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MISCELLANEOUS

I. DISCIPLINARY PROCEEDINGS

The Supreme Court of South Carolina issued four opinions concerning misconduct by members of the bar. In *In re O'Shields*,¹ the court adopted the recommendation of the Board of Commissioners on Grievances and Discipline² that the respondent O'Shields be disbarred for unspecified misconduct.

An attorney who misappropriated funds by "forging or causing to be forged" his clients' signatures on checks was disbarred in *In re Merritt*.³ Disbarment was ordered despite the subsequent restoration of the misappropriated funds.

In *In re Mixson*⁴ the court was faced with more serious challenges to the Board's findings and recommendations. The respondent was charged with two instances of misconduct which the Board thought tended to "pollute the administration of justice or to bring the courts or the legal profession into disrepute."⁵

The first item of alleged misconduct was a civil contempt charge against the respondent for failure to pay alimony and child support. The court held that the contempt order could not be the basis for a disciplinary proceeding because "[i]t carried, per se, no connotation of moral dereliction."⁶ The court did, however, find substance in the second charge, misappropriation of funds. For this misconduct the court indefinitely suspended the respondent.

Since the respondent was under a civil contempt order and thus subject to arrest in South Carolina, he argued that the committee's failure to establish procedures under which he could personally appear in his defense constituted a fundamental injustice. Although recognizing this problem, the court refused to invalidate the panel's finding of facts because it was "convinced" that even if the respondent had been present, the panel's findings would have been the same.

Also rejected was the respondent's contention that the court and the Board should have refrained from adjudicating the case

1. 258 S.C. 330, 188 S.E.2d 472 (1972).

2. Hereinafter designated "the Board."

3. 259 S.C. 234, 191 S.E.2d 250 (1972).

4. 258 S.C. 408, 189 S.E.2d 12 (1972).

5. *Id.* at 409, 189 S.E.2d at 13.

6. *Id.* at 412, 189 S.E.2d at 14.

because the court in *Mixson v. Mixson*⁷ had determined that the respondent was in contempt of the Richland County Court. Since, according to the court, the contempt order was not a valid basis for disciplinary proceedings, the court rejected the respondent's contention that it should disqualify itself from the case.

In *In re Sampson*⁸ the Board's recommendation that the respondent be publicly reprimanded was rejected. Although the respondent was initially charged with eight instances of misconduct, the court found her guilty of only two: charging an excessive fee and "improperly interven[ing] between a fellow attorney and his client."⁹ Emphasizing that the objective of disciplining attorneys is "the protection of the courts and the public," the court thoroughly examined the respondent's background and conduct. In particular, the court considered a disorderly conduct conviction, resisting arrest conviction, and the mishandling of a probate case. After reviewing these improprieties, the court stated that "[m]ore was involved than an isolated incident of impropriety or bad judgment"¹⁰ and thus ordered indefinite suspension.

II. ELECTIONS AND VOTING

The scope and functioning of South Carolina's voting and election laws came into question in *Vandross v. Ellis*,¹¹ *State ex rel. McLeod v. Ellis*,¹² and *Brisben v. Thornton*.¹³

In *Vandross*, the federal district court held it had no jurisdiction under section 1983¹⁴ to grant relief to the plaintiff who complained he had been deprived of his right to run for the South Carolina Senate. Vandross alleged that the defendant, the director of the South Carolina State Election Commission, refused to accept his filing of candidacy and to certify him to the Democratic Party. The defendant contended that he refused to certify Vandross because he failed to file by the required deadline.

The court held that the right to run for state office arises from the individual's relationship with his state. Citing *Snowden*

7. 253 S.C. 436, 171 S.E.2d 581 (1969).

8. 259 S.C. 471, 192 S.E.2d 859 (1972).

9. *Id.* at 473, 192 S.E.2d at 860.

10. *Id.* at 476, 192 S.E.2d at 862.

11. 347 F. Supp. 197 (D.S.C. 1972). See also Survey of Practice and Procedure *infra*.

12. 259 S.C. 364, 192 S.E.2d 188 (1972).

13. 258 S.C. 524, 189 S.E.2d 827 (1972).

14. 42 U.S.C. § 1983 (1970). This section provides "redress" for violation of constitutional rights under color of law.

v. Hughes,¹⁵ the court held that the right in question was not "federally protected or guaranteed." Since the right in question did not fall within the ambit of those amenable to section 1983 protection, the deprivation was not one for which the court could grant relief.

