South Carolina Law Review

Volume 24 | Issue 4 Article 11

1972

Practice and Procedure

William A. Pollard

PRACTICE AND PROCEDURE

I. PRE-TRIAL

A. *Jurisdiction*

The Supreme Court of South Carolina, acting in its original jurisdiction,[1] considered the jurisdiction of the Richland County Court in *New South Life Ins. Co. v. Lindsay*.[2] The appellant in this matter, a holder of an endowment policy of New South Life Insurance Company, after being permitted to intervene in the lower court, moved to dismiss the action for lack of jurisdiction. While the motion was under advisement and the lower court hearing was continuing, an application was made to the supreme court for a writ of prohibition which was also based upon the lack of jurisdiction of the Richland County Court.

The original action was brought in the Richland County Court after a substantial deficit was discovered in the reserves of the company. Subsequent to this discovery the company made a complete report of the same to the Insurance Commissioner who then held a hearing and rendered a decision. The company then commenced the action in the county court asking for injunctive relief and an order under Section 37-297 of the Code[3] directing rehabilitation of the company in accordance with a plan "tentatively approved in principle by the Chief Insurance Commissioner."[4]

In defining the conditions for the granting of a writ of prohibition the supreme court quoted the case of *Ex parte Jones*:[5]

> The ancient prerogative writ of prohibition has been recognized and employed in the common-law system of jurisprudence for more than seven centuries, and like all prerogative writs should be used with forebearance and caution, and only in cases of necessity.
>
> . . . .
>
> With regard to the function and scope of the writ, it has been settled in this state from an early period that it will only lie to prevent

1. Under S.C. CODE ANN. §15-21 (1962) and S.C. CONST. art. V.
2. 258 S.C. 198, 187 S.E.2d 794 (1972).
3. S.C. CODE ANN. §37-297 (1962).
4. 258 S.C. at 203, 187 S.E.2d at 797.
5. 160 S.C. 63, 158 S.E. 134 (1931).

> an encroachment, excess, usurpation, or improper assumption of jurisdiction on the part of an inferior court or tribunal, or to prevent some great outrage upon the settled principles of law and procedure; but if the inferior court or tribunal has jurisdiction of the person and subject matter of the controversy, the writ will not lie to correct errors and irregularities in procedure, or to prevent an erroneous decision or an enforcement of an erroneous judgment, or even in cases of encroachment, usurpation, and abuse of judicial power or the improper assumption of jurisdiction, where an adequate and applicable remedy by appeal, certiorari, or other prescribed methods of review are available.[6]

The first ground cited by the insurance company to support county court jurisdiction was based on Sections 15-764 and 37-70 of the Code.[7] To sustain jurisdiction under these provisions the insurance company alleged it was appealing an order of the insurance commissioner. The supreme court found that the company was not seeking any review of any decision made by the insurance commissioner, in that there was no allegation that the insurance company was aggrieved thereby or that there was any error therein. The second alleged basis for jurisdiction was founded on Section 15-764 of the Code,[8] which provides that the county court has jurisdiction

> . . . (1) When the amount demanded in the complaint or the value of the property involved does not exceed fifteen thousand dollars; (2) when there is no money demand; and (3) when the right involved cannot be monetarily measured.[9]

Supposedly, this section was applicable because "the cause is a civil case or special proceeding in which there is no money demand and that the cause is one in which the right involved cannot be monetarily measured."[10] The fact that the deficit involved was eight million dollars made it apparent to the supreme court that the value of the property involved exceeded the statutory limit for county court jurisdiction and that the right involved could be monetarily measured. Further the court considered the fact that the insurance company alleged it had a value of several million dollars which would be

6. 258 S.C. at 199-200, 187 S.E.2d at 796. Berry v. Lindsay, 256 S.C. 282, 182 S.E.2d 78 (1971).
7. S.C. CODE ANN. §§15-764, 37-70 (1962).
8. *Id.*, §15-764.
9. S.C. CODE ANN. §15-764 (1962).
10. 258 S.C. at 201, 187 S.E.2d at 797.

lost if the plan was not approved, and used this factor to support its denial of jurisdiction.

