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Practice and Procedure

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PRACTICE AND PROCEDURE

Although there were no landmark decisions in the practice and procedure area during the survey period, the cases reported herein were felt to be of sufficient interest to merit consideration.

I. PRETRIAL

A. Jurisdiction

In *Jones v. Barco Inc.*,[1] an action was brought on an allegedly usurious note and a master in equity was directed to hear and decide all issues of fact and law. The plaintiffs sought the statutory penalty on the allegedly usurious note delivered by the plaintiff to Barco, the alleged agent or co-conspirator of North American Acceptance Corporation. Barco defaulted and North American denied the allegation, claiming to be a holder in due course and that the plaintiffs were seeking two recoveries on the same set of facts. North American counterclaimed by seeking foreclosure of the mortgage securing the note — an equitable action. On North American's motion, the matter was referred to a master in equity to hear and decide all issues of law and fact, despite the plaintiff's insistance that they were entitled to a jury trial of the factual issues arising in their action at law.

The supreme court held that by the clear and explicit language of section 10-1402[2] the right to a compulsory reference in a law action is limited to equitable issues. Because this was an action at law, the South Carolina Constitution demands that the right to a jury trial be preserved inviolate,[3] and the lower court's error was not cured by the attempted grant to the plaintiffs of the right to move for a jury trial *after* the finding of the master.

B. Pendancy

In *Mayer v. Master Feed & Grain Co.*[4] an action to void a renunciation of dower was instituted, by service of summons

1. 159 S.E.2d 279 (S.C. 1968).
2. S.C. CODE ANN. § 10-1402 (1962) provides: "When the parties do not consent the court may, upon application of either or its own motion, direct a reference in the following cases: (1) In all equitable actions and equitable issues in actions at law . . . ."
3. S.C. CONST. art. 1, § 25.
4. 250 S.C. 275, 157 S.E.2d 413 (1967).

only, in Charleston County. Before service of the complaint was demanded the defendant commenced another action in Colleton County by serving a summons and complaint on the plaintiff and her husband (a co-defendant in the Charleston action). The plaintiff in the Charleston action answered the Colleton action, setting up the pending suit in Charleston County and asserting that her rights should be settled there. The defendant demurred to the complaint in the Charleston action on the ground that there was another action pending between the same parties for the same cause in Colleton County and moved for a change of venue to permit consolidation of the two actions. This motion was denied.

The supreme court held that service of summons by the plaintiff, even without a complaint, effectively commenced an action. Accordingly, the defendant could not demur to the complaint on the ground that there was another action pending when that other action was commenced subsequent to the service of summons. Furthermore the demurrer was not proper because the complaint did not show another action was pending.[5]

C. Service of Process

In *Seubert v. Buchanan*,[6] the plaintiff left a copy of a summons and complaint at the defendant's medical office by sliding the papers under the door. At that time the defendant was on vacation. After returning, he made a special appearance, objecting to the court's jurisdiction of his person on the ground that there had been no lawful service. His motion was denied.

The supreme court quoted from section 10-438 of the South Carolina Code[7] and found the statute was not susceptible of the construction which the plaintiff urged — that if the summons comes into the actual possession of the defendant by any means, the requirements of personal delivery do not apply. The defendant was held not to be properly before the court because he had not been served.

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5. S.C. CODE ANN. § 10-642(3) (1962).
6. 250 S.C. 140, 156 S.E.2d 632 (1967).
7. S.C. CODE ANN. § 10-438 (1962) provides: "[T]he summons shall be served by delivering a copy thereof to the defendant personally or to any person of discretion residing at the residence or employed at the place of business of the defendant."

D. Discovery

In *Lewis v. Atlanta-Charlotte Airline Railway*,[8] our court rejected the "managing agent" theory in pre-trial examination of a corporation through its employees.[9] This theory, followed almost universally in federal courts, as well as in several states, dictates that pre-trial examination of a corporation must be made through an officer or "managing agent" of the corporation, and that subordinates without general capacity to act in behalf of the corporation are not proper subjects through which the corporation may be examined.

In the instant case, the plaintiff was permitted to examine the defendant's engineer because the information sought lay solely within the engineer's knowledge.

In *Kimmerlin v. Bloom*,[10] the supreme court found that an order requiring an oral examination of one of the defendants, issued in the trial court's discretion under the authority of section 26-503, was not appealable before final judgment since the order did not involve the merits or affect any substantial rights of the defendant.

E. Pleadings

The defendant in *Glenn v. E.I. DuPont de Nemours & Co.*[11] demurred to the plaintiff's complaint which in form stated two causes of action, one sounding in contract and the other in tort, on the ground that the two causes had been improperly united. The circuit judge overruled the demurrer and the supreme court affirmed, holding that the complaint set forth only one primary right on the plaintiff's part and one primary wrong on the defendant's part and sought a single recovery. Several decisions supporting this conclusion were cited.[12]

II. TRIAL

A. Res Judicata

In *Powell v. Powell*,[13] the Court of Common Pleas for Greenville County denied the wife alimony while awarding the

8. 159 S.E.2d 243 (S.C. 1968).
9. For a thorough discussion of this case see 20 S.C.L. REV. 358 (1968).
10. 159 S.E.2d 910 (S.C. 1968).
11. 250 S.C. 323, 157 S.E.2d 630 (1967).
12. Columbia v. Seaboard Airline Ry., 158 S.C. 511, 155 S.E. 841 (1930); Miles v. Charleston Light & Water Co., 87 S.C. 254, 69 S.E. 292 (1910).
13. 249 S.C. 663, 156 S.E.2d 305 (1967).

husband a divorce on the ground of desertion. The Juvenile and Domestic Relations Court for that county in a prior action had awarded separate support to the wife on the factual basis that she had left the marital abode for good cause. In the present action she pleaded that prior judgment unsuccessfully. On appeal the supreme court said the two courts had concurrent original jurisdiction in actions for separate support and for divorce, and that a prior judgment of either court was binding on the other as to all questions actually litigated in the prior action. The husband's divorce action was on the claim that his wife deserted him without just cause — a point determined against him in the prior action. Accordingly, he was precluded from bringing his action.

Deaton v. Gay Trucking Co.,[14] a federal case, concerned actions arising out of a single accident in which three sisters were killed. An action for the wrongful death[15] of one of the girls was unsuccessful. An action was then brought under the "survival" statute[16] for that girl, along with actions for wrongful death of the other two. The defendant moved for a summary judgment in each case on the ground that the issues involved had been resolved by a jury in the prior unsuccessful wrongful death action and that the matter was either res judicata or the plaintiffs were estopped by the prior judgment. The motion was refused.

The supreme court held that a judgment for a defendant in a wrongful death action does not constitute an estoppel by judgment and is not res judicata as to subsequent actions under South Carolina's survival statute. This is true even when the ultimate beneficiaries, the decedent's grandparents in this case, are the same. Similarly a judgment for a defendant on an action by an administratrix for the death of one child was no bar against the bringing of a subsequent action for the other children, because the administratrix was suing in different capacities.

The question of whether a prior action was res judicata also arose in *London v. Surety Indemnity Co.*[17] London was injured

14. 275 F. Supp. 750 (D.S.C. 1967).
15. S.C. CODE ANN. § 10-1951 (1962).
16. S.C. CODE ANN. § 10-209 (1962).
17. 250 S.C. 26, 156 S.E.2d 329 (1967).

when an automobile belonging to McPhail, Sr., but driven by one Graham while under the management of McPhail, Jr., crashed. In a prior action London received a fifteen thousand dollar verdict against Graham in a suit against Graham and McPhail, Jr., who was absolved of negligently allowing an intoxicated person to operate the car. The present suit was brought to collect ten thousand dollars under an omnibus clause of an insurance policy issued to McPhail, Sr., who claims that the prior action is res judicata because it established Graham had no permission from McPhail, Jr.

The supreme court, on the authority of *Johnston-Crews Co. v. Folk*,[18] held that the cause of action in the two suits was different, the first being in tort and the latter in contract and that since that was true, the tort judgment would not be a bar unless the issue of permission of McPhail, Sr. was adjudicated. The court further found that McPhail, Sr. was not a party to the first action and that the issues in that action were not whether permission had been given by him but whether it had been negligently given by McPhail, Jr.

On the state level in *Wold v. Funderburg*,[19] the Funderburgs had procured a decree of adoption of two children in the Superior Court for Richmond County, Georgia — a court of record. The natural mother (plaintiff here) had earlier brought an unsuccessful action, against the Funderburgs *only*, to invalidate the decree in that same court. She then brought this action in the Juvenile and Domestic Relations Court of Aiken County (which is not a court of record) against the Funderburgs, the minor children, and John Crawford (the natural father). She asked the court to grant her custody and to set aside the Georgia decree because her consenting signature was obtained, if at all, through fraud and that Crawford's signature was forged. Crawford filed an answer alleging that his signature was forged and requesting that the adoption be voided and the children returned to the mother.

The defendants interposed a general denial and claimed that the Georgia action was res judicata. The supreme court upheld a finding for the plaintiff though it noted that this action amounted to a collateral attack on the Georgia decree. The general rule is that a judgment cannot be so attacked

18. 118 S.C. 470, 111 S.E. 15 (1921).
19. 250 S.C. 205, 157 S.E.2d 180 (1967).

unless fraud has been practiced in obtaining the judgment.[20] The supreme court found this requirement was satisfied by proof of the fraudulent signatures. It then found that the Florence court had concurrent jurisdiction with the Georgia court over the subject matter of adoption since both courts were authorized by constitution or statute to deal with the matter. It also found that the court had personal jurisdiction over the adopting parents and children, all of whom were residing in this state. Finally, the court felt the inclusion of the father and the children as parties to the present action was sufficient to overcome the res judicata aspect of a decree to which only the Funderburgs were parties.

B. Discretion of the Trial Judge

South Carolina State Highway Department v. Rural Land Co.[21] involved a complex condemnation proceeding occasioned by I-95 running through the 10,500-acre plantation of the defendant. The highway's route resulted in 90.5 acres being condemned and parcels of 484.3, 122.9, and 165.7 acres being separated from the main portion. Due to the involved nature of the case a pre-trial conference with the judge and all counsel present was held. At that time the Highway Department's counsel introduced plans which the parties agreed represented the physical aspects of the road construction. The landowner prepared his case in the light of these plans but at the trial the Highway Department's counsel offered evidence of proposed modifications of the plans which could have had the affect of reducing the landowner's damages. The court excluded this evidence because the landowner had not had the benefit of the altered plans until after the trial commenced. As a result of the exclusion of this evidence, the department moved for a mistrial but this also was refused.

Noting that this precise point had not arisen before in South Carolina, the supreme court held the trial judge had not abused his discretion in excluding the evidence and that the plaintiff was not entitled to a mistrial. However, the court specifically stated that they were not holding that a condemner could under no circumstances offer evidence as to proposed changes of construction affecting the issue of dam-

20. Piedmont Press Ass'n v. Record Pub. Co., 156 S.C. 43, 152 S.E. 721 (1930).
21. 250 S.C. 12, 156 S.E.2d 333 (1967).

ages but were merely holding that under the circumstances of this litigation there was no error.

Another contention of the plaintiff was that the trial judge erred in his charge to the jury by identifying certain portions of the charge, which were admittedly properly charged, as being requested charges of the Highway Department. The court observed that the practice has been subjected to some criticism, but it is not reversible error.[22]

C. Directed Verdict

In *Foster v. United Insurance Company of America*,[23] the defendant moved for a directed verdict after the plaintiff's testimony had established the lack of an insurable interest. At the close of the defendant's argument, but before the court ruled on the directed verdict motion, the plaintiff was allowed a non-suit without prejudice on his plea that the defendant had not pleaded lack of insurable interest and that the plaintiff was therefore surprised.

The supreme court found that the defendant should have been granted a directed verdict, since to hold otherwise would allow the plaintiff to reassert an unmeritorious cause of action, materially injure the defendant, and take up the court's time. The court also noted that lack of insurable interest did not have to be pleaded as an affirmative defense.[24]

III. APPEAL AND ERROR

A. Court's Authority to Set Referee's Fees

In *Singleton v. Collins*[25] the only exception with merit concerned the lower court's fixing of the fee of a special referee and ordering it to be paid by the defendant. The defendant contended that by virtue of section 27-701[26] a referee's fee is limited to ten dollars per day. The supreme

22. 88 C.J.S. *Trial* § 411(c) (1955); 53 AM. JUR. *Trial* § 538 (1945).
23. 158 S.E.2d 201 (S.C. 1967).
24. *See generally* 46 C.J.S. *Insurance* § 1319(b) (1946); 29A AM. JUR. *Insurance* § 1842 (1960).
25. 161 S.E.2d 246 (S.C. 1968).
26. S.C. CODE ANN. § 27-701 (1962) provides:
> The following schedule of fees contains the amount of costs authorized to be taxed and collected in Horry County . . .
> (41) Reference, each day engaged in holding _____ $10.00
> (43) Report on reference, making up and returning ____ $10.00

court, observing that the liability of the parties reasonably to compensate the referee was not an issue before the court, held that the lower court in the absence of a stipulation could not fix a fee in excess of the statute and direct it to be paid. However, the court noted that in such a case there was at least an implied obligation on the part of the party's counsel to see that the referee was paid a reasonable fee for his service.

B. Interlocutory Appeal

McCombs v. Bridges[27] concerned an appeal from the denial of a lower court to strike certain allegations of the complaint as irrelevant, immaterial and redundant, and the denial of a motion for a more definite complaint. The supreme court held it well settled that an interlocutory appeal from an order refusing to strike allegations of a pleading as irrelevant and uncertain would not lie,[28] and that an order requiring a more definite and certain complaint was not appealable until after final judgment.[29]

C. Standing to Sue

Gunn v. Rollings[30] concerned a suit brought by two unadopted children for injuries arising from the same accident in which the defendant's decedent, their step-father, was killed. One defense interposed was that the decedent stood *in loco parentis* to the minors at the time of the accident because they lived in the same household and had voluntarily assumed the relationship of parent and children. Because of this relationship the defendant contended that the unemancipated minors could not maintain the action. The plaintiff's demurrer to this defense was sustained by the lower court.

The supreme court said the exact point had never been presented before in South Carolina, although it was settled law that an unemancipated child has no right of action against a parent for injuries caused by the parent's recklessness.[31] The court held that one *in loco parentis,* since he has the

27. 161 S.E.2d 817 (S.C. 1968).
28. Register v. Niagara Fire Ins. Co., 248 S.C. 504, 151 S.E.2d 640 (1966).
29. Oxman v. Profitt, 241 S.C. 28, 126 S.E.2d 852 (1962).
30. 250 S.C. 302, 157 S.E.2d 590 (1967).
31. Fowler v. Fowler, 242 S.C. 252, 130 S.E.2d 568 (1963); Maxey v. Sauls, 242 S.C. 247, 130 S.E.2d 570 (1963).

same obligations and rights as a natural parent, has the same immunity from tort liability as does a natural or adoptive parent.[32] It was concluded that the lower court erred in sustaining the demurrer.

D. Default Judgments on Unliquidated Accounts

The defendant in *Morgan's Inc. v. Surinam Lumber Corp.*[33] appealed from a default judgment entered for the amount prayed for in the plaintiff's complaint. His main contention was that the judgment was improperly entered without the taking of testimony in proof of the accounts sued on. No itemized, verified statement of the account was served upon the defendant although one was filed with the clerk of court along with the complaint.

The supreme court stated that section 10-1531 of the South Carolina Code permitted entry of a default judgment on unliquidated accounts upon pleadings only when an itemized, verified statement of the account was served with the summons and complaint. Thus while service of a complaint may be satisfied by notice of where it is filed, the service of a statement of the account cannot, but must be served with the summons. In the event that this procedure is not followed, the plaintiff must introduce testimony in proof of the account in order to obtain a valid judgment. The court concluded that the lower court correctly ruled that the defendant was in default, but erred in refusing to vacate the judgment.

E. Time for Answering

The wife in *Lanier v. Lanier*[34] appealed from an order denying her petition for leave to answer, and declaring her to be in default and her husband entitled to an order of reference without further notice to her. The court had so held because the wife, after an attempt at re-cohabitation, took their children and left, violating a previous court order granting the husband exclusive temporary custody. Her reason for not answering her husband's complaint was the resumed cohabitation. This she pleaded as a defense in her proposed answer.

32. 67 C.J.S. *Parent and Child* § 72-3 (1950).
33. 160 S.E.2d 191 (S.C. 1968).
34. 160 S.E.2d 558 (S.C. 1968).

The supreme court said that, even assuming that the temporary court order was still in effect after the resumed cohabitation, the lower court still erred in not granting her permission to answer. The high court felt her petition (filed shortly after commencement of the action) clearly established a prima facie case of excusable neglect and a meritorious defense, all that is required under the statute.[35]

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35. S.C. CODE ANN. §§ 10-609, -1213 (1962).