Though convinced that no jurisdiction existed, Judge Hemphill discussed the case on the merits in the event there was an appellate determination that jurisdiction did exist. The court found that the defendant Ellisor refused to accept and certify the plaintiff's filing solely because the plaintiff was not present to file until several minutes after the filing deadline. After determining that "Vandross, not the defendants, [was] responsible for the dilemma in which he [found] himself,"¹⁶ the court found it unnecessary to invoke the holding of some cases "that where there are special circumstances or a special showing of excuse, a declaration of candidacy which is filed too late may be accepted nevertheless."¹⁷ The relief sought was therefore denied by the court.¹⁸

In *State ex rel. McLeod v. Ellisor*,^{18.1} the South Carolina Supreme Court was called upon to interpret and define a new provision¹⁹ of South Carolina absentee balloting laws. The issue was whether the new provision extending the right to vote by absentee ballot to those "physically unable to present" themselves to vote should properly be read as extending the right only to those physically unable because of a medical infirmity, or should be read as extending the right also to those unable to present themselves because of absence from the state. The court determined that the act extended the right only to those whose disability resulted from some medical problem. The court based its determination on dictionary definitions of the words and upon consideration of statutory provisions under which classes of people are allowed to vote by absentee ballot even though they are merely "absent."²⁰ The court decided that the new act should be given a limited meaning because the privilege extended to those designated classes of voters would be rendered nugatory by the

15. 321 U.S. 1 (1944).

16. 347 F. Supp. at 208.

17. *Id.* at 207, citing *State ex rel. Huse v. Haden*, 349 Mo. 982, 163 S.W.2d 946 (1942).

18. The court did, however, order the return of a \$250.00 filing fee which had been paid by Mr. Vandross in connection with his attempt to run for the State Senate.

18.1. 259 S.C. 364, 192 S.E.2d 188 (1972).

19. No. 1574, [1972] S.C. Acts & Jt. Res. 3087.

20. See S.C. CODE ANN. § 23-442 (1962) and S.C. CODE ANN. § 23-449.31 (Cum.

Supp. 1971).

broader reading of the new act and because the old provisions should not be read as impliedly repealed.

The incorporation election of the City of North Charleston raised procedural issues in *Brisben v. Thornton*.^{20,1} The South Carolina Constitution requires that the incorporation of a municipality be approved by a majority of those "residing and entitled by law to vote within the district proposed to be incorporated."²¹ This constitutional provision has been interpreted to mean that "only registered electors actually residing within the limits of the proposed city or town are eligible to vote in an incorporation election"²² and that "a majority of all qualified electors *actually residing* within the proposed area is required."²³

Subsequent to the North Charleston election, the commission in charge of the election revised the list of registered voters supplied by the State Election Commission. The local commission struck from the list the names of those who had not voted and who had not been eligible to vote in the incorporation election. After striking these names, the revised rolls listed 5,167 eligible electors of whom 2,627 had voted in favor of incorporation and 1,137 in opposition. These figures were certified to the Secretary of State and application for a municipal charter was made.

The plaintiffs contended that the list of voters furnished by the State Election Commission was binding on the local commission and, alternatively, that the commission could not revise the list after the election. Making no distinction between revision before or after the election, the court rejected the plaintiffs' contentions on the grounds that the list supplied by the State Election Commission was comprised of all voters registered to vote in the area, whereas, as noted before, the South Carolina Constitution limits the class eligible to vote in incorporation elections to those registered voters who actually reside in the area to be incorporated. Thus, the court reasoned that the list "was not conclusive as to the number of electors residing and entitled to vote within the proposed district to be incorporated"²⁴ and that the local commission was obligated to revise the list in order that the election conform to the state constitutional requirements. The

20.1. 258 S.C. 524, 189 S.E.2d 827 (1972).

21. S.C. CONST. art. VIII, § 2.

22. 258 S.C. at 527, 189 S.E.2d at 828.

23. *Id.* at 527-28, 189 S.E.2d at 828.

24. *Id.* at 531, 189 S.E.2d at 830.

court, therefore, refused to enjoin the Secretary of State from issuing the municipal charter.

III. THE MILITARY

The federal district court was faced with intricate jurisdictional issues in *Parrish v. Seamans*.²⁵ The plaintiff Parrish, a former Colonel in the United States Air Force, had been convicted in a general court martial for violations of the Uniform Code of Military Justice. Pursuant to his sentence, Parrish served a one year term of confinement and was discharged from the Air Force in 1956. On appeal to the Air Force Board for Correction of Military Records, his records were changed to show an honorable discharge. This change was made under the authority of title 10, section 1552(a) of the United States Code, which provides:

The Secretary of a military department . . . may . . . correct any military record of that department when he considers it necessary to correct an error or remove an injustice . . . Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.²⁶

Parrish in this suit asserted that the 1955 conviction and resulting discharge were in violation of his constitutional rights and consequently were void. He also sought a writ of mandamus ordering the restoration of all benefits that "he would have received from the date of his unlawful discharge until the date he would have retired, and all entitlements and privileges forfeited by him as a result of his conviction."²⁷

The central issue was whether article 76 of the Uniform Code of Military Justice precluded the district court from exercising jurisdiction over the matter. Under that article, military judicial proceedings are generally not reviewable by civilian courts. The plaintiff argued, however, that section 1552 created an exception to the general rule of non-reviewability. Even though the court agreed that certain cases²⁸ recognized the section 1552 exception,

25. 343 F. Supp. 1087 (D.S.C. 1972).

