South Carolina Law Review

Volume 17
Issue 1 *1963-1964 Survey Issue*

Article 15

1964

Practice and Procedure

Ronald E. Boston

William C. Boyd III

Reginald C. Brown Jr.

John W. Chappell

Follow this and additional works at: https://scholarcommons.sc.edu/sclr

Part of the Law Commons

Recommended Citation

Boston, Ronald E.; Boyd, William C. III; Brown, Reginald C. Jr.; and Chappell, John W. (1964) "Practice and Procedure," *South Carolina Law Review*: Vol. 17 : Iss. 1 , Article 15.
Available at: https://scholarcommons.sc.edu/sclr/vol17/iss1/15

This Article is brought to you by the Law Reviews and Journals at Scholar Commons. It has been accepted for inclusion in South Carolina Law Review by an authorized editor of Scholar Commons. For more information, please contact digres@mailbox.sc.edu.

PRACTICE AND PROCEDURE

I. Pre-Trial

A. Discovery

During the reporting period, the South Carolina Supreme Court articulated the basic policy that the discovery devices of state practice have limited application under adoption law.[1] In *McDonald v. Berry*,[2] the attorney for the adopting parents was not required to disclose their names or addresses to the natural parents who had released the child for adoption and who presented no meritorious grounds for attacking the adoption decree.[3] Preventing harassment of the child and his adoptive parents is the cornerstone of the decision. By way of dictum the court discussed the attorney-client privilege. It was noted that generally the identify of the client is not privileged while an address given confidentially is a privileged communication.

In *Cook v. Douglas*,[4] two passengers, mother and daughter, of the first automobile involved in a collision brought separate injury actions against the driver of the second automobile. The defendant attempted to depose the mother as a witness to the daughter's suit, and vice versa, under section 26-701 of the South Carolina Code, 1962, providing for written depositions of any witness to a civil action. After noting that sections 26-501 through 26-512 of the Code provide the exclusive method of examination of an "adverse party," the court held that mother and daughter occupied the "inseparable and dual capacity of adverse party and witness" due to their substantial "identity of interest through separate suits based upon substantially the same cause of action and involving identical facts."[5]

B. Formal Requirements

In *Irick v. Carr*,[6] the court considered the defense of excusable neglect[7] in relation to failure to answer or demur to a complaint

1. See S.C. Code Ann. § 32-1129 (1962) providing for issuance of amended birth certificates for adopted children free from such notice; evidence said the court of a general legislative policy. McDonald v. Berry, 243 S.C. 453, 456, 134 S.E.2d 392, 393 (1964).
2. McDonald v. Berry, *supra* note 1.
3. For a discussion of the new adoption law see the survey of Recent Legislation and Wills and Trusts.
4. Cook v. Douglas, 243 S.C. 201, 133 S.E.2d 209 (1963).
5. *Id.* at 204, 133 S.E.2d at 210.
6. Irick v. Carr, 243 S.C. 565, 135 S.E.2d 94 (1964).
7. S.C. Code Ann. §§ 10-609, -1213 (1962).

Published by Scholar Commons, 2020

within the twenty day statutory period.[8] Default judgment had been rendered against the defendant before he employed counsel. On motion to vacate, defendant alleged that he had had no legal training to inform him of the statute of limitations, that he was emotionally upset by the illness of his mother (He was served two days after returning from a five day visit with her in Mississippi.), and that he was bothered with pressing business problems. The South Carolina Supreme Court refused to disturb the ruling of the lower court that these circumstances did not constitute excusable neglect. The only cases in this area in recent years involved errors made by attorneys in the conduct of a case.[9] The court had, however, ruled in 1946 that pressing business obligations would not excuse a layman for failure to employ counsel.[10] Yet in 1914, the court had intimated that bad health and poor memory would be a valid excuse.[11] The instant case is therefore a welcome definition of the layman's obligation to attend to his legal business. In the past, the decisions have seemed to rest solely upon how necessitous the circumstances of the layman appear.

Cochran v. City of Sumter[12] demonstrates that there must be strict compliance with the statutes permitting suit against a political subdivision of the state. The particular statute held to bar this action required the filing of a verified claim within ninety days of the date of injury.[13] The plaintiff's attorney had notified the defendant of the claim twenty-seven days after the injury through a letter to the city manager, after which they continued in close contact on the matter. The court reasoned that any suit against an immune governmental body is in derogation of its sovereignty and must be within the enabling statute. The unverified notice of claim was thus faulty.

The *Cochran* case appears to go beyond the precedents in this area. *Rushton v. South Carolina Highway Dep't*[14] approved this type statute as necessary for notice to the governmental agency to allow investigation while the facts were clear in the witnesses' minds. The earlier case of *Ancrum v. South Carolina Highway*

8. S.C CODE ANN. § 10-641 (1962).

9. Lee v. Peck, 240 S.C. 203, 125 S.E.2d 353 (1962); McGhee v. Chevy, 235 S.C. 37, 109 S.E.2d 713 (1960); Simon v. Flowers, 231 S.C. 545, 99 S.E.2d 391 (1957).

10. Brown v. Nix, 208 S.C. 230, 37 S.E.2d 579 (1946).

11. Farmers Bank v. Talbert, 97 S.C. 74, 81 S.E. 305 (1913).

12. Cochran v. City of Sumter, 242 S.C. 382, 131 S.E.2d 153 (1963).

13. S.C. CODE ANN. § 47-71 (1962).

14. Rushton v. South Carolina Highway Dep't, 207 S.C. 112, 34 S.E.2d 484 (1946).

Dep't[15] had simply granted a new trial on the best evidence rule holding that the original complaint should be introduced into evidence in preference to copies thereof. The policy decision of the instant case may well prove to be the most important development in pre-trial practice during the reporting period.

C. Parties

In *Hardwick v. Liberty Mut. Ins. Co.*[16] the plaintiff sought a declaratory judgment as to the liability of the defendant, who promptly demurred on a defect of parties. At the time of accident the plaintiff's borrowed automobile was insured by the defendant through a policy with the third party owner. The defendant was thus seeking to join the owner as well as the plaintiff's insurer. The court held there was no defect of parties, extending the distinction of proper as contrasted to indispensable parties to this action for declaratory judgment.

The doctrine of indispensable parties remains a firmly established part of South Carolina practice. The application of the rule is primarily a question of the factual background of each litigation. The test of *Doctor v. Lee*[17] which is cited in the instant case is very succinct: "[P]arties are not necessary to a complete determination of a controversy unless they have rights which must be ascertained and settled before rights of parties to the suit can be determined."[18]

D. Jurisdiction

In *Clinkscales v. Clinkscales*[19] the circuit court for Anderson County had awarded divorce with custody of children to the wife. When the wife moved to Greenville, the husband brought action in the circuit court for that county to take custody from her. The wife questioned the jurisdiction of the latter court. The circuit court found jurisdiction under the statute fixing venue of actions, generally, in the county of the defendant's residence.[20]

The South Carolina Supreme Court reversed holding that the court issuing the divorce decree has exclusive jurisdiction on questions of custody.

15. Ancrum v. South Carolina Highway Dep't, 162 S.C. 504, 61 S.E. 98 (1931).
16. Hardwick v. Liberty Mut. Ins. Co., 243 S.C. 162, 133 S.E.2d 71 (1963).
17. 215 S.C. 332, 55 S.E.2d 68 (1949).
18. *Id.* at 335, 55 S.E.2d at 69.
19. 243 S.C. 377, 134 S.E.2d 216 (1963).
20. S.C. CODE ANN. § 10-303 (1962).

The question was one of novel impression in South Carolina. This policy seems well reasoned as a method of avoiding conflict of jurisdiction. Its basis is section 20-115 of the South Carolina Code, 1962, providing that the "divorce court may from time to time after final judgment make orders touching the care, custody, and maintenance of the children." Precedents of North Carolina and Virginia operating under similar statutes were cited in accord with the instant case.

E. Joinder

Gibbs v. Young[21] demonstrates the difficulty faced by the foreign plaintiff in attempting to gain redress against a foreign corporation. The plaintiff, a California citizen, was injured in an auto collision in Georgia with a truck owned by an Alabama corporation and driven by a resident of Anderson County. The corporation was licensed to operate through Chesterfield County, and suit was brought against the individual and corporation in Chesterfield. The South Carolina Supreme Court sustained the demurrer as to the corporate defendant and granted change of venue to Anderson County as to the individual. There was no question as to jurisdiction over the resident of the state, but the corporate defendant was protected by section 10-214 of the South Carolina Code, 1962, limiting jurisdiction over a foreign corporation when sued by a foreign plaintiff to those actions arising in the state or where the subject matter of the action is within the state. The impact of the case is that the above limitation applies equally whether the corporation is sued individually or jointly.

II. TRIAL

A. Jury Argument

Boyleston v. Baxley[22] was a tort suit for personal injuries arising out of an automobile accident. The plaintiff could remember nothing of the occurrence; both defendant and his passenger were dead, and there were no other eye witnesses. The physician who examined the body of the defendant testified that the major injury was a broken neck which caused defendant's death. On cross examination he admitted he could not be sure of the cause of death without autopsy. There was no other evidence as to the

21. 242 S.C. 217, 130 S.E.2d 484 (1963).
22. 243 S.C. 281, 133 S.E.2d 796 (1963).

cause of death. The South Carolina Supreme Court sustained the trial judge's ruling that the defendant's counsel could not argue to the jury that the defendant had died prior to the accident due to a heart attack, pointing out that there was no evidence weighing against the inference that defendant had died in the collision. The basis of the decision is the well tested rule that counsel has a duty to confine his arguments to the issues raised by the pleadings and evidence.

B. Judgments

The court's decisions in the area of Judgments were largely a restatement of settled principles of law.

In *Case v. Case*,[23] the South Carolina Supreme Court held that an order or decree of a trial judge is not final until written and delivered to the clerk for filing. In this case appellant contended, and the record supported his contention, that during the hearing on the merits the trial judge orally declared that he would grant plaintiff a divorce on the grounds of desertion. Plaintiff was allowed to withdraw the divorce action—a portion of her demand—with temporary relief continued. Defendant-appellant here sought to have the trial judge's oral declaration made binding as a final order or decree. Mr. Chief Justice Taylor, writing for the court, cited section 10-1510 of the South Carolina Code, 1962, which requires in part that: "Upon the trial of a question of fact by the court its decision shall be given in writing. . . ." The court also cited *Archer v. Tong*,[24] in which the court said: "Until the paper has been delivered by the judge to the clerk of the court, to be filed by him as an order in the case, it is subject to the control of the judge and may by him be withdrawn at any time before such delivery." Accordingly, the court held in the present case that: "Even if . . . the trial judge granted an oral divorce to plaintiff, such pronouncement is not a final ruling on the merits nor is it binding on the parties until it has been reduced to writing, signed by the judge and delivered for recordation."

In *Brookline Sav. & Trust Co. v. Barnett*[25] respondent Brookline had been assigned certain promissory notes given by appellants to a contractor for work done on their home. Subsequently, a revision note was given to Brookline by the Barnetts.

23. 243 S.C. 447, 134 S.E.2d 394 (1964).
24. 46 S.C. 292, 24 S.E. 83 (1895).
25. 243 S.C. 481, 134 S.E.2d 569 (1964).

Judgment was obtained on the note and the circuit court endorsed upon the execution, pursuant to section 34-62 of the South Carolina Code, 1962, that "the judgment in this case was obtained on obligations contracted for the erection of improvements on homestead of defendants and for no other." The position of appellants was that since the negotiable note was assigned and renewals thereof taken, a judgment based upon the renewal note could not be enforced against the homestead. They charged that the circuit court erred in not so ruling. The South Carolina Supreme Court held, pursuant to article III, section 28 of the South Carolina Constitution, and section 34-1 of the South Carolina Code, 1962, that the homestead exemption is inferior to obligations contracted for the purchase, erection or improvement of the homestead and that the judgment held by Brookline represented the original debt incurred by the appellants for the making of improvements or repairs to their residence, regardless of its assignment or renewal.

C. Discretion of Trial Judge

The court following settled rules, held in several cases that an order for a new trial based upon a consideration of the facts is not reviewable by the South Carolina Supreme Court,[26] and that the disposition of a motion for a new trial on grounds of the inadequacy of the verdict is discretionary with the trial judge and will not be disturbed on appeal absent abuse.[27]

However, in *Hatchell v. McCracken*[28] the trial judge, having determined that the verdict rendered by the jury was inadequate, awarded damages *higher* than the amount given by the jury but less than the amount prayed for by the plaintiff, without giving the plaintiff option of a new trial. Defendant had indicated a willingness to pay the higher amount but plaintiff appealed. The South Carolina Supreme Court, noting that this precise question had not heretofore been before the court, held this to be reversible error. The court noted as a general rule that a judgment *non obstante veredicto*, in any amount greater than the verdict of the jury, may be entered only when the evidence supporting it is uncontradicted and unimpeached so that the verdict could and should have been entered in the exact amount of the

26. Mack v. Frito-Lay, Inc., 243 S.C. 376, 133 S.E.2d 833 (1963); Lee v. Kirby, 243 S.C. 185, 133 S.E.2d 127 (1963).
27. Daniel v. Hazel, 242 S.C. 443, 131 S.E.2d 260 (1963).
28. 243 S.C. 45, 132 S.E.2d 7 (1963).

judgment. In this case, where the damages were unliquidated and very much in dispute, the court held that even if the plaintiff were entitled to a directed verdict on all other issues, the judge could not have directed a verdict for the amount of damages as this would be an invasion of the province of the jury. The court quoted from *Anderson v. Aetna Cas. & Sur. Co.*,[29] to the effect that: "Although the court may amend a verdict, the amendment must be accompanied with an option of a new trial *nisi* to the party against whom [the] amendment militates." Otherwise it would compel the plaintiff to forego his constitutional right to the verdict of a jury to allow such an amendment to stand.

The last case to be considered in this area was that of *Fore v. United Ins. Co. of America*[30] in which a default judgment was set aside by the trial judge pursuant to section 10-1213 of the South Carolina Code, 1962. The court held that the appellant's exceptions failed to point out any abuse of discretion by the trial judge, the only ground upon which his order to vacate will be set aside by the court when statutory requirements have been met in the issuance of such an order.

III. APPEAL

A. *Court Rules*

The most interesting court rules decision handed down by the court during this survey period was *F.C.X. Co-op. Serv., Inc. v. Bryant.*[31] A close study of this case should prove extremely valuable to any attorney in that it should enable him to avoid the pitfalls occasioned by improper preparation of exceptions. In this case an action was brought to recover the unpaid portion of the purchase price of certain farm supplies sold and delivered by the plaintiff to the defendant pursuant to a written contract between the parties. In the trial court the action resulted in a directed verdict for the plaintiff whereupon the defendant appealed on twenty-two exceptions. In preparation of his brief the defendant's attorney set out nineteen questions, many of them repetitious. He failed to state under each subdivision of his brief the specific exception which was alleged

29. 175 S.C. 254, 178 S.E. 819 (1935).

30. 242 S.C. 451, 131 S.E.2d 508 (1963).

31. 242 S.C. 511, 131 S.E.2d 702 (1963); see also Allen v. Georgia Industrial Realty Co., 242 S.C. 472, 131 S.E.2d 419 (1963), discussed herein under the heading of Exceptions.

to raise the point considered under that subdivision. Motion was made to dismiss on the ground that the defendant had not met the requirements of the South Carolina Supreme Court Rules No. 4, section 6 and No. 8, sections 2, 3, and 7. The court found that the appellant had violated the letter and spirit of these rules to such an extent as to unduly burden opposing counsel and the court. The court, after having discussed the flagrant violations of the rules and having failed to pass upon the plaintiff's motion to dismiss, considered the exceptions on their merits and found against the defendant. This avenue taken by the court illustrates the fact that it is not bound by its own rules and may waive compliance as a matter of grace.

The case of *Allen v. Hatchell*[32] also set forth the court policy of waiver of compliance with court rules. In this case the court noted that it was a close question as to whether or not there had been compliance with Rule 4. This being the case, the court relied on language contained in *Jackson v. Carter*:[33]

> If such examination of an exception as may be necessary to disclose that it is framed in violation of this rule (e.g., Rule 4, Supreme Court Rule) also discloses that it clearly embraces a meritorious assignment of prejudicial error, the court will ordinarily waive the breach of the rule and consider the exception. Otherwise the exception will not generally be considered.

The court went on to hold that although the exception did not comply with Rule 4 literally, there was a meritorious assignment of prejudicial error in the charge of the trial judge based upon the evidence presented in the transcript and inferences drawn therefrom by the court. This case is analogous to the *F.C.X.* case in that the court in both instances waived compliance with one of its own rules and considered the exceptions on their merits; however, the two cases differ in that the violation of the rule in the *Allen* case does not appear to be as flagrant as in the *F.C.X.* decision. There was also a difference in the result reached by the court in these decisions in that in the *Allen* case the court found that there was a meritorious assignment of error whereas in the *F.C.X.* case the court upon consideration of the exception failed to find any merit in any of the exceptions taken by the appellant.

32. 242 S.C. 458, 131 S.E.2d 516 (1963).
33. 128 S.C. 79, 121 S.E. 559 (1924).

Boston et al.: Practice and Procedure

In *Shell v. Brown*[34] the court was again faced with the application of Rule 4, section 6 but in a different content. In this case a demurrer filed by the defendant in the lower court was overruled. Defendant appealed, excepting "on the ground the complaint failed to state a cause of action." The court in dismissing the appeal on the grounds of vagueness and indefiniteness quoted from *Brady v. Brady*:[35]

> We have held in many cases that every ground of appeal ought to be so distinctly stated that the court may at once see the point which it is called upon to decide without having to grope in the dark to ascertain the precise point at issue.

The only other decision in this area was *Sellars v. Nicholson*[36] where the court found the appealing party had failed to file return in the South Carolina Supreme Court within twenty days as required by Rule 1. The court held that the circuit judge properly granted the respondent's motion for an order dismissing the appeal where there had been a violation of the rule. The court in conclusion said that the circuit judge had no alternative but to grant the motion for the order, thus the court here refuses to waive compliance with a court rule prescribing the time the parties have to perfect an appeal.

B. Scope of Review

The case of *Knight v. Johnson*[37] was the only case before the court dealing with scope of review. The dispute involved an automobile collision. During the trial the defendant was allowed to introduce testimony, over the objection of the plainitff, as to the motive and purpose of the plaintiff in the operation of the automobile at the time of the accident. A verdict was rendered for the defendant but on motion of the plaintiff a new trial was granted upon the grounds that prejudicial error had been committed in the admission of such testimony and the defendant appealed. On appeal the plaintiff contended that the order of the trial court was not subject to review by the South Carolina Supreme Court because the order was based on a question of fact, thus it was not within the court's scope of review. The court,

34. 243 S.C. 380, 134 S.E.2d 214 (1963).
35. 222 S.C. 242, 72 S.E.2d 193 (1952).
36. 243 S.C. 340, 133 S.E.2d 837 (1963).
37. 244 S.C. 70, 135 S.E.2d 372 (1964).

speaking through Mr. Justice Lewis, agreed with the plaintiff that it is a well settled rule recognized by the court that when the order is based upon questions of fact or upon questions of law and fact it is not appealable. However, the court went on to point out that the order appealed from here was based solely upon a question of law in that the trial judge's order stated that in the admission of such testimony the court had committed prejudicial error. The South Carolina Supreme Court then proceeded in the determination of the basic question on appeal and found that the testimony introduced in the lower court was admissible and the order granting the new trial was reversed accordingly.

C. Law of the Case

After being remanded to the circuit court[38] the case of *Cleveland v. Cleveland*[39] was once again before the South Carolina Supreme Court for consideration. The court held that the circuit court could not properly consider a question decided by a master when no exception to the master's report had been taken.

The conclusions of the master, not being challenged by a proper exception in this respect, became the law of the case.

In *Bost v. Banker's Fire & Marine Ins. Co.*[40] the court held that a trial judge's charge relating to a question of imputation of knowledge, not having been excepted to, whether right or wrong became the law of the case.

In the case of *Hutson v. Herndon*[41] the trial court's ruling that certain lease agreements were binding and not subject to oral variance, was the law of the case and binding upon the South Carolina Supreme Court since no appeal had been taken in the earlier action.

Finally, in *Dillon Tire Serv., Inc. v. Pope*[42] the court held that an order issued by the circuit court holding that the indebtedness of the defendant to the plaintiff was not at issue and from which no appeal was made became the law of the case.

D. Exceptions

Four cases dealing with exceptions will be discussed in this subsection; *Bob Jones Univ., Inc. v. City of Greenville*[43] is the

38. Cleveland v. Cleveland, 238 S.C. 547, 121 S.E.2d 98 (1961).
39. 243 S.C. 586, 135 S.E.2d 84 (1964).
40. 242 S.C. 274, 130 S.E.2d 907 (1963).
41. 243 S.C. 257, 133 S.E.2d 753 (1963).
42. 243 S.C. 293, 133 S.E.2d 813 (1963).
43. 243 S.C. 351, 133 S.E.2d 843 (1963).

most significant. Here the appellant in his exceptions contended that the master committed prejudicial error in his report by failing to separately append thereto and identify all evidence which he found inadmissible. Mr. Justice Moss, writing for the majority of the court, found that the appellant failed to specify in any of his exceptions any incompetent testimony that may have been considered by the master or any evidence submitted that the master should have considered but may not have done so to appellant's prejudice. The court based its decision on a 1962 case.[44]

What the majority of the court seemed to have overlooked, and what Mr. Justice Bussey in his dissent pointed out, was that the appellant through the master's failure was left totally in the dark as to what evidence had been and had not been considered. Any attempt by appellant to be more specific in his exceptions would have amounted to mere speculation and conjecture on his part.

In *Hall v. Senn*[45] the court again held that an exception in which no question of law or fact is set forth is too vague and indefinite to be reviewed. The court went on to state that the exception was not sufficient to challenge the legal sufficiency of the findings of fact of the lower court in that the exceptions failed to point out the claimed error committed by the court below.

The case of *Brown v. Graham*[46] dealt with the situation where the master issued two reports. The plaintiff appealed to the circuit court only upon exceptions to the second report. The South Carolina Supreme Court held that the lower court was correct in excluding the earlier report.

An unusual situation arose in *Allen v. Georgia Industrial Realty Co.*[47] wherein the master based his findings upon four different grounds, one of which was estoppel. The plaintiff on appeal excepted to these findings but failed to set forth any question in his brief challenging the master's findings of estoppel. The South Carolina Supreme Court said in order to prevail on the appeal, the plaintiff had to obtain a reversal of the master's findings as to estoppel, without which any error in the other findings became immaterial and moot. Since the plaintiff failed

44. Cox v. First Provident Corp., 240 S.C. 130, 125 S.E.2d 1 (1962).
45. 242 S.C. 544, 131 S.E.2d 700 (1963).
46. 242 S.C. 491, 131 S.E.2d 421 (1963).
47. 242 S.C. 472, 131 S.E.2d 419 (1963).

Published by Scholar Commons, 2020

South Carolina Law Review, Vol. 17, Iss. 1 [2020], Art. 15

to set forth any question pertaining to the estoppel, his right to insist that the court review the other findings of the master was precluded.

RONALD E. BOSTON
WILLIAM C. BOYD, III
REGINALD C. BROWN, JR.
JOHN W. CHAPPELL