

# Exhibit 4

**Kathleen McDaniel** – Attorney  
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May 6, 2014

The Honorable Joyce McDonald  
Kershaw County Clerk of Court  
Post Office Box 1557  
Camden, SC 29021

**RE: Albert H. Hough, individually, and as the Personal Representative of the Estate of Harold W. Hough and as the Personal Representative of Elizabeth P. Hough, George J. Hough and Angela Hough v. Richard Wesley Hough, Joel Pitts Hough and Mary Louise Robinson  
Case Number: 2011-CP-2800073  
Our Case Number: 11127.003**

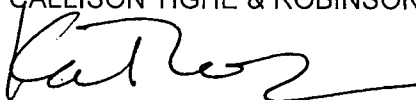
Dear Ms. McDonald:

Enclosed please find the original and one copy of Defendant Richard Hough's Memorandum in Opposition to Plaintiffs' Motion to Disallow or Strike Defendant Richard Hough's § 15-61-25 Notice of Interest in Purchasing Property in the above-referenced matter. Please file the original and return a clocked copy to me in the self-addressed envelope provided.

I am by copy of this letter serving all parties with this document.

With kind regards, I am

CALLISON TIGHE & ROBINSON, LLC



Kathleen McDaniel

KMM/cnc  
Enclosures

cc: B. Michael Brackett, Esquire (Via U.S. mail)  
M. Scott Rankin, Esquire (Via U.S. mail)  
Mary Louise Robinson (Via U.S. mail)

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF KERSHAW )  
 )  
 Albert H. Hough, individually, and as )  
 Personal Representative of the Estate of )  
 Harold W. Hough and as Personal )  
 Representative of the Estate of Elizabeth )  
 P. Hough; George J. Hough and )  
 Angela Hough, )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 Richard Wesley Hough, Joel Pitts )  
 Hough and Mary Louise Robinson, )  
 )  
 Defendants. )  
 )

IN THE COURT OF COMMON PLEAS  
 FIFTH JUDICIAL CIRCUIT

Case No.: 2011-CP-28-0073

**DEFENDANT RICHARD HOUGH'S  
 MEMORANDUM IN OPPOSITION TO  
 PLAINTIFFS' MOTION TO DISALLOW OR  
 STRIKE DEFENDANT RICHARD HOUGH'S  
 § 15-61-25 NOTICE OF INTEREST IN  
 PURCHASING PROPERTY**

Defendant Richard Wesley Hough submits this memorandum in opposition to the Plaintiffs' motion to disallow or strike Richard Hough's notice of interest in purchasing the property that is the subject of this partition action.

As an initial matter, the Plaintiffs set up as one reason to disallow Richard Hough's notice the fact that he has admitted that the real property at issue is capable of being partitioned in kind. Such admission is no basis for disallowing a non-petitioning party to provide the Court with its notice of interest in purchasing the property or disallowing such purchase of the property following a determination of the proper valuation. In fact, the statute at issue, S.C. Code Ann. § 15-61-25, provides that even a defaulting party may be allowed to purchase the such interests in the property, even if a default judgment has been entered against them. If a party in default, who will be determined to have admitted each of the allegations in a partition complaint, can purchase the interests, then an answering party certainly has that right as well, regardless of whether he admits or denies that the property is susceptible to partition in kind.

The Plaintiffs' main point of contention regarding Richard Hough's notice of interest in purchasing the property is the claim that notice of such interest was untimely. The right of first

refusal statute provides that non-petitioning parties must inform the Court of an interest in purchasing the property “no later than ten days prior to the date set for trial of the case.” S.C. Code Ann. § 15-61-25. In this case, Richard Hough filed a letter informing the Court of his interest in purchasing the property with the Kershaw County Clerk of Court on May 2, 2014.

**(Ex. A, Richard Hough’s clocked-in letter informing Court of interest in purchasing property.)** The trial in the date set for trial of this case was May 12, 2014. Under any common reading of the manner of time computation, the notice would appear to have been submitted to the Court ten days prior to May 12, 2014.

The Plaintiffs assert that in order for the notice to have been timely submitted it must have been submitted no later than 12:00 a.m. the morning of May 2, 2014. This is an incorrect interpretation of the statute.

The Supreme Court has considered a similar issue. *Holt v. Settlemeyer*, 79 S.C. 263 (1908). In *Holt*, the rules regarding elections in Gaffney, South Carolina provided that anyone seeking to be added to the ballot for primary had to file a pledge with the chairman of the executive committee 5 days before the election. *Id.* The primary was set for January 7. *Id.* Holt filed his pledge on January 2. *Id.* The executive committee decided that his pledge was untimely and excluded him from the ballot. *Id.* The Supreme Court reversed, holding that the filing on January 2 complied with the “five days before” requirement. *Id.*

Although the Supreme Court does not provide a detailed analysis, we can deduce that in order to reach such a decision, the Supreme Court must have determined that either the day of filing or the day of the election (at least one of the terminal days) must have been countable in the time computation. If both terminal days had been excluded, then the pledge could not have been filed 5 days before the election. Applying this logic to the case at hand, Richard Hough’s notice was filed and served 10 days before the trial of the case.

An older case is also instructive. *Buist v. Mitchell*, 5 S.C.L. 485 (1814). In *Buist*, the Constitutional Court of Appeals of South Carolina considered the timeliness of service of

process. *Id.* Such return was due 15 days before the next sitting of court, which was to occur on November 3. *Id.* Service of a writ was made on the defendant's residence on October 19. *Id.* In *Buist*, the court concluded that the service was timely. *Id.* In so ruling, the court held:

The rule of law is, that there are no fractional parts of a day, so that if process be served before twelve o'clock at night, it shall be accounted served on that day to which the twenty hours belong. If then the day on which the writ be served, is to be account as one of the fifteen days, it will be in time, as it will be fifteen days next before the sitting of the court to which it is returnable.

*Id.* Counting the day of service (even though it was during the day and not apparently not at the stroke of midnight) and excluding the day of the court's sitting, the service was made 15 days before the sitting of the court. *Id.* Applying this rule in the instant matter and counting the day of service (even though not at midnight), such service was made 10 days before the trial of the case.

The general weight of authority further provides that where something is to be done on a particular day, a party has that entire day to complete that action. For example, one secondary source states, "Thus, where one is given a stated number of days in which to perform an act, he or she may perform at any time up to midnight of the last day." Am. Jur. 2d Time § 10 Day. This general rule is acknowledged in *South Carolina Nat. Bank v. Guest*, 232 S.C. 367, 102 S.E.2d 215 (1958). In *Guest*, the dispute regarded the priority of two liens. In analyzing the priority issue, the Supreme Court noted that although lien priority is an exception, the general rule is that "the term 'date' embraces the whole day and fractions thereof are not considered in computation of time." *Id.* Thus, if the general rule is that computation of time does not recognize fractions of days, then an act completed at any time before the end of the day, i.e. midnight, occurs on that day.

The Plaintiffs rely heavily upon a more recent case to support their position; however, that case is inapposite here. *Town of Summerville v. City of North Charleston*, 378 S.C. 107, 662 S.E.2d 40 (2008). In *Town of Summerville*, the Supreme Court considered whether notice of a hearing was published 30 days before the hearing. *Id.* In that case, the notice was

published on April 28. The hearing was held on May 27. In order for there to have been 30 days' notice, the time computation must have included the day of publication as well as the day of the hearing, i.e. both terminal days must have been included in order for the statutory requirement to have been met. *Id.* The Supreme Court recognized that the applicable statute specifically provided for the computation of time so as to exclude the day of publication and include the day of the event. *Id.* Thus, the notice was not timely.

The scenario presented in *Town of Summerville* is quite different that presented in this matter. Under no manner of computing time could the annexation hearing notice have been timely as there were only 30 days if both terminal days were included. In this partition matter, the applicable time period is 10 days. If both terminal days are included, then there are 11 days' notice. However, even if only one of the terminal days is included, Richard Hough has given the required 10 days' notice.

Furthermore, *Town of Summerville* does not support the Plaintiffs' position that a day only counts as a day if notice is given no later than midnight on the morning of that day. In fact, it supports the exact opposite conclusion. In *Town of Summerville*, the appellant was attempting to argue that a day constituted a 24 hour period counted backwards from the exact time that the meeting was held. The Supreme Court held that day does not mean *any* 24 hour period but it means the *specific* 24 hour period from midnight to midnight, i.e. a calendar day. The Supreme Court held, "where the time prescription mentions only the passage of a number of days, a 'day' means a calendar day, beginning and ending at midnight." *Id.* Thus, where an act is accomplished at any time prior to midnight, it is accomplished on that day. Applying that reasoning to this case, Richard Hough's notice of interest to purchase was filed and served 10 days prior to the trial of this case.

Finally, another holding from the other South Carolina relied upon by the Plaintiffs has been superseded by the South Carolina Rules of Civil Procedure. *William v. Halford*, 67 S.C. 296, 45 S.E. 207 (1903). In that case, the Supreme Court held that a deposition *de benne esse*

had not been noticed timely prior to its taking where the notice was served on November 10 and the deposition was to occur on November 20. *Id.* The rule at that time required 10 days' notice. *Id.* However, depositions are now subject to Rule 6, SCRPC, which provides for inclusion of the last day of the period to be included in time computation. Under Rule 6, SCRPC, the deposition notice would be timely. Accordingly, this holding in *William* should be of no moment to this Court.

### **CONCLUSION**

Based upon the foregoing, Richard Hough respectfully requests that this Court deny the Plaintiffs' Motion to Disallow or Strike his notice of interest to purchase and permit Richard Hough to proceed as permitted by the partition statute to purchase the real property that is the subject of this partition action.

CALLISON TIGHE & ROBINSON, LLC



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**ATTORNEY FOR RICHARD W. HOUGH**

May 6, 2014  
Columbia, South Carolina

COUNTY OF KERSHAW )

FIFTH JUDICIAL CIRCUIT

Albert H. Hough, individually, and as )  
Personal Representative of the Estate of )  
Harold W. Hough and as Personal )  
Representative of the Estate of Elizabeth )  
P. Hough; George J. Hough and )  
Angela Hough, )

Case No.: 2011-CP-2800073

**CERTIFICATE OF SERVICE**

Plaintiffs, )

v. )

Richard Wesley Hough, Joel Pitts )  
Hough and Mary Louise Robinson, )

Defendants. )

I, Carli Cochran, do hereby certify that I have served a copy of the following as indicated hereinbelow, by U.S. mailing a copy of same on the date below to the parties at the addresses shown below:


**Document Served:** Defendant Richard Hough's Memorandum in Opposition to Plaintiffs' Motion to Disallow or Strike Defendant Richard Hough's § 15-61-25 Notice of Interest in Purchasing Property

**Parties Served:**

B. Michael Brackett, Esquire  
Moses & Brackett, PC  
Post Office Box 100261  
Columbia, SC 29202

Mary Louise Robinson  
1100 Gunter Circle  
West Columbia, SC 29169

Scott Rankin, Esq.  
711 Lafayette Avenue  
Camden, SC 29020

  
\_\_\_\_\_  
Carli Cochran

May 6, 2014  
Columbia, South Carolina

EXHIBIT A

**Kathleen McDaniel** – Attorney  
803-404-6900  
[kathleenmcdaniel@callisonigtighe.com](mailto:kathleenmcdaniel@callisonigtighe.com)

FILED FOR RECORD CALLISON TIGHE  
2014 MAY -2 PM 4:57  
JOYCE McDONALD  
CLERK OF COURT  
KERSHAW COUNTY, S.C.

