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Miscellaneous

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Various subjects are again discussed under this title. Even though the cases are interesting, none are novel. The law, however, was well restated in some of them.

Trespass

In *Hinson v. A. T. Sistare Construction Company, Inc.*,[1] the plaintiff sought damages for willful trespass to property. The defendant had gone upon the plaintiff's property in his absence after being advised by the State Highway Department that its bid for highway construction would be accepted by the Highway Department, but before the contract was actually awarded. Also, the amount of the award for the property condemned was not made to the plaintiff until after the construction began. The trial court submitted the question of actual and punitive damages to the jury. When the verdict was returned, the jury had written: "We find for the plaintiff the sum of nominal damages, actual damages and $2,000.00 punitive damages." The court then instructed the jury as to the meaning of "nominal damages" and sent the jury back for it to decide the amount of nominal damages. When the jury returned, it had substituted $200.00 in lieu of the word "nominal," and left the punitive damages as originally stated.

On appeal, the Supreme Court held that the finding of $200.00 nominal damages was not responsive to the trial judge's instructions and reversed the lower court as to actual damages. It stated, "Where there has been a willful invasion of a legal right but no substantial damage has been shown to have resulted therefrom, the verdict for punitive damages alone will stand, since it will be presumed that nominal damages, incapable of admeasurement, have been merged in the punitive damages."

Judgments

Singleton, et al v. Mullins Lumber Company, et al,[2] was an action by the heirs of a deceased mortgagor to set aside

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1. 236 S. C. 125, 113 S. E. 2nd 341 (1960).
2. 234 S. C. 330, 108 S. E. 2nd 414 (1959).

a decree of foreclosure which had been rendered in 1909. It was alleged in the complaint that the foreclosure was null and void because in it there had been (1) no legal service of process upon the defendants, (2) no order appointing a guardian *ad litem* for minor defendants, (3) no order of reference as required by circuit court rule 51, (4) no appearance by the guardian *ad litem,* (5) no report by the Master of his finding of fact and conclusions of law "as required by law" and (7) no filing by the plaintiff of his affidavit or a certificate of the Clerk of Court that a notice of *lis pendens* had been filed as required by said rule. The plaintiffs relied upon lack of jurisdiction and fraud in order to maintain this action in attacking the prior judgment. A quote from the Court is apropos:

> "Due proof of service appears in the record of the foreclosure proceedings. Such a record, standing as it has for approximately half a century, may not be overthrown by less than the clearest and most convincing evidence. To hold otherwise would be a dangerous thing, imperiling titles to real estate and other rights long since adjudicated; it would, moreover, be contrary to precedent unbroken in the history of our jurisprudence. Even though proof of service were wholly lacking, it would be presumed that the court that rendered the judgment would not have done so without proper proof of service of the summons in the cause. (cases cited) And such presumption grows stronger with the passage of time. (case cited)"

The Court then discussed at length what is meant by the term "direct" and the term "collateral" as used with reference to an attack upon a judgment. One should read this case thoroughly for it is enlightening on this subject.

Unemployment Compensation

Our Court in *Hyman v. S. C. Employment Security Commission,*[3] in construing Section 68-113,[4] held that "The failure of a claimant for unemployment compensation benefits to make a reasonable search for suitable work, independently of the employment office wherein his claim is filed,

3. 234 S. C. 369, 108 S. E. 2nd 554 (1959).
4. CODE OF LAWS OF SOUTH CAROLINA, 1952. All code sections referred to are in this Code.

is evidence of the plaintiff's detachment from the labor market and consequent unavailability for work."

The lower court had reversed the finding of the commission that the plaintiff was ineligible for benefits because it did not meet the availability requirements of the Unemployment Compensation Law. The Commission had based its findings on the testimony of the claimant that he had only been to the union and to the unemployment office seeking employment. He also had stated that he had not looked for non-union employment.

> "We conclude that availability for work implies an unrestricted exposure of the applicant for benefits to the normal labor market to which he has been customarily attached. The burden is upon the claimant for benefits to show that he has met the benefit eligibility conditions and that he is available for work. It is the duty of the claimant for unemployment benefits to show that he has made a reasonable effort to obtain employment in his usual trade or occupation or other suitable employment. Claimant does not make this showing simply by proving that he has registered with the employment office of the Commission and reporting to his union headquarters. The failure of the claimant to make his personal search for work during the period of his unemployment is ample evidence to support the finding of fact by the Commission that he was unavailable for work within the meaning of the S. C. Unemployment Compensation Law."