The third ground alleged for jurisdiction was based on Sections 15-766 and 15-767 of the Code,[11] which provide that all general laws and statutory provisions, including circuit court rules of practice and procedure, are applicable to the county courts. The insurance company alleged that Section 37-297.1,[12] which allows circuit courts to hear proceedings for the purpose of rehabilitating insurance companies, was a general law and therefore fell within the scope of Section 15-766 and 767. The supreme court summarily rejected this contention by simply stating, "This statutory provision does not purport to confer jurisdiction upon the Richland County Court. . . ."[13] Consequently, there being no grounds for jurisdiction of the Richland County Court, the writ of prohibition was granted.

B. Parties

In *Palmetto Production Credit Ass'n. v. Willson*,[14] a case involving mortgaged property, the mortgagee sought foreclosure against the partnership mortgagor. When one partner filed an individual counterclaim, the plaintiff demurred to such. The supreme court, following a long line of South Carolina decisions, reversed the lower court's decision to overrule the demurrer and *held* that one partner cannot properly interpose an individual counterclaim, a partnership and the individuals composing it being distinct legal entities.

II. TRIAL

A. Legal and Equitable Issues

Reaffirming its holding in *Airfare, Inc. v. Greenville Airport Comm'n*,[15] the court in *State v. Yelsen Land Co.*,[16]

11. S.C. CODE ANN. §§15-766, 767 (1962).

12. *Id.*, §37-297.1.

13. 258 S.C. at 205, 187 S.E.2d at 798.

14. 257 S.C. 13, 183 S.E.2d 565 (1971).

15. 249 S.C. 265, 153 S.E.2d 846 (1967). Under our code practice legal and equitable issues and rights may be asserted in the same complaint, and legal and equitable remedies and relief afforded in the same action. In such event the legal issues are for determination by the jury, and the equitable issues for the judge sitting as a chancellor.

16. 257 S.C. 401, 185 S.E.2d 897 (1972).

held, notwithstanding the unfortunate wording of the state's complaint which requested injunctive relief, that the nature of the issues and the remedies sought are determinative of the character of an action. In this case the state claimed title to certain lands and sought both to have its title confirmed and enjoin the defendants from trespassing thereon. In its answer and counterclaim the defendants claimed title to the property, alleged trespass and sought confirmation of their title, monetary damages, attorney's fees, and injunctive relief. When the case came up for trial, the lower court judge, acting on his own motion and over the objection of the state, referred all issues to the Master in Equity. From this ruling the State appealed. The defendant, however, argued that the issues were properly referred to the Master and the plaintiff had waived its right to a jury trial because both the complaint and counterclaim alleged no adequate remedy at law. The supreme court disagreed, pointing to the fact that both parties sought relief at law as well as in equity, confirmation of title and injunctive relief, respectively, citing *Bryan v. Freeman*[17] in support of the requirement that a party be granted a jury trial whenever it had raised the issue of title to the property in question. "To hold that the State voluntarily relinquished its right to a jury trial of the law issues involved would require a strained construction of the allegation in the complaint."[18]

B. Jury Trial

Citing the interest of orderly procedure, the supreme court, in *Gilford v. South Carolina Nat'l Bank*,[19] affirmed a decision denying a motion for a new trial, basing such denial on appellant's failure to raise an objection in a proper manner. This case involved an action which was brought by a survivor to obtain joint-survivor account funds that were being withheld by the defendant bank. With consent of the bank the issues were referred to the Master in Equity "to take testimony and report his findings and recommendations of fact and conclusions of law."[20] Subsequently the bank answered, saying it was a disinterested stakeholder and alleged

17. 253 S.C. 50, 168 S.E.2d 793 (1969) (action to quiet title not referred to Master).

18. 257 S.C. at 405, 185 S.E.2d at 899.

19. 257 S.C. 374, 186 S.E.2d 258 (1972).

20. *Id.*, at 377, 186 S.E.2d at 259.

that appellants should be made parties to the action. The court ordered such, but a copy of the order referring the issues to the Master was not served by the appellants. Counsel for respondent, however, notified appellants of the joinder by letter. Appellants' counsel thereafter sent a letter to respondent's counsel objecting to having the matter referred, and later at the hearing before the Master moved for a jury trial. The Master, after satisfying himself that no motion to have the Order of Reference set aside had been made and that such Order had not been revoked, overruled the motion for a jury trial. No further objections being made to the mode of trial, the hearing proceeded. After the Master's report was filed in favor of the respondent, the appellants moved for a new trial "on the ground that the matter was improperly referred and a hearing held by the Master over objection of respondent, and on the ground that the matter is one at law for trial by jury."[21] The supreme court, acknowledging the fact that a Master has no authority to grant a jury trial, held the Master's overruling of appellants' motion for a jury trial was correct. In considering the alleged error of trying the issues before the Master instead of a jury, the court reaffirmed its holding in *Beall v. Weston*[22] that adding of additional parties after a consent order of reference did not revoke the order of reference in an equity case. Furthermore, the court held that while the appellants might have attempted to establish their right to a jury trial by motion before the lower court judge, any such right was waived when counsel failed to make such motion.

C. Motions

In *Harlan v. Satterfield Constr. Co.*,[23] a verdict in the lower court was rendered for the plaintiff and counsel for defendant moved for judgment *non obstante veredicto* or, alternatively, for a new trial. Thereafter, over counsel for plaintiff's vigorous objection, the court allowed defense counsel to postpone stating and arguing his grounds for the motion until a transcript of the trial record was available. When no grounds for the motion were given two weeks after

21. Other exceptions to the result of the Master's report were taken, but are not discussed here.

22. 83 S.C. 491, 65 S.E. 823 (1909).

23. 257 S.C. 69, 184 S.E.2d 339 (1971).

the trial, and after the court had risen, plaintiff's counsel served notice of a motion to dismiss defendant's motions on the grounds that the court no longer had jurisdiction to hear them. After the transcript was prepared both plaintiff's and defendants' motions were heard and overruled.

The supreme court acting on appeals by both parties cited both Circuit Court Rule 79[24] and Section 10-1461 of the Code[25] as requiring a motion for judgment notwithstanding the verdit to be made before adjournment of the trial court. "Such motions when heard at the trial term may be decided afterward . . . and under our settled practice, with the consent . . . of the opposing party, the trial judge may retain jurisdiction beyond the term. . . . "[26] The court noted that opposing counsel must consent or make no objection to such a retention of jurisdiction and that clearly in this case counsel for plaintiff had not consented and in fact insisted on having the grounds for the motion made known. Furthermore, although plaintiff's counsel did participate in the discussion as to preparing of the transcript, he did so under objection. Therefore, defendant's motions died with adjournment.

The discretion of the trial judge in not granting a motion by the appellant for a voluntary nonsuit was challenged in *Harmon v. Harmon.*[27] The plaintiff, the second wife of the defendant, filed for a divorce under Section 20-101(1) of the Code[28] alleging the defendant was committing adultery with his first wife who was subequently allowed to join as a party to the action. Alleging their marital difficulties were resolved, the plaintiff moved for a voluntary nonsuit under Circuit Court Rule 45.[29] The first wife, however, objected to this since her divorce was Mexican and she had raised the question of its validity prior to the nonsuit motion. Consequently, the lower court denied the nonsuit, holding that the status of the parties should be judicially determined. The supreme court, noting that the recent adoption of Circuit Court Rule 45[30] has given the presiding judge greater dis-

24. RULES OF PRACTICE FOR THE CIRCUIT COURTS OF S.C. 79 (1971).
25. S.C. CODE ANN. §10-1461 (1962).
26. 257 S.C. at 73, 184 S.E.2d at 340.
27. 257 S.C. 154, 184 S.E.2d 553 (1971).
28. S.C. CODE ANN. §20-101(1) (1962).
29. RULES OF PRACTICE FOR THE CIRCUIT COURTS OF S.C. 45 (1971).
30. *Id.*, (adopted May 13, 1969).

cretionary powers in relation to the rights of plaintiffs to dismiss or discontinue actions, affirmed the lower court decision, holding that in light of the grounds for allowing the first wife to join "[i]t would work a hardship and be unduly prejudicial to the respondent to permit the discontinuance of this action over her objection."[31]

D. Miscellaneous

In *Hill v. American Express Co.*,[32] an action brought in the lower court against a company issuing a credit card, for wrongfully dishonoring the card, was declared by the court to be one *ex contractu*, rather than one for defamation, thereby avoiding the two year statute of limitations governing defamation actions.

In *Dickard v. Merritt*,[33] the supreme court reaffirmed two elementary principles. The first was that "the evidence together with all the inferences reasonably deducible therefrom, has to be viewed in a light most favorable to the plaintiff."[34] Secondly, the court held that a trial judge's charge must be viewed as a whole and the separate portions thereof must be considered in relation to the rest of the charge.

III. APPEAL AND ERROR

A. Interlocutory Judgments

In the past year, the supreme court heard two cases on the issue of the right to appeal from an interlocutory judgment. In the first, *Geiger v. Carolina Pool Equipment Distrib., Inc.*,[35] the court cited two general authorities[36] to support its decision that an order denying a motion for summary judgment, being an interlocutory decision, is not directly appealable.

> . . . [t]he prevailing view seems to be that the denial of a motion for summary judgment is an interlocutory decision only and therefore not directly appealable, since such a denial is not an adjudication on the merits against the movant and he is not thereby foreclosed from

31. 257 S.C. at 161, 184 S.E.2d at 557.
32. 257 S.C. 86, 184 S.E.2d 115 (1971).
33. 256 S.C. 458, 182 S.E.2d 886 (1971).
34. *Id.* at 460, 182 S.E.2d at 888.
35. 257 S.C. 112, 184 S.E.2d 446 (1971).
36. 4 AM. JUR. 2d *Appeal and Error* §104 (1962); 15 A.L.R.3d 809 (1967).

> the possibility of prevailing in the case when the facts are developed. . . .[37]

In the second case, *Nauful v. Milligan*,[38] the defendant appealed from an order granting a motion for summary judgment on the issue of liability in an action for assault and battery. The plaintiff argued that such an order was interlocutory and therefore not appealable until final judgment. The supreme court acknowledged the fact that Rule 44 of the Circuit Court Rules provides in subsection (c) that "a summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."[39] Citing the section of the Code providing for appeals from interlocutory judgments,[40] the court stated that to be appealable an interlocutory or intermediate order must be one "involving the merits." Since the summary judgment in this case established that all defenses alleged by the defendant were without merit, therefore leaving only the question of damages at issue, the court held that such an interlocutory decree involved the merits and was appealable under Section 15-123 of the Code.[41]

Turning to the substance of the appeal,[42] the court did reverse the lower court decision in part because the trial court, after entering summary judgment, had proceeded to determine what testimony would be admissible at a trial on the issue of damages. The supreme court found this to be error and held the lower court exceeded its authority.

B. Objections

Allen-Parker Co. v. Lollis[43] involved an action in claim and delivery brought by the assignee of a conditional sales contract, wherein several procedural issues were raised which the supreme court had little trouble disposing of based on established law. The court first held that any exceptions made

37. 4 AM. JUR. 2d *Appeal and Error* §104 (1962).

38. 258 S.C. 139, 187 S.E.2d 511 (1972).

39. RULES OF PRACTICE FOR THE CIRCUIT COURTS OF S.C. 44 (1972).

40. S.C. CODE ANN. §15-123 (1962).

41. *Id.*

42. The court affirmed summary judgment as to liability because the defendant admitted attacking the plaintiff and the issues of provocation and mutual combat were considered, with the court reaffirming several decisions holding mere words inadequate provocation.

43. 257 S.C. 266, 185 S.E.2d 739 (1971).

before the trial court but not argued in the appellant's brief are considered abandoned.[44] It was also held that where more than one reasonable inference may be drawn from the evidence, the question of fraud is one of fact.[45]

The appellant next contended that the trial judge was in error in his charge to the jury, but the court pointed to the fact that counsel for the appellant was offered "[t]he opportunity to express any objections to the charge as made or to request additional instructions, as required by Section 10-1210 of the Code."[46] Since no objections were raised at that time the court held that no objections to the instructions were available on appeal.[47]

In answer to appellant's final exception, that the verdict did not conform to the charges,[48] the court noted that no exception was made before the jury was excused and held:

> It is well established that where a verdict is objectionable as to form, the party who desires to complain should call that fact to the court's attention when the verdict is published. Otherwise the right to do so is waived . . . . Any error in the form of the verdict was waived by failure of the appellant to make proper objection before the jury was discharged.

IV. FEDERAL COURTS

A. *Jurisdiction*

The power of a federal district court to require a nonresident corporation to defend an action in the District Court was considered in *McGee v. Holan Div. of Ohio Brass Co.*[49] The District Court in denying jurisdiction, held that portion of the long-arm statute found in the Uniform Commercial Code dealing with extraterritorial jurisdiction in tort claims[50]

---

44. Shea v. Glens Falls Indem. Co., 228 S.C. 173, 89 S.E.2d 221 (1955).
45. Cook v. Metropolitan Life Ins. Co., 186 S.C. 77, 194 S.E. 636 (1938).
46. 257 S.C. at 278, 185 S.E.2d at 745.
47. Richardson v. Register, 227 S.C. 81, 87 S.E.2d 40 (1955).
48. The verdict given in the court's charge read: "[w]e find for the defendant on the counterclaim . . . so much money." The verdict rendered was: "We find for the defendant, and should be given title to the trailer and attorney's fees." [*sic*].
49. 337 F. Supp. 72 (D.S.C. 1972).
50. S.C. CODE ANN. §10.2-803(c) (1966).

to be unconstitutional.[51] The basis of the action under which long-arm jurisdiction was asserted was a claim for personal injuries suffered when the defendant's product malfunctioned. The equipment itself was purchased by the plaintiff's employer in Georgia from the defendant. The product in question was an aerial hydraulic bucket which fell to the ground while the plaintiff was working as an employee of the purchaser. The defendant corporation was not domesticated in South Carolina nor had it qualified to do business here. Being chartered in New Jersey, with its principal offices in Ohio, the defendant did maintain an office in Charlotte, North Carolina. A salesman for the company, according to the plaintiff's employer, operating out of Charlotte, had made approximately two visits per year to the employer's business in Sumter. The nature of these visits was not mentioned in the opinion, but the court did note that the purpose was not to make sales. Purchases from the defendant were made through an independent company "not shown to be owned by defendant or a subsidiary of defendant."[52] Further, the court noted that deliveries to Sumter were not made in defendant's trucks.

Service upon the defendant was declared by the court to be in accordance with Rule 4(e) of the Federal Rules of Civil Procedure[53] and therefore not at issue. The development of

51. The court based its holdings on S.C. CONST. art. III, Sec. 17 (1895) which provides: "Every act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title." The "long-arm statute" was combined with the "Uniform Commercial Code" and as the court pointed out, no mention of the statute was made in the title to the South Carolina version of the Uniform Commercial Code. Noted by the court was the fact that the "Official Uniform Commercial Code" drafted by the American Law Institute contained no such provision. In pointing out the unconstitutionality of such inclusion the court stated,

> This is the very evil that the framers of the South Carolina Constitution were attempting to avoid by Section 17 of Article III. While the people of South Carolina may have thought they were getting the nationally recognized Uniform Commercial Code, the legislature actually passed an enlarged version thereof which included provisions for jurisdiction and service in personal injury tort claims in no way related to commercial transactions and with no warning in the title of their inclusion therein.

52. 337 F. Supp. at 74.

53. FED. R. CIV. P. 4(e).

current jurisdictional theories was discussed briefly,[54] with the court necessarily basing its holding on the *International Shoe* case and quoting from that decision:

> Due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[55]

Acknowledging the fact that the Supreme Court of South Carolina has adopted the very broad contacts theory of jurisdiction,[56] and stating that the decision as to whether or not maintenance of an action does not offend traditional notions of fair play and substantial justice was a question of fact to be decided by the court, it was held that insufficient contacts were present to support jurisdiction. Concluding that to require the defendant to stand and defend this case in this jurisdiction would offend the *International Shoe* standard,[57] the court failed to mention the inconvenience that would result to the plaintiff by requiring him to bring suit in another jurisdiction, or any interest the state might have in seeing issues of this nature resolved in local forums.[58]

Although the court had decided that due process standards would be offended by extending jurisdiction, the court went further and held that the subsection of South Carolina's version of the Uniform Commercial Code dealing with tort actions was unconstitutional.[59] In so holding, the court noted that two state trial judges had, in separate cases, reached the same conclusion when faced with non-commercial cases.[60] It

---

54. The court mentioned the presence and consent theories. For an interesting analysis of the developments in extraterritorial jurisdiction over both non-resident corporations and individuals *see,* Note, *Developments in the Law, State Court Jurisdiction,* 73 HARV. L. REV. 909 (1960).

55. International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945).

56. Cited in support of this were two cases. Carolina Boat and Plastics Co. v. Glascoat Dist., Inc., 249 S.C. 49, 152 S.E.2d 352 (1967) and Boney v. Trans-State Dredging Co., 237 S.C. 54, 115 S.E.2d 508 (1960).

57. 326 U.S. 310, 66 S.Ct. 154 (1945).

58. *See* n. 54 *supra.*

59. *See* n. 51 *supra.*

60. deLoach v. Nash, (Court of Common Pleas, Richland County, March 27, 1971) (Judge Rhodes) and Byrd v. Melton (Court of Common Pleas, Richland County, July 14, 1971) (Judge Nicholson).

is interesting, however, to note that the court in its opinion recognized that Article I Section 34 of the South Carolina Constitution[61] does not require all subsections of Section 10.2-803[62] to be struck down, but only those with no reference to commercial transactions.[63] Such a distinction, of course, would appear to have permitted the plaintiff to contend that subsection (h) of Section 10.2-803[64] was not only constitutional, but specifically applicable to provide jurisdiction in a warranty action brought against a manufacturer by an injured South Carolina resident for injuries sustained in this state.[65] This subsection reads:

> . . . A court may exercise personal jurisdiction over a person who acts directly or by an agent as to a cause of action arising from the person's . . . (h) production, manufacture, or distribution of goods with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed.[66]

Furthermore, with jurisdiction obtained under subsection (h) based upon a breach of warranty, there appears to be nothing which would bar the plaintiff from asserting other causes of action, in tort, against the defendant.

In conclusion, it is submitted that this decision might not reflect current trends in extending jurisdiction over nonresident corporations. However, it must be acknowledged that a good argument can be made for the contrary position.[67]

---

61. S.C. CONST. art. I, §34.

62. S.C. CODE ANN. §10.2-803 (1966).

63. Deering Milliken Research Corp. v. Textured Fibres, Inc., 310 F. Supp. 491 (D.S.C. 1970) (Russell, D.J.).

64. S.C. CODE ANN. §10.2-803(h) (1966).

65. The contention might be made that Georgia law should apply in this case, since the equipment was purchased in Georgia, and under GA. CODE ANN. Sec. 109A-2-318 (1962) an employee would not be entitled to bring a warranty action as the warranty would not extend to the purchaser's employees. But the modern trend is to apply the law of the place of injury. *See,* Hardman v. Helene Curtis Indus., Inc., 48 Ill. App.2d 42, 198 N.E.2d 681 (1964), and Bowles v. Zimmer Mfg. Co., 277 F.2d 868 (7th Cir. 1960).