May 2, 2014

**(Via Hand-Delivery)**

The Honorable Joyce McDonald  
Kershaw County Clerk of Court  
Post Office Box 1557  
Camden, SC 29021-1557

**RE: Albert H. Hough, individually, and as the Personal Representative of the Estate of Harold W. Hough and as the Personal Representative of Elizabeth P. Hough, George J. Hough and Angela Hough v. Richard Wesley Hough, Joel Pitts Hough and Mary Louise Robinson**  
**Case Number: 2011-CP-2800073**  
**Our Case Number: 11127.003**

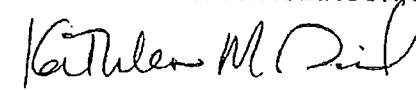
Dear Ms. McDonald:

I am writing on behalf of Richard Wesley Hough, a non-petitioning defendant in the above partition action, to inform the Court that, pursuant to Section 15-61-25 of the South Carolina Code of Laws, Richard Hough is "interested in purchasing the property" that is the subject of this partition action. Please let this letter serve as Richard Hough's notice of such interest in purchasing the property. A trial in this matter is set to begin on May 12, 2014.

I am by copy of this letter serving all parties with a copy of this letter as well as providing a copy to Special Referee John DuBose.

With kind regards, I am

CALLISON TIGHE & ROBINSON, LLC



Kathleen McDaniel

cc: Special Referee John DuBose  
B. Michael Brackett, Esquire  
M. Scott Rankin, Esquire  
Mary Louise Robinson

232 S.C. 367

Supreme Court of South Carolina.

The SOUTH CAROLINA NATIONAL BANK,

Greenville, South Carolina, Appellant,

v.

C. D. GUEST et al., of whom The State  
Bank and Trust Company, is, Respondent.

No. 17393. | Feb. 24, 1958.

Action involving the priority of chattel mortgages on an automobile. Judgment for the respondent in the County Court of Greenville County, W. B. McGowan J., and the plaintiff appeals. The Supreme Court, Taylor, J., held that mortgage of defendant bank was entitled to priority over the mortgage of plaintiff bank.

Order affirmed.

West Headnotes (3)

[1] Chattel Mortgages

↔ Effect in General

It is equitable that any risk incurred by one failing to protect himself by promptly recording his chattel mortgage should fall upon him who fails to act promptly rather than upon another who can rely upon the record for his protection. Code 1952, § 60-101.

1 Cases that cite this headnote

[2] Chattel Mortgages

↔ Delay in Recording, and Recording in Wrong Place

Where mortgage of plaintiff bank on automobile was first in point of time of execution and recordation but was not of record at time of execution of mortgage to defendant bank on same automobile, and the latter acted in good faith and without notice of the mortgage of plaintiff bank, mortgage of defendant bank was entitled

to priority over the mortgage of plaintiff bank. Code 1952, § 60-101.

2 Cases that cite this headnote

[3] Time

↔ Fractions of Day

The term "date" embraces the whole day and fractions thereof are not considered in computation of time, but an exception to such rule arises when it becomes necessary to determine the right of rival lien claimants.

1 Cases that cite this headnote

Attorneys and Law Firms

**\*\*216 \*368** Rainey, Fant, Brawley & Horton, Younts & Spence, Greenville, for appellant.

Grier, McDonald, Todd, Burns & Bradford, Greenwood, for respondent.

Opinion

**\*369** TAYLOR, Justice.

The question presented in this appeal involves the priority of one of two chattel mortgages, one held by Appellant, South Carolina National Bank of Greenville, South Carolina, and the other by Respondent, The Bank of Greenwood, South Carolina.

The facts are not in dispute. C. D. Guest, a resident of Greenville County, somewhere between 9 a. m. and 1 p. m. on January 5, 1955, procured a loan of \$3,000 from said Greenville Bank and by way of security executed a chattel mortgage upon a certain Chrysler automobile. Later, on the same day, at some time after 3 p. m., the said C. D. Guest borrowed \$3,515.24 from the Ninety Six Branch of the Greenwood Bank upon the same vehicle, representing that it was free of liens.

The Greenville Bank recorded its mortgage in the Office of the Register of Mesne Conveyances for Greenville County on January 7, 1955, at 9:17 a. m. Thereafter, on the same day, the Greenwood Bank

likewise did so at 10:00 a. m. Thus, it is seen that while the Greenville mortgage was first in point of time of execution and recordation, it was not of record at the time of the execution of the Greenwood mortgage. There is no contention but that the Greenwood Bank acted in good faith and without notice of the Greenville mortgage.

\*370 The controlling consideration is the force and effect to be given the applicable Recording Act of 1925, 34 Statutes at Large 85, now appearing as Section 60-101, Code of Laws of South Carolina, 1952:

\*\*\* all mortgages or instruments in writing in the nature of a mortgage of any property, real or personal, \*\*\* and generally all instruments in writing required by law to be recorded in the office of the register of mesne conveyances or clerk of court in those counties where the office of register of mesne conveyances has been abolished or in the office of the Secretary of State delivered or executed on or after August 1, 1934, except assignments and satisfactions of conditional sale contracts securing the purchase money of motor vehicles or refrigerators, shall be valid so as to affect the rights of subsequent creditors (whether lien creditors or simple contract creditors) or purchasers for valuable consideration without notice \*\*217 only from the day and hour when they are recorded in the office of the register of mesne conveyances or clerk of court of the county in which the property affected is situated, in the case of real estate or in the case of personal property, in which the owner of such property resides, if he resides within the State, or, if he resides without the State the county in which such personal property is situated at the time of the delivery or execution of such deed or instrument.'

'A study of the development of the Recordation Acts (Sec. 8875 of the Code) shows that they were an outgrowth of efforts to protect 'subsequent purchasers and creditors' from 'secret liens'. These are the true key words to any proper study and application of the principles. Such study shows (and it is undisputed) that at the common law, a mortgage, deed or other instrument, although not recorded, was good not only between the parties but against the world. This led to difficult situations and to hardships when thereafter innocent purchasers and mortgagees were involved.

In other words, the evil of such secret transfers and secret liens \*371 became evident, and resulted in the equitable doctrine of 'subsequent purchaser for value without notice' as well as the development of the Recording Acts.

'Therefore, the important point is that the common law doctrine as to the validity of a paper such as that of the plaintiff is applicable here except insofar as it is limited if at all by the terms of the Recording Act. By its terms, however, the Act (Sec. 8875) merely places a limitation upon such validity insofar as it affects the rights of subsequent purchasers of creditors without notice. \*\*\* Goodrich Silvertown Inc., v. Rogers, 189 S.C. 101, 200 S.E. 91, 93.

An exhaustive review of the various Recording Acts throughout the country is found in Patton on Titles beginning at page 33. There they are classified into three groups:

- (1) Those which give priority to the instrument first recorded, whether prior or subsequent to another.
- (2) Those which invalidate an instrument as against subsequent ones acquired in good faith before its recordation.
- (3) Those which give protection to a subsequent paper as against a prior one, provided it is first to be recorded.

Our Act falls within the second group as do approximately two thirds of those of the other States. The author, citing numerous authorities, observes:

'Under this type of Act here considered the earlier purchaser can protect himself from a subsequent purchaser who is without notice of his rights only by recording his conveyance before the latter conflicting interest occurs. A later recording will not affect the rights of a subsequent purchaser even though prior to the recordation of the conveyance to the latter. And as distinguished from the Acts considered in the ensuing section (referring to the third classification, insertion

added) the protection to the subsequent purchaser without notice exists regardless of when he records or whether he ever records his own conveyance.'

\*372 In this connection, see also *Turpin v. Sudduth*, 53 S.C. 295, 31 S.E. 245, 306; and the annotation contained in L.R.A. (1916D), page 244.

[1] The present Act provides no grace period for recording; therefore, the instrument should be recorded promptly upon execution to assure its validity against subsequent liens. For a mortgagee not to do so renders him liable to the risk of a mortgage being displaced by a subsequent lien fastening upon the property before its registration. While we are concerned here with construction of a statute, it is equitable that any risk incurred by one failing to protect himself by promptly recording his mortgage should fall upon him who fails to act \*\*218 promptly rather than upon another who can only rely upon the record for his protection, *Epps v. McCallum Realty Company*, 139 S.C. 481, 138 S.E. 297.

The oft cited case of *King v. Fraser*, 23 S.C. 543, was cited by both Appellant and Respondent as authority for their respective positions; however, we are of opinion that the reasoning in that case supports an affirmance of the case at bar. For a review of the Recording Acts from 1843 through 1914, see *In re Syleecau Mfg. Co.*, D.C., 17 F.2d 503, 506, all of which beginning with and subsequent to the 1876 Act, place subsequent creditors and subsequent purchasers in the same category and are referred to as 'subsequent creditors and purchasers.'

[2] In *King v. Fraser*, supra, the question was whether a mortgagee, whose mortgage had not been recorded within the prescribed time but was afterwards recorded, took precedence over the general unsecured creditors of the mortgagor; and it was held that the

mortgage had priority over all the unsecured creditors, including those whose debts were contracted between the date of the execution of the mortgage and the date of its record, but that it was otherwise as to creditors who had acquired a lien subsequent to the execution of the mortgage but prior to \*373 its record, as well as to purchasers without notice who had acquired title after the mortgage was executed but before it was recorded. See also the recent case of *Goodwin v. Harrison*, 231 S.C. 243, 98 S.E.2d 255.

[3] Appellant also takes the position that, inasmuch as the two mortgages were executed on the same date, the transactions are to be construed as having transpired simultaneously, in that the term 'date' embraces the whole day and fractions thereof are not considered in computation of time, 52 Am.Jur. 338. An exception to this rule, however, arises when it becomes necessary to determine the rights of rival lien claimants. *Carroll v. Cash Mills*, 125 S.C. 332, 118 S.E. 290; 33 Am.Jur. 437; 52 Am.Jur. 341; *Ex parte Stagg*, 1 Nott & McC., 405, 10 S.C.L. 405. Here, in order to establish priority of its mortgage over that of Appellant it was necessary that Respondent show that it had become a lien creditor subsequent to, and without notice of, Appellant's mortgage transaction, as well as prior to the recording of Appellant's mortgage. The case is thus within the exception before mentioned.

For the foregoing reasons, we are of opinion that the mortgage of the Bank of Greenwood has priority over the mortgage held by the South Carolina National Bank of Greenville; that all exceptions should be dismissed and the Order appealed from affirmed; and It Is So Ordered. Affirmed.

STUKES, C. J., and OXNER, LEGGE and MOSS, JJ., concur.

#### Parallel Citations

102 S.E.2d 215

79 S.C. 263  
Supreme Court of South Carolina.

HOLT  
v.  
SETTLEMEYER et al.

March 2, 1908.

Certiorari by D. J. Holt to compel W. L. Settlemeier and others, as the executive committee and board of canvassers of the Gaffney Democratic primary, to declare him the Democratic nominee for alderman. Writ granted.