Mechanics' Liens

In *Woody v. Hardy*,[5] the owner of a lot contracted with Duckworth to construct a dwelling on the lot, the contract being entered into on March 24, 1956. The owner was to obtain a Veterans Administration loan with which to pay the contractor, Duckworth. The contractor did not build according to the agreed specifications and the Veterans Administration refused to approve at the first inspection. Later, Duckworth abandoned the contract and refused to complete it. Thereafter, the Veterans Administration loan was cancelled.

The plaintiff had furnished materials to Duckworth for use in the dwelling. It developed that the plaintiff and the

5. 235 S. C. 131, 110 S. E. 2nd 157 (1959).

defendant owner then contracted to complete the dwelling, the plaintiff furnishing the necessary materials to the owner.

The defendant moved into the house on September 8, 1956, at which time the plaintiff thought the house was completed. However, the defendant complained about certain items, so that plaintiff sent a plumber to the dwelling on October 8, 1956, to put in two joints of pipe which cost $4.12. No additional charge was made by the plaintiff for the installation of these two joints of pipe.

Plaintiff filed his mechanic's lien on December 18, 1956, in the office of the Clerk of Court for Oconee County and on the same date served the same on the defendant. The filing and serving of the mechanic's lien was within ninety days from the furnishing of the last item on October 8, 1956, but was not within ninety days from the furnishing of any other material. This action to foreclose a mechanic's lien was then commenced on January 21, 1957. The total amount of the mechanic's lien as filed was $5,101.38, and the trial court allowed the claim in the amount of $5,077.77. This included the amount of the value of the materials furnished to Duckworth prior to his abandoning the contract with the defendant.

On appeal, the Supreme Court held that the mechanic's lien was filed and served within the time allowed by Section 45-259, and that the plaintiff was entitled to a mechanic's lien for the amount of the labor and materials furnished pursuant to his agreement with the defendant after Duckworth abandoned his contract. The Court reversed the lower court's holding that the plaintiff was entitled to a mechanic's lien for the amount of the materials furnished to Duckworth prior to his abandoning the contract. The case was sent back to the lower court for it to determine the amount that was due to Duckworth by the defendant at the time respondent gave appellant notice of the lien.

The Court quoted several paragraphs from *Lowndes Hill Realty Co. v. Greenville Concrete Co.*[6] which was applicable to the case. The Court pointed out that the plaintiff supplier could not obtain a mechanic's lien for more than the amount due Duckworth by the defendant at the time Duckworth abandoned the contract. Of course, this is in accord with Section 45-254.

6. 229 S. C. 619, 93 S. E. 2nd 855 (1956).

The *Lowndes Hill Realty Co.* case and the instant case should be studied and thoroughly understood by lawyers representing clients similar to the parties in these cases.

Architect's Certificate

A dispute between a building contractor and the members of a school board was involved in *Hines v. Farr, et al.*[7] Plaintiff had contracted to construct a building for the school board, and the contract provided that when the contractor was ready for the final inspection and acceptance, the architect would make such inspection, and when he found the work acceptable under the contract, and the contract fully performed, he would promptly issue a final certificate, over his own signature, stating that the work provided for in the contract had been completed and was acceptable to him under the terms and conditions thereof, and that the entire balance found to be due the contractor, and noted in said final certificate, was due and payable.

It further provided that, in the event of a dispute between the parties, "it shall be the responsibility of the architect to make written decisions in regard to all claims of the owner or contractor and to interpret the contract document on all questions arising in connection with the execution of the work."

A dispute arose as to the amount due for extra compensation by reason of rock excavation at the rate of $12.00 per cubic yard. The certificate filed by the architect showed conclusively that the number of cubic yards of rock stated in the claim was removed.

The case was tried before a jury, but upon proper motion, the trial judge directed a verdict for the plaintiff for the amount of his claim. The appellants contended that plaintiff was barred from any recovery due to the fact that he failed to demand arbitration within the period provided for in the contract—thirty days after the dispute arose. The Court held this to be no defense due to the fact that the same parties were before the court in a different case in which the court had ruled that the respondent was not entitled to arbitration but must pursue his claim in a court of competent jurisdiction. The prior case became *res judicata.*

7. 235 S. C. 436, 112 S. E. 2nd 33 (1960).

On appeal, the trial court was affirmed in each instance. The Court held that the certificate of the architect—the agent of the defendants—could not be impeached in the absence of allegations and proof of fraud, dishonesty or incompetency on the part of such architect. There was no such testimony in the case or bar, and the court was bound by the architect's certificate.

Boundaries

Smith v. Durant[8] was an action for the possession of a lot in the Town of Lake City. Plaintiff's father, T. A. Gaddy, who owned land including that in controversy, died intestate in 1935, leaving as his heirs at law plaintiff and her mother, Mrs. Mammie B. Gaddy, who died intestate in 1953. The mother had procured a subdivision of the property and a plat of it by E. L. Isenhower, surveyor, dated September 20, 1938, which was duly recorded. Upon it there was shown a triangular lot, 59A, at the intersection of the highway and a street now called Moore Street. Adjoining it on the northeast is lot 58A, with 58 feet frontage on the highway, then lot 57A with 65 feet frontage, and adjoining the latter on the northeast lot 56A with 100 feet frontage. The evidence established that the plat was in error in that the lot in dispute with 212.37 feet frontage lying between lots 57A and 56A had been overlooked and omitted by the surveyor.

In 1945, plaintiff's mother and the plaintiff then a minor, by guardian *ad litem,* brought an action in the Court of Common Pleas, naming defendant herein as a party, for the sale and conveyance of respondent's undivided interest in lots 57A, 58A, and 59A. The Court ordered certain property sold, namely, lot 59A and, "All those two certain pieces, parcels or lots of land adjoining the above described lot, situate, lying and being on U. S. Highway 52, and known and designated as the northern portion of lot 58A, less a road or street passing through the southern portion thereof, deeded to Town of Lake City, South Carolina, and lot 57A as shown on the plat herein above referred to."

The above property was conveyed to the defendant in that action, and a separate deed from the mother of the plaintiff herein contained the same description. No boundaries of lot 57A are given although the erroneous plat showed

8. 263 S. C. 80, 113 S. E. 2nd 349 (1960).

it as joining on the northeast lot 56A which, as a matter of fact, it did not, inasmuch as the disputed area lay between them. Lot 56A was and had been for some time the property of one Burroughs.

This action was commenced by plaintiff within ten years after she reached her majority so that adverse possession was not a defense to her action.

The evidence showed without question that there was an error of approximately 200 feet between Lot 56A as shown on the Isenhower plat, and Lot 57A. The defendant herein objected to the testimony of a surveyor, Floyd, who had found the error in the plat. The Court allowed the testimony to be admitted.

On appeal, several questions were passed upon by the Supreme Court. It affirmed the lower court in holding that the testimony of Floyd was admissible on the ground that "Parol testimony might be given in evidence, to explain the situation of land, contrary to the face of the deed if it is evident from the nature of the thing itself that there is a mistake in the deed as where north is mentioned for north or south for north, *et vice versa.*"

The Court also held that the reasonable inference from the evidence in the case was that the intention of the parties to the contract of purchase of sale in 1945, and the judicial proceedings to authorize the conveyance of plaintiff's interest, was to sell to the purchaser, the defendant herein, the lots designated by number in the proceedings and deeds, and not to include the adjoining area which was omitted from the plat through the error of the surveyor. A thread through all the cases shows that it is the intention which governs and when it is not expressed accurately in the deed, evidence *aliunde* may be admitted to supply or explain it.

Another question presented by appellant, which the Court decided was as follows:

> "In the case of a conflict in the description in a deed between the calls for distances and the cause for boundaries, which control?"

Appellant contended that the Isenhower plat shows his Lot 57A to be bounded on the north or northeast by Lot 56A on the plat and that this should control because the conveyances to him refer to the plat, although the frontage of his

lot 57A is stated on the plat to be 65 feet, whereas under his contention the frontage would be approximately 300 feet. The Court stated in regard to this,

> "From the first case cited by him to the point and referred to as the leading case on the subject, *Fulwood v. Graham,* 1 Rich. 491, we quote the syllabus: 'In locating lands, the following rules are resorted to and generally in the order stated. (1.) Natural boundaries; (2.) Artificial marks; (3.) Adjacent boundaries; (4.) Course and distance. Neither rule, however, occupies an inflexible position, for when it is plain that there is a mistake, an inferior means of location may control a higher.'"

The Court went on to discuss several cases on point, but overruled appellant's exception and held that the reference to the plat and the size of the lot as shown on the plat was controlling.

Commercial Transactions

In *Charles R. Allen, Inc. v. Island Cooperative Services Association Limited, et al.,*[9] our court held that in a situation in which a draft was drawn on a purchaser and later discounted at the defendant bank, the bank was the sole owner of the draft and it could not be attached as property of the payee, even though it had allowed the payee to immediately use the proceeds therefrom. The bank collected interest on the draft and was allowed to charge the draft back to the payee's account in the event of non-payment. The facts in this case are quite complicated but the evidence showed that the proceeds of the draft when deposited with the defendant bank were and could be withdrawn by the depositer freely. The conclusion reached by the Supreme Court, then, appears to be eminently correct.

This is an interesting case to read and covers many points involved in commercial transactions in which banking institutions are involved.

9. 234 S. C. 537, 109 S. E. 2nd 446 (1959).