66. S.C. CODE ANN. §10.2-803(h) (1966).

67. Two other cases dealt with the extraterritorial jurisdiction of South Carolina courts. Duplan, Inc. v. Deering Milliken, Inc., 334 F. Supp. 703 (D.S.C. 1971), was mentioned by the court in *McGee* as dealing entirely with a commercial transaction and therefore not conflicting with constitutional standards. In *Duplan* the district court held that jurisdiction in such cases must be based on state law and such laws must not violate due process fairness standards and subsequently required the defendant to defend. The Fourth Cir-

[Author's Note: Subsequent to the writing of this article, the General Assembly of the State of South Carolina reenacted the applicable sections of the jurisdictional statute in an attempt to cure the constitutional flaw. S.C. CODE ANN. §§10.2-801 through 10.2-809 (Supp. Aug. 2, 1972).]

B. Service, Venue, Forum Non Conveniens

In *Penntube Plastics Co. v. Fluorotex, Inc.*[68] a federal district court ruled on three major issues dealing with patent infringement cases in federal courts. The action was brought by a Delaware corporation against a Delaware corporation and its subsidiary which was allegedly a South Carolina corporation. Subsequently a declaratory judgment action was brought in the District of Delaware alleging invalidity of the patent in question.

After denying a motion by the defendant Delaware corporation to quash service, the court considered the defendant's motion to dismiss for improper venue. Since the Delaware corporation was obviously not a resident of the District of South Carolina, the District Court had to find under the special venue statute,[69] that acts of infringement had been committed in the state and that the defendant had a regular and established place of business in the district. Since the defendant admitted selling the products which allegedly infringed on the plaintiff's right, the first prong of the test, described by the court as specific and unambiguous, was satisfied. Consequently, the defendant was deemed to have a regular place of business in South Carolina, satifying the second prong of the special venue test. The motion to dismiss for improper venue was therefore overruled.

After granting a motion by the plaintiff to restrain the Delaware corporation from proceeding further in its action to invalidate the patent in question, the court considered the defendants' motion for transfer of the action to the District of Delaware. The plaintiff argued that a transfer was barred.

> [A] transfer is authorized by the statute only if the plaintiff had an 'unqualified' right to bring the action in the transferee forum at the

cuit Court of Appeals in Ratliff v. Cooper Laboratories, Inc., 444 F.2d 745 (4th Cir. 1971), applied the two part test and found, notwithstanding state provisions for jurisdiction, insufficient contacts present to support jurisdiction.

68. 336 F. Supp. 698 (D.S.C. 1971).

69. 28 U.S.C. §1400(b) (1948).

> time of commencement of the action; i.e., venue must have been proper in the transferee district and the transferee court must have had power to command jurisdiction over all of the defendants.[70]

Citing the special venue statute[71] used to support service on the defendant "parent" corporation, the court found the defendant South Carolina corporation had a "regular and established place of business" in Delaware and had "committed acts of infringement" there also. Finding that there was a virtual lack of corporate separateness and that "Fluorotex (the South Carolina defendant) does in fact have a regular and established place of business at Newark, Delaware and has committed acts of alleged infringement there,"[72] the court held the statutory requirements had been satisfied. This established the plaintiff's "unqualified right" to bring the action in Delaware and thereby defeated his main objection to the transfer. After establishing this fact, numerous convenience factors, most relating to witnesses and evidence, were given in support of granting defendants' motion to transfer.

WILLIAM A. POLLARD

70. 336 F. Supp. 698, 703 (D.S.C. 1971), *citing* Shutte v. Armco Steel Corp., 431 F.2d 22, 24 (3rd Cir. 1970).

71. 28 U.S.C. 1400(b) (1948).

72. 336 F. Supp. at 704.