.
>
> The name of a person is something by which to identify him. The defendant in this case was sufficiently identified to bring him into the Court as 'S. J. Storfer,' the defendant named in the original summons. The objection made to the service was entirely technical, and the tendency of the Courts is now properly in the direction of disregarding mere technicalities.

There is but one exception to the necessity of using a summons and that is where the Supreme Court in its original

1. All Code Sections mentioned in this volume refer to the 1952 Code.

jurisdiction issues a rule to show cause. *Dacus v. Johnston* (1936), 180 S. C. 329, 185 S. E. 491. The exception would apply to all the common law extraordinary writs. In this connection it should be noted that the writ of *quo warranto* has been abolished in this state and has been replaced by a civil action, therefore a summons is now an indispensable requisite when bringing such an action and a rule to show cause cannot be used. *State v. Tollison* (1913), 95 S. C. 58, 78 S. E. 521. These writs are provided for in the South Carolina Constitution as follows: Art. 5, Secs. 4, 15, and 31, and Art. 17, Sec. 11. In such common law writs there was an order or rule to show cause. Such a writ had to be served in a manner which would give "substantial notice" to the person affected. It was a proceeding, not an action. Not being the latter, Sec. 10-401 doesn't apply, and as there is no statute in this State on this particular phase a summons would not be necessary, but the order or rule to show cause would have to be served as at common law. For example, see Mandamus, 38 C. J., Secs. 644 to 667.

The opinion in *Easler v. Maybank, Governor,* (1939), 191 S. C. 511, 5 S. E. 2d 288, which concerned a writ of mandamus used confusing phraseology when referring to the proceeding as "By permission this action was commenced in the original jurisdiction of the Court seeking a writ of mandamus directed to Honorable Burnet R. Maybank, as Governor of the State of South Carolina to compel him to order and election. . . . . " If it were strictly an "action", a summons would have been necessary under Sec. 10-401. But since it was a proceeding having to do with a writ "directed" to the Governor to "compel him" to do an act, it was in the nature of a rule to show cause and as such no statutory summons would be required.

In *Doty v. Reed, Sheriff,* (1948), 212 S. C. 231, 47 S. E. 2d 451, involving mandamus, the respondent claimed that the petition showed that the petitioner was asking for damages against the sheriff and that therefore it was an action at law which required that the service be by a summons. Notice had been given the sheriff by a rule to show cause. The Court declared at page 236 as follows:

> "The petition herein not having alleged facts from which an inference could be drawn that petitioner had suffered

> ascertainable monetary damages by reason of the breach of duty by the respondent, and the present proceeding being ancillary to the main cause, and the respondent as an officer of the Court not being a third party in the ordinary sense, a summons was unnecessary."

However, it should be noted that the *Doty* case does not directly say what notice or kind of process is necessary as to the service of writs. One can only arrive at a conclusion by inference, which is not very helpful in ascertaining a rule of law. Additional matter concerning these writs will be found later on in this volume.

A defendant may waive an entire want of process especially when he makes a general appearance and answers on the merits. *Beard-Laney, Inc. v. Darby* (1946), 208 S. C. 313, 38 S. E. 2d 1, declares at page 316:

> Section 427 Code of 1942, [now Sec. 10-401, Code 1952] requires that a civil action 'shall be commended by service of a summons'. Sections 428 and 429 prescribe the requisites of a summons and state that it shall be 'subscribed by the plaintiff or his attorney'. Hence the present action should have been commenced by the service of a summons and defendants should have been allowed twenty days in which to answer or otherwise plead to the complaint. But this was not the only means by which the Court could acquire jurisdiction of defendants. The members of the Public Service Commission, who were the only defendants at this stage of the proceeding, accepted service of the rule to show cause and complaint, raised no jurisdictional objection, and filed an answer. By making a general appearance and answering on the merits these defendants waived not only all defects and irregularities in the process, but also an entire want of process. . . .

However, the foregoing ruling must, it now appears, be taken in connection with that in the more recent case of *State Highway Dept. v. Isthmian S. S. Co.* (1947), 210 S. C. 408, 43 S. E. 2d 132, wherein at page 416 it is declared:

> As stated, it is also the established rule of other jurisdictions, without the aid of statute, that general appearance for any purpose before disposition of objection to jurisdiction of the person waives the latter objection even when it is expressly attempted to be reserved, as

> here (except reservation was not attempted here in the motion for leave to amend the answer). It is the substance of the act and not the form or language which counts. [Authorities cited]....

And on page 418 there is added:

> .... Respondent's motion to dismiss on the merits, answer and motion to amend the latter, all going to the merits, were made during the pendency of the objection to jurisdiction and before decision upon it. The inconsistency is patent; respondent in one breath denied the jurisdiction of the court and in the next sought relief from it consistent only with the court's jurisdiction of the action. Waiver arises from such inconsistency. A general appearance is implied. 3 Am. Jur. 787 *et seq.*; 6 C. J. S., Appearances, § 13, p. 42. It is different, of course, after adverse decision upon a jurisdictional objection. No inconsistency arises then from pleading to the merits; and that is the condition in which our cited statutes carefully protect the rights of a defendant.

In this connection it should be noted that, when a motion is made to dismiss a case or proceeding on the sole ground that the court lacks jurisdiction, and the motion is refused, the defendant may give notice that he thereby reserves his rights as to lack of jurisdiction. In such event he may answer or contest upon the merits and there will be no implied waiver of the objection to the jurisdiction. Sections 10-648 to 10-651. See *Williams v. Ray* (1958), ___ S. C. ___, 102 S. E. 2d 368.

