South Carolina Law Review

Volume 19
Issue 1 *1966-1967 Survey Issue*

Article 12

1967

Practice and Procedure

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PRACTICE AND PROCEDURE

I. PRETRIAL

A. *Discovery*

Proctor v. Corley[1] has helped to clear the confusion surrounding discovery in South Carolina. The defendant obtained an order under section 26-701 of the South Carolina Code requiring a witness to appear for pretrial examination. The plaintiff objected on the ground that the examination by the defendant was not required under section 26-701. The circuit court dismissed the clerk's order and the defendant appealed.

Citing *McLaurin v. Wilson*,[2] the court first made it clear that depositions taken under sections 26-701 through 26-703 of the Code are distinct from testimony *de bene esse* provided for in sections 26-704 through 26-709. Examination *de bene esse* provides for the preservation of evidence, a use inconsistent with later *viva voce* examination.

Under section 26-701 the testimony of *any* witness could be taken. In addition, the deposition could be read into evidence at the trial and this would not preclude *viva voce* examination of the witness if either party desired it.

The circuit court had dismissed the clerk's order on the ground that the defendant had not shown good and sufficient cause for examining the witness under section 26-503 of the Code. The supreme court held that this section was meant to apply only to the examination of adverse parties, and an adverse party is not a witness within the meaning of section 26-701. The defendant's application for the order was the only showing contemplated by the terms of the statute which provide that the examination of the witness be "required by the party making such application."

B. *Change of Venue*

During the survey period the South Carolina Supreme Court considered the question of change of venue in three cases. In *Cavalier v. Corley*[3] the court restated the established principle that the granting of a motion for change of venue on grounds of convenience of witnesses and promotion of justice is within

1. 246 S.C. 478, 144 S.E.2d 285 (1965).
2. 16 S.C. 402 (1882).
3. 247 S.C. 509, 148 S.E.2d 372 (1966).

the discretion of the trial judge and will not be disturbed on appeal where no clear showing of abuse of discretion is made. The appellant's argument, based on older cases, was rejected in favor of the controlling decisions of recent cases.

Harmon v. Graham[4] presented a question of first impression in this state. The defendant served upon the plaintiff a motion for change of venue pursuant to section 10-303 of the South Carolina Code. The same day, the defendant, "not waiving but specifically reserving all rights under his motion for a change of venue heretofore served,"[5] served an answer and counterclaim on the plaintiff. The change of venue was granted and the plaintiff appealed contending that the defendant had waived his right to a change of venue when he asserted a counterclaim.

The court unanimously affirmed the change of venue saying that it would be an anomaly to hold that the defendant could not assert his right under section 10-705 of the Code without waiving his right under section 10-303, which right was expressly reserved. In support of its decision the court quoted from *Corpus Juris Secundum*[6] and cited a Texas case[7] and a California case,[8] both clearly in point.

In *Miller v. Miller*,[9] the defendant made a motion for change of venue which made it necessary for the trial court to make a finding as to the defendant's place of residence at the time the action was instituted. The supreme court restated the well settled principle that the issue of residence is a question of fact, and its determination by the trial judge is conclusive unless without evidentiary support. In determining domicil the court will give decisive weight to the act and intent rather than the duration of residence. This, too, is settled law.

C. *Nonsuit Prior to Joinder*

In *Knopf v. Knopf*,[10] the court held that denial of the plaintiff's motion to discontinue his action before the issues had been joined was an abuse of discretion, in the absence of resulting prejudice to the defendant. The plaintiff has the right to dis-

4. 247 S.C. 54, 145 S.E.2d 521 (1965).
5. *Id.* at 55-56, 145 S.E.2d at 521.
6. 92 C.J.S. *Venue* § 217 (1955).
7. Hickman v. Swain, 106 Tex. 431, 167 S.W. 209 (1914).
8. Goss v. Brown, 64 Cal. App. 381, 221 Pac. 683 (1923).
9. 248 S.C. 125, 149 S.E.2d 336 (1966).
10. 247 S.C. 378, 147 S.E.2d 638 (1966).

continue any action commenced by him where it will not result in legal prejudice to the defendant. In this case the plaintiff brought an action for divorce against his wife. Before the issue was joined, he served a motion for an order of dismissal to be heard on the fourth day after service. Pending the hearing of this motion, the wife filed an answer to the complaint. The court quoted from *Krause v. Borjessan*,[11] a Washington case, which held that the right to a voluntary nonsuit is fixed at the time it is claimed. Thus a defendant cannot thereafter claim a setoff or seek affirmative relief as a means of preventing the granting of the nonsuit.

II. TRIAL

A. *Evidence*

The opinion in *Johnson v. Finney*[12] helps lay to rest the term "scintilla of evidence" in South Carolina by following the recent trend in avoiding that language. The ordinary meaning of the scintilla rule is that if there is the slightest trace of evidence presenting a conflict the case must be submitted to the jury.[13] This doctrine has now been generally rejected.[14] As used by the South Carolina courts, a scintilla of evidence is any material evidence that, if true, would tend to establish the issue in the mind of a reasonable juror.[15] This is obviously not a true "scintilla" of evidence, and use of the word "scintilla" only serves to confuse the issue. For that reason, it has fallen into disuse in recent years.

The test that has been applied in place of the scintilla rule is the one used in *Johnson v. Finney*. The court stated that if more than one reasonable inference can be drawn the case must be submitted to the jury, but if the evidence is susceptible of only one reasonable inference the question is one of law for the court. This is substantially the same test as that of the scintilla rule as used in South Carolina, but avoids use of the confusing term "scintilla." The test in *Johnson* has been used before and is well established law in South Carolina.[16]

11. 55 Wash. 2d 284, 347 P.2d 893 (1959).
12. 246 S.C. 366, 143 S.E.2d 722 (1965).
13. 53 AM. JUR. *Trial* § 356 (1945).
14. *Ibid.*
15. See, *e.g.*, Cook v. Norwood, 217 S.C. 383, 60 S.E.2d 695 (1950); Moorer v. Dowling, 216 S.C. 456, 58 S.E.2d 734 (1950).
16. *Cf.* West v. Sowell, 237 S.C. 641, 118 S.E.2d 692 (1961).

B. *Jury Trial*

The court in *Family Loan Co. v. Surratt*[17] held that a party who agrees to reference to a master of all issues in an action waives any right to a jury trial. In this case the defendant consented to an order of reference containing a preliminary recital that the issues had been joined and that "the same is an equity matter and ought to be referred." The complaint clearly alleged the right to no relief other than recovery of the amount due on the contract under consideration. Thus, as the supreme court pointed out, the pleader had erroneously characterized the action as one in equity. Nevertheless, the order having been referred to him, the master recommended that judgment be entered against the defendant for the amount due on the contract, and it was so entered. The defendant contended that he was entitled to a jury trial on the legal issue. But the court held that having consented to a general order of reference, the defendant cannot later be heard to complain that he was entitled to some other mode of trial.

C. *Motions for Directed Verdict and Nonsuit*

In *Ralston Purina Co. v. O'Dell*[18] the plaintiff sued the defendant, O'Dell, to recover for goods and merchandise sold him. Three others were joined as defendants as they had allegedly guaranteed payment. During trial the plaintiff moved for a voluntary nonsuit against the three guarantors, which was denied. At the close of testimony an involuntary nonsuit was granted as to the three alleged guarantors, and the plaintiff's motion for a directed verdict was denied. The action had been brought for a sum in excess of 9,000 dollars, but the jury returned a verdict against O'Dell for only 4,000 dollars. The plaintiff moved for judgment n.o.v. in the full amount, but this motion was also denied. The supreme court held that the trial judge erred in not granting the plaintiff's motion for directed verdict against O'Dell. The only inference that could be drawn from the evidence was that he was indebted to the plaintiff for the whole amount. Where the evidence is susceptible of only one reasonable inference, the court should decide the question as one of law.[19]

17. 248 S.C. 113, 149 S.E.2d 334 (1966).

18. 248 S.C. 37, 148 S.E.2d 736 (1966).

19. *Id.* at 41, 148 S.E.2d at 737. The court cited Skipper v. Hartley, 242 S.C. 221, 130 S.E.2d 486 (1963).

The trial judge also erred in refusing to grant the plaintiff's motion for voluntary nonsuit against the three guarantors. The rule in South Carolina is that a plaintiff is entitled to a voluntary nonsuit without prejudice as a matter of right unless there is a showing of legal prejudice to the defendant. Such prejudice does not arise from the fact that granting the plaintiff's motion would impose upon the defendant the necessity of defending another suit. The court cited *Gulledge v. Young*[20] in support of the proposition that the trial judge has no discretion with respect to the granting of a motion for voluntary nonsuit unless and until legal prejudice is shown. In that event the matter becomes one of discretion for the trial judge.

In *Able v. Travelers Ins. Co.*,[21] the defendant had insured Able against accidental bodily injury. Able, a policeman, died from a cerebral hemorrhage shortly after suffering a fall while chasing a man in an attempt to arrest him. The defendant refused to make any payments to Able's widow, the beneficiary under the policy, on the ground that Able died of illness rather than by accident. The jury found for the defendant. The plaintiff excepted to the denial of her motion for a new trial and alleged error in the charge to the jury.

The court held that, under South Carolina Circuit Court Rule No. 76, the alleged lack of evidentiary support for the verdict should first have been presented by a motion for a directed verdict.

As to the second exception, after charging the jury, the trial judge, as required by section 10-210 of the South Carolina Code, asked the plaintiff's counsel if he wished to request any additional instructions or take any exception to the charge as given. He replied in the negative. The court held that in the absence of an exception at the trial, the plaintiff could not thereafter challenge the charge on appeal.

The court in *Evans v. Wabash Life Ins. Co.*[22] reached a decision similar to the one in *Able*[23] based on Circuit Court Rule No. 76. Here the defendant made a motion to strike certain allegations from the complaint at the close of the plaintiff's testimony and failed to renew its motion or move for a directed verdict after presenting its own evidence. This failure precluded

20. 242 S.C. 287, 130 S.E.2d 695 (1963).
21. 248 S.C. 101, 149 S.E.2d 262 (1966).
22. 247 S.C. 464, 148 S.E.2d 153 (1966).
23. Able v. Travelers Ins. Co., 248 S.C. 101, 149 S.E.2d 262 (1966).

a challenge to the sufficiency of the evidence on appeal. In addition, the court stated that when the defendant presented evidence, it lost the opportunity to have the trial judge's refusal of its motion reviewed in the light of the plaintiff's evidence alone. This is settled law in South Carolina.

D. *New Trial*

In *Strickland v. Prince*,[24] an action arising out of an automobile accident, the plaintiff received a verdict in the amount of 7,750 dollars, of which 608.15 dollars was admittedly for property damage. The remainder was awarded for damages resulting from injury to his nervous system although there was no physical impact on his person. The defendant moved for a new trial nisi. The trial judge granted a new trial unless the plaintiff remitted all the damages in excess of the 608.15 dollars property damage. Instead of remitting, the plaintiff appealed.

The court held that since the plaintiff did not remit in accordance with the order granting a new trial nisi, the effect of the order was to grant a new trial absolute. The South Carolina Supreme Court interpreted the trial judge's order as one based upon a consideration of the evidence resulting in a conclusion contrary to the one reached by the jury with respect to the elements of damage. An order for a new trial based upon such considerations is not appealable. This is settled law in South Carolina.

Gray v. Davis[25] was also an action for personal injury and property damage sustained in an automobile collision. The jury returned a verdict in the amount of 7,000 dollars actual and 500 dollars punitive damages. The defendant moved for a new trial on the grounds that the verdict was the result of prejudice, caprice or passion and not founded on the evidence or, in the alternative, was unduly liberal. The Court found no merit in the defendant's first contention.

As to the second contention, it must clearly appear that the trial judge abused his discretion before the court will disturb his decision on a new trial motion. The trial judge's statement that the award of only 500 dollars punitive damages was indicative of lack of prejudice in the minds of the jurors was not error. In the case of *Jennings v. McCowan*,[26] quoted in the instant case,

24. 247 S.C. 497, 148 S.E.2d 161 (1966).
25. 247 S.C. 536, 148 S.E.2d 682 (1966).
26. 215 S.C. 404, 55 S.E.2d 522 (1949).

the court said that a relatively small amount of punitive damages would tend to negate any idea of passion or prejudice.

E. *Judgment Non Obstante Veredicto After Mistrial*

In *Grooms v. Zander*,[27] the South Carolina Supreme Court held that a lower court lacks jurisdiction to entertain a post trial motion for judgment n.o.v. in the case of mistrial. The defendant made timely motions for a nonsuit and a directed verdict, and the trial judge withheld his rulings as to both. The case was submitted to the jury, and when they failed to reach a verdict the judge declared a mistrial and discharged the jurors. Before recessing, he agreed to preserve the defendant's rights under its motions and later heard the motion for a directed verdict and granted it. This was a novel question in South Carolina, and on appeal, the South Carolina Supreme Court reversed. It stated that the trial judge could not direct a verdict after a mistrial because there was no jury to which this instruction for the defendant could be given. If the request is considered as a motion for judgment notwithstanding the failure of the jury to agree upon a verdict, the result is unchanged. Circuit Court Rule No. 79, which provides for judgment n.o.v., states, "Such motion . . . must be made after reception of the verdict. . . ." Since no verdict was returned there could be no judgment n.o.v.

Courts elsewhere have taken the opposite view on this question. The Federal Rules of Civil Procedure allow a party to renew his motion for a directed verdict if the jury fails to agree.[28] A number of states have similar rules. For example, Idaho has adopted this section of the Federal Rules,[29] Arizona has a statute which permits judgment n.o.v. after mistrials,[30] Georgia has a motion for judgment notwithstanding the mistrial,[31] and Texas case law allows the trial court, on reconsideration, to sustain a motion for instructed verdict even after the jury fails to agree.[32] This would seem to be the better rule.

27. 246 S.C. 512, 144 S.E.2d 909 (1965).
28. FED. R. CIV. P. 50(b).
29. Pigg v. Brockman, 85 Idaho 492, ___, 381 P.2d 286, 289 (1963).
30. Watterson v. Superior Court, 91 Ariz. 11, 368 P.2d 756 (1962).
31. Smith v. Francis, 221 Ga. 260, 144 S.E.2d 439 (1965).
32. Hutchinson v. Texas Aluminum Co., 330 S.W.2d 895, 897 (Tex. Civ. App. 1959).

III. APPEAL AND ERROR

A. *Supreme Court Rules*

In *Pacific Ins. Co. v. Fireman's Fund Ins. Co.*,[33] the court stated that even though it would be justified in dismissing the appeal for failure of the appellant's brief to comply with South Carolina Supreme Court Rule No. 8, Section 3, it would review the case where the basic issue involved was one of sufficient importance to the bar and bench of the state to warrant a decision thereon. This clarifies the statement in *United States Fid. and Guar. Co. v. First Nat'l Bank*:[34]

> In this case we would be fully justified in dismissing the entire appeal for failure to comply with the last cited rule, but refrain from doing so because no previous decision has come to our attention wherein this court has passed upon the effect of failure to comply with Section 3 of Rule 8.

United States Fid. and Guar. Co. left the effect of Section 3 of Rule No. 8 still in question. *Pacific Ins.* makes it clear that the penalty for failure to comply with that section will be dismissal of the appeal unless the issue involved is of sufficient importance to the bar and bench of the state to warrant a decision thereon.

Section 6 of Supreme Court Rule No. 4 was considered in two cases. In *Solley v. Weaver*,[35] the sole exception as stated by the appellant was that, "the Court erred in granting Defendant's Motion for nonsuit because there was more than one reasonable inference properly deducible from the testimony of negligence on the part of the Defendant."

The court held that this exception violated Rule No. 4, Section 6, in that it was entirely too general, vague and indefinite to be considered. In order to avoid being too general the exception should have pointed out a specific issue of fact which should have been submitted to the jury.

In *Boyer v. Loftin-Woodard, Inc.*[36] the exceptions complained that the trial judge had erred in granting the defendant's motion for judgment n.o.v. because (1) reasonable inference

33. 247 S.C. 282, 147 S.E.2d 273 (1966).
34. 244 S.C. 436, 442, 137 S.E.2d 582, 584 (1964).
35. 247 S.C. 129, 131, 146 S.E.2d 164, 165 (1966).
36. 247 S.C. 167, 146 S.E.2d 606 (1966); For a more detailed discussion of this case and related cases, see Comment, 18 S.C.L. REV. 307 (1966).

could be drawn that the negligence of the defendant was the proximate cause of the accident, (2) it was not necessary to build inference upon inference to establish liability, and (3) the evidence presented a question of fact for the jury.[37] The court held that the exceptions were entirely too general, vague and indefinite to be considered on appeal, citing South Carolina Supreme Court Rule No. 4, Section 6.

B. *Time for Appeal*

In *Braun v. City of Aiken*,[38] the appellants received a signed order and letter from the trial judge on March 3, denying their motion for judgment n.o.v. or a new trial. On March 25, the appellants served a notice of intention to appeal from the order. The appeal was dismissed under section 7-405 of the South Carolina Code which requires notice of appeal within ten days after receipt of notice that the order has been granted. The appellants contended that the ten day period had not commenced to run since notice had not been given to them by the prevailing party. The South Carolina Supreme Court held that there was no requirement that a written notice of judgment be given to the appealing party by the prevailing party and therefore the 10 day period had run against the appellants.

C. *Mootness*

In *Fabian's Uptown Charleston, Inc. v. South Carolina Tax Comm'n*,[39] the plaintiff's suit to enjoin enforcement of a rule prohibiting quantity discounts in sale of liquor by wholesalers was rendered moot when the plaintiff went out of business and surrendered its retail liquor license. The South Carolina Supreme Court will not pass on moot or academic questions or make an adjudication where no actual controversy remains.

D. *Jurisdiction to Consider Evidence*

Dunn v. Miller[40] stands for the proposition that, in an equity case, if the factual findings of the master and the circuit judge are in sharp disagreement on the material issues, the supreme

37. *Id.* at 170, 146 S.E.2d at 607.
38. 247 S.C. 18, 145 S.E.2d 423 (1965).
39. 247 S.C. 164, 146 S.E.2d 608 (1966).
40. 147 S.C. 567, 148 S.E.2d 676 (1966).

court has jurisdiction to consider the evidence and findings of fact in accordance with its view of the preponderance or greater weight of the evidence.

E. *Weight of Evidence*

In *Grier v. Cornelius*[41] and *Crider v. Infinger Transp. Co.*,[42] the court held that in reviewing the decision of the trial court on a motion for a directed verdict followed by a motion for judgment n.o.v., it would consider the evidence in the light most favorable to the non-moving party. Stronger language appeared in *Grier*, where the court held that under such circumstances it, "must adopt the view of the evidence most favorable to the verdict and give it the strongest probative force of which it will admit."[43]

F. *Law of the Case*

In *Welborn v. Page*,[44] the court stated that conclusions of a special referee must be challenged by the proper exceptions in order to be considered and overruled by the circuit judge. Otherwise these conclusions would become the law of the case and, thus, not subject to challenge in any further action.

G. *Interlocutory Appeal*

In *Wallace v. Interamerican Trust Co.*[45] the court denied an interlocutory appeal made by the defendant from an order requiring the production of books and records of the corporation involved in a stockholder's derivative action for the examination, inspection and audit by the plaintiffs in preparation for trial. The order was made under sections 26-502 and 12-16.26 of the South Carolina Code. Section 15-123 of the Code provides that appeal from an interlocutory order will not lie before final judgment unless it is one involving the merits or affecting a substantial right. This order did not determine any issues in the case but was simply made to promote a proper and expeditious trial of the merits. Therefore, the court held that a dis-

41. 247 S.C. 521, 148 S.E.2d 338 (1966).
42. 248 S.C. 10, 148 S.E.2d 732 (1966).
43. 247 S.C. 521, 532, 148 S.E.2d 338, 343 (1966).
44. 247 S.C. 554, 148 S.E.2d 375 (1966).
45. 246 S.C. 563, 144 S.E.2d 813 (1965).

cretionary order issued under sections 26-502 and 12-16.26 is not appealable before final judgment.

In *Mason v. S.S. Kresge Co.*[46] the South Carolina Supreme Court stated that it is now well settled that an order granting or denying a motion to make a pleading more definite and certain is not appealable until final judgment unless the motion goes to the merits of the case. The motion involves the merits where incorrectly granting or denying it would deprive a party of a substantial right.

H. *Miscellaneous*

In *Coker v. United Ins. Co. of America*,[47] the plaintiff did not except to the conclusion of the trial judge that the applicable statute of limitations had been tolled. Thus, the question of the correctness of the ruling was not before the supreme court for decision on appeal.

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46. 247 S.C. 144, 146 S.E.2d 158 (1966).
47. 247 S.C. 271, 146 S.E.2d 868 (1966).