26. 10 U.S.C. § 1552(a) (1970).

27. 343 F. Supp. at 1089.

28. The court quoted from *Ashe v. McNamara*, 355 F.2d 277 (1st Cir. 1965), which had held that since Congress, when it gave the secretaries of the military departments the authority to review courts-martial, had specifically deleted from the proposed legislation

it refused to follow the reasoning of those cases. The court thought to do so would be to nullify the provisions of finality contained in article 76 which the court considered essential to the scheme of military justice created by Congress.

The court also considered whether the remedy requested, a writ of mandamus, was appropriate. Noting that the plaintiff sought the nullification of his discharge even though he had already obtained an alteration of his records to show an honorable discharge, the court characterized the plaintiff's action as primarily a "claim for a money judgment against the United States."²⁹

Citing *Carter v. Seamans*,³⁰ the court held that under the applicable statute³¹ it had no jurisdiction over claims against the United States in excess of \$10,000.00. In light of the period of time involved, the court was convinced that the plaintiff's claim would exceed that amount. Therefore the court held that the suit should have been filed in the United States Court of Claims which has jurisdiction over claims against the United States in excess of \$10,000.00.³²

Independent of the jurisdictional issues, the court held that mandamus would be an improper remedy. Stating that "[m]andamus is an extraordinary remedy which is available only in cases in which the usual forms of procedure are powerless to afford relief,"³³ the court held that it would be inappropriate to issue a writ because the court of claims could resolve all issues, including the constitutionality of plaintiff's conviction and discharge.

In *Drummond v. Froehlke*,³⁴ the Fourth Circuit Court of Appeals held that the Army had not failed to follow its own regulations in discharging the plaintiff and upheld the plaintiff's undesirable discharge.

provisions which would have precluded review of the secretary's action, Congress intended to create an exception to the non-reviewability of military judicial proceedings. The court cited as following the *Ashe* rule: *Smith v. McNamara*, 395 F.2d 896 (10th Cir. 1968) and *United States v. Augenblick*, 377 F.2d 586 (Ct. Cl. 1967). The court distinguished *Smith* and *Ashe* on the grounds that the plaintiff sought to completely void his discharge, whereas in those cases the plaintiffs had sought only a change in the types of discharge.

29. 343 F. Supp. at 1093.

30. 411 F.2d 767 (5th Cir. 1969).

31. 28 U.S.C. § 1346 (1970).

32. 28 U.S.C. § 1491 (1970).

33. 343 F. Supp. at 1094.

34. 460 F.2d 264 (4th Cir. 1972).

Army regulation 635-208 requires that to be discharged under nonhonorably conditions an individual must be certified as mentally competent and physically sound. If no certification can be made, alternative procedures possibly leading to an honorable medical discharge are to be invoked.

The plaintiff had been certified as having "no disqualifying mental or physical defects."³⁵ The certification also contained a psychiatrist's recommendation that plaintiff be given a discharge for unsuitability under honorable conditions. The lower court had found that in light of the psychiatrist's recommendation the Army should have invoked the alternative procedure required by regulation 635-208.

Terming the psychiatrist's recommendation "gratuitous," the court held that the Army's failure to proceed under the alternative procedures did not violate its own requirements since the certification required by regulation 635-208 had been made.

IV. CORPORATIONS

The nature of the fiduciary duty owed by corporate directors and officers to stockholders was further explained by the South Carolina Supreme Court in *Talbot v. James*.³⁶

Chicora Apartments, Inc., was a closely held corporation organized specifically to build and operate apartments. Of the twenty shares of stock issued, James, the defendant, owned ten, and Mr. and Mrs. Talbot, the plaintiffs, owned ten. James was the president and a director of the corporation while Talbot was vice-president and a director.

The controversy centered on a contract for the construction of the apartments executed by James in two capacities—one, as president of Chicora Apartments, Inc., and the other, as the sole proprietor of the James Construction Company. The plaintiffs brought this suit for an accounting, claiming that James had breached his fiduciary duty by failing to disclose the nature of the contract. The plaintiffs claimed that in so doing James was able to appropriate to his personal use some \$25,025.31, which had been obtained for the construction of the apartments.

James asserted that his dual interest in the contract had been revealed to the Talbots and that he was entitled to the sums

35. *Id.* at 266.

36. 259 S.C. 73, 190 S.E.2d 759 (1972).

received as payment for general overhead expenses on the construction contract.

The court examined the preincorporation and incorporation agreements to ascertain the obligations and rights of the parties. It noted specifically that under both agreements the plaintiffs' only obligation was to convey the land to the corporation. James, on the other hand, was obligated under the preincorporation agreement "[t]o promote the project . . . and . . . be responsible for the planning, architectural work, construction, landscaping, legal fees, and loan processing of the entire project."³⁷ He was "authorized, empowered and directed to make . . . documents and instruments . . . including . . . [a] Construction Contract."³⁸ The contract entitled James to a \$20,000.00 "fee" in addition to the construction cost. Also, an itemization of the expenses of the construction indicated that \$31,589.00 of the price was allocated to general overhead expenses.³⁹

The issues were whether James had disclosed the facts of his dual capacity in executing the contract, whether he had disclosed the details of the contract, and whether, if these disclosures were not made, James had breached his fiduciary duty.

On the question of disclosure of dual capacity the court determined that James had entered the contract without disclosing his conflicting interests. However, even if the defendant had made this disclosure, the court held that his failure to disclose the details of the contract, which was personally beneficial to him, was still a breach of his fiduciary duty. In making this determination the court relied on *Gilbert v. McLeod Infirmary*⁴⁰ which held that, when an officer contracts with his corporation in his personal capacity, the transaction is voidable at the option of the corporation.⁴¹

Additionally, the court cited *Gilbert* for the principle that even if the officer does not act in his official capacity the transac-

37. *Id.* at 78, 190 S.E.2d at 761.

38. *Id.* at 80, 190 S.E.2d at 763.

39. The full contract price was to be \$736,000.00.

40. 219 S.C. 174, 64 S.E.2d 524 (1951).

41. It must be noted that this case today would be controlled by S.C. CODE ANN. § 12-18.16(a) (Cum. Supp. 1971). This statute did not become effective until January 1, 1964, whereas the contract in question was executed on November 6, 1963. Under the statute, even if disclosure were not made, the contract would be voidable only if the defendant could not show that it was "fair and equitable" when made.

tion will be voidable if the director has not made full disclosure, paid full value, or if the corporation has been imposed upon.⁴² Under these standards the court thought that James had violated his duty, thus entitling the corporation to recover the funds which James had diverted to his own use. A factor important to the court was that under the preincorporation agreement James was obligated to perform the services for which he now claimed compensation. Additionally, the court noted that under the preincorporation agreement James had not been authorized to contract with himself personally.

Justices Bussey and Brailsford disagreed with the majority's view of the facts. They thought that on the date of the contract the plaintiffs knew "James Construction Company was going to be the general contractor on the project,"⁴³ and that "any lack of knowledge" of the details of the contract on Talbot's part was due to his "lack of diligence or interest and not to any intentional failure to disclose by James."⁴⁴ Under this view the dissenters thought that the contract was not voidable at the option of the corporation.

According to the dissenters, James was not obligated by the preincorporation agreement to perform the service of a general contractor. Thus, they thought that even if the contract were voidable James would be entitled to compensation for his costs, including the general overhead expense, and thus would be liable to the corporation only for his personal profits.

In *United States v. Theodore*⁴⁵ the South Carolina federal district court held⁴⁶ that a partnership which holds itself out as a corporation can not, when sued in its corporate capacity, "change [its] proverbial hat" in order to assert rights available to a partnership but not available to a corporation. The court rejected the respondent's argument that under South Carolina law the sole method of deciding whether a business entity is a professional association is by determining whether the entity filed the required agreements.⁴⁷

42. 259 S.C. at 83, 190 S.E.2d at 764, citing *Gilbert v. McLeod Infirmary*, 219 S.C. 174, 64 S.E.2d 524 (1951).

43. *Id.* at 91, 190 S.E.2d at 768.

44. *Id.*

45. 347 F. Supp. 1070 (D.S.C. 1972).

46. See also *Survey of Taxation infra*.

47. See S.C. CODE ANN. § 56-1604 (Cum. Supp. 1971).

Citing *Dargan v. Graves*,⁴⁸ which held that a business entity that had obtained a corporate charter but had failed to complete incorporation was bound by its representation that it was in fact a corporation, the court held that South Carolina still recognizes incorporation by estoppel. On this theory the court determined that the respondent could be compelled to submit the corporate records which the respondent had withheld on the grounds that as a partner in a partnership he could assert his right against self-incrimination.

The court also stated that even if it were true that the respondents could not be sued as a corporation, under the Federal Rules of Civil Procedure⁴⁹ they could still be reached in their business capacity and consequently could not assert rights personal to themselves in favor of the partnership.

V. ANTITRUST

In *Kendall Elevator Co. v. LBC&W Associates*,⁵⁰ the defendant's architect had included in a client's construction plans a restriction that elevators could not be supplied by anyone who was not "the manufacturer of the major components"⁵¹ of the elevators, and a specification that the elevators must be manufactured by the Otis Elevator Company, or of equal quality. According to the United States District Court, District of South Carolina, since these specifications were not intended to create a monopoly or to restrain trade, the defendant had not violated federal antitrust laws.⁵²

The court thought that architects should properly consider the convenience of service and of maintenance as well as other advantages gained by dealing with the manufacturers. Based on this reasoning, the court believed the architect was completely justified in recommending to his clients that the suppliers of elevators be restricted to manufacturers of major components. The court further recognized that the restriction, which excluded the plaintiff from dealing with the architect's clients, was not unlawful unless the defendant had violated title 15, section 1, of the United States Code. Section 1 states that a necessary element

48. 252 S.C. 641, 168 S.E.2d 306 (1969).