Service of Summons:

The summons, with the requisites prescribed in Section 10-402, when properly served is deemed to have given the court jurisdiction from the time of such service. Of course, there should be proof of service as required by Section 10-407. However, the entire absence in the record of such proof is not conclusive of no such service. Indeed, the introduction of the judgment roll carries with it the conclusive presumption that there was proper proof of service before the court, or it would not have rendered the judgment. And this presumption continues until the judgment is set aside in a direct proceeding for that purpose, *Abraham v. N. Y. Underwriters Ins. Co.* (1938), 187 S. C. 70, 196 S. E. 531. As held therein at page 74:

> 'In the first of these two cases the Court says specifically that the mode of proof of service is a mere question of practice,' "and subordinate to the jurisdictional fact that such service was duly made." It is the actual service and the actual residence that determines the jurisdiction of the person, not the proof by which these conditions of jurisdiction are made to appear.'

And further on page 75:

> 'Even in cases where the record shows no proof of service at all, and therefore shows no compliance with any of the provisions of Section 440 of the Code, the Supreme Court has held that the judgment is not subject to attack, especially after a lapse of several years, and that every necessary presumption respecting the service of process will be invoked to sustain the judgment. [Cases cited].

When Service Upon Person Not Necessary: There are situations in which service of a summons upon a person is not necessary. An up-to-date illustration concerns automobiles which have caused damage. Under Section 45-551 an action *in rem* through attachment can be brought against the vehicle without personal service on anyone. As said in *Williams v. Garlington et al.* (1924), 131 S. C. 289, 127 S. E. 20, at page 293:

> . . . 'This is the distinction between an action *in personam* and an action *in rem.* In an action *'in rem,'* a valid judgment may be obtained so far as it affects the *res* without personal service of process; while in an action to recover a judgment *'in personam'* process must be personally served, or there must be a personal or authorized appearance in the action.' *White v. Glover,* 138 App. Div., 797; 123 N. Y. S., 482.
>
> 'It is a distinguishing peculiarity of a proceeding *in rem* that the jurisdiction of the Court, in the particular case, rests merely upon the seizure or attachment of the property. No personal notice to any individual is required. The *res,* being brought within the jurisdiction of the Court, becomes subject to its adjudication, and all parties interested are supposed to be duly appraised of the proceedings by the mere taking of the property, or by the usual proclamation or published notice. . . .'

See also *Tolbert v. Buick Car* (1927), 142 S. C. 362, 140 S. E. 693.

Statutory Service, When Exclusive; When Not:

Under Sections 37-105 and 10-425 the legislature has prescribed an exclusive method of service as to insurance companies and fraternal benefit associations. As said in *Mobley v. Bland & Penn. Cas. Co.* (1942), 200 S. C. 448, 21 S. E. 2d 22 at page 454, regarding Section 7964, 1932 Code which had similar language:

> The *Lipe case,* which did not involve a foreign insurance company, was, in our opinion, quite properly governed by Section 826 of our Code, for it dealt with a foreign corporation which was other than a foreign insurance company, and therefore is entirely distinguishable from the case now under consideration. Furthermore, the *Lipe case* was decided in the year 1923. Even if it should contain any implication that the manner of service, proper in that case, should apply here, such implication is overcome by the far more recent case of *Murray v. Sovereign Camp, W. O. W.*, 192 S. C., 101, 5 S. E. (2d), 560, which was decided by this Court sixteen years thereafter in the year 1939. We quote from page 108 of that opinion in 192 S. C., page 562 of 5 S. E. (2d): "We hold, therefore * * * that service on foreign insurance companies as provided for in Section 7964 of the Code of 1932 is exclusive, and that service made in any other way upon such corporations is invalid. . . .

Of course, where a statute says "may" instead of "shall", as does Section 10-430 relative to motor vehicle carriers and Section 10-433 relative to nonresident individual fiduciaries, such service is not exclusive. See *Muckenfuss v. So. Transportation, Inc.* (1944), 204 S. C. 369 at page 372, 29 S. E. 2d 486. In *Murray v. Sovereign Camp W. O. W.* (1939), 192 S. C. 101, 5 S. E. 2d 560, at page 108, the rule is clear:

> In our consideration of the question, we have examined the authorities, including a number of the decisions of other jurisdictions, and while we deem it unnecessary to quote from them, attention is directed to annotations found in the following volumes: 5 L. R. A., N. S., 298; 113 A. L. R., 9, 29 *et seq.* The provisions of most of the Statutes construed in the cases there collected were permissive

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and not mandatory as to service upon the insurance commissioner or other appointed agent, the words used being "may" or "can" be served. These cases, with a few exceptions, correctly hold that service under a statute of that kind is not exclusive but cumulative. No case has been called to our attention, however, where the statute under construction provided that service "shall" be made upon a designated agent, which holds that such service is cumulative. On the contrary, the Courts are practically uniform in holding in such cases that the method of service designated in the Statute is exclusive, and that service may not be had upon any other agent of the corporation.

The foregoing Sections have been taken only as indicative. There are many other Sections concerning the question: Upon whom should personal service be made? The answers can best be found by reference to Sections 10-421 to 10-438 and their respective annotations.

The following cases may be considered highlights in their respective spheres: Service of process and requirements as to proof of such service must be followed, otherwise the court does not acquire jurisdiction: *Matheson v. McCormac* (1937), 186 S. C. 93, 195 S. E. 122; The provisions of the Code relating to the service of summons on foreign corporations apply only to cases in which there is a proceeding *in rem,* as for example, a warrant of attachment: *Tillinghast v. Boston Co.* (1893), 39 S. C. 484, 18 S. E. 120.

Before going further, it may be well to call attention to Section 10-472, otherwise an attorney can well lose either for himself or his client certain costs. That Section provides no service costs are taxable against the losing party unless the summons or any other paper mentioned in the Section is served through the Sheriff's office in the county in which the process is served.