The following is a copy of the petition:

"To the honorable, the Chief Justice, and Associate Justices, composing the Supreme Court of the state of South Carolina, the petition of your petitioner directed to the said Supreme Court in the exercise of its original jurisdiction respectfully shows:

"(1) That your petitioner and the respondents hereinabove named are citizens and qualified voters resident of the town of Gaffney, S. C.

"(2) That in December, 1907, at a mass meeting of the citizens and voters of said town, it was determined to hold a primary election on the 7th day of January, 1908, for the purpose of nominating candidates for the various offices, as mayor and aldermen in said town, to be the nominees in the general election to be held for said offices in March, 1908.

"(3) That at said mass meeting a set of rules and regulations for said primary election were adopted, a copy of which is hereto attached and made a part of this petition, and the respondents herein, with the exception of W. L. Settlemeier, were elected as an executive committee, whose duties, among other things, were to provide for the carrying out of said election, to receive the pledges of candidates, receive from them the assessments levied, to count the ballots officially, and declare the results of the said primary, naming the nominees thereof, etc.

"(4) Section 6 of said rules provided that all candidates should five days before such first primary file a pledge with the chairman of said executive committee, the

substance of which is set out in said section, and that candidates for the office of alderman should pay an assessment of \$2, and said section further provides-which is the only forfeiture or penalty mentioned in said rules-that the votes of any candidate who fails to pay said assessment shall not be counted.

"(5) That your petitioner and the respondent, W. L. Settlemeier, both were candidates for the office of alderman in Ward 1 of the town of Gaffney, in which ward, as in all others, only the candidates for mayor and the candidate for alderman in that particular ward were to be voted for.

"(6) That on the 2d day of January, 1908, your petitioner, believing that he was in time, offered to file his pledge and pay his assessment as provided for by said rules, and, after some discussion with the chairman and secretary of said executive committee as to whether he was in time, his pledge was accepted, the same being written out for him by the said secretary or under his direction, and the assessment of \$2 was paid by your petitioner, and accepted by the committee or its chairman and secretary.

"(7) Thereafter, and before said primary was held, at the instance of some person or persons, the said executive committee held a meeting at which it was determined by them that your petitioner had not filed his pledge in time, and was not, therefore, entitled to have his name printed on the tickets to be used at such primary, said meeting being held without notice to your petitioner, and without giving him an opportunity to be heard.

"(8) That ballots were prepared for said Ward 1 which did not have your petitioner's name thereon, but nevertheless your petitioner did not withdraw his candidacy, but continued thereon, and on the day of the primary election, to wit, the 7th day of January, 1908, there were cast for your petitioner for the said office of alderman 29 legal ballots, \*660 while your petitioner's opponent, W. L. Settlemeier, received only 12 legal ballots, by which your petitioner received a clear majority of legal ballots for said office over his opponent of 17 ballots; that the ballots cast for your petitioner were written by the electors on the face of the ballots prepared by the said committee by writing the name of your petitioner thereon, and scratching the name of his opponent, W. L. Settlemeier, and were

therefore legal as prescribed by the said rules of the said primary election.

“(9) That said executive committee met on the 13th day of January, 1908, for the purpose of canvassing said votes and declaring the results, and, upon the invitation of said committee, your petitioner's attorney was invited to show the said committee why they should not adhere to their said former ruling, and refuse to count the ballots cast for your petitioner, whereupon your petitioner's attorney demanded that the ballots cast for your petitioner be counted for him, and that he be declared to be the nominee for the office of alderman for said Ward 1.

“(10) Thereupon petitioner and his attorney retired, and the said committee canvassed the votes from said ward, and ruled against your petitioner's claim, and declared the respondent, W. L. Settlemeier, to be the duly elected nominee of said primary in Ward 1, over the protest of your petitioner, and notwithstanding that there were in said box from Ward 1, 29 legal ballots for your petitioner, and only 12 legal ballots for the said W. L. Settlemeier, and in the face of the fact apparent that your petitioner obtained a majority of 17 ballots over his opponent, and should therefore have been declared to be the duly nominated candidate for alderman from said ward.

“(11) That the result of the action of said committee is to prevent your petitioner from being a candidate for election in the general election, and to deprive him of the office to which he would be elected, and to deprive him of the honors and emoluments of said office.

“(12) That your petitioner is informed and believes that he has no redress from the wrongful action of said committee except through the intervention of this court, or some other court, but that the time being so short, and as no other court convenes in this county until about the 1st of March, 1908, your petitioner would be prejudiced by such delay if he be entitled to be declared the nominee of said primary; and your petitioner further is informed and believes that he has complied with the rules as herein set out, but that, if he did not, the enforcement of said rules could be and were waived accepting his pledge and the assessment; and, further, that said rules are adopted for the orderly carrying out of such election, and that there was no reasonable excuse for a decision by the committee that

he be barred, as neither they nor the respondent, W. L. Settlemeier, suffered any prejudice or inconvenience, nor would the primary have been interfered with in any way by petitioner's candidacy, as ample time remained after the filing of said pledge to prepare the ballots and other election machinery.

“(13) That your petitioner is informed and believes that the action of said committee in barring petitioner was based upon a technical construction of the rule that your petitioner had not filed his pledge five days before such first primary, and for no other reason.

“Wherefore your petitioner prays that the respondents, the committee named above, be required to show cause before this honorable court why your petitioner should not be declared to be the duly elected nominee for Ward 1 instead of the respondent, W. L. Settlemeier, or for such orders or relief as from the foregoing facts may be deemed proper by this court.

“January 13, 1908.

“ \_\_\_\_\_, Attorney for Petitioner.

“State of South Carolina, County of Cherokee.

“Personally appeared D. J. Holt, the petitioner herein, who, being duly sworn, says that the facts set out in the foregoing petition are true of his knowledge, except as to matters set out therein on information and belief, and, as to such matters, he believes it to be true.

“ \_\_\_\_\_, Petitioner.

“Sworn to before me this \_\_\_\_\_ day of January, 1908.  
\_\_\_\_\_. [Seal.]”

#### West Headnotes (1)

##### [1] Time

⊕ Excluding First or Last Day

The rule of a political party that candidates for nominations should file a pledge with the chairman of an executive committee five days before a primary election to be held on January 7th, and should pay an assessment, was complied with by filing the pledge with and paying

the assessment to the chairman of the committee on January 2d.

1 Cases that cite this headnote

**Attorneys and Law Firms**

W. S. Hall, for petitioner.

J. C. Otts, for respondents.

**Opinion**

PER CURIAM.

On hearing the petition, affidavits, and demurrer herein, it is considered by the court that the

Democratic executive committee of the town of Gaffney committed error of law in deciding under the rules of the party the petitioner had not filed his pledge and paid his assessments within the time required by said rule, and was not entitled to be a candidate in the primary election, and to have the votes cast for him therein counted.

It is therefore ordered and adjudged that the petitioner D. J. Holt is entitled to be declared the Democratic nominee for alderman in Ward 1, for the town of Gaffney at the municipal election to be held in said town on the 3d day of March, 1908.

**Parallel Citations**

60 S.E. 659

2 Tread. 631  
Constitutional Court of  
Appeals of South Carolina.

MARY BUIST, Adm'x of  
Rev. GEORGE BUIST,

v.

WILLIAM B. MITCHELL,  
Ex'r of JOHN MITCHELL.

January Term, 1814.

West Headnotes (1)

[1] Time

⚡ Notices and Process

Process

⚡ Time for Service

It is sufficient if process be served 15 days before the sitting of the court, including the first day on which the court sits, and excluding the day on which process is served.

Cases that cite this headnote

Opinion

\*631 NOTT, J.

The act of 1799, enacts that all judicial process shall be made returnable to the clerk of the court, fifteen days next before the sitting of the said court; and the question now is, whether the act means fifteen days exclusive of the day on which it is returnable, and of the first day of the court, or whether one day may be inclusive. The presiding judge on this circuit was of opinion, that one of the days might be inclusive, and decided accordingly; and a motion is now made to reverse that decision. I am of opinion, the decision was correct; it was conformable to the usual rule of construction in similar cases both in England and this state, and consistent with the practice that has always prevailed under that act. I am, therefore, of opinion that the motion ought to be discharged.

SMITH, J.

The copy writ was left at defendant's residence on the 19th of October, and the court sat on the 3rd November, making but fourteen days, exclusive of the day on which the writ was served, and the first day of court. The defendant's motion was to vacate the service of the writ for irregularity, \*632 not being returned fifteen days next before the sitting of the court. It appears to me to admit of great doubt whether the construction contended for by the defendant, is not the correct one; but the authority in *Sellon*, p. 406. will warrant a different construction; and as it is more a question of practice than of substantial justice, it is perhaps the best course to say, that the sitting day of court is to be considered as one of the fifteen. Therefore, I must be against the motion.

GRIMKE, J.

The question in this case is, whether the day on which the process is served and is returnable, shall be both excluded in counting the fifteen days before the return day; for if so, then there will be in this case, but fourteen days intervening between the day of service and the day of the return. The rule of law is, that there are no fractional parts of a day, so that if process be served before twelve o'clock at night, it shall be accounted served on that day to which the twenty hours belong. If then the day on which the writ be served, is to be accounted as one of the fifteen days, it will be in time, as it will be fifteen days next before the sitting of the court to which it is returnable. In B. R. the 4 or 8 days allowed for pleading are, one inclusive; and the other exclusive; but in C. B. both are inclusive. I *Sellon*, 293. The time to plead under a judge's order, is reckoned inclusive of the day of the date of the order, but exclusive of the day on which it expires: so that an order for a week's time to plead, \*633 obtained on a Saturday expires on the morning of the following Saturday; and in C. B. the plaintiff may sign judgment in the afternoon of that day. *Sellon*, 311.

Again; as to the mode of reckoning the days, the day of giving the notice is reckoned exclusive, and the sitting or commission day inclusive. *Sellon*, 407. By which, it appears that according to the practice of the English

**Buist v. Mitchell, 2 Tread. 631 (1814)**

3 Brev. 485, 5 S.C.L. 485, 7 S.C.L. 631

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courts, their mode of computation includes always one of the days; and in C. B. which is the court that, by our law, we are directed to follow in our proceedings, that both days are included in the case mentioned above; so that, if a rule to plead be given on the 7th, it is out on the 10th, and judgment may be signed on the 11th. Reasoning, therefore, from analogy, I should be of opinion that one of the days on which the process is served or returned, should be counted. But the terms of our act, requiring that it should be fifteen days next before the sitting, precludes the return day from being counted in that number. I am, therefore, of opinion,

that the day on which the process was served, must be counted as one of the fifteen days before the sitting of the court, and that the service in this case was regular; the motion must, therefore, be discharged.

COLCOCK, J. concurred.

**Parallel Citations**

3 Brev. 485, 5 S.C.L. 485, 7 S.C.L. 631, 1814 WL 484  
(S.C. Const.App.)

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378 S.C. 107  
Supreme Court of South Carolina.

TOWN OF SUMMERVILLE, Appellant,  
v.  
CITY OF NORTH  
CHARLESTON, Respondent.

No. 26492. | Heard April 2,  
2008. | Decided May 19, 2008.

**Synopsis**

**Background:** Two municipalities brought actions against each other, seeking annexation of the same tract of land. Cases were consolidated. The Circuit Court, Dorchester County, James C. Williams, Jr., J., granted the second municipality's motion for summary judgment. First municipality appealed.

**[Holding:]** The Supreme Court, Pleicones, J., held that first municipality failed to wait statutorily-required 30 days after notice of hearing and date of the annexation, when it published notice on April 28 and enacted ordinance on May 27.

Affirmed.

West Headnotes (4)

**[1] Appeal and Error**

↔ Extent of Review Dependent on  
Nature of Decision Appealed from

When reviewing a grant of summary  
judgment, an appellate court applies the  
same standard used by the trial court.

2 Cases that cite this headnote

**[2] Appeal and Error**

↔ Cases Triable in Appellate Court

Determining the proper interpretation of  
a statute is a question of law, and the

Supreme Court reviews questions of law  
de novo.

22 Cases that cite this headnote

**[3] Municipal Corporations**

↔ Ordinances Annexing or Detaching  
Territory

Municipality failed to wait until 30 days  
had lapsed, between date it published  
notice of hearing on annexation and date  
of enactment of annexation ordinance, as  
required by statute, when it published its  
notice on April 28 and enacted ordinance  
on May 27. Code 1976, § 5-3-150; § 15-  
29-10 (2005).

Cases that cite this headnote

**[4] Time**

↔ Days

Where a time prescription mentions only  
the passage of a number of days, a "day"  
means a calendar day, beginning and  
ending at midnight.

Cases that cite this headnote

**Attorneys and Law Firms**

**\*\*40** Jack M. Scoville, Jr., of Georgetown, for  
Appellant.

Derk Van Raalte and J. Brady Hair, both of North  
Charleston, for Respondent.

**Opinion**

**\*\*41** Justice PLEICONES.

**\*108** This is a direct appeal from a grant of  
partial summary judgment to the City of North  
Charleston. The issue on appeal is whether the Town  
of Summerville complied with a statute which requires  
the publication of notice not less than **\*109** thirty days  
prior to acting on a petition to annex real property.  
Because the Town of Summerville did not comply with  
the statute, we affirm.

## FACTS

This is an annexation dispute between neighboring municipalities. At some point in 2005, both the Town of Summerville and the City of North Charleston desired to annex a portion of real property known as the Barry Tract. In April 2005, Summerville enacted an ordinance declaring the Barry Tract annexed. Believing Summerville's annexation to be invalid, North Charleston enacted its annexation ordinance in June 2005. The municipalities sued each other, and the cases were consolidated for trial.

The record reflects that both municipalities utilized the annexation procedure set forth in S.C.Code Ann. § 5-3-150 (2004), which originates with a petition initiated by the owners of the property sought to be annexed. The statute provides that annexation is complete upon the enactment of an ordinance and requires the annexing municipality to publish notice of a public hearing "not less than thirty days before acting on an annexation petition..." *Id.* North Charleston moved for summary judgment on the question whether thirty days elapsed between April 28, 2005, the date Summerville published notice of its hearing, and May 27, 2005, the date Summerville enacted its annexation ordinance. The trial court held that thirty days had not elapsed in this period, and Summerville appealed. We certified the appeal from the court of appeals pursuant to Rule 204(b), SCACR.

## ISSUE

Did the trial court err in holding that less than thirty days elapsed between April 28, 2005, and May 27, 2005?

## STANDARD OF REVIEW

[1] [2] When reviewing a grant of summary judgment, an appellate court applies the same standard used by the trial court. *Lanham v. Blue Cross and Blue Shield of S.C., Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002). A grant of \*110 summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled

to judgment as a matter of law. Rule 56(c), SCRCPP; *Tupper v. Dorchester County*, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997). Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo. *Catawba Indian Tribe v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007).

## ANALYSIS

[3] Summerville argues that under a plausible construction of the annexation statute at issue, a "day" can be measured by the lapse of twenty-four hours from a relevant time. Put in terms of the statute at issue, Summerville argues that § 5-3-150 requires that a municipality publish notice of a public hearing not less than thirty twenty-four hour periods prior to acting on an annexation petition. Summerville argues that it enacted its annexation ordinance at 5:30 p.m., May 27, and that counting the days that elapsed by twenty-four hour periods, the twenty-ninth day prior to its enacting the ordinance ended at 5:30 p.m., April 28, 2005. Summerville therefore posits that if the notification in the newspaper occurred at 5:00 a.m. the morning of April 28, it occurred midway through the thirtieth day and complied with the annexation statute's notice requirement. We disagree.

Summerville's argument fails on its own terms. Assuming that the lapse of thirty sequential twenty-four hour periods provides the measuring stick, 5:30 p.m., May 27, and 5:00 a.m., April 28, are separated by 29 days, 12 hours, and 30 minutes. Converting thirty days to a number of hours of required notice, the statute would then mandate that notice be published "not less than [720 hours] before acting on an annexation petition..." *Id.* In this case, publication and action were separated by 708 hours, 30 minutes. As a \*\*42 quantitative reality, this is less than thirty days.<sup>1</sup>

<sup>1</sup> Summerville attempts to draw a distinction between a requirement of "not less than thirty days" and a fictional requirement of "at least thirty days," but this distinction suffers from a similar flaw. If a brief filed in court must be not less than four pages in length, a three and one-half page brief would not suffice.

\*111 In fact, S.C.Code Ann. § 15–29–10 (2005) provides a specific method for computing time for publication of notices. The statute provides that “[t]he time for publication of legal notices shall be computed so as to exclude the first day of publication and include the day on which the act or event, of which notice is given, is to happen or which completes the full period required for publication.” *Id.* Using this method, April 28, the day of publication, is excluded. Counting forward, May 27 is twenty-nine days from the publication of the notice. Thus, using the statutory counting method for legal notices, we conclude that Summerville did not comply with the relevant public notice requirement in this case.

The parties offer additional arguments on alternative methods of counting time, but those arguments are largely inconsequential. North Charleston posits that Summerville's argument fails even under its own ordinance dealing with computation of time. While North Charleston is correct, it is clear that a local ordinance cannot, absent some authorization or directive, control how time is computed under a state statute. Similarly, this Court's rules contain procedures for computing time, *see* Rule 6, SCRPC and Rule 234, SCACR, and while these rules unquestionably apply in their respective spheres, they are neither dispositive nor are they helpful in answering the question at hand. In this case, a statute requires that published notice precede a public meeting by a specific time period, and a separate statute specifically explains how time is to be computed for the publication of legal notices.

Summerville's more basic argument about how a “day” is defined is not supported by our precedent. We have held that “[t]he word ‘day,’ in its common acceptance, means a civil day of twenty-four hours, beginning and ending at midnight,” *Corwin v. Comptroller Gen.*, 6 S.C. 390, 399 (1875), and that “[f]ractions of days are not recognized in our laws.” *Williams v. Halford*, 64 S.C. 396, 402, 42 S.E. 187, 189 (1902). *Corwin* interprets the word “day” in the context of the South Carolina Constitution's requirement that the Governor veto and return a bill or resolution within three days (Sundays excepted) or the bill shall become law,<sup>2</sup> and *Williams* dealt with the predecessor \*112 to Rule 6(a), SCRPC's rule on computation of time, found in the 1893 Code of Civil Procedure at § 407. These cases instruct that where a time requirement does not

speak in terms of specific hour periods, the Court will not interpret a day to mean anything other than a calendar day. *See also Cleveland v. Calvert*, 54 S.C. 83, 86, 31 S.E. 871, 872 (1899) (applying § 421 of the 1893 Code, the predecessor of the current publication statute, and concluding that notice appearing twenty-one days prior to action complied with statutory requirement of three weeks' notice). We adhere to this pronouncement, and note that where the legislature desires for the passage of a specific number of hours to precede an action, it has shown a propensity for writing precisely such a requirement. *See, e.g.*, S.C.Code Ann. § 5–15–130 (2004) (containing a notice requirement of specific hours).

2 The requirement is now five days. *See* S.C. Const. Art. IV, § 21.

[4] The fact that there are multiple rules for computing time is not all together surprising. As far back as the 1870 Code, South Carolina's statutory law contained separate rules for computing time periods spelled out in procedural rules and time periods for the publication of legal notices. *See* 1870 Code of Civ. Pro. §§ 421, 422. Accordingly, old civil procedure cases relied on the version of the procedural rule then in effect, and old publication cases pulled from the applicable publication rule. All of this simply means that the method for computing time in a particular case may be prescribed by statute, court rule, local ordinance, or some other authority, and the answer we supply today is that where a time prescription mentions only \*\*43 the passage of a number of days, a “day” means a calendar day, beginning and ending at midnight.

## CONCLUSION

We hold that summary judgment was properly granted in favor of the City of North Charleston on the question whether less than thirty days elapsed between April 28, 2005, the date Summerville published notice of its hearing, and May 27, 2005, the date Summerville enacted its annexation ordinance. The order of the circuit court is

**AFFIRMED.**

Town of Summerville v. City of North Charleston, 378 S.C. 107 (2008)

662 S.E.2d 40

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TOAL, C.J., MOORE, WALLER and BEATTY, JJ.,  
concur.

Parallel Citations

662 S.E.2d 40

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67 S.C. 296

Supreme Court of South Carolina.

WILLIAMS et al.

v.

HALFORD et al.

Aug. 4, 1903.

Appeal from Common Pleas Circuit Court of Colleton County; James J. Izlar, Special Judge.

Action by Julia Williams and J. H. Williams against J. R. Halford et al. From decree for plaintiffs, defendants appeal. Reversed.

West Headnotes (2)

[1] Time

↔ Notices and Process

Under Code, § 2881 (See Code 1942, § 706), requiring that reasonable notice, not less than 10 days, must be given in writing by party proposing to take a deposition de bene esse, notice served on the tenth, to take testimony on the twentieth, is insufficient.

3 Cases that cite this headnote

[2] Trial

↔ Issues to Be Submitted

A wife and child sued under Code, § 2368 (See Code 1942, § 8695), providing that if any citizen of the state shall convey by deed to his mistress or bastard child, he having a lawful wife and child living, property for the benefit of such mistress or child, such conveyance shall be void as to the lawful wife and child for such amount as shall exceed one-fourth of his estate, and defendants set up a paramount title by denial of the allegations of the complaint that their title was derived by gift, and also set up an independent title by adverse possession. Held, that the issue should be

submitted to the jury, by whose finding the court would be bound.

1 Cases that cite this headnote

Attorneys and Law Firms

\*207 Howell & Gruber, for appellants. Griffin & Padgett, for respondents.

Opinion

GARY, A. J.

This action was brought under section 2368 of the Code of Laws, which is as follows: "If any person who is an inhabitant of this state, or who has any estate herein, shall have already begotten, or shall hereafter beget, any bastard child, or shall live in adultery with a woman, the said person having a wife or lawful children of his own living, and shall give, or settle, or convey, either in trust or by direct conveyance, by deed of conveyance, by deed of gift, legacy, devise, or by any other ways or means whatsoever, for the use and benefit of the said woman with whom he lives in adultery, or of his bastard child or children, any larger or greater proportion of the real value of his estate, real or personal, after payment of his debts, than one-fourth part thereof, such deed of gift, conveyance, legacy or devise, made or hereafter to be made, shall be null and void, in favor of wife and legitimate children, for so much of the amount or value thereof as shall or may exceed such fourth part of his real and personal estate." The complaint alleges that the plaintiffs are the widow and son of James J. Williams, alias Halford, and that the defendants J. R. Halford, Harriet Turner, and Laura Abbot, are the illegitimate children of the said James J. Williams, alias Halford, begotten of Jane Crosby, after his marriage with Julia Williams. That Jane Crosby, alias Halford, died in 1894, and James J. Williams in 1896. That in 1871 James J. Williams conveyed certain real and personal property described in the fourth paragraph of the complaint to Jane Crosby, in trust for his children by the said Jane Crosby; and that the said personal property, with its increase, was in the possession of Jane Crosby at the time of her death, but belonged to James J. Williams. That in 188\_ James J. Williams caused the said Jane Crosby to sell

certain lands therein mentioned to S. M. J. Carter; that the funds arising from such sale were supplemented by the personal funds of James J. Williams, and were reinvested in the purchase of certain lands therein described. That in 1892 James J. Williams, without consideration, conveyed to Jane Crosby all his real and personal estate of whatever kind soever. That in 1881 Jane Crosby conveyed certain of the property hereinbefore mentioned to her children by James J. Williams. That since the decease of James J. Williams the children born of Jane Crosby as aforesaid, for and in consideration of \$100, conveyed to the defendant J. W. Halford certain of the property described in the complaint.

The 10th, 11th, 12th, and 13th paragraphs of the complaint are as follows:

"(10) That all property, both real and personal, in possession of the said Jane Crosby, alias Jane Halford, at her decease, of whatsoever kind or description, was conveyed to her by the said James J. Williams, alias James J. Halford, and Miner Carter, was, and is, in fact, the personal earnings and property of him, the said James J. Williams, alias James J. Halford, and was conveyed to her, the said Jane Crosby, alias Jane Halford, while they were living together in adultery, and she to her children, all of which was illegal, null, and void; which said deeds and conveyances were made for the express purpose of evading section 1887 of the Revised Statutes of South Carolina.

(11) That the said James R. Halford, B. F. Halford, J. W. Halford, Harriet Turner, and Laura Abbott have been receiving the rents and profits of said estate property, and have disposed of and wasted the personal property of said estate of the value of \$800, more than one-fourth of the value of said estate.

(12) That the plaintiff Julia Williams is entitled to one undivided third part of three- \*208 fourths of said estate, and J. H. Williams to two-thirds of three-fourths thereof.

(13) That J. E. Halford, B. F. Halford, J. W. Halford, Laura Abbott, and Harriet Turner were entitled to one-fifth each of one-fourth of the entire estate."

The defendants J. R. Halford, B. F. Halford, and Laura Abbott answered the complaint as follows:

"First, for a first defense: (1) That they deny each and every allegation in the said complaint contained, and allege that they and their codefendants, Harriet Turner and J. W. Halford, are the exclusive owners of all the lands mentioned and described in the complaint.

Second, for a second defense: (1) That neither the plaintiffs nor their ancestors, nor predecessors nor grantors, were seised or possessed of the premises described in the complaint within 10 years last past before the commencement of this action. (2) That these defendants' ancestress, Jane Halford, under whom they claim, entered into possession of the premises described in the complaint under claim of title, exclusive of any other right, founding such claim upon a written instrument as being a conveyance of the premises in question, and there has been a continued occupation and possession by the said Jane Halford of the premises included in this instrument under such claim for more than 10 years past before the commencement of this action and before the death of the said Jane Halford." The third paragraph alleges the erection of certain improvements therein described.

His honor the presiding judge submitted the following issues to the jury, to which the answers are attached, to wit: "(1) Are the defendants the exclusive owners of all the lands mentioned in the complaint? Answer. Yes. (2) Did James J. Williams intermarry with one Julia Albriton, in the state of Florida, in 1852? Answer. Yes. (3) Is J. H. Williams, the plaintiff herein, the legal son of said marriage? Answer. Yes. (4) Are both the said Julia Williams, the wife, and J. H. Williams, the son, now alive? Answer. Yes. (5) Did the said James J. Williams afterwards leave the state of Florida, come to the state of South Carolina, change his name to J. J. Halford, and while his wife, Julia, was alive, contract a second marriage with one Jane Crosby, and cohabit with her until his death? Answer. Yes. (6) Are the defendants the fruit of the marriage entered into between James J. Halford and Jane Crosby? Answer. Yes. (7) Did the said James J. Halford during his lifetime make the conveyances of his property as mentioned and set forth in the complaint herein? Answer. Yes. (8) Did the said Jane Halford, on the 6th January, 1881, in consideration of natural love and

affection, convey the lot or parcel of land described in paragraph five (5) of the complaint to her children? Answer. Yes. (9) Was the 200- acre tract mentioned in paragraph 4 of the complaint, and conveyed with other property by James J. Halford to Jane Halford in trust for the children of the said James J. and Jane Halford, sold at the instance of James J. Halford, and the proceeds reinvested in the purchase of that certain lot of land in the town of Walterboro? Answer. No.”

In commenting on these issues, his honor the presiding judge instructed the jury as follows: “The question here of legal title is raised by the pleadings, and must go to the jury, according to the rule established by our courts. Yet this does not prevent the court from submitting other issues to the jury for determination along with the question of title. And, while you may find for the defendants on the question of legal title, you may find such facts which would enable the court, when the cause comes up for hearing on the equity side of the court, to do justice among the parties, and in that court resort to the process of partition, if necessary to obtain the proper results. The issues which you must determine upon the pleadings, including legal title to the premises in question, are stated in the issues which I have submitted to you. The answer of the jury to these questions is necessary to determine the rights of the parties, and to secure to them, respectively, their rights on the equity side of the court. Now, while under the strict principles of the law, so far as the legal title is concerned, you may, if you find the other facts outside of the legal title to be true, not be able to find the legal title in the plaintiffs, and be compelled to find for the defendants, or, in other words, while you may be compelled to say, in answer to the issue of title raised, that it is in the defendants, still this finding would not be inconsistent with your other findings of fact. For under the law the legal title may be in the illegitimate child or children, yet the lawful wife or child or children might, by reason of a violation of the act, still have such an interest or right in the property over the one-fourth part thereof as would in equity be preserved and secured on them.”

The circuit judge refused a motion for a new trial as to the finding of the jury upon the issue of title. The cause was then called on calendar No. 2. After considering the testimony, the circuit judge rendered his decree, which concludes as follows: “It is therefore ordered

and adjudged that it be and hereby is referred to the master of Colleton county to take testimony and report to this court the value of the several tracts or parcels of land conveyed by J. J. Williams, alias J. J. Halford, and by Miner Carter, to Jane Crosby, alias Jane Halford, at the time the same came into her possession; also the value of all the personal property transferred by said deeds, or any or either of them, and which passed into the possession of the said Jane Crosby, alias Jane Halford, thereunder for the benefit of herself and children, whether the said real and personal property was conveyed in trust or otherwise; also the indebtedness of the said J. J. Williams, alias J. J. Halford, at the time of making, or causing to be made, any of the deeds of conveyance in question; also the rents and profits of the real estate so conveyed since the death of the said J. J. Williams, alias J. J. Halford, over and above all permanent improvements enhancing the value thereof and all taxes paid thereon by the defendant. And that said master do further report, under the principles herein announced, whether the amount of said real and personal property exceeded one-fourth of the clear value of the property, real and personal, at the time of the conveyances, or any or either of them, were made by the said J. J. Williams, alias J. J. Halford, and the amount of the excess over and above the one-fourth thereof. And it is further ordered and adjudged that the defendants have ten days from the hearing of said report, or any exceptions thereto and order therein, to elect whether or not they will pay the sum, if any, ordered by the court in excess of one-fourth to be paid to the plaintiffs and retain the property; and, if the defendants shall fail or refuse to elect within the time aforesaid, the plaintiffs have leave to apply to this court for a writ or writs of partition to enforce their rights under this decree, in order that a proper and necessary result in the said cause may be obtained; but in case the said report and order therein shall be that the value of the property in question does not exceed one-fourth in value of the clear value of the said property, after deducting the amount of the indebtedness of the said J. J. Williams, alias J. J. Halford, after the payment of all his just debts at the time of the conveyances as aforesaid, then that the title of the defendants stands confirmed, and the complaint be dismissed. It is further ordered and adjudged that the parties have leave to apply for further orders in the cause, either in open court or at chambers, upon due notice upon the coming in of the master's report,

and that all questions as to the costs of said action be reserved until the order of the court is made on said report.”

The appellants' exceptions are numerous, but, under the view which this court takes of the case, many of them present merely abstract questions, and therefore need not be considered.

We will first consider the question whether the presiding judge submitted the question of title to the jury in proper form under the pleadings in this case, or gave due effect to the finding of the jury. In order that the plaintiffs may be able to get relief by the assertion of their equitable rights under the statute hereinbefore mentioned, it is incumbent on them to establish the fact that the defendants derive their title from the father of the alleged bastards. But a bastard is allowed to purchase property even from his putative father, if it is founded upon valuable consideration. *King v. Johnson*, 2 Hill, Eq. 624. In the case just mentioned the court uses this language: “The obligations between parents and children are reciprocal. On the parent devolves the duty of maintaining, educating, and providing for the child; in return for which the child owes obedience and assistance during minority, and reverence and respect always; and it follows necessarily that, if in law either is absolved from those obligations, so also is the other. Now it is very clear that the putative father is not entitled in law to the custody of his natural child, in opposition to the claims of the mother, nor is he bound to provide for it further than is required by express enactments of the Legislature. 2 Kent's Com. (1st Ed.) 178. The child cannot inherit from the father, and the extent to which the father can provide for his illegitimate child is limited by the act above referred to. The father is not, therefore, entitled in law to the services of his natural child. It is said, however, that when the other assumes and discharges the duties of a parent, corresponding duties arise on the part of the natural child; and this is true so long as this relation exists. But these relations are merely conventional, and, being voluntary, may be dissolved at pleasure. Not so as to the relations between the father and his legitimate children. The obligations between them are imposed by law, and neither can be dissolved from them. The right of the putative father to the custody and services of his natural child must therefore arise out of contract, in which the parties are at liberty to

stipulate for themselves. There is certainly nothing in these relations to prevent the father from rewarding the child for its labor, or being its agent to invest the proceeds; on the contrary, in despite of the stern policy which alienates the bastard from his putative father, nature has bound them together by ties which cannot be severed; and it is impossible to resist the feeling that there is a moral duty imposed on the father to aid the child when he can do so without violating the law or doing wrong to others. I am well aware that there is much danger of abuse in the application of this principle, and that without great circumspection it will be made a cover for evading the act, but of its correctness there can be no question; and abuses may be guarded against by requiring clear and unequivocal evidence of the fairness and reasonableness of the transaction. Of this the present case may serve as an example; for it is apparent the defendant's testator was a mere drone in the hive, and that the land conveyed to the defendants is a very inadequate compensation for the long and faithful services of the defendants, out of the proceeds of which it was paid for.”

The appellants denied the allegations of the complaint that their title was derived from James J. Williams as a gift, and likewise set up an independent title by adverse possession. This was sufficient to raise the question of paramount title, in the trial of which by the \*210 jury the plaintiffs are required to be the actors. *Bank v. Peterkin*, 52 S. C. 236, 29 S. E. 546, 68 Am. St. Rep. 900. The presiding judge does not seem to have considered the issue of title as arising out of chancery, and that its submission to the jury was for the enlightenment of the conscience of the court; but it is evident he did regard the title upon which the appellants relied as sufficient to defeat the equitable rights of the plaintiffs under the statute in case it was established to the satisfaction of the jury. The question of title was not a legal issue arising out of chancery, the submission of which to the jury was for the enlightenment of the court's conscience. If the presiding judge, when he submitted to the jury the issue, “Are the defendants the exclusive owners of all the lands mentioned and described in the complaint?” meant “exclusive owners” as against the equity of the plaintiffs, then he should have regarded the verdict as sufficient to defeat the plaintiffs' equity; while, on the other hand, if he did not intend that the jury should find a verdict that would defeat the equitable rights of

the plaintiffs, he misconceived the scope of the issue of title raised by the pleadings. Upon the trial of the legal issue of title by the jury, it is incumbent upon the plaintiffs to introduce testimony tending to prove all the material requirements of the statute alleged in the complaint, in order to show that the title of the appellants is not paramount to their right to assert their equity under the statutes. The defendants may defeat the case as made by the plaintiffs' testimony either by the introduction of testimony directly contradicting it, or may show that valuable consideration was paid for the property, or that they have an independent title arising from any other facts. We desire, however, it should be distinctly understood that we do not undertake at this time to decide whether the defense of adverse possession is available or applicable in this case, as such question is not properly before us for consideration, and is therefore left open. This is a case in which the circuit court might find it advisable to direct the jury to find a special verdict as to the manner in which the appellants had title to the land under section 283 of the Code.

Having reached the conclusion that there should be a new trial upon the question of title, and that the pleadings raise a question of title in the appellants paramount to the claim of the plaintiffs, and which would therefore defeat it if sustained by the testimony, we do not deem it proper to decide any other question except that as to the time of serving notice to take testimony *de bene esse*. Notice to take the testimony of Julia Williams *de bene esse* was served on the defendants' attorneys on the 10th day of November, 1902, and the testimony was taken on the 20th day of November, 1902. Section 2881 of the Code of Laws requires that "reasonable notice, not less than

ten days, must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record." It will be observed that the notice required shall be not less than 10 days. This case comes within the principle announced in *Adkins v. Moore*, 43 S. C. 173, 20 S. E. 985, in which the court says: "The defendants were entitled to full twenty days from the time of service of the complaint till the day therein fixed for trial, and, as they were required to appear on the twentieth day from the service thereof, the time was shorter than that required by law." It is true, section 407 of the Code provides that "the time within which an act is to be done, as herein provided, shall be computed by excluding the first day and including the last," but this was not a case in which the defendants were required to act "within" 10 days. When such is the requirement, the party is in time if he acts on the tenth day, for that is "within" 10 days. If, however, the party is entitled to a notice of "not less than 10 days," he is not required to act until the expiration of 10 days, or, in other words, after 10 days. The notice in this case was not sufficient, unless "within" and "not less than" or "after" mean the same thing, which cannot be successfully contended.

It is the judgment of this court that the judgment of the circuit court be reversed, and that the case be remanded to that court for a new trial upon the issue of title, and for such further proceedings as may be necessary under the pleadings.

#### Parallel Citations

45 S.E. 207

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF KERSHAW )  
 )  
 Albert H. Hough, individually, and as )  
 Personal Representative of the Estate of )  
 Harold W. Hough and as Personal )  
 Representative of the Estate of Elizabeth )  
 P. Hough; George J. Hough and )  
 Angela Hough, )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 Richard Wesley Hough, Joel Pitts )  
 Hough and Mary Louise Robinson, )  
 )  
 Defendants. )

IN THE COURT OF COMMON PLEAS  
 FIFTH JUDICIAL CIRCUIT

Case No.: 2011-CP-28-0073

**DEFENDANT RICHARD HOUGH'S  
 MEMORANDUM IN OPPOSITION TO  
 PLAINTIFFS' MOTION TO DISALLOW OR  
 STRIKE DEFENDANT RICHARD HOUGH'S  
 § 15-61-25 NOTICE OF INTEREST IN  
 PURCHASING PROPERTY**

Defendant Richard Wesley Hough submits this memorandum in opposition to the Plaintiffs' motion to disallow or strike Richard Hough's notice of interest in purchasing the property that is the subject of this partition action.

As an initial matter, the Plaintiffs set up as one reason to disallow Richard Hough's notice the fact that he has admitted that the real property at issue is capable of being partitioned in kind. Such admission is no basis for disallowing a non-petitioning party to provide the Court with its notice of interest in purchasing the property or disallowing such purchase of the property following a determination of the proper valuation. In fact, the statute at issue, S.C. Code Ann. § 15-61-25, provides that even a defaulting party may be allowed to purchase the such interests in the property, even if a default judgment has been entered against them. If a party in default, who will be determined to have admitted each of the allegations in a partition complaint, can purchase the interests, then an answering party certainly has that right as well, regardless of whether he admits or denies that the property is susceptible to partition in kind.

The Plaintiffs' main point of contention regarding Richard Hough's notice of interest in purchasing the property is the claim that notice of such interest was untimely. The right of first

refusal statute provides that non-petitioning parties must inform the Court of an interest in purchasing the property "no later than ten days prior to the date set for trial of the case." S.C. Code Ann. § 15-61-25. In this case, Richard Hough filed a letter informing the Court of his interest in purchasing the property with the Kershaw County Clerk of Court on May 2, 2014.

**(Ex. A, Richard Hough's clocked-in letter informing Court of interest in purchasing property.)** The trial in the date set for trial of this case was May 12, 2014. Under any common reading of the manner of time computation, the notice would appear to have been submitted to the Court ten days prior to May 12, 2014.

The Plaintiffs assert that in order for the notice to have been timely submitted it must have been submitted no later than 12:00 a.m. the morning of May 2, 2014. This is an incorrect interpretation of the statute.

The Supreme Court has considered a similar issue. *Holt v. Settlemeyer*, 79 S.C.: 263 (1908). In *Holt*, the rules regarding elections in Gaffney, South Carolina provided that anyone seeking to be added to the ballot for primary had to file a pledge with the chairman of the executive committee 5 days before the election. *Id.* The primary was set for January 7. *Id.* Holt filed his pledge on January 2. *Id.* The executive committee decided that his pledge was untimely and excluded him from the ballot. *Id.* The Supreme Court reversed, holding that the filing on January 2 complied with the "five days before" requirement. *Id.*

Although the Supreme Court does not provide a detailed analysis, we can deduce that in order to reach such a decision, the Supreme Court must have determined that either the day of filing or the day of the election (at least one of the terminal days) must have been countable in the time computation. If both terminal days had been excluded, then the pledge could not have been filed 5 days before the election. Applying this logic to the case at hand, Richard Hough's notice was filed and served 10 days before the trial of the case.

An older case is also instructive. *Buist v. Mitchell*, 5 S.C.L. 485 (1814). In *Buist*, the Constitutional Court of Appeals of South Carolina considered the timeliness of service of

process. *Id.* Such return was due 15 days before the next sitting of court, which was to occur on November 3. *Id.* Service of a writ was made on the defendant's residence on October 19.

*Id.* In *Buist*, the court concluded that the service was timely. *Id.* In so ruling, the court held:

The rule of law is, that there are no fractional parts of a day, so that if process be served before twelve o'clock at night, it shall be accounted served on that day to which the twenty hours belong. If then the day on which the writ be served, is to be account as one of the fifteen days, it will be in time, as it will be fifteen days next before the sitting of the court to which it is returnable.

*Id.* Counting the day of service (even though it was during the day and not apparently not at the stroke of midnight) and excluding the day of the court's sitting, the service was made 15 days before the sitting of the court. *Id.* Applying this rule in the instant matter and counting the day of service (even though not at midnight), such service was made 10 days before the trial of the case.

The general weight of authority further provides that where something is to be done on a particular day, a party has that entire day to complete that action. For example, one secondary source states, "Thus, where one is given a stated number of days in which to perform an act, he or she may perform at any time up to midnight of the last day." Am. Jur. 2d Time § 10 Day. This general rule is acknowledged in *South Carolina Nat. Bank v. Guest*, 232 S.C. 367, 102 S.E.2d 215 (1958). In *Guest*, the dispute regarded the priority of two liens. In analyzing the priority issue, the Supreme Court noted that although lien priority is an exception, the general rule is that "the term 'date' embraces the whole day and fractions thereof are not considered in computation of time." *Id.* Thus, if the general rule is that computation of time does not recognize fractions of days, then an act completed at any time before the end of the day, i.e. midnight, occurs on that day.

The Plaintiffs rely heavily upon a more recent case to support their position; however, that case is inapposite here. *Town of Summerville v. City of North Charleston*, 378 S.C. 107, 662 S.E.2d 40 (2008). In *Town of Summerville*, the Supreme Court considered whether notice of a hearing was published 30 days before the hearing. *Id.* In that case, the notice was

published on April 28. The hearing was held on May 27. In order for there to have been 30 days' notice, the time computation must have included the day of publication as well as the day of the hearing, i.e. both terminal days must have been included in order for the statutory requirement to have been met. *Id.* The Supreme Court recognized that the applicable statute specifically provided for the computation of time so as to exclude the day of publication and include the day of the event. *Id.* Thus, the notice was not timely.

The scenario presented in *Town of Summerville* is quite different that presented in this matter. Under no manner of computing time could the annexation hearing notice have been timely as there were only 30 days if both terminal days were included. In this partition matter, the applicable time period is 10 days. If both terminal days are included, then there are 11 days' notice. However, even if only one of the terminal days is included, Richard Hough has given the required 10 days' notice.

Furthermore, *Town of Summerville* does not support the Plaintiffs' position that a day only counts as a day if notice is given no later than midnight on the morning of that day. In fact, it supports the exact opposite conclusion. In *Town of Summerville*, the appellant was attempting to argue that a day constituted a 24 hour period counted backwards from the exact time that the meeting was held. The Supreme Court held that day does not mean *any* 24 hour period but it means the *specific* 24 hour period from midnight to midnight, i.e. a calendar day. The Supreme Court held, "where the time prescription mentions only the passage of a number of days, a 'day' means a calendar day, beginning and ending at midnight." *Id.* Thus, where an act is accomplished at any time prior to midnight, it is accomplished on that day. Applying that reasoning to this case, Richard Hough's notice of interest to purchase was filed and served 10 days prior to the trial of this case.

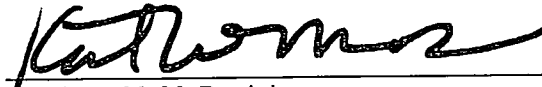
Finally, another holding from the other South Carolina relied upon by the Plaintiffs has been superseded by the South Carolina Rules of Civil Procedure. *William v. Halford*, 67 S.C. 296, 45 S.E. 207 (1903). In that case, the Supreme Court held that a deposition *de benne esse*

had not been noticed timely prior to its taking where the notice was served on November 10 and the deposition was to occur on November 20. *Id.* The rule at that time required 10 days' notice. *Id.* However, depositions are now subject to Rule 6, SCRCP, which provides for inclusion of the last day of the period to be included in time computation. Under Rule 6, SCRCP, the deposition notice would be timely. Accordingly, this holding in *William* should be of no moment to this Court.

**CONCLUSION**

Based upon the foregoing, Richard Hough respectfully requests that this Court deny the Plaintiffs' Motion to Disallow or Strike his notice of interest to purchase and permit Richard Hough to proceed as permitted by the partition statute to purchase the real property that is the subject of this partition action.

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**ATTORNEY FOR RICHARD W. HOUGH**

May 6, 2014  
Columbia, South Carolina



EXHIBIT A

Kathleen McDaniel – Attorney  
803-404-6900  
kathleenmcdaniel@callisontighe.com

FILED FOR RECORD CALLISON TIGHE

2014 MAY -2 PM 4:57

JOYCE McDONALD  
CLERK OF COURT  
KERSHAW COUNTY, S.C.

May 2, 2014

(Via Hand-Delivery)

The Honorable Joyce McDonald  
Kershaw County Clerk of Court  
Post Office Box 1557  
Camden, SC 29021-1557

RE: Albert H. Hough, individually, and as the Personal Representative of the Estate of Harold W. Hough and as the Personal Representative of Elizabeth P. Hough, George J. Hough and Angela Hough v. Richard Wesley Hough, Joel Pitts Hough and Mary Louise Robinson  
Case Number: 2011-CP-2800073  
Our Case Number: 11127.003

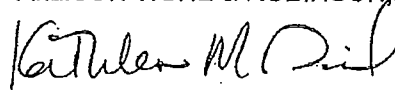
Dear Ms. McDonald:

I am writing on behalf of Richard Wesley Hough, a non-petitioning defendant in the above partition action, to inform the Court that, pursuant to Section 15-61-25 of the South Carolina Code of Laws, Richard Hough is "interested in purchasing the property" that is the subject of this partition action. Please let this letter serve as Richard Hough's notice of such interest in purchasing the property. A trial in this matter is set to begin on May 12, 2014.

I am by copy of this letter serving all parties with a copy of this letter as well as providing a copy to Special Referee John DuBose.

With kind regards, I am

CALLISON TIGHE & ROBINSON, LLC



Kathleen McDaniel

cc: Special Referee John DuBose  
B. Michael Brackett, Esquire  
M. Scott Rankin, Esquire  
Mary Louise Robinson

232 S.C. 367

Supreme Court of South Carolina.

The SOUTH CAROLINA NATIONAL BANK,  
Greenville, South Carolina, Appellant,

v.

C. D. GUEST et al., of whom The State  
Bank and Trust Company, is, Respondent.

No. 17393. | Feb. 24, 1958.

Action involving the priority of chattel mortgages on an automobile. Judgment for the respondent in the County Court of Greenville County, W. B. McGowan J., and the plaintiff appeals. The Supreme Court, Taylor, J., held that mortgage of defendant bank was entitled to priority over the mortgage of plaintiff bank.

Order affirmed.

West Headnotes (3)

[1] Chattel Mortgages

↔ Effect in General

It is equitable that any risk incurred by one failing to protect himself by promptly recording his chattel mortgage should fall upon him who fails to act promptly rather than upon another who can rely upon the record for his protection. Code 1952, § 60-101.

1 Cases that cite this headnote

[2] Chattel Mortgages

↔ Delay in Recording, and Recording in Wrong Place

Where mortgage of plaintiff bank on automobile was first in point of time of execution and recordation but was not of record at time of execution of mortgage to defendant bank on same automobile, and the latter acted in good faith and without notice of the mortgage of plaintiff bank, mortgage of defendant bank was entitled

to priority over the mortgage of plaintiff bank. Code 1952, § 60-101.

2 Cases that cite this headnote

[3] Time

↔ Fractions of Day

The term "date" embraces the whole day and fractions thereof are not considered in computation of time, but an exception to such rule arises when it becomes necessary to determine the right of rival lien claimants.

1 Cases that cite this headnote

Attorneys and Law Firms

\*216 \*368 Rainey, Fant, Brawley & Horton, Younts & Spence, Greenville, for appellant.

Grier, McDonald, Todd, Burns & Bradford, Greenwood, for respondent.

Opinion

\*369 TAYLOR, Justice.

The question presented in this appeal involves the priority of one of two chattel mortgages, one held by Appellant, South Carolina National Bank of Greenville, South Carolina, and the other by Respondent, The Bank of Greenwood, South Carolina.

The facts are not in dispute. C. D. Guest, a resident of Greenville County, somewhere between 9 a. m. and 1 p. m. on January 5, 1955, procured a loan of \$3,000 from said Greenville Bank and by way of security executed a chattel mortgage upon a certain Chrysler automobile. Later, on the same day, at some time after 3 p. m., the said C. D. Guest borrowed \$3,515.24 from the Ninety Six Branch of the Greenwood Bank upon the same vehicle, representing that it was free of liens.

The Greenville Bank recorded its mortgage in the Office of the Register of Mesne Conveyances for Greenville County on January 7, 1955, at 9:17 a. m. Thereafter, on the same day, the Greenwood Bank

likewise did so at 10:00 a. m. Thus, it is seen that while the Greenville mortgage was first in point of time of execution and recordation, it was not of record at the time of the execution of the Greenwood mortgage. There is no contention but that the Greenwood Bank acted in good faith and without notice of the Greenville mortgage.

\*370 The controlling consideration is the force and effect to be given the applicable Recording Act of 1925, 34 Statutes at Large 85, now appearing as Section 60-101, Code of Laws of South Carolina, 1952:

\*\*\* all mortgages or instruments in writing in the nature of a mortgage of any property, real or personal, \*\*\* and generally all instruments in writing required by law to be recorded in the office of the register of mesne conveyances or clerk of court in those counties where the office of register of mesne conveyances has been abolished or in the office of the Secretary of State delivered or executed on or after August 1, 1934, except assignments and satisfactions of conditional sale contracts securing the purchase money of motor vehicles or refrigerators, shall be valid so as to affect the rights of subsequent creditors (whether lien creditors or simple contract creditors) or purchasers for valuable consideration without notice \*\*217 only from the day and hour when they are recorded in the office of the register of mesne conveyances or clerk of court of the county in which the property affected is situated, in the case of real estate or in the case of personal property, in which the owner of such property resides, if he resides within the State, or, if he resides without the State the county in which such personal property is situated at the time of the delivery or execution of such deed or instrument.'

'A study of the development of the Recordation Acts (Sec. 8875 of the Code) shows that they were an outgrowth of efforts to protect 'subsequent purchasers and creditors' from 'secret liens'. These are the true key words to any proper study and application of the principles. Such study shows (and it is undisputed) that at the common law, a mortgage, deed or other instrument, although not recorded, was good not only between the parties but against the world. This led to difficult situations and to hardships when thereafter innocent purchasers and mortgagees were involved.

In other words, the evil of such secret transfers and secret liens \*371 became evident, and resulted in the equitable doctrine of 'subsequent purchaser for value without notice' as well as the development of the Recording Acts.

'Therefore, the important point is that the common law doctrine as to the validity of a paper such as that of the plaintiff is applicable here except insofar as it is limited if at all by the terms of the Recording Act. By its terms, however, the Act (Sec. 8875) merely places a limitation upon such validity insofar as it affects the rights of subsequent purchasers of creditors without notice. \*\*\*' Goodrich Silvertown Inc., v. Rogers, 189 S.C. 101, 200 S.E. 91, 93.

An exhaustive review of the various Recording Acts throughout the country is found in Patton on Titles beginning at page 33. There they are classified into three groups:

- (1) Those which give priority to the instrument first recorded, whether prior or subsequent to another.
- (2) Those which invalidate an instrument as against subsequent ones acquired in good faith before its recordation.
- (3) Those which give protection to a subsequent paper as against a prior one, provided it is first to be recorded.

Our Act falls within the second group as do approximately two thirds of those of the other States. The author, citing numerous authorities, observes:

'Under this type of Act here considered the earlier purchaser can protect himself from a subsequent purchaser who is without notice of his rights only by recording his conveyance before the latter conflicting interest occurs. A later recording will not affect the rights of a subsequent purchaser even though prior to the recordation of the conveyance to the latter. And as distinguished from the Acts considered in the ensuing section (referring to the third classification, insertion

added) the protection to the subsequent purchaser without notice exists regardless of when he records or whether he ever records his own conveyance.'

\*372 In this connection, see also *Turpin v. Sudduth*, 53 S.C. 295, 31 S.E. 245, 306; and the annotation contained in L.R.A. (1916D), page 244.

[1] The present Act provides no grace period for recording; therefore, the instrument should be recorded promptly upon execution to assure its validity against subsequent liens. For a mortgagee not to do so renders him liable to the risk of a mortgage being displaced by a subsequent lien fastening upon the property before its registration. While we are concerned here with construction of a statute, it is equitable that any risk incurred by one failing to protect himself by promptly recording his mortgage should fall upon him who fails to act \*\*218 promptly rather than upon another who can only rely upon the record for his protection, *Epps v. McCallum Realty Company*, 139 S.C. 481, 138 S.E. 297.

The oft cited case of *King v. Fraser*, 23 S.C. 543, was cited by both Appellant and Respondent as authority for their respective positions; however, we are of opinion that the reasoning in that case supports an affirmance of the case at bar. For a review of the Recording Acts from 1843 through 1914, see *In re Sylecau Mfg. Co., D.C.*, 17 F.2d 503, 506, all of which beginning with and subsequent to the 1876 Act, place subsequent creditors and subsequent purchasers in the same category and are referred to as 'subsequent creditors and purchasers.'

[2] In *King v. Fraser*, supra, the question was whether a mortgagee, whose mortgage had not been recorded within the prescribed time but was afterwards recorded, took precedence over the general unsecured creditors of the mortgagor; and it was held that the

mortgage had priority over all the unsecured creditors, including those whose debts were contracted between the date of the execution of the mortgage and the date of its record, but that it was otherwise as to creditors who had acquired a lien subsequent to the execution of the mortgage but prior to \*373 its record, as well as to purchasers without notice who had acquired title after the mortgage was executed but before it was recorded. See also the recent case of *Goodwin v. Harrison*, 231 S.C. 243, 98 S.E.2d 255.

[3] Appellant also takes the position that, inasmuch as the two mortgages were executed on the same date, the transactions are to be construed as having transpired simultaneously, in that the term 'date' embraces the whole day and fractions thereof are not considered in computation of time, 52 Am.Jur. 338. An exception to this rule, however, arises when it becomes necessary to determine the rights of rival lien claimants. *Carroll v. Cash Mills*, 125 S.C. 332, 118 S.E. 290; 33 Am.Jur. 437; 52 Am.Jur. 341; *Ex parte Stagg*, 1 Nott & McC., 405, 10 S.C.L. 405. Here, in order to establish priority of its mortgage over that of Appellant it was necessary that Respondent show that it had become a lien creditor subsequent to, and without notice of, Appellant's mortgage transaction, as well as prior to the recording of Appellant's mortgage. The case is thus within the exception before mentioned.

For the foregoing reasons, we are of opinion that the mortgage of the Bank of Greenwood has priority over the mortgage held by the South Carolina National Bank of Greenville; that all exceptions should be dismissed and the Order appealed from affirmed; and It Is So Ordered. Affirmed.

STUKES, C. J., and OXNER, LEGGE and MOSS, JJ., concur.

#### Parallel Citations

102 S.E.2d 215

79 S.C. 263  
Supreme Court of South Carolina.

HOLT  
v.  
SETTLEMEYER et al.

March 2, 1908.

Certiorari by D. J. Holt to compel W. L. Settlemeier and others, as the executive committee and board of canvassers of the Gaffney Democratic primary, to declare him the Democratic nominee for alderman. Writ granted.

The following is a copy of the petition:

"To the honorable, the Chief Justice, and Associate Justices, composing the Supreme Court of the state of South Carolina, the petition of your petitioner directed to the said Supreme Court in the exercise of its original jurisdiction respectfully shows:

"(1) That your petitioner and the respondents hereinabove named are citizens and qualified voters resident of the town of Gaffney, S. C.

"(2) That in December, 1907, at a mass meeting of the citizens and voters of said town, it was determined to hold a primary election on the 7th day of January, 1908, for the purpose of nominating candidates for the various offices, as mayor and aldermen in said town, to be the nominees in the general election to be held for said offices in March, 1908.

"(3) That at said mass meeting a set of rules and regulations for said primary election were adopted, a copy of which is hereto attached and made a part of this petition, and the respondents herein, with the exception of W. L. Settlemeier, were elected as an executive committee, whose duties, among other things, were to provide for the carrying out of said election, to receive the pledges of candidates, receive from them the assessments levied, to count the ballots officially, and declare the results of the said primary, naming the nominees thereof, etc.

"(4) Section 6 of said rules provided that all candidates should five days before such first primary file a pledge with the chairman of said executive committee, the

substance of which is set out in said section, and that candidates for the office of alderman should pay an assessment of \$2, and said section further provides-which is the only forfeiture or penalty mentioned in said rules-that the votes of any candidate who fails to pay said assessment shall not be counted.

"(5) That your petitioner and the respondent, W. L. Settlemeier, both were candidates for the office of alderman in Ward 1 of the town of Gaffney, in which ward, as in all others, only the candidates for mayor and the candidate for alderman in that particular ward were to be voted for.

"(6) That on the 2d day of January, 1908, your petitioner, believing that he was in time, offered to file his pledge and pay his assessment as provided for by said rules, and, after some discussion with the chairman and secretary of said executive committee as to whether he was in time, his pledge was accepted, the same being written out for him by the said secretary or under his direction, and the assessment of \$2 was paid by your petitioner, and accepted by the committee or its chairman and secretary.

"(7) Thereafter, and before said primary was held, at the instance of some person or persons, the said executive committee held a meeting at which it was determined by them that your petitioner had not filed his pledge in time, and was not, therefore, entitled to have his name printed on the tickets to be used at such primary, said meeting being held without notice to your petitioner, and without giving him an opportunity to be heard.

"(8) That ballots were prepared for said Ward 1 which did not have your petitioner's name thereon, but nevertheless your petitioner did not withdraw his candidacy, but continued thereon, and on the day of the primary election, to wit, the 7th day of January, 1908, there were cast for your petitioner for the said office of alderman 29 legal ballots, \*660 while your petitioner's opponent, W. L. Settlemeier, received only 12 legal ballots, by which your petitioner received a clear majority of legal ballots for said office over his opponent of 17 ballots; that the ballots cast for your petitioner were written by the electors on the face of the ballots prepared by the said committee by writing the name of your petitioner thereon, and scratching the name of his opponent, W. L. Settlemeier, and were

therefore legal as prescribed by the said rules of the said primary election.

“(9) That said executive committee met on the 13th day of January, 1908, for the purpose of canvassing said votes and declaring the results, and, upon the invitation of said committee, your petitioner's attorney was invited to show the said committee why they should not adhere to their said former ruling, and refuse to count the ballots cast for your petitioner, whereupon your petitioner's attorney demanded that the ballots cast for your petitioner be counted for him, and that he be declared to be the nominee for the office of alderman for said Ward 1.

“(10) Thereupon petitioner and his attorney retired, and the said committee canvassed the votes from said ward, and ruled against your petitioner's claim, and declared the respondent, W. L. Settlemeier, to be the duly elected nominee of said primary in Ward 1, over the protest of your petitioner, and notwithstanding that there were in said box from Ward 1, 29 legal ballots for your petitioner, and only 12 legal ballots for the said W. L. Settlemeier, and in the face of the fact apparent that your petitioner obtained a majority of 17 ballots over his opponent, and should therefore have been declared to be the duly nominated candidate for alderman from said ward.

“(11) That the result of the action of said committee is to prevent your petitioner from being a candidate for election in the general election, and to deprive him of the office to which he would be elected, and to deprive him of the honors and emoluments of said office.

“(12) That your petitioner is informed and believes that he has no redress from the wrongful action of said committee except through the intervention of this court, or some other court, but that the time being so short, and as no other court convenes in this county until about the 1st of March, 1908, your petitioner would be prejudiced by such delay if he be entitled to be declared the nominee of said primary; and your petitioner further is informed and believes that he has complied with the rules as herein set out, but that, if he did not, the enforcement of said rules could be and were waived accepting his pledge and the assessment; and, further, that said rules are adopted for the orderly carrying out of such election, and that there was no reasonable excuse for a decision by the committee that

he be barred, as neither they nor the respondent, W. L. Settlemeier, suffered any prejudice or inconvenience, nor would the primary have been interfered with in any way by petitioner's candidacy, as ample time remained after the filing of said pledge to prepare the ballots and other election machinery.

“(13) That your petitioner is informed and believes that the action of said committee in barring petitioner was based upon a technical construction of the rule that your petitioner had not filed his pledge five days before such first primary, and for no other reason.

“Wherefore your petitioner prays that the respondents, the committee named above, be required to show cause before this honorable court why your petitioner should not be declared to be the duly elected nominee for Ward 1 instead of the respondent, W. L. Settlemeier, or for such orders or relief as from the foregoing facts may be deemed proper by this court.

“January 13, 1908.

“ \_\_\_\_\_, Attorney for Petitioner.

“State of South Carolina, County of Cherokee.

“Personally appeared D. J. Holt, the petitioner herein, who, being duly sworn, says that the facts set out in the foregoing petition are true of his knowledge, except as to matters set out therein on information and belief, and, as to such matters, he believes it to be true.

“ \_\_\_\_\_, Petitioner.

“Sworn to before me this \_\_\_\_ day of January, 1908.  
\_\_\_\_\_. [Seal.]”

West Headnotes (1)

[1] **Time**

⊕ Excluding First or Last Day

The rule of a political party that candidates for nominations should file a pledge with the chairman of an executive committee five days before a primary election to be held on January 7th, and should pay an assessment, was complied with by filing the pledge with and paying

the assessment to the chairman of the committee on January 2d.

1 Cases that cite this headnote

**Attorneys and Law Firms**

W. S. Hall, for petitioner.

J. C. Otts, for respondents.

**Opinion**

PER CURIAM.

On hearing the petition, affidavits, and demurrer herein, it is considered by the court that the

Democratic executive committee of the town of Gaffney committed error of law in deciding under the rules of the party the petitioner had not filed his pledge and paid his assessments within the time required by said rule, and was not entitled to be a candidate in the primary election, and to have the votes cast for him therein counted.

It is therefore ordered and adjudged that the petitioner D. J. Holt is entitled to be declared the Democratic nominee for alderman in Ward 1, for the town of Gaffney at the municipal election to be held in said town on the 3d day of March, 1908.

**Parallel Citations**

60 S.E. 659

2 Tread. 631  
Constitutional Court of  
Appeals of South Carolina.

MARY BUIST, Adm'x of  
Rev. GEORGE BUIST,

v.

WILLIAM B. MITCHELL,  
Ex'r of JOHN MITCHELL.

January Term, 1814.

SMITH, J.

The copy writ was left at defendant's residence on the 19th of October, and the court sat on the 3rd November, making but fourteen days, exclusive of the day on which the writ was served, and the first day of court. The defendant's motion was to vacate the service of the writ for irregularity, \*632 not being returned fifteen days next before the sitting of the court. It appears to me to admit of great doubt whether the construction contended for by the defendant, is not the correct one; but the authority in *Sellon*, p. 406. will warrant a different construction; and as it is more a question of practice than of substantial justice, it is perhaps the best course to say, that the sitting day of court is to be considered as one of the fifteen: Therefore, I must be against the motion.

West Headnotes (1)

[1] Time

⇒ Notices and Process

Process

⇒ Time for Service

It is sufficient if process be served 15 days before the sitting of the court, including the first day on which the court sits, and excluding the day on which process is served.

Cases that cite this headnote

GRIMKE, J.

The question in this case is, whether the day on which the process is served and is returnable, shall be both excluded in counting the fifteen days before the return day; for if so, then there will be in this case, but fourteen days intervening between the day of service and the day of the return. The rule of law is, that there are no fractional parts of a day, so that if process be served before twelve o'clock at night, it shall be accounted served on that day to which the twenty hours belong. If then the day on which the writ be served, is to be accounted as one of the fifteen days, it will be in time, as it will be fifteen days next before the sitting of the court to which it is returnable. In B. R. the 4 or 8 days allowed for pleading are, one inclusive; and the other exclusive; but in C. B. both are inclusive. 1 *Sellon*, 293. The time to plead under a judge's order, is reckoned inclusive of the day of the date of the order, but exclusive of the day on which it expires: so that an order for a week's time to plead, \*633 obtained on a Saturday expires on the morning of the following Saturday; and in C. B. the plaintiff may sign judgment in the afternoon of that day. *Sellon*, 311.

Opinion

\*631 NOTT, J.

The act of 1799, enacts that all judicial process shall be made returnable to the clerk of the court, fifteen days next before the sitting of the said court; and the question now is, whether the act means fifteen days exclusive of the day on which it is returnable, and of the first day of the court, or whether one day may be inclusive. The presiding judge on this circuit was of opinion, that one of the days might be inclusive, and decided accordingly; and a motion is now made to reverse that decision. I am of opinion, the decision was correct; it was conformable to the usual rule of construction in similar cases both in England and this state, and consistent with the practice that has always prevailed under that act. I am, therefore, of opinion that the motion ought to be discharged.

Again; as to the mode of reckoning the days, the day of giving the notice is reckoned exclusive, and the sitting or commission day inclusive. *Sellon*, 407. By which, it appears that according to the practice of the English

courts, their mode of computation includes always one of the days; and in C. B. which is the court that, by our law, we are directed to follow in our proceedings, that both days are included in the case mentioned above; so that, if a rule to plead be given on the 7<sup>th</sup>, it is out on the 10<sup>th</sup>, and judgment may be signed on the 11<sup>th</sup>. Reasoning, therefore, from analogy, I should be of opinion that one of the days on which the process is served or returned, should be counted. But the terms of our act, requiring that it should be fifteen days next before the sitting, precludes the return day from being counted in that number. I am, therefore, of opinion,

that the day on which the process was served, must be counted as one of the fifteen days before the sitting of the court, and that the service in this case was regular; the motion must, therefore, be discharged.

COLCOCK, J. concurred.

**Parallel Citations**

3 Brev. 485, 5 S.C.L. 485, 7 S.C.L. 631, 1814 WL 484  
(S.C.Const.App.)

378 S.C. 107  
Supreme Court of South Carolina.

TOWN OF SUMMERVILLE, Appellant,  
v.  
CITY OF NORTH  
CHARLESTON, Respondