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Practice and Procedure

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PRACTICE AND PROCEDURE

I. The Statute of Limitations and the Doctrine of "Relation Back"

One of the most controversial cases to be decided by the supreme court during the survey period was *Glenn v. E.I. DuPont De Nemours and Company.*[1] The plaintiff's husband died in July, 1961, as the result of injuries which arose out of his employment with Dunean Mills. After a recovery on a workman's compensation claim, Mrs. Glenn was discharged as her husband's administratrix. The present suit against DuPont to recover damages for wrongful death was brought in January, 1967. Under section 10-1952[2] of the 1962 Code such an action can be brought only in the name of the administrator or the executor of the deceased's estate. In her complaint Mrs. Glenn alleged that she was the "duly appointed administratrix of the estate of her husband." On appeal there was no explanation by the plaintiff as to why she was unaware that she was no longer her husband's administratrix, but neither was there any indication that she had acted in bad faith. On the other hand, it appears that the defendant knew of Mrs. Glenn's discharge.[3] Rather than bring the point up at a time when it could be remedied, that is, before the statute of limitations had run, DuPont chose instead to demur to the complaint on other grounds. This demurrer was overruled, and the decision of the trial judge was affirmed on appeal.[4]

Not until after the unsuccessful appeal and the running of the statute of limitations did the defendant move to strike the complaint on the ground that Mrs. Glenn was no longer her husband's administratrix. Following this motion, Mrs. Glenn sought to cure the defect by having herself appointed administratrix *de bonis non.* The trial judge held that the complaint could be amended so as to substitute Mrs. Glenn's present status for that of the nonexistent administratrix. Furthermore, the trial judge held that the appointment related back to the time the suit was commenced, this fact saving it from being barred by the statute of limitations. DuPont appealed.

1. 174 S.E.2d 155 (S.C. 1970).
2. S.C. Code Ann. § 10-1952 (1962).
3. 174 S.E.2d at 160.
4. Glenn v. E.I. DuPont De Nemours & Co., 250 S.C. 323, 157 S.E.2d 630 (1967).

In a close decision (3-2) the supreme court reversed the trial court's ruling. The court held that the action was commenced only when the plaintiff was appointed administratrix *de bonis non* and that the "relation back" doctrine could not be used to revitalize the prior suit.

After noting that Mrs. Glenn had no legal capacity to sue at the time the action was brought, the court stated:

> A civil action may be maintained only in the name of a person in law, an entity, which the law of the forum may recognize as capable of possessing and asserting a right of action. A suit brought in a name which is not a legal entity is a nullity and the action fails.[5]

Furthermore, the court held that the defect in the complaint could not be cured because an action which in fact was a nullity could not support an amendment. The court noted:

> It is well settled that where an action is brought in the name of a nonexisting plaintiff, an amendment of complaint by substituting the proper party to the action as plaintiff will be regarded as the institution of a new action as regards the statute of limitations.[6]

In determining whether the plaintiff's case could be saved by the doctrine of "relation back," the court relied heavily on the Iowa case of *Pearson v. Anthony*.[7] In that case the wife of the decedent had filed a wrongful death action prior to being appointed administratrix. It appears that she expected to receive the appointment in the future but had not secured the appointment because of a lack of funds. The court said that the acts of a person pretending to be the administratrix were not effec-

5. 174 S.E.2d at 157-58.

6. *Id., citing* Annot., 8 A.L.R.2d 57 (1949). It is interesting to note that the dissent chides the majority for not having done its homework with respect to this annotation. Justice Bussey declares:

> The majority opinion contains a quote from 8 A.L.R.2d, at page 57, with reference to the substitution of a proper party for a nonexistent party. Cited in support of such quotation is Pearson v. Anthony, supra; a North Carolina case which has been overruled; a Georgia case and two cases from Arkansas which are not at all factually on point with the instant case. The Arkansas case of McGraw v. Miller . . . is much more nearly in point with the instant case and there the court reached a result in accord with the holding of the lower court in this case.

174 S.E.2d at 162. Furthermore, Bussey states that, had the majority read the entire annotation, they would have discovered a generally liberal attitude "on the part of the vast majority of the courts in this country, particularly in the modern decisions, in allowing the substitution of a proper plaintiff for an improper one, after the running of the statute of limitations . . . ." *Id.*

7. 218 Iowa 697, 254 N.W. 10 (1934).

tive to commence an action and toll the running of the statute of limitations, notwithstanding the fact that she was subsequently appointed administratrix.

In a lucid and often biting dissent,[8] Justice Bussey indicates that the majority's ruling is against the weight and trend of modern authority. The real issue, the dissent points out, is whether the defendant will be allowed to maneuver the plaintiff into a position in which she is forced to institute a new action that will be barred by the statute of limitations. If the defendants knew from the beginning that Mrs. Glenn's action was a nullity because of her failure to be appointed administratrix, why did they not raise this point on their first demurrer and appeal when there was still time to cure the defect? Justice Bussey contends that DuPont's failure to raise the point on its first appeal constituted a waiver[9] and that they are now estopped from asserting it. The dissent states:

> Generally speaking, a party will not be permitted to maintain inconsistent positions or to take positions in regard to a matter which is directly contrary to or inconsistent with, one previously assumed by him, *at least where he had, or was chargeable with, full knowledge of the facts*, and another will be prejudiced by this action. This principal operates to preclude one who prevents a thing from being done from availing himself of the nonperformance which he himself has occasioned.[10]

The dissent next discussed and rejected the contention that, when the plaintiff originated her action, she was a non-existing legal entity:

> Here Mrs. Glenn is a very much alive, existing person, the widow of the deceased, entitled to letters of administration, and a statutory beneficiary of the cause of action. There is no question of her existence, the only question being as to the capacity in which she instituted the action.[11]

In considering whether the doctrine of "relation back" should be applied to save the present action from the statute of limi-

8. 174 S.E.2d at 159.
9. 174 S.E.2d at 160. *See* Jennings v. McGowan, 215 S.C. 404, 55 S.E.2d 522 (1949); Martin v. Fowler, 51 S.C. 164, 28 S.E. 312 (1897).
10. 174 S.E.2d at 160, *quoting from* 28 AM. JUR. *Estoppel & Waiver* § 68 (1966) (emphasis added).
11. *Id.* at 161.

tations, the dissent emphasized that there were South Carolina decisions which have held that the subsequent appointment of an administrator or executor relates back to the time of the testator's or the intestate's death so as to validate those acts of the representative which were beneficial to the estate.[12] In *Martin v. Fowler*,[13] a case involving two alleged administrators who brought an action prior to qualifying for that position, the court used the above reasoning as one of the grounds for reaching a decision contrary to that reached in *Glenn*.

The dissent was not unmindful of the fact that the court's holding in *Glenn* would tie South Carolina to a minority rule:

> In the great majority of cases that have considered the doctrine of relation back of the appointment of an administrator as it might affect the running of the statute of limitations, it has been held that such an appointment made after the statute has run against a claim will relate back to validate actions taken on the claim within the statutory period by the person subsequently appointed administrator, thus barring reliance upon the defense of limitations by the party against whom the claim is asserted on behalf of the estate. Such result has been reached in wrongful death actions as well as other types of actions.[14]

Glenn is truly a textbook case in civil procedure. The court was presented with a question of novel impression and there was ample authority to support both sides. The litigants did not give the court an easy way out by providing a "guilty party," for both sides were responsible for the situation in which they found themselves. A procedural case like *Glenn* cannot be decided by a mere matching of authority. In assessing the holding one must ask what will be achieved, or what important right will be vindicated by a decision of this type.

Does this decision advance the purpose of section 10-1952 of the Wrongful Death Act? No. The only legitimate interest that DuPont had in a properly appointed administratrix was to assure that the matter would be res judicata and that they would not be sued again on the same cause of action.[15] An amendment to the complaint would have satisfied this condition.

12. Martin v. Fowler, 51 S.C. 164, 28 S.E. 312 (1897); Cook v. Cook, 24 S.C. 204 (1885); Haselden v. Whitesides, 2 Strob. 353 (S.C. 1848); Walker v. May, 2 Hill Eq. 22 (S.C. 1834); Witt v. Elmore, 2 Bailey 595 (S.C. 1832).
13. 51 S.C. 164, 28 S.E. 312 (1897).
14. 174 S.E.2d at 162, *quoting from* Annot., 3 A.L.R.3d 1237 (1965).
15. Southern Ry. v. Moore, 158 S.C. 446, 155 S.E. 740 (1930).

The second question is whether the majority decision is necessary to uphold the integrity of the statute of limitations. Once again, the answer is no. The purpose of such a statute is to insure that a person does not have to worry continually about being sued on long dormant causes of action, and to make sure that actions will be brought while they can still be effectively defended. In *Glenn* the defendant had full notice of the suit within the statutory time limit and took vigorous steps to defend it. This decision does not protect the integrity of the statute of limitations, but instead raises once again the question of whether it is right to allow the statute to be used as a sword as well as a shield.

Perhaps Justice Bussey best summarized the arguments against the holding in *Glenn* when he stated, "In brief, the vast majority of courts refuse to sacrifice substance to form and thereby allow defendants to escape the consequences of a meritorious cause of action on mere technicalities."[16]

II. VENUE

In *Bouvy v. N.W. White & Co.*[17] the defendant appealed from a ruling denying a motion for a change of venue. The plaintiffs had brought the action in Lexington County pursuant to a South Carolina statute which allows a motor carrier to be sued in any county in which it operates.[18] The plaintiff's principal place of business, the place of the accident, and the residence of seven of the witnesses were, however, all located in adjoining Richland County. The defendant's motion for a change of venue was based on section 10-310 of the Code, which provides that "[t]he court may change the place of trial . . . [w]hen the convenience of witnesses and the ends of justice would be promoted by the change."[19] A motion of this type is addressed to the discretion of the trial judge and, in order for it to be sustained, one must prove that both the convenience of the witnesses *and* the ends of justice would be served by the change.[20]

In affirming the decision of the trial judge, the court reviewed the case of *Utsey v. Charleston S. & N.R.R.*[21] where the court held that the ends of justice were better served by having the

16. 174 S.E.2d at 163.
17. 174 S.E.2d 347 (S.C. 1970).
18. S.C. CODE ANN. § 58-1470 (1962).
19. S.C. CODE ANN. § 10-310(3) (1962).
20. Miller v. Miller, 248 S.C. 125, 149 S.E.2d 336 (1966).
21. 38 S.C. 399, 17 S.E. 141 (1891).

witnesses' testimony judged by jurors from their own locality. This rule has never been accepted in other jurisdictions,[22] but there are a number of South Carolina cases which suggest that the rule should be strictly applied when all of the material witnesses are from the county to which removal is sought, or none are from the county in which the action was instigated.[23] In *Bouvy* the court indicated that this doctrine should not be applied so rigidly as to restrict the latitude of the trial judge unduly. Citing *Graham v. Beverly*,[24] the court stated:

> Sound as may be the view that the credibility of a witness is best judged, and his testimony therefore best evaluated, by a jury of his own county, its importance to promote the 'ends of justice' must of necessity depend upon many collateral factors . . . . [I]t is a matter addressed to the sound discretion of the judge who hears the motion. It is not, in itself, a formula determinative of that issue.[25]

The defendant also argued that, since it had made a prima facie showing and the plaintiff had made no contrary showing, the trial judge abused his discretion in concluding that the convenience of the witnesses would not be promoted by a change. The supreme court, upholding the trial court's decision, stated that the judge is not required to set aside his own experience and knowledge and accept the conclusions of the affiants. In this case it was proper for the judge to weigh his own knowledge of the geography and conditions of the area against the arguments made by the defendant.

Brockman v. Brockman,[26] a divorce action, involved a situation where a motion for change of venue was not a matter left to the discretion of the trial judge. The defendant-appellant presented the court with an undisputed affidavit that he was a resident of Spartanburg County, South Carolina, and moved for a change of venue to that county. This motion was refused without assigning any reason therefor.

Venue in divorce cases is set under section 20-106 of the Code, the pertinent portion of which provides that "actions for divorce from the bonds of matrimony shall be tried in the county . . .

22. Annot., 74 A.L.R.2d 135 (1960).
23. *E.g.* Reynolds v. Atlantic Coast Line R.R., 217 S.C. 16, 59 S.E.2d 344 (1950).
24. 235 S.C. 222, 110 S.E.2d 923 (1959).
25. *Id.* at 226-27, 110 S.E.2d at 925.
26. 253 S.C. 528, 171 S.E.2d 862 (1970).

in which the defendant resides at the time of the commencement of the action . . . ."[27]

The supreme court held that, where the residence of the defendant was not in dispute, a motion for a change of venue to that county was a question of law and was not addressed to the discretion of the judge. The trial judge, therefore, had erred in refusing to grant the appellant's motion for a change of venue from Union to Spartanburg County.

Keller v. Bank of Orangeburg,[28] a case of novel impression, dealt with the problem of determining the residence of a corporate executor for purposes of venue. The action was brought in Calhoun County against the appellant bank as executor of the estate of James A. Moss. The appellant bank had been appointed executor in Orangeburg County; however, the suit was brought in Calhoun County where it also maintained offices. The bank's motion for a change of venue was denied.

On appeal the supreme court rejected the appellant's contention that under section 10-303[29] the residence of a corporate fiduciary should be restricted to the county in which it was appointed and qualified as executor. The court pointed out that West Virginia was the only state in which this rule had been adopted by judicial decision rather than by a mandatory statute.[30] The court thus followed the majority rule[31] that an executor can be sued in the county in which he is a resident, unless otherwise provided by statute. Therefore, the bank could be sued in any county in which it maintained a place of business.

The bank had argued that, unless the minority rule was adopted, a testator who selected a corporate executor would subject his estate to suits in any county in which the corporation had offices. The court admitted that there was some merit to this argument, but emphasized that a corporate fiduciary was protected from such a harsh result by the statute which allows a change of venue in proper cases.[32]

27. S.C. CODE ANN. § 20-106 (1962).
28. 253 S.C. 66, 169 S.E.2d 99 (1969).
29. S.C. CODE ANN. § 10-303 (1962).
30. Charlotton v. Gordan, 120 W. Va. 615, 200 S.E. 740 (1938); Charter v. Doddridge County Bank, 119 W. Va. 735, 196 S.E. 158 (1938). *Compare* Dowdy v. Franklin, 203 Va. 7, 121 S.E.2d 817 (1961).
31. 92 C.J.S. *Venue* § 58 (1955).
32. S.C. CODE ANN. § 10-310 (1962).

III. TRIAL

A. *Mention of Insurance*

In *Walling v. Doe*[33] the trial judge in his instructions to the jury read them the provisions of section 46-750.34[34] of the Code which relates to conditions for recovery under the uninsured motorist provisions of an insurance policy; the trial judge told the jurors that all of the conditions of the statute had been met. The supreme court reversed and remanded the case on the grounds that such an instruction left no doubt as to whether there was uninsured motorist coverage which would pay any judgment and that such an instruction was, therefore, prejudicial to the defendant.

The effect of an inadvertent mention of insurance was discussed in *Keller v. Pearce-Young-Angel Co.*[35] At the trial the plaintiff's brother, while testifying as to his own losses from property damage, mentioned the fact that he had talked with an adjuster for the defendant's insurance carrier. On appeal the court held that the trial judge's refusal to grant a mistrial was not an abuse of discretion. The court indicated that it was inclined to agree with the trial judge's statement that "nearly everybody has got insurance." The court pointed out that, although this was no excuse or justification for intentionally injecting the issue of insurance coverage into a trial, this factor should be considered in determining the possibility of prejudice when insurance coverage is inadvertently mentioned. The court, citing *Horsford v. Carolina Glass Company*,[36] stated that the proper remedy for accidental reference to insurance was to have the remark stricken from the record and the jury charged to disregard the testimony.

B. *Instructions to the Jury*

In *Long v. Gibbs Auto Wrecking Company*[37] the court upheld jury instructions given by the trial judge to the effect that "if a party fails to produce the testimony of an available witness or to explain his absence as a witness on a material issue, it may be inferred by the jury that his testimony, if presented, would be

33. 253 S.C. 427, 171 S.E.2d 494 (1969).
34. S.C. CODE ANN. § 46-750.34 (Supp. 1969).
35. 253 S.C. 395, 171 S.E.2d 352 (1969).
36. 92 S.C. 236, 75 S.E. 533 (1912). Justice Bussey refers to this case as "[t]he parent case in South Carolina on the admissibility of evidence with reference to insurance." 253 S.C. at 399, 171 S.E.2d at 354.
37. 253 S.C. 370, 171 S.E.2d 155 (1969).

adverse to the party who fails to call the witness."[38] Although evidence was presented to show that the missing witness was in Florida on business, the court decided that this was not sufficient to prevent the trial judge from instructing the jury that they could draw an adverse presumption from the witness's absence. The court noted that, although the witness was out of the state, there was no showing that he could not have arranged to be present.

The appellant in *Quality Concrete Products, Inc. v. Thomason*[39] argued that the trial judge had erred in refusing to instruct the jury to the effect that the respondent had abandoned its contract with the appellant and, therefore, should not be allowed to recover. The ruling of the trial judge was upheld on the grounds that such a request constituted a charge on the facts and was prohibited by the constitution. The court also explained that instructions to the jury should be confined to issues raised by the pleadings and supported by the evidence. In this case there was no evidence from which it could be concluded that the respondent had abandoned its contract with the appellant.

IV. RES JUDICATA

Res judicata and estoppel by judgment are two doctrines which are closely related and often confused. Both are intended to save the courts and the parties from repeated litigation involving the same subject matter. The doctrine of res judicata holds that there cannot be more than one suit between the same parties on the same cause of action.[40] On the other hand, estoppel by judgment is concerned with obtaining a final adjudication of a factual issue as opposed to a final adjudication of a cause of action.[41]

In *Jones v. Hamm*,[42] the first of this year's cases involving these two doctrines, the court merely summarized the elements necessary for the application of estoppel by judgment. The court stated:

> It is hornbook law that a prior judgment of a court having jurisdiction of the parties and the subject matter is conclusive in any subsequent action between the

38. *Id.* at 377, 171 S.E.2d at 158.
39. 253 S.C. 579, 172 S.E.2d 297 (1970).
40. BLACK'S LAW DICTIONARY 1470 (4th ed. 1951).
41. *Id.* at 650, 981.
42. 253 S.C. 283, 170 S.E.2d 206 (1969).

> same parties, or their privies, of all questions which were actually litigated in the prior action and determined by the judgment, regardless of whether the subsequent action involves the same or a different cause of action.[43]

The second case, *Carolina Equipment & Parts Co. v. Continental Casualty Co.*,[44] deals with both the doctrine of res judicata and the doctrine of estoppel by judgment. The plaintiff sued a subcontractor for rent on highway building equipment and sued the Continental Casualty Company as the holder of the performance bond for the work. The plaintiff obtained a judgment against the contractor but lost its suit against the insurance company. The president of the equipment company testified that he had seen the rented machinery being used on the job. The insurance company, however, was able to prove that it was not the bonding agent for that particular stretch of highway construction.

The plaintiff-equipment company then brought a second suit for the same rents, but this time alleged that the equipment had been used on a stretch of highway construction which was bonded by Continental. Continental pleaded (1) res judicata and (2) estoppel but was overruled by the trial judge. On appeal a divided court upheld the trial court's decision. As to the first issue the majority dismissed Continental's plea of res judicata by pointing out that the suit was brought on a different bond from the bond in the first case. Therefore, the suit was based on a new cause of action and not precluded by the doctrine of res judicata.

On the second point the insurance company argued that the first suit had finally determined that the equipment was used on another project and that the plaintiff was now estopped by that judgment from pleading otherwise. The majority, however, held that the only issue decided at the first trial was that the plaintiff had sued on the wrong performance bond. The court pointed out that, when the president of the equipment company testified in the first trial, he was unaware that the subcontractor he was suing was actually working under two separate construction contracts. The court stated:

> We perceive of no reason to hold that Carolina is estopped to prosecute this action. Mr. Stevens made an

43. *Id.* at 285, 170 S.E.2d at 207.
44. 253 S.C. 129, 169 S.E.2d 379 (1969).

> honest mistake in his testimony at the first trial as to docket numbers . . . but the substance of his testimony as to what he saw and did was the same at both trials . . . .[45]

The dissent argued that the case should have been reversed on the grounds of estoppel. Justice Littlejohn pointed out that "Carolina Equipment finds itself in the very uncomfortable position of having convinced two separate Dorchester County juries of facts which are irreconcilable."[46] In summarizing his position, Justice Littlejohn contended:

> In judicial proceedings, fairness to one's adversary requires that at some point a party be bound by a factual position he has formerly taken before the court. The salutary effects of and the necessity for a rule binding a party at some point to his chosen factual position are present whether the position was maintained honestly or dishonestly, carefully or negligently. The cost and expense of litigation and the vexation to the party sued is the same regardless of the cause.[47]

V. JURISDICTION AND PROCESS

In *Parklands, Inc. v. Gibson*[48] two of the defendants objected on the grounds that personal service of process in Texas was not sufficient to bring them within the jurisdiction of the court. The suit arose as the result of extensive and confusing trust litigation which had taken place in Texas. The plaintiffs in *Parklands* were stakeholders in lands and funds which were involved in the Texas litigation. Because of the number of conflicting claims, the plaintiffs sought a court order which would safely allow them to pay out the funds and transfer the property.

Under section 10-455 personal service of process on out of state defendants is the equivalent of service by publication.[49] The question before the court was, therefore, whether the defendants could be served with process by publication. If so, then personal service would also be effective to establish jurisdiction. The pertinent statute, section 10-451,[50] provides that

45. *Id.* at 135, 169 S.E.2d at 381.
46. *Id.* at 144, 169 S.E.2d at 386.
47. *Id.*
48. 253 S.C. 367, 170 S.E.2d 669 (1969).
49. S.C. CODE ANN. § 10-455 (1962).
50. S.C. CODE ANN. § 10-451 (1962).

service by publication may be had "when the subject of the action is real or personal property in this state and the defendant has or claims a lien or interest, actual or contingent, therein or the relief demanded consists wholly or in part in excluding the defendant from any interest or lien therein."[51]

The trial court, sustaining the defendant's objection on jurisdictional grounds concluded that the subject of the action was not land in South Carolina, but certain contracts and agreements made in Texas. The supreme court, in reversing this ruling, held that the subject of the action was real and personal property in the state. Process could, therefore, be served either by publication under section 10-451[52] or by equivalent personal service under section 10-455.[53]

Section 15-235 of the South Carolina Code[54] provides that, whenever a judicial circuit is without a resident judge, jurisdiction in all matters arising in that circuit may be exercised by the judge of the adjoining circuit. In *DuPont v. DuPont*[55] divorce proceedings were transferred to the fourteenth circuit while the resident judge of the fifteenth circuit was on vacation. The question raised on appeal was whether or not the adjoining circuit judge could retain jurisdiction after the return of the resident judge. The supreme court held that jurisdiction could not be retained. The court concluded, "The exercise of jurisdiction at chambers by the judge of an adjoining circuit is permissible only when the statutory condition is met, i.e., the circuit in which the matter arises is without a resident or presiding judge by reason of absence or otherwise."[56]

The pitfalls of section 10-633 of the Code,[57] which provides for the service of a summons without a complaint, were illustrated by *Rochester v. Holiday Magic, Inc.*[58] The statute provides that if the complaint does not accompany the summons, then

> the summons must state where the complaint is or will be filed, and if the defendant, within twenty days thereafter, causes notice of appearance to be given and, in person or by attorney, demands in writing a copy of

51. *Id.*
52. *Id.*
53. S.C. CODE ANN. § 10-455 (1962).
54. S.C. CODE ANN. § 15-235 (1962).
55. 253 S.C. 591, 172 S.E.2d 372 (1970).
56. *Id.* at 594, 172 S.E.2d at 374.
57. S.C. CODE ANN. § 10-633 (1962).
58. 253 S.C. 147, 169 S.E.2d 387 (1969).

> the complaint, specifying the place within the state where it may be served, a copy thereof must within twenty days thereafter be served accordingly.[59]

Although the *Rochester* court did not directly discuss the inherent fairness of that statute, the case does dramatically emphasize how confusing and potentially dangerous this law can be for the unwary and unfamiliar.

While visiting South Carolina, an officer of the defendant corporation was served with a summons without complaint. The summons, which was on a printed form, indicated, "[y]ou are hereby summoned and required to answer the complaint in this action a copy of which is herewith served upon you . . . ." However, under the heading "SUMMONS AND NOTICE" were typed the words "(COMPLAINT NOT SERVED)." In short, the Summons contained the impossible assertion that the complaint was both served and not served. The general counsel for Holiday Magic forwarded this confusing document to a North Carolina attorney who was handling other business for the company.

At this point the proper procedure would have been for the defendant to have demanded a copy of the complaint. Instead, the attorney wrote to both the clerk of court and to the plaintiff's lawyers, indicated that he had no complaint to answer, and requested advice as to the South Carolina procedure in the matter. He also asked that further action be withheld until he notified the plaintiff's attorney. Both the clerk and the plaintiff's attorney received the letter, but neither replied. The clerk, of course, knew nothing about the affair as the complaint was not filed until over four months after the summons was served, nor was he under any legal duty to investigate the matter. Since there was no file in which the letter could be placed, it was set aside by the clerk and eventually mislaid.

Only after a default judgment had been entered and over one year later did the defendant receive a response to his inquiry. At that time the plaintiff's attorney wrote the defendant's attorney and informed him that Holiday Magic owed his client one quarter of a million dollars! Despite the fact that Holiday Magic had been remiss in failing to retain a South Carolina lawyer, the supreme court, which recognized the inherent injustice in the situation, reversed the default judgment and directed that time be given to answer.

59. S.C. CODE ANN. § 10-633 (1962).

This case indicates what a trap the summons without complaint can be for the unwary defendant. If the statute can be a trap for attorneys, as in this case, one can imagine what its effect on a layman must be. What of the layman who, upon receiving the summons, checks with the clerk of court, but is told by the clerk that he has no complaint and knows nothing about the matter? Under the circumstances it would not be unreasonable for him to decide that the proper course of action would be to go home and wait for the complaint to be served, or even to conclude that his adversary had decided not to sue. Either decision could be fatal, since the plaintiff does not have to serve the complaint until he receives a demand in writing, and the defendant must make that demand within twenty days of the service of summons.

Perhaps the legislature should take a hard look at section 10-633. The summons without complaint should not be abolished, but should be improved so as to protect the rights of both the plaintiff and the defendant more adequately. The statute, as presently written, is obviously designed for the convenience of plaintiffs' attorneys, since it allows them to institute actions quickly without having to take the time to draw up a complaint. This advantage could be very valuable in cases where process must be served on a defendant who is about to leave the jurisdiction, or where the statute of limitations is about to run.

