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Miscellaneous

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Attachments

Our Supreme Court held in *Brewer v. Graydon*[1] that realty belonging to a nonresident could not be attached in actions for alienation of affections or criminal conversation. It refused to overrule *Addison v. Sigette,*[2] stating that had the General Assembly desired to allow attachments in such cases, it could have so provided as it did pertaining to libel and slander actions.

In *Southeastern Equipment Co. v. One 1954 Autocar Diesel Tractor*[3] plaintiff commenced an action by issuing a summons against the defendant, a foreign corporation, and attached a tractor, property of the defendant. Thereafter the defendant appeared specially for the purpose of substitution of security which was granted. Then defendant served upon plaintiff's counsel a motion to dissolve the attachment for defects and wrote plaintiff's counsel demanding a copy of the complaint subject to the motion to dissolve the attachment. Immediately thereafter, defendant's counsel served an additional notice on plaintiff's counsel in which it sought to qualify the notice of motion to dissolve the attachment and the letter demanding a copy of the complaint as being subject to special appearance.

About 20 days later a copy of the complaint was served upon defendant's counsel who acknowledged it. Later a motion was made by defendant to dismiss the complaint on the grounds that more than 30 days had elapsed since the issuance of the summons, but that no personal service thereof had been made upon it, and no publication thereof commenced.

By order of the lower court, the complaint as to the defendant was dismissed for lack of service of the summons, and the tractor substituted as party defendant. The court refused to dissolve the attachment. On appeal by both parties, the Court concluded that the acts stated above did not comply with

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1. 233 S. C. 124, 103 S. E. 2d 767 (1958).
2. 50 S. C. 192, 27 S. E. 631 (1897).
3. 234 S. C. 213, 107 S. E. 2d 340 (1959).

Section 10-648[4] and that the defendant had subjected itself to the jurisdiction of the court.

It was held that the order refusing to dissolve the attachment must be affirmed inasmuch as the motion was made after "substitution of security" which was too late. Such act constituted implied acknowledgement of the validity of the attachment.

Wrongful Death — Beneficiary Thereof

Again the Court reaffirmed its prior decisions in deciding that when a preferred beneficiary under Section 10-1952 of the 1952 Code died before action was commenced, the action shall be for the benefit of the next remoter class of beneficiaries rather than for the estate or heirs at law of the preferred beneficiary.[5] The Court recognized that South Carolina was not in line with the apparent majority view, but it refused to overturn its previous much deliberated decisions.[6]

Actions

In *Stewart v. Martin, et al.*[7] the Court was called upon to decide an hitherto open question. Plaintiff brought an action alleging that defendants had committed tortious acts in preventing the sheriff from seizing an automobile subject to attachment for damages allegedly received in a collision therewith. Defendants demurred to the complaint on the ground that it "did not state facts sufficient to constitute a cause of action in that it did not appear that there had been any adjudication that the alleged damage to plaintiff's taxicab was caused by the negligent operation of the Chevrolet, or any judicial determination that plaintiff had a lien thereon."

The lower court sustained the demurrer, and construed the complaint as being an action for conversion. On appeal the Supreme Court held that the action was to recover damages resulting from the wrongful and malicious acts of the defendants in removing and secreting the automobile, thereby preventing the sheriff from seizing it under the attachment papers. It went on to hold that such an action was maintainable in South Carolina.

4. CODE OF LAWS OF SOUTH CAROLINA, 1952.
5. Rushton v. Smith, 233 S. C. 292, 104 S. E. 2d 376 (1958).
6. Morris v. Spartanburg Ry., Gas & Electric Co., 70 S. C. 279, 49 S. E. 854 (1904); and Elkin v. Southern Ry., 156 S. C. 390, 153 S. E. 337 (1930).
7. 232 S. C. 483, 102 S. E. 2d 886 (1958).

Recognition was given to the fact that most courts do not allow such actions by a general creditor. However, it pointed out that by statute[8] any person injured by the negligent operation of an automobile has an interest or right superior to a general creditor. Even though the right may be inchoate or contingent, the owner of such right has a special interest in the property — namely, security interest for the payment of any judgment which may be awarded.

The Court quite accurately pointed out also the injustice which could result if such an action were not maintainable. In situations in which the owner or driver of an automobile could not be ascertained, the injured party would be without a remedy because in an in rem action the res must be brought before the court before judgment can be obtained.

Elections

Two cases arose during this period involving contested political elections. In the first[9] the petitioner alleged that the candidate certified by the Board of State Canvassers as the winner in the General Election of 1958 had not complied with Section 23-265 of the 1952 Code which requires candidates to make certain pledges. In addition the expenditure statement mentioned in the pledge must be filed before and after the election. The winner filed such a pledge on June 9, 1958, on June 23, 1958, on June 25, 1958, on November 4, 1958, at about noon, and on November 8, 1958. He filed Expenditure Statements on June 9, 1958, on June 11, 1958, on June 23, 1958, on June 25, 1958, on November 4, 1958, and on November 8, 1958.

The Court stated that it clearly appeared that compliance with the statute had been effected as to the primary elections. Such is certainly evident by referring to the dates set forth above and by keeping in mind that the primary elections were held on June 10, and June 24, 1958.

The pledge filed by the winner on June 25, 1958, was held to be prospective and was sufficient compliance with the statute for the general election. Concerning the statements of expenditures pertaining to the general election, the Court held that the statement filed on November 9, 1958, substantially

8. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 45-551.
9. Lovelle v. Thornton, 234 S. C. 21, 106 S. E. 2d 531 (1959).

complied with the statute. Inasmuch as the statement filed about noon on November 4, 1958, showed that no expenditures had been made, the Court further held that filing the statement on election day was not fatal. The Court after pointing out that the provisions of the statute relating to the time of filing are directory rather than mandatory, stated:

> We should not, because of a merely technical failure to comply with a directory provision of the statute, deny to the successful candidate the fruits of his victory, or to the voters the officer of their choice.

In the second case[10] ex-judge Redfearn, who has been much in the news during the last year, sought to nullify the certification of a write-in candidate as the winner of the 1958 general election for the office of Probate Judge for Chesterfield County.

Of the 119 ballots contested by Redfearn, the voter had placed an "X" or a check mark in the circle under the word "Democrat" on the ballot. On 97 of these Redfearn's name was scratched out and in the column to the right of it, other names were written in. On the remaining 21 ballots, Redfearn's name had not been scratched out, but other names had been written in opposite the name of the office.

Section 23-310 of the 1952 Code was held to be directory and not inflexible, and Section 23-357 specifically allows a voter to vote for any qualified person whose name is not on the ballot by "writing in the name of the person opposite the office." The election statutes do not require a voter to go further and strike out the name printed on the ballot; neither do they proscribe the counting of a ballot for a write-in candidate when the voter has also marked the party circle. The intent of the voter is of primary importance in deciding contested ballots, and such intent will control in the absence of the violation of positive requirements of law. The Court refused to upset the action of the State Board of Canvassers.

Estoppel by Judgment

Mackey v. Frazier[11] was an action by the owner and operator of an automobile against the driver of a truck involved in a collision with the automobile. The owner of the truck had

10. Redfearn v. Board of State Canvassers of South Carolina, 234 S. C. 113, 107 S. E. 2d 10 (1959).
11. 234 S. C. 81, 106 S. E. 2d 895 (1959).

previously sued Mackey for damages arising out of the collision. Mackey counterclaimed in that action, alleging negligence and willfulness on the part of Frazier as servant and agent of the truck's owner. Mackey also set up a general denial and defenses of sole and contributory negligence on the part of Frazier as operator of the truck. In said action the owner of the truck had judgment against Mackey for the damages sustained. The acts alleged in the present case were verbatim the same as those set forth in the counterclaim in the first action. The defendant herein set up as a defense the former adjudication and moved for judgment on the pleadings.

The question thus presented to the Court was: Can one who sues the master for personal injury caused by the sole negligence of the servant and having failed in such action, maintain another action against the servant alleging the same acts of negligence as the proximate cause of his injury and damage?

After referring to several cases from other jurisdictions, the Court held that the facts of the instant case constituted estoppel by judgment and was a complete bar to the action. However, the Court specifically refused to hold that the prior case was res judicata, because the parties to the actions were not the same. To the writer, the decision seems eminently correct.

Duty of Innkeeper to Guests

The court of appeals for the Fourth Circuit in deciding *Bowling v. Lewis*[12] held that an innkeeper in South Carolina owes to his guests, at the least, the duty of exercising ordinary or reasonable care to maintain those parts of his premises which a guest may be expected to use, in a reasonably safe condition. Judge Wyche's order granting an involuntary dismissal was reversed, the Court having concluded from the facts of the case that there was sufficient evidence to go to the jury.

12. 261 F. 2d 311 (4th Cir. 1958).