Service by Publication:

Sections 10-451 to 10-455 set forth the method by which a court can acquire jurisdiction where a defendant is a nonresident or the whereabouts of a party having an interest in real estate is unknown. The provisions of Section 10-451 apply only to actions or proceedings *in rem* since no personal judgment is valid if only publication of a summons must be

used. *Bush v. Aldrich* (1918), 110 S. C. 491, 96 S. E. 922, which thoroughly covers the applicability of Section 10-451, at page 499 says:

> At page 727 of 95 U. S., page 565 of 24 L. Ed., the Court said, with respect to substituted service by publication:
>
> "Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the State, or of some interest therein, *by enforcing a contract* (italics added), or lien respecting the same, or to partition it among different owners, or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings *in rem.*"

Again on the same page:

> "Jurisdiction is acquired in one of two modes: First, as against the person of the defendant, by the service of process; or secondly, by a procedure against the property of the defendant within the jurisdiction of the Court. In the latter case the defendant is not personally bound by the judgment beyond the property in question. And it is immaterial whether the proceeding against the property be by an attachment or bill in chancery. It must be, substantially, a proceeding *in rem.* A bill for the specific execution of a contract to convey real estate is not strictly a proceeding *in rem* in ordinary cases; but where such a procedure is authorized by statute, on publication, without personal service of process, it is substantially of that character."

See also *Pennoyer v. Neff* (1878), 5 (U. S.) Otto 714-748, and *Dyer v. Georgia Power Co.* (1934), 173 S. C. 518, 176 S. E. 711, for various angles of this process problem. See also *Riker v. Vaughan,* under the next subdivision.

Infants, Service of Process Upon:

Whether an infant, or minor, is a resident or a nonresident, the requirements of Section 10-434 or 10-451 must be strictly followed. As said in *Finley v. Robertson* (1882), 17 S. C. 435, at page 439:

> The mode of making infants parties to an action in a court of record is clearly and expressly prescribed by

> statute, and a due and tender regard for the rights and welfare of infants requires that this statute shall be strictly followed.

And *Riker v. Vaughan* (1885), 23 S. C. 187 goes into a detailed explanation on page 189 as follows:

> This being the only mode provided by statute by which a nonresident minor can be made a party defendant to an action, the only question is whether this mode has been "strictly followed." It is quite clear that it has not. The statute, as one alternative, prescribes three things to be done: 1. The procuring of an order for service by publication. 2. The actual publication; and, 3. The deposit in the post-office of a copy of the summons, addressed to the person to be served, at his place of residence. And as the other alternative, two things: 1. The procuring of an order for service by publication. 2. Personal service of the summons out of the State. It is conceded in this case that no order for service by publication was ever obtained, and therefore the first requirement under either of the alternatives above presented has not been complied with. It may be that it is difficult to see any practical benefit to be derived from the order permitting service by publication, yet as the statute expressly requires it, we do not see by what authority we can dispense with that, any more than with any other requirement. So that, even if it should be conceded that the endorsement on the summons signed by the minor, taken in connection with the statement in his petition that the "case had been begun by service of summons upon petitioner," amounted to an acceptance or acknowledgment of service, and as such, equivalent to personal service, there would still be a fatal defect in the failure to obtain an order that the service might be made by publication, for the statute only provides that personal service out of the State shall be sufficient "where publication is ordered."

Amendment of Summons or Proof of Service:

This can be done only under an order of court. Section 10-409. As to the proper method of amending a summons one finds the following to be the rule as laid down in *Arthur v. Allen* (1884), 22 S. C. 432, beginning at page 441:

> . . . . It may be conceded that a summons cannot be amended without leave of the court, and the practical inquiry here is, has such leave been granted? The order of Judge Hudson was, "That James C. F. Sims be made a party defendant herein; that the plaintiff have leave within twenty days from the rising of the court to amend his complaint by alleging," &c. Now, if it be true, as it undoubtedly is, that the proper mode of making a party defendant to a case is by the service of a summons upon him, it would seem to follow necessarily that where there is an order requiring a certain person to be made a party defendant, such order implies that the summons in the case is to be amended by inserting his name and serving a copy thereof so amended upon such person. . . . .
>
> . . . . It is true that the amendment of the summons was not made by inserting the name of the additional party authorized in the summons first issued, with an appropriate reference to the order authorizing such an amendment, as perhaps would have been the better practice, inasmuch as the rule seems to be well settled that there can be but one original summons in a case, and that instead thereof a transcript of such original summons was made in which the name of Sims was added as an additional defendant, and was styled "amendment to supplemental summons and complaint, making J. C. F. Sims a party defendant," and marked "original"; but this departure from what would have been a better practice is merely formal and cannot have the effect of annulling the paper. It appears to us, therefore, that the summons was substantially amended, and that this was done by virtue of an order which necessarily implied leave to make such amendment. . . . .

Proof of Service:

Some of the cases heretofore cited also cover certain aspects of this topic, but at this juncture a careful analysis of Sections 10-404 to 10-409, with their respective annotations, is suggested.

A sheriff's return of personal service or an affidavit of service by a deputy is only prima facie evidence. *Laurens Trust Co. v. Copeland* (1930), 154 S. C. 390, 151 S. E. 617. As said at page 397:

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. . . . It is true that the affidavit of service, purporting to have been signed by the deputy sheriff, L. F. Nabors, shows upon its face that she was personally served on December 4, 1924. The return of this officer is only *prima facie* evidence of the facts therein stated, but this affidavit of service has been impeached by extrinsic evidence, and the proof of its falsity has been clearly and convincingly established. . . . .

. . . . There is nothing in this case to bring it within the rule laid down in the cases of *Dill-Ball Co. v. Bailey*, 103 S. C., 233, 87 S. E., 1010, and *Metropolitan Life Insurance Co. v. Still et al.*, 140 S. C., 18, 138 S. E., 401, where this Court held that, while the service in those cases was not altogether regular, yet the parties were fully informed of the pendency of those actions. In those cases copies of the summons and complaint were left in mail boxes at the respective residences of the parties, and the testimony showed that they got the papers in their possession, and the Court very properly held that they were informed of the action pending against them, and that this was sufficient to show service and a substantial compliance with the law. In the present case, there is no evidence whatever that copies of the summons and complaint were served in any manner upon Mrs. Copeland, or that she ever had any notice of the pendency of the action against her, unless the return of the deputy sheriff in the record is to be taken as evidence thereof. If you disregard the return of the deputy sheriff, which we hold should be done, for the reason that the presumption of its correctness has been entirely overcome and rebutted by the uncontradicted extrinsic evidence of its falsity, then there is not a particle of testimony remaining in the record to sustain the findings of the Circuit Judge. . . . .

As we have learned heretofore absence of proof of service is not conclusive that no service was made; indeed, where the record shows no proof of service at all and no compliance with Section 10-407, and a judgment has been obtained, every necessary presumption will be invoked to sustain the judgment. *Coogler v. Crosby* (1911), 89 S. C. 508, 72 S. E. 149, and *Abraham v. N. Y. Underwriters Ins. Co.* (1938), 187 S. C. 70, 196 S. E. 531.

Cannon v. Haverty Furniture Co. (1935), 179 S. C. 1, 183 S. E. 469, gave the writer as a young county judge what was probably a much needed lesson on this subject. Though the Court was divided in opinion, the decision is rather replete with authorities and comprehensively covers what is proper proof of service. As to whether or not service is defective one finds on page 13:

> In connection with what we have stated above, we wish to state, further, that, when the proof of service shows on its face that the service in question is defective, that service was not acquired, the orders and acts of the Court based thereon are void. In the case at bar the paper purporting to be the proof of service on Cannon in the first action does not, for the reasons we have pointed out, show complete service. Therefore the order of arrest was without authority of law and the imprisonment unlawful. As shown above, the purported proof of service on Cannon, intended to be made by substitution, does not show that the party with whom the summons and complaint was left was or is a person of discretion; it does not show that Cannon was at the time in question a resident at the place the said summons and complaint is said to have been left, and does not show that Cannon stayed at that place. In our opinion, it was not proper to supply this information, after the order and judgment in question were given and after the arrest of Cannon and his subsequent imprisonment thereunder, for the purpose of rendering the judgment against Cannon in the first action voidable instead of void. The certificate of service, that is the certificate purporting to show service, cannot be supplemented for this purpose. Further, *the certificate of service should have been complete within itself in order to give authority for the said order of arrest and subsequent imprisonment thereunder.* ....

What the proof of service must show is clearly pointed out in *Matheson v. McCormac* (1937), 186 S. C. 93, 195 S. E. 122 at page 109:

> The proof of service must show affirmatively that the service of the process was correctly made. This is imperatively necessary to give the Court jurisdiction of the person thus sought to be brought into Court. It is not contended that in this original action, under which

plaintiffs claim title to the property which they have contracted to sell to C. L. McCormac and L. E. Hassinger, that Alexander J. Matheson was served as a nonresident by publication of the summons. No order of publication was taken; no publication of the summons was made, nor was a copy of the summons and complaint deposited in the post office addressed to said defendant at his last known place of residence, nor is there any showing that his place of residence was unknown to the applicant for the order of publication, nor could with reasonable diligence be ascertained.

Nor was any attempt made to obtain jurisdiction of the *rem* by attachment.

The conclusion is inevitable that the Court did not obtain jurisdiction of the defendant, Alexander J. Matheson in the action through which the plaintiffs therein obtained title to the property they propose to convey to C. L. McCormac and L. E. Hassinger.

Impeaching a Judgment in Equity:

It has already been noted that a judgment cannot be attacked or impeached collaterally except for lack of jurisdiction. In 1939 the Supreme Court also pointed out that such an attack can be made by way of equity where there is proof of fraud. It declared at page 401 in *1st Carolinas Joint Stk. Ld. Bk. v. Knotts,* 191 S. C. 384, 1 S. E. 2d 797, the rule to be as follows:

A collateral attack upon a judgment has been defined to be "one in an action other than that in which it was rendered." *Turner v. Malone,* 24 S. C., 398; *Darby & Co. v. Shannon,* 19 S. C., 526. The general rule is that a judgment may be attacked collaterally only when its defects and infirmaties are apparent by an inspection of it. *Finley v. Robertson,* 17 S. C., 435; *Tederall v. Bouknight,* 25 S. C., 275.

However, the case is different when fraud or collusion is alleged. A well-recognized exception to the general rule is found in *Ruff v. Elkin,* 40 S. C., 69, 18 S. E., 220, 223, where it is said that a judgment may not be impeached in an action other than that in which it was rendered, "except upon proof of fraud, or want of jurisdiction." [Authorities cited.]

> The cases of *Scott v. Newell*, 146 S. C., 385, 144 S. E., 82, and *Piedmont Press Ass'n. v. Record Pub. Co.*, 156 S. C. 43, 152 S. E., 721, likewise recognize the propriety of an attack upon a judgment in an independent suit on the equity side of the Court. as distinct from a collateral or direct attack
>
> A debtor will not be allowed to hinder, delay or defraud his creditors by reason of a collusive and fraudulent judgment, although the judgment may be recovered under the deceptive guise of apparently regular judicial proceedings. In such case the creditor may show in an independent action that such judgment was procured through fraud of the debtor or complicity of both parties, with a design to hinder, delay, or defraud him. [Authorities cited.]

The foregoing case involved intrinsic fraud. However, one finds the Supreme Court holding in 1951 in *Bryan v. Bryan et al.*, 220 S. C. 164, 66 S. E. 2d 609, that if only intrinsic fraud is involved there can be no impeachment, even in equity. And there was no reference whatsoever in the decision to the *Bank case, supra.* One is thus left with two inconsistent cases, decided just about a decade apart; the earlier, laying down a moderate and just rule; the latter, laying down a harsh and unjust rule. One wonders how the attorneys and the Justices all overlooked the earlier case. And so, until the matter is finally straightened out one can only settle the confusion by applying that feeble maxim that greater regard should be given the later decision.

Service of Papers Generally:

Sections 10-461 to 10-473 deal with service of notices and other papers and, incidentally, with the filing of the summons and pleadings (Section 10-470) — as to all of which the successful trial practitioner should be familiar.

The annotations to certain of the Sections point out that verbal notices are not sufficient. All must be in writing. Service may be by mail, but certain requirements must be met, as, for example, double time must be allowed. After action has been commenced, service must then be on the attorney and not the client. However, when the attorney's duty is ended by obtaining execution, and a new proceeding is brought assailing the execution, service can no longer be upon him but

must be upon the one who was his client. *Duncan etc. Co. v. Brown* (1880), 15 S. C. 414; *Kolb v. Jones* (1881), 62 S. C. 193, 40 S. E. 168.

Filing Pleadings with Clerk, Especially Complaint:

At this point in connection with Section 10-470 and as practical sidelights in the trial process, it will be well to note that one can seriously injure by delay his client's cause if he doesn't follow Section 10-1101, 1952 Code, and also know Rule 26 and also Sections 10-1102 through -1106. This applies to all counties not having a consolidated calendar, which Richland County has. In those few counties having a consolidated calendar, Sections 10-1110 through -1121 govern and must be followed. In those counties every step must be filed with the Clerk "immediately after service," even notices and any "other papers."

In every county one must not fail to file the complaint when the issues are made up, especially in the counties not having a consolidated calendar. This is a condition precedent to getting a jury case on Calendar 1, so that it will in turn go on the roster for trial. So, to properly protect a client's rights, there must be a notation on the *back* upon which calendar the cause is to go. Circuit Rule 26 and Sections 10-1101 to 10-1102.

An instance happened in the Richland County Court which goes to show how a client's right can either be lost or pared down. The writer, and not the local Bar, always arranged the jury roster from Calendar 1 as sent up by the Clerk of Court. At the close of one such roster arranging a young attorney came up and asked the writer why his case had not been called; that he had attended now three meetings. He was told that at each of those meetings every case on the Calendar had been called. It was suggested he check in the Clerk's office, which he did. He found the cause filed in the "Miscellaneous" box, because it wasn't marked for any of the three calendars and the Clerk couldn't make the decision. The attorney then marked it for Calendar 1, and it got on the next roster and was tried and his client got a small verdict in the tort case. He told the writer afterwards that he checked with several older trial lawyers and they told him that if his cause had been tried in either of the two previous terms, where the venires were rather inclined to larger verdicts, his client

would probably have fared better. To that extent then, he had through either ignorance or negligence caused his client, and maybe himself, a serious loss.

In the counties using three calendars, even answers are seldom, if ever, filed with the clerk, and although technically motions should be filed (Section 10-1102) so as to appear on Calendar 2 for a hearing, that is seldom, if ever, done in those counties. However, it is advisable for a new practitioner in any of those counties, especially any in which a Clerk of Court is not paid a salary, to ascertain from some older attorney what is the custom in that county as to filing and paying the fees for legal papers other than a complaint. Now-a-days, under Section 15-233, as amended, wherein since 1925 judges have been given "all powers" at chambers except those matters necessitating jury trials, in such counties complaints are not filed for Calendar 3 for obtaining default judgments; and the Clerk usually never hears of them until such pleadings come to his office with the attorney's affidavit of default and an order for judgment signed by the judge at chambers.

It should be noted that in 1925 a judge was given "all powers" as above mentioned. And yet again we find a glaring error in the annotations to Section 15-233 in the 1952 Code, namely, that a judge at chambers has no power to vacate or correct a judgment at chambers. None of those cases are later than 1913, and yet "all powers" except jury trials were given the judge years after those cases were decided. The reader is cautioned that there are a number of such errors running through the 1952 annotations, which call for careful checking.

For practical purposes, especially in saving trouble in the future for attorneys who will have to examine the court records in the Clerk's office, be sure that all backs of legal papers indicate clearly the nature of the bradded contents on the inside; also, be sure that each back is so typed or written that when the papers are unfolded, they will not be upside down. Nothing makes a judge, officer of the court, or another attorney so out-done and also critical of an attorney as to have such carelessness in the folding and backing of legal papers.

There is an easy way of folding papers under Rule 12, so as to be sure to avoid the above dilemma. Catch between

thumb and forefinger of left hand the left top corner of paper to be folded; fold in an equal fold so that bottom of corner gets between the thumb and forefinger; fold again in another equal fold in like manner; then let gravity swing papers downwards, with the thumb and forefinger acting as a pivot. The part to be backed will be that portion facing one, and the top will be where the thumb and forefinger are.

In spacing the matter on any *back*, the following should govern:

Leave ¾ inch space at the top and *never* write or type anything in that space as it must be left for the Clerk to put the Judgment Roll number in.

Time in Which to Answer:

Courts of record: There is but one time limit in such courts regardless of the subject involved or the character of the cause in any civil action. The summons "shall require the defendant to answer" "within twenty days after the service of the summons". Section 10-402. And the defendant must serve his answer or demurrer within that twenty days. Section 10-641.

Even a rule to show cause issued by the chief justice, which, when it takes the place of a summons in what is an *action* and not just a *proceeding* will, should it require a defendant to answer in *less than* 20 days, be considered a fatal jurisdictional defect. *State v. Tollison* (1913), 95 S. C. 58, 78 S. E. 521. See also *Heyward v. Long* (1935), 178 S. C. 351, 183 S. E. 145.

And the 20 day period cannot be extended except by consent or by a court order. *Johnson v. Finger* (1915), 102 S. C. 354, 86 S. E. 673, 61 L. Ed. 907.

Magistrate courts: Here one finds an entirely different situation regarding the legal time limits. Instead of only one such limitation as with courts of record, there are four different time limits in which a defendant *must* be given the right to plead. Any improper variation is fatal to jurisdiction unless there be waiver. See *Rosamond v. Earle* (1895), 46 S. C. 9, 24 S. E. 44.

(1) As to money demand, if less than $25.00 is involved the complaint shall be served on the defendant "not less than 5 days before the day therein fixed for trial," unless "the justice of the case" should require a different time limit. Section 43-82. *Moore v. So. Railway* (1906), 76 S. C. 333, 56

S. E. 971. Where a magistrate in a case involving $15.00 sets the trial date less than 5 days after service of the summons, without any cause shown therefor, and tries the case then, the judgment is void. *Paul v. So. Ry. Co.* (1897), 50 S. C. 23, 27 S. E. 526. See also *Cothran v. Knight* (1896), 47 S. C. 243, 25 S. E. 142.

(2) Where the money demand is $25.00 or more, the complaint "shall be served on the defendant not less than 20 days" . . . . "before the day therein fixed for trial," unless "the justice of the case" requires a different time limit. Section 43-82. The decisions already cited likewise apply here. See *Wideman v. Pruitt* (1898), 52 S. C. 84, 29 S. E. 405, wherein a requirement that a defendant appear on the 21st day after service of the summons exclusive of the day of service was held to be sufficient, and *Able v. Hall* (1915), 101 S. C. 24, 85 S. E. 165, which held that a defendant is entitled to 20 days to appear where the action is for more than $25.00, and when the magistrate set the time at 15 days without a proper showing, a special appearance objecting to jurisdiction did not amount to waiver, even though such appearance was also to vacate the attachment.

(3) As to attachments, Title 43, Vol. 4 of the Code beginning at page 637, concerning magistrates, has no sections dealing with that proceeding, as it has with regard to claim and delivery. Hence when one seeks to attach in a magistrate court one must go to Title 10, Chapter 10, Vol. 1 of the Code, at page 758, where the same requirements must be met as in a like proceeding in a circuit or county court. However, as to the time limit for a defendant's appearance, where a delayed copy of the complaint is served pursuant to notice by the defendant Section 10-921 must be construed in connection with Section 43-82 as is hereinafter noted.

Attachment is only a collateral *proceeding* to an action. Since it is only a provisional remedy in aid of an action, the *action* must be commenced in regular form. *Williamson v. Easter Bldg., etc. Ass'n.* (1898), 54 S. C. 582, 597, 32 S. E. 765. See also *Lester v. Fox Film Corp.* (1920), 114 S. C. 414, 418; 103 S. E. 775. It would therefore seem clear that the *action*, if brought in a magistrate court, must conform as to time for appearance to Section 43-82, and that Section 10-921, relating to "service and answer" deals only with time for appearing where a copy of the complaint, which was not served

with the summons, is served later upon demand of the defendant.

In the latter event the defendant would be entitled to 20 days to appear for trial, and it would seem in that particular situation that, regardless of what time had been named in the summons for his appearance, even if less than $25.00 was involved, he would have the full 20 days. On the other hand, one would conclude that where the summons and complaint are served together the time limits in, and the cases cited under, Section 43-82 would apply to the *action* as distinguished from the attachment proceedings. Particular attention is called to *Able v. Hall, supra,* which involved an attachment in a magistrate court.

(4) With regard to claim and delivery, as already indicated, specific sections of the Code deal with that proceeding in a magistrate court. Sections 43-171 to 43-184. One will find some of the requirements therein and rights of litigants thereunder different from those in the Sections providing for such a proceeding in a circuit or a county court, namely Sections 10-2501 to 10-2516. One such important difference is that in such a proceeding in a circuit or county court one "may at the time of issuing the summons or at any time before answer claim the immediate delivery of such property." Section 10-2501; whereas in a magistrate court the plaintiff may make such claim "at the time of issuing the summons, but not afterwards." Therefore the plaintiff's attorney must carefully consider what to do at the time the summons is issued. It will be too late to do later what could have best protected a client's right if done earlier.

Here again one is faced with another time limit problem, when Section 43-173 is compared with Section 43-82. The former Section provides that upon receipt of the necessary affidavit and undertaking, the "magistrate shall endorse upon the affidavit a direction to any constable of the county requiring a taking of the property claimed by the plaintiff."

At this stage of the proceeding it is important to note that Section 43-173 continues by providing that "the magistrate shall at the same time issue a summons" requiring the defendant to appear "not more than 20 days from the date thereof, to answer the complaint of the plaintiff". Thus it would clearly appear that in a claim and delivery *proceeding*, the necessary *action* in conjunction therewith must meet the pro-

cess requirements of Section 43-173 and not of Section 43-82, even if the amount involved in the action is less than $25.00.

In *Simmons v. Cochran* (1888), 29 S. C. 31, 6 S. E. 859, which involved claim and delivery, it was declared at page 33:

> Did the trial justice have jurisdiction? is the first question. The code provides in such cases, that the trial justice shall issue a summons directed to the defendant, requiring him to appear and answer, at a time and place to be therein specified, and not more than twenty days from the *date thereof*. It appears that both of the trial justices failed to observe this provision of the code; the time fixed in the summons of each was beyond twenty days from the date of issue. This appears on the face of the proceedings. Why the general assembly thought proper to enact such an unqualified requirement in such cases, is not for this court to consider. It is so written in the statute book, and the language seems imperative — *not more* than twenty days. The summons is the paper which gives jurisdiction to the court over the person of the party brought in; and where the law has provided a special mode or character of said summons, either as to service, form, or otherwise, involuntary jurisdiction cannot be acquired without a compliance with said law. And especially is this so in all statutory proceedings and remedies.
>
> If a trial justice had the right to disregard the act as to the time fixed in the summons, for a day, or for three days, as in the summons here, why could he not also for a month, or a year? Who could interfere with his discretion? True, this seems a small matter in the case before us; but it is important that the forms of law and requirements of the statutes in reference to the administration of the law should be observed. This is best for all in the long run, although hardships may sometimes occur by a strict adherence to such requirements.

Kelly v. Kennemore and *Barr v. Kennemore* (1896), 47 S. C. 256, 25 S. E. 134, likewise involving claim and delivery, were cases where the magistrate fixed the trial date, or date of appearance, less than 20 days after the date of the summons; the time in the *Barr* case being 19 days. Justice Pope, writing the court's opinion, held that, under what is now Section 43-173 the magistrate acquired jurisdiction.

Justice McIver in his concurring opinion went thoroughly into the legal background on pages 261, 262:

> . . . The question presented, as I understand it, is, whether the trial justice had jurisdiction of the cases. The denial of such jurisdiction seems to be based solely upon the grounds: that neither of the defendants had received such notice of the time of trial as is required by statute. There are two separate and distinct provisions in the Code upon the subject; one found in subdivision 12, of section 71, manifestly applicable to actions of claim and delivery only, and the other in subdivision 16, of section 88, of the Code, which seems to be applicable to actions for the recovery of money. In the former the provision is that, the trial justice shall issue a summons, directed to the defendant, "requiring him to appear before said trial justice, at a time and place to be therein specified, and not more than twenty days from the date thereof, to answer the complaint of said plaintiff." But, in the other section of the Code above referred to, . . . the provision is as follows: "When twenty-five or more dollars is demanded, the complaint be served on the defendant not less than twenty days, and where less than that sum is demanded, not less than five days before the day therein fixed for trial." So that, in actions in a trial justice court, for claim and delivery of personal property, the Code requires that the time specified in the summons for trial shall be "not more than twenty days from the date thereof" — the summons; while in actions for the recovery of money in a trial justice court, "where $25 or more is demanded," the requirement is that, "the complaint shall be served on the defendant not less than twenty days * * * before the day therein fixed for trial." If, therefore, these actions should be regarded as actions for claim and delivery, as I think they must be, then the requirement of the statute has been complied with, if the day fixed for trial was "not more than twenty days" from the date of the summons, and the jurisdictional objection is without foundation. Now, in the first case, the date of the summons, as it appears in the "Case," was the 26th day of *February*, 1895, which it was conceeded [sic] at the hearing was a misprint, January being the true date, and the day fixed for the trial was the 14th of February, 1895, which was

> clearly within the twenty days limit; and, in the second case, the date of the summons, as it appears in the "Case", was 28th of January, 1895, and the day fixed for the trial of that case was the 15th of February, 1895, which was likewise clearly within the twenty days limit. None of the cases which have been cited have any application to the question presented here. In *Simmons v. Cochran,* 29 S. C., 31, the time fixed for the trial exceeded the twenty days limit, and, hence, the statutory requirement not having been complied with, it was properly held that the trial justice had no jurisdiction. In *Adkins v. Moore,* 43 S. C., 173, the action was *not* for claim and delivery, but for the recovery of money, and, hence, it was very properly held by Mr. Justice Gary that the defendant not having received the notice as required by the statute, the full twenty days, the trial justice had no jurisdiction. In *Rosamond v. Earle,* 46 S. C., 9, the Court held that the defendant, having voluntarily appeared and pleaded to the merits, had waived any objection as to due notice of the trial . . . .

It would further appear that, regardless of the amount involved, the leeway given a magistrate by Section 43-82, to name at his discretion, a lesser time for appearance upon proper cause being shown is not applicable. However, under Section 43-173 the phrase "not more than 20 days" gives the magistrate similar leeway without any requirement that "good reason" be shown by way of affidavit. Of course, in his judicial discretion it would seem that he can shorten the time, depending on the circumstances of the situation before him.

It should be noted in passing that the case of *Adkins v. Moore* (1895), 43 S. C. 173, 20 S. E. 985, should not be annotated under Section 43-173, since it was not concerned with claim and delivery as Justice McIver pointed out in his concurring opinion in the Kelly case, *supra,* but involved only a money demand, as is also indicated by its being annotated under Section 43-82.

CONTINUANCES

That a trial attorney should thoroughly familiarize himself with the rules pertaining to the tribunal before which his client's case is to be tried is aptly illustrated by the decisions involving continuances and therefore circuit court Rule 27.

The civil case of *King v. Smith* (1928), 148 S. C. 419, 146 S. E. 237, makes this clear besides setting forth the common law principles applicable to continuances.

At page 424 it is stated:

> We have given the reasons advanced in this cause for the desired continuance careful attention. We are impressed, too, that the kind-hearted circuit Judge gave them his most earnest consideration. It is evident that he desired to show every possible courtesy both to the excellent and highly ethical member of the bar who was undergoing affliction and his client. But he was confronted with a plaintiff, a young school teacher, injured almost unto death, with possibly, it seemed then, only a few weeks to live, seeking recovery of damages for the injuries he had sustained from the man whose negligence he charged had brought him to his unfortunate situation. Pleading that the sound discretion of the Court be exercised in their respective favors were an ill lawyer of a litigant on the one hand and almost a dying litigant on the other.
>
> No such situation, or one in any way quite similar to it, has been discovered by us in an exhaustive search of our reported cases.

And at page 426:

> . . . However anxious the defendant may have been to have present at the trial his leading counsel, Capt. Mauldin, it must be taken into consideration that the junior member of the firm, Mr. Love, has been for several years a trial lawyer of great experience, and highly regarded as a practitioner of much ability, and that he had associated with him Mr. Sullivan, of the Anderson bar, who likewise stands very high in the profession of the law. With these two attorneys to represent him, the defendant had the benefit of able counsel, well prepared to see that his defense was properly presented to the Court. The main purpose of our Court procedure is to see, first,

that litigants have a fair and impartial trial; the next is to give those demanding it as speedy a trial as possible.

Rule 27 of the circuit Court provides that a party seeking for a continuance, in addition to showing that due diligence was exercised by him to procure the attendance of an absent witness, must also set forth, under oath, the fact or facts he believes the witness, if present, would testify to, and the grounds of that belief. It does not appear that the defendant complied with this rule when he sought a continuance on account of the absence of Miss Burriss and Mrs. Little. It is doubtful, too, if he exercised due diligence in procuring the attendance of the desired witnesses. The record does not show when Miss Burriss and Mrs. Little left Anderson, the one for Europe and the other for Atlanta. The defendant was served with the summons and complaint some time on [sic] April. No effort was made to subpoena the ladies until the week of June 20th, when the case was to be tried. It appears also that it is likely Mrs. Tribble gave the same testimony which the defendant wished to offer through the absent witnesses.

Again at page 427 this summation followed:

This is a hard case, we admit; just as the circuit Judge admitted it was hard. He exercised his discretion as he thought best under all the circumstances. This Court is unable to declare from the record and all the surrounding circumstances, of which Judge Bonham was in better position to judge than we are, that he abused the discretion allowed him under the law.

State v. Hutto (1903), 66 S. C. 449, 45 S. E. 13, gives one the criminal angle, and also applies Rule 27 (then Rule 28). As pointed out by Chief Justice Pope, abiding by Rule 27 is not in itself sufficient. The moving party must have its witness under a recognizance bond in a criminal case. The opinion at page 450 declares:

The matter of continuance of causes is vested by law in the discretion of the presiding Judge. However, if the Circuit Judge should abuse his discretion, this Court would interfere. Was there any abuse of discretion in this instance? We think not, for the following reasons: Experience has established the fact that it is seldom

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> the case that all the witnesses either for the prosecution or the defense are present to testify at the trial. To secure the presence of such witnesses, the law very generously gives both sides to the controversy the right to have ther witnesses, respectively, arrested to give bond for attendance at Court. In the instance at bar, the defendant did not pursue this course, but relied upon the service of subpoena tickets upon his witnesses. This is one reason for the denial of the motion to continue. Again, under Rule XXVIII., a party applying for a continuance shall by affidavit set forth the materiality of the testimony of the absent witnesses to support the defense; that the motion is not intended for delay, but is made solely because he cannot safely go to trial without such testimony; that he has made use of due diligence to procure the testimony of the witness; and that the witness, if present, he believes, would testify to certain fact or facts set out in the affidavit, and the grounds of such belief. The last provision of this rule is intended to advise the adverse party of such fact or facts, so that such adverse party may or may not admit the same. If such adverse party admits that if such witness would, if present, testify to such fact or facts, then the trial may go forward. Such was the admission of the solicitor in the case at bar. Hence there was no error by the Circuit Judge in this case.

Even where a witness is under a recognizance bond, Rule 27 must be complied with, except the provision therein requiring one to have a subpoena issued, since doing so would then seem to be unnecessary. It would also seem that, where a witness is so seriously sick as to have her life endangered if she were brought into court, a recognizance bond would not be required and certainly a bench warrant would not be used. *State v. Waring* (1917), 109 S. C. 52, 95 S. E. 143. See also *State v. Hiers* (1917), 107 S. C. 411, 93 S. E. 124.

The later case of *State v. Gilstrap* (1944), 205 S. C. 412, 32 S. E. 2d 163, shows that where a motion for a continuance, with all the necessary conditions precedent complied with, has not been made, or if it has been made but would have to be refused because of a lack of at least one of such conditions, a trial attorney, either through negligence or ignorance, may seriously injure his client's case. In the *Gilstrap* case the

defendant moved for a new trial on the ground that an expert witness "failed at the last moment to attend the trial". The Supreme Court in a unanimous opinion said at page 421:

> This witness, although he had promised counsel for the defendant to attend and testify, was not subpoenaed. Nor was the Court requested to issue any process to procure his attendance. Nor was a recess or a continuance asked; nor was any affidavit submitted under Rule 27 of the Circuit Court showing what the witness would swear to if present. The defendant when on the stand testified that he was entirely sane when he made the attack upon the little girl; that he knew it was wrong, and that immediately thereafter he attempted to blot out the horror of it by resorting to the drinking of liquor. Under the foregoing circumstances, we see no merit in the exception raising this question.

Consolidation of Cases: As pointed out in *McKinney v. Greenville Ice & Fuel Co.* (1958), ___ S. C. ___, 101 S. E. 2d 659, 660:

> [1] In Kennedy v. Empire State Underwriters of Watertown, N. Y., 202 S. C. 38, 24 S. E. 2d 78, we pointed out the distinction between true consolidation of cases and their trial together for convenience, to wit: that in true consolidation the several actions are combined into one, losing their separate identity and becoming a single action in which a single judgment is rendered; whereas if they are simply tried together for convenience or, as it is sometimes said, "consolidated for trial", they do not merge into one, but each remains separate in all procedural matters other than the joint trial.
>
> [2] Only where the parties are identical and the causes of action such as may have been united in the same complaint under Section 10-701 of the 1952 Code may the Court, in its discretion, order consolidation over objection of either party. [Cases Cited]
>
> [3] Where the parties are not the same, several cases may, by their consent, but not otherwise, be tried together for convenience. [Cases Cited.]
>
> [4] "Where a personal tort has been done to a number of individuals, but no joint injury has been suffered and

no joint damages sustained in consequence thereof, the interest and right are necessarily several, and each of the injured parties must maintain a separate action for his own personal redress." Pomeroy, Code Remedies, 4th Ed., Section 148.