These are valid objectives which should and can be retained in any revision. The main problem with the statute is that it serves as a trap for the careless or unknowing defendant. This fault could be eliminated by placing on the plaintiff the burden of supplying the defendant a copy of the complaint. Perhaps the statute could be revised so that the plaintiff cannot obtain a default judgment until he has served the defendant (either personally or through publication) with a copy of the complaint.

VI. Default Judgment

In *Livingston v. South Carolina Farm Bureau Mutual Insurance Co.*[60] the court refused to give leave to the insurer to plead after it had taken a default judgment. The summons and complaint were delivered to the Insurance Commissioner in compliance with section 37-105[61] of the South Carolina Code of Laws and forwarded by him to Farm Bureau on the same day.

60. 174 S.E.2d 163 (S.C. 1970).
61. S.C. Code Ann. § 37-105 (1962).

The appellant did not respond to the complaint within the twenty day period required by statute,[62] and a default judgment was entered. Prior to the default judgment, but after the twenty day period, the appellant moved, on the grounds of excusable neglect, for an order permitting it to file an answer to the complaint. The insurance company explained that the papers had come into the hands of a clerk who did not know of their importance and had not been brought to the company's attention until it was too late to file an answer. The trial court refused this motion.

A motion of this type is directed to the discretion of the trial court under section 10-609 of the code. This section provides that "[t]he court may, in its discretion and upon such terms as may be just, allow an answer or reply to be made or other act to be done after the time limited by this Code or by an order enlarge such time."[63]

The supreme court held that the trial judge had not abused his discretion in refusing the order, because the appellant had failed to show excusable neglect. The court stated that the insurance company had merely shown neglect without an excuse and that this was not sufficient grounds for granting the motion.

Rochester v. Holiday Magic, Inc.[64] and *Edwards v. Ferguson*[65] dealt with the issue of whether the trial judge had abused his discretion in refusing to vacate default judgments granted pursuant to section 10-1213[66] of the Code. Although the fact situations in these cases differed, the holdings were virtually identical. The court noted that, in order to vacate a judgment under the statute, there must be a showing that the judgment was taken by the defendant as a result of his mistake, inadvertence, surprise, or excusable neglect and that the defendant had a prima facie meritorious defense. The court held that, if these two requirements are met, the judgment should be vacated and the defendant permitted to answer. In both the above cases, the court agreed with the appellants and concluded that the trial court had abused its discretion in refusing to grant the relief sought.

Rochester involved a default judgment taken as a result of the defendant's failure to comply with South Carolina's summons

62. S.C. CODE ANN. § 10-641 (1962).
63. S.C. CODE ANN. § 10-609 (1962).
64. 253 S.C. 147, 169 S.E.2d 387 (1969).
65. Smith's Adv. Sht. No. 19 (Jun. 13, 1970).
66. S.C. CODE ANN. § 10-1213 (1962).

without complaint statute and has been dealt with at length elsewhere in this article. In *Edwards* an automobile liability insurance carrier appealed from a default judgment taken as the result of the failure of its insured to give the company timely notice of both the pending action and the accident itself. Not only did the insured wait fourteen months before notifying the insurance company of the accident, but it also appeared that there may have been collusion between the plaintiff and the defendant. In both opinions the court pointed out that section 10-1213 "should be liberally construed to see that justice is promoted and to strive for disposition of cases on their merits."[67] In considering whether the ends of justice would be served by vacating the judgment in *Edwards*, the court even took judicial notice of the fact that the insurance company was required by law to issue the defendant an assigned risk policy and that under the Motor Vehicle Safety Responsibility Act the company could not cancel the policy because of acts of the insured in violation of its provisions. It is true that the integrity of procedural rules must be preserved; however, one cannot read *Rochester* and *Edwards* without being convinced that the ends of justice were best served by a liberal interpretation of this statute.

VII. Trial by Jury

In *Norwood v. Bryant*[68] the court held that compulsory reference to a master in equity was not proper where the subject of the action was a dispute as to the boundary line between two adjoining pieces of property. The court pointed out that, whenever there is an issue as to title to real property, under section 10-1096[69] of the Code the parties are entitled to have a jury weigh the facts, unless they specifically waive this right.

VIII. Joinder

The circumstances under which causes of action may be joined in the same complaint are briefly reviewed in *Gantt v. C.I.T. Credit Corporation.*[70] This was a case involving joinder of causes of action for slander, invasion of privacy, and conversion, all arising out of the defendant's attempts to collect a debt owed by the plaintiff's husband.

67. Edwards v. Ferguson, Smith's Adv. Sht. No. 19 (Jun. 13, 1970); Rochester v. Holiday Magic, Inc., 253 S.C. at 152, 169 S.E.2d at 390.
68. 253 S.C. 551, 172 S.E.2d 108 (1970).
69. S.C. Code Ann. § 10-1056 (1962).
70. 173 S.E.2d 658 (S.C. 1970).

Section 10-701[71] of the Code allows several causes of action (whether legal, equitable, or both) to be united in one complaint where they arise out of "the same transaction or transactions connected with the same subject of action." The purpose of the statute is to avoid unnecessary suits and to help eliminate congested court dockets and long delays before trial. The court explained that joinder should be permitted "when the causes of action are reasonably connected by the coincidence of time, place and circumstances, where the causes of action are materially allied in substance and interrelated, and where the development of the actions tells a connected story."[72]

IX. PLEADINGS

In *Funderburke v. Johnson*,[73] a case involving an automobile accident, the court upheld the action of the trial judge striking from the defendant's answer the defense that the accident was caused by the sole negligence of a third party. Part of Circuit Court Rule 18 states that "[i]n all cases of more than one . . . defense . . . each shall be separately stated and numbered . . . ."[74] The court held, however, that the issue of sole negligence was covered by the defendant's general denial and that to list the defense separately and to number it would make it erroneously appear that it was a separate defense. The court concluded that it was within the discretion, if it was not the duty, of the trial judge to strike the defense from the defendant's answer.

In his dissent[75] Justice Bussey admitted that the issue of sole negligence of a third party could be raised under a general denial but contended that there was neither authority nor reason why such a defense could not be separately pleaded. To the contrary, he stated that

> I am . . . convinced that it is good practice to plead such matter. There are, indeed, cases in which . . . a defendant should be required to plead such in order to avoid surprise to the plaintiff and to prevent delay in the administration of justice . . . . The plaintiff can never suffer prejudice as a result of having been advised of the alleged fault of a third party, . . . but to

71. S.C. CODE ANN. § 10-701(1) (1962).
72. 173 S.E.2d at 661.
73. 253 S.C. 430, 171 S.E.2d 597 (1969).
74. CIR. CT. R. 18.
75. 253 S.C. at 433, 171 S.E.2d at 598.

> the contrary, is benefited by knowing fully any defenses of the defendant.[76]

In the second case in this area, *Still v. Hampton and Branchville Railroad*,[77] the court held that a person injured by the tortious acts of another has only one cause of action for actual and punitive damages. The court warned that one should not confuse the cause of action with the type of damages sought.

X. MISCELLANEOUS

In *Orr v. Saylor*[78] in a well documented dissent,[79] Acting Associate Justice Wade S. Weatherford, Jr., reviews the history of the doctrine of *res ipsa loquitur* in South Carolina and urges its adoption as a rule of evidence. The majority refused to consider the rule at this particular time, but did state:

> Perhaps, in an appropriate case, we should do so and consider whether we have heretofore, while denying the rule by name, followed it in substance in applying the circumstantial evidence rule. We are not however convinced that this case is factually appropriate for this purpose. Furthermore, we have not been requested to re-examine our position on this appeal, and the issue has not been briefed by counsel.[80]

Coleman v. Daniel[81] was an action by a creditor to set aside a conveyance of real estate on the grounds that it was fraudulently made for the purpose of avoiding two judgments. In their answer the defendants alleged that the judgments were based on notes which were obtained through subterfuge and misrepresentation. In sustaining the plaintiff's demurrer, the supreme court held that this answer was not a defense to the fraudulent conveyance action but was actually a collateral attack on the judgments. The court pointed out that a judgment could not be collaterally attacked, unless it was " 'void on its face, or upon an inspection of the judgment roll' ".

Finally, the supreme court amended Rule 8 of the Rule of Disciplinary Procedure for Attorneys.[82] This rule deals with

76. 253 S.C. at 435, 171 S.E.2d at 599.
77. 253 S.C. 62, 169 S.E.2d 97 (1969).
78. 253 S.C. 155, 169 S.E.2d 396 (1969).
79. *Id.* at 159, 169 S.E.2d at 398.
80. *Id.* at 158-59, 169 S.E.2d at 397.
81. 253 S.C. 363, 170 S.E.2d 665 (1969).
82. RULE OF DISC. PROC. R. 8, *as amended*, Smith's Adv. Sht. No. 19 (Jun. 13, 1970).

the manner of filing a complaint with the Secretary of the Board of Commissioners on Grievances and Discipline. Added to the rule was a paragraph which states that the resident judge for the accused attorney shall be provided with a copy of the complaint and the answer and also that the Secretary shall notify the resident judge of the disposition made by the Board of Commissioners. The amendment also provides that these communications shall be confidential except as between the resident judge and the presiding judge of the circuit or any county judge within the circuit.

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