49. FED. R. CIV. P. 17(b).

50. 350 F. Supp. 75 (D.S.C. 1972).

51. *Id.* at 76.

of an antitrust violation is an agreement or "joint action." The court noted the plaintiff had conceded that he had no prospect of proving the existence of such an agreement. As to the second restriction, the court determined that Otis' name was used not to limit the class of elevators to those manufactured by Otis, but only to set a standard of quality.

VI. SEX DISCRIMINATION

In *Eslinger v. Thomas*,⁵³ Eslinger, a student at the University of South Carolina Law School, alleged that she had been denied employment as a page in the South Carolina State Senate "solely because of her sex." Because "the defendants had shown no justifiable reason"⁵⁴ for this refusal the court had no difficulty finding a denial of Eslinger's constitutional rights. The court, however, refused to levy damages against defendant Thomas, the Clerk of the Senate. Following *Kirstein v. Rector & Visitors of the University of Virginia*,⁵⁵ the court held that since Thomas' refusal to hire Eslinger was "in good faith" and did not deprive her of a constitutional right previously clearly recognized, it should not impose money damages which otherwise would be recoverable under title 42, section 1983 of the United States Code.

Subsequent to the institution of this suit the Senate adopted a resolution⁵⁶ which permitted the hiring of part-time female employees; however, the resolution prohibited these employees from performing personal errands for the senators. Eslinger also challenged the constitutionality of the discrimination engendered in this resolution. The court, citing *Williams v. McNair*,⁵⁷ which held that discrimination is permissible as long as it is not arbitrary and is rationally justified, found that "the constitutional rights of female citizens are not unduly restricted or violated"⁵⁸ by the resolution.⁵⁹

52. 15 U.S.C. § 1 (1970).

53. 340 F. Supp. 886 (D.S.C. 1972).

54. *Id.* at 894.

55. 309 F. Supp. 184 (D.S.C. 1970).

56. S.C. Senate Resolution 525 (1971).

57. 316 F. Supp. 134 (D.S.C. 1970), *aff'd*, 401 U.S. 951 (1971).

58. 340 F. Supp. at 894.

59. Other than recognizing the "real physical differences" between men and women the court did not discuss or suggest the rational justification behind the discrimination. Presumably, the justification is that the discrimination is to protect the reputations of both Senators and part-time female employees.

The court refused to invoke the more recent equal protection test which would have required the Senate to justify its discriminatory practices as necessary for the furtherance of a compelling state interest. The court held that invocation of the more rigid test is proper only where discrimination is based on race or where the "classifications and restrictions . . . serve to penalize or restrict the exercise of some constitutionally protected right."⁶⁰ The court said that sex discrimination, unlike racial discrimination, "is not patently unlawful or unconstitutional."⁶¹

VII. SECURITIES REGULATION

The main issue in *MacAndrews & Forbes Co. v. American Barmag Corp.*⁶² was whether bills of exchange fall within the definition of "securities"⁶³ as used in title 15, sections 77(a) *et seq.*, of the United States Code. The plaintiff alleged that the defendant by fraud and misrepresentation obtained certain bills of exchange as partial payment for machinery which plaintiff had purchased from the defendant on the inducement of defendant's fraudulent statements. The court, recognizing previous rulings,⁶⁴ determined that the term "security" should be broadly interpreted and held that the bills of exchange are "sufficiently within the definition of 'security'."⁶⁵

VIII. PROTECTION OF THE RIGHTS OF INCOMPETENTS

In *Clarendon Holding Co. v. Witherspoon*⁶⁶ the South Carolina Supreme Court refused to authorize the sale of the property of the defendant, a person *non compos mentis*. Plaintiff sued to quiet title to certain property conveyed to it by the defendant. The defendant's guardian ad litem countered asking for a declaration that his ward owned the property. The guardian asserted that the conveyance was made under an invalid court order which

60. 340 F. Supp. at 896.

61. *Id.*

62. 339 F. Supp. 1401 (D.S.C. 1972).

63. Under 15 U.S.C. § 77b(1) (1970), as the court points out, the definition of "security" is very broad indeed. It speaks specifically of the various forms of securities and generally of "any evidence of indebtedness" as well as of "any interest or instrument commonly known as a 'security'."

64. See, e.g., *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6 (1971); *Tcherepnin v. Knight*, 389 U.S. 332 (1967).

65. 339 F. Supp. at 1406.

66. 258 S.C. 296, 188 S.E.2d 480 (1972).

issued from proceedings in which Elkins, the defendant's committee, had taken no action to protect the defendant's interest. In light of Elkins' testimony that he had failed to consider the defendant's best interest in the sale and that he was not even "aware" that he had petitioned for the sale, the court concluded that the ward owned the property because he had not been adequately represented at the prior sale. The court based its holding on *Simpson v. Doggett*,⁶⁷ which held that a guardian's failure to diligently prosecute the rights of his ward would not only result in liability against the guardian but also void a judgment obtained in violation of this duty. The court held that the committee was subject to the same duties as a guardian ad litem and that because of his failure to protect the rights of the incompetent it was the court's duty to void the proceedings.

IX. PATENT INFRINGEMENT

A major problem in patent infringement cases is their technical subject matter. *Maschinenfabrik Rieter A.G. v. Greenwood Mills*⁶⁸ is no exception. It concerned a textile system designed to transport ginned, cleaned, and opened cotton to carding machines for further processing. In 1962 a patent under the title "Automatic Carding Plant" was issued for the Rieter system.

After public display of the Rieter system, Continental/Moss Gordon, Inc., pursuant to Greenwood Mills' request, developed and supplied to Greenwood Mills a system for feeding cotton to the card machine. The Continental system, claimed the plaintiff, infringed on the patent of the Rieter system.

Continental maintained that no infringement existed because plaintiff's patent was invalid for failure to meet statutory requirements. The court held that plaintiff's claim met the test of section 112⁶⁹ which requires that "the specifications and claims [must be] sufficiently detailed to enable a man of ordinary skill in the art to construct [the invention described in the patent] in accordance with the teachings of the patent in suit and to determine from the claim language the scope of the patent coverage."⁷⁰

67. 159 S.C. 294, 156 S.E. 771 (1930).

68. 340 F. Supp. 1103 (D.S.C. 1972).

69. 35 U.S.C. § 112 (1970).

70. 340 F. Supp. at 1109.

The central issue was whether the invention was, at the time it was made, obvious to a person skilled in the art to which the invention pertained. If the invention is held obvious, it is unpatentable under section 103.⁷¹ After reviewing the facts at length, the court concluded that the innovations of the Rieter system were not obvious and therefore patentable.

The court analyzed in depth the question of obviousness. Specifically, it rejected the defendant's approach which based its view of prior art on selected aspects of prior patents. The court cited several cases⁷² which held that the necessity of relying on such an approach in itself indicates that the invention was not obvious. The extreme age of these prior patents, noted the court, indicated their irrelevance and perhaps even the non-obviousness of the plaintiff's invention.

One prior patent was used as a reference point by the Patent Office in researching for the Rieter patent. The court considered it particularly significant that the similarities between plaintiff's patent and the older patent had been carefully weighed by the Patent Office.

With respect to those patents presented by the defendant but omitted in the Patent Office's research record, the court felt that the absence of notation did not necessarily indicate they had been disregarded.

"Secondary" factors,⁷³ according to the court, also bear on the issue of obviousness. Such factors are "commercial success, long felt but unsolved problems, and the attempts and failures of others to solve such problems."⁷⁴ Under this approach the court reasoned that the facts indicated non-obviousness. The court emphasized that Continental had in fact duplicated the plaintiff's system after its success. The court considered this a strong indication that the imitator thought the system innovative.

71. 35 U.S.C. § 103 (1970). Section 103 states:

A patent may not be obtained. . . . if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

72. *Reynolds v. Whittin Mach. Works*, 167 F.2d 78 (4th Cir. 1948), *cert. denied*, 334 U.S. 844 (1948); *Adams v. United States*, 330 F.2d 622 (Ct. Cl. 1964), *aff'd*, 383 U.S. 39 (1966).

73. These factors are enumerated in *Graham v. John Deere Co.*, 383 U.S. 1 (1966).

74. 340 F. Supp. at 1115.

Finally, the defendant argued that its system did not infringe on Rieter's patent because it was substantially different. On this point, the court stated: "[O]ne does not avoid infringement by following the teachings of a patent imperfectly or by constructing a device that does not function as well as the patented structure, so long as he appropriates the substance of the invention."⁷⁵ Having concluded that the Continental system was substantially identical to the Rieter system, the court upheld the validity of the plaintiff's patent and held the defendant liable for infringement.

In a second case, *Sabel v. Wickes Corp.*,⁷⁶ the court held the plaintiff's patent invalid on the grounds of obviousness. The plaintiff's invention was an ornamental column fabricated by die stamping sheet metal and welding the sheets to a metal frame.⁷⁷ Previously, the columns had been fabricated from either wrought or cast iron, both of which were inferior materials. The court found that the innovations were obvious.⁷⁸ Noting that the commercial success of the columns was the result of using sheet metal, the court held that according to accepted law "the substitution of one material for another is not patentable."⁷⁹

The presumption of validity of an issued patent was also recognized, but it was determined that "the presumption is weakened because of the failure of the patent examiner to properly consider the pertinent prior art."⁸⁰

X. UNFAIR COMPETITION

In *Columbia Broadcasting System v. Custom Recording Co.*,⁸¹ Columbia Broadcasting System⁸² requested injunctive relief to prevent the defendant from re-recording its publicly marketed phonographic records and selling the copies in competition with C.B.S. The defendant asserted that having purchased copies of the plaintiff's records he could make any use of them that he

75. 340 F. Supp. at 1119, quoting *Matthews v. Allen*, 182 F.2d 824, 828 (4th Cir. 1950).

76. 345 F. Supp. 1227 (D.S.C. 1971).

77. This statement is considerably over-simplified.

78. The court cited *Graham v. John Deere Co.*, 383 U.S. 1 (1966), for the proposition that the state of the art prior to the invention determines whether it is obvious.

79. 345 F. Supp. at 1229.

80. *Id.*

81. 258 S.C. 465, 189 S.E.2d 305 (1972).

82. Hereinafter, "C.B.S."

wished. He based this contention on a South Carolina statute⁸³ which specifically abolished any right the original might have had at common law.

On appeal, the court phrased the issue: "Did the actions of the defendant amount to such a breach as to entitle plaintiff to injunctive relief?"⁸⁴ More precisely, the issue is: Does the plaintiff have a legal right to insist its records not be re-recorded and sold by someone else?

The court discussed *International News Service v. Associated Press*,⁸⁵ which disregarded the property aspects of misappropriation of unpatented, uncopyrighted intangible creations and emphasized the unfairness of allowing a competitor to appropriate the creator's work product without recompense. That case recognized the appropriateness of injunctive relief in such situations. However, the court recognized that *Sears, Roebuck & Co. v. Stiffel Co.*⁸⁶ and *Compco Corp. v. Daybright Lighting, Inc.*,⁸⁷ which held "that a state law of unfair competition cannot impose liability for the copying of an article which was not protected by either a federal patent or copyright,"⁸⁸ put considerable strain on the older *Associated Press* theory. The court resolved this apparent dichotomy by distinguishing between the copying involved in the *Sears* and *Compco* cases and actually "appropriating the performance" by recording it.⁸⁹

The court found persuasive *Liberty/UA, Inc. v. Eastern Tape*

83. S.C. CODE ANN. § 66-101 (1962) states:

When any phonograph record or electrical transcription, upon which musical performances are embodied, is sold in commerce for use within this State, all asserted common-law rights further to restrict or collect royalties on the commercial use made of any such recorded performances by any person are abrogated and expressly repealed. When such article or chattel has been sold in commerce any asserted intangible rights shall be deemed to have passed to the purchaser upon the purchase of the chattel itself and the right to further restrict the use made of phonograph records or electrical transcriptions, whose sole value is in their use, is forbidden and abrogated. Nothing in this section shall be deemed to deny the rights granted any person by the United States copyright laws. The sole intentment of this section is to abolish any common-law rights attaching to phonograph records and electrical transcriptions, whose sole value is in their use, and to forbid further restrictions or the collection of subsequent fees and royalties on phonograph records and electrical transcriptions by performers who were paid for the initial performance at the recording thereof.

84. 258 S.C. at 472, 189 S.E.2d at 308.

85. 248 U.S. 215 (1918).

86. 376 U.S. 225 (1964).

87. 376 U.S. 234 (1964).

88. 258 S.C. at 473, 189 S.E.2d at 309.

89. *See* *Liberty/UA, Inc. v. Eastern Tape*, 264 N.E.2d 874 (1970), among other cases, was cited by the court for this proposition.

Corp.,⁹⁰ a North Carolina case which involved a statute identical to the South Carolina statute. The court adopted the reasoning in *Liberty* that the statute, enacted in 1939 when the legislature could not have envisioned the technology which makes this type of dispute possible, should be construed as applicable only when the record is actually played to a listener and not when it is re-recorded. The court held that "[t]he parasitic acts of defendants violated plaintiff's legal rights. Injunctive relief should have been granted to protect those rights."⁹¹

Justice Bussey in the dissent objected to deciding the substantive issues on an appeal from denial of a temporary injunction. He considered this improper because it denied the court the assistance and benefits normally incident to an adjudication by the court. He also maintained that granting a temporary injunction is a decision for the lower court, especially when plaintiff seeks legal redress and injunctive relief and there is no impediment to the vindication of the plaintiff's legal rights.

In *Future Plastics, Inc. v. Ware Shoals Plastics, Inc.*,⁹² one of two cases involving allegedly misappropriated trade secrets, the secrets were the methods and machinery by which high molecular weight plastics could be manufactured through the use of a "ram extrusion" process. Future Plastics was founded in 1960 by Coyt Murray and others to exploit certain inventions made by Murray. After incorporation it developed the processes now in issue. The defendant Massey, accused of conveying the secrets to the defendant corporation, went to work for Future in 1962. In his employment he learned the processes and in fact constructed several of the machines plaintiff used in connection with them. In 1964, Murray asked Massey and other employees to sign covenants not to compete and agreements binding themselves to secrecy. Massey refused to sign. In 1965 Murray released several employees from their covenants and binders. Until 1965 stringent efforts were made to protect the secrets, but in that year Murray founded Impact Plastics and disposed of his interest in Future. Impact utilized the procedures to compete with Future, but Future failed to prevent their use or to bind Impact to se-

90. 11 N.C. App. 20, 180 S.E.2d 414 (1971).

91. 258 S.C. at 478, 189 S.E.2d at 312.

92. 340 F. Supp. 1376 (D.S.C. 1972).

crecy. Subsequent to Murray's departure from Future, the company was beset by problems, and Massey began planning⁹³ to leave Future and set up his own business to compete with Impact and Future. In 1966, Future's stockholders, agreeing not to compete until 1971, sold the company to Impact Plastics. Murray, once again in charge of Future, requested Massey to bind himself to secrecy and non-competition. Massey refused and left Future. Prior to leaving Future, Massey and others founded Ware Shoals Plastics, which utilized the process.

In 1967 representatives of Future made statements to law officers and others accusing Massey of misappropriating Future's secrets and stealing its equipment. Future then brought this action to recover damages and to enjoin Ware Shoals Plastics from further utilizing its trade secrets. The defendants counter-claimed, charging slander and legal harassment intended to eliminate competition. The defendants asserted that the processes were common knowledge in the plastics industry and that Massey had never been bound to secrecy. The court found specifically that, because of Future's failure to maintain secrecy, by 1966 the process could no longer be considered secret. The court, however, reached its holding in part on other grounds.

Future claimed that, because its business began as a joint venture between Murray and others, Murray had a right to use the processes. Therefore, reasoned Future, by allowing Impact to utilize the processes, it was not relaxing its secrecy. The court rejected this contention because Future's corporate status completely negated the existence of a joint venture. Thus, the court held that Future's acquiescence in Impact's use of its secrets was a breach of the duty to maintain secrecy which must be discharged if the misappropriation of trade secrets is asserted as the basis of legal action.⁹⁴

Secondly, the court stated that Massey could not be charged with misappropriation because he was not bound to maintain secrecy. The court determined that in the absence of an express agreement to the contrary, "an employee after leaving the service of his employer may carry on the same business and use for his own benefit the things he has learned in his prior employment."⁹⁵

93. On his own time, the court found.

94. *J.T. Healy & Son, Inc. v. James A. Murray & Son, Inc.*, 357 Mass. 728, 260 N.E.2d 723 (1970), was cited by the court for this rule.

95. 340 F. Supp. at 1384.

The court also recognized that an injunction would be improper because "he who seeks equity must do equity and he must come into court with clean hands."⁹⁶ Noting that Future Plastics was wholly owned by Impact, which "was conceived in the same sin of which it now accuses the defendants,"⁹⁷ the court denied the plaintiff relief.

The court dismissed defendant's slander counterclaim because he had failed to show damages, and the harassment element of the counterclaim was also dismissed because the suit had been brought in good faith.

In *Lowndes Products, Inc. v. Brower*,⁹⁸ the plaintiff brought suit alleging that former employees had wrongfully appropriated its trade secrets, which consisted of processes, formulas, and machinery used in manufacturing non-woven textiles. As a second ground of recovery, the plaintiff alleged that certain defendants, while still employed, had breached their duty of fidelity.

Relying on the *Restatement of Torts*⁹⁹ and Callmann's treatise on unfair competition,¹⁰⁰ the court determined that the technology involved constituted trade secrets.

On the issue of secrecy the court noted Lowndes' actions, including "instances where actual or potential competitors were given tours of Lowndes' facilities."¹⁰¹ Finding that Lowndes had "failed to take the precautionary measures necessary to protect its techniques,"¹⁰² the court denied the plaintiff relief.

As to plaintiff's breach of loyalty charge, the court determined that two of the ex-employees while employed by the plaintiff had violated the duty.¹⁰³ The court granted plaintiff a recovery of damages sustained as a result of the defendant employees'

96. *Id.*

97. *Id.*

98. 259 S.C. 322, 191 S.E.2d 761 (1972).

99. RESTATEMENT OF TORTS, Explanatory Notes § 757, comment b, at 5 (1939).

100. 2 R. CALLMANN, THE LAW OF UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES §§ 52 *et seq.* (3d ed. 1968).

101. 259 S.C. at 330, 191 S.E.2d at 766.

102. *Id.* at 331, 191 S.E.2d at 766.

103. Brower, while a plant manager, had failed to notify his employers that key employees were planning to leave. He had in fact encouraged them to leave and to keep their plans secret.

Loftin, another former employee, deprived the plaintiff of a valuable sales relationship. He also entered into an agreement with a customer to organize a corporation to compete with the plaintiff.

breaches of duty. The court adopted the view¹⁰⁴ that the principal can recover not only for the damages caused by the breach of duty but also the benefits wrongfully appropriated by the agent. The court also reasoned that third parties who knowingly induce or make possible breaches of the agent's duty are also liable to the principal.¹⁰⁵ The court therefore held that the other defendants should be held jointly liable with the two disloyal employees. As the beneficiary of the breaches of fidelity, the corporation formed to compete with the plaintiff was also held liable.

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104. 3 AM. JUR. 2d *Agency* §§ 220, 223 (1962).

105. 3 AM. JUR. 2d *Agency* § 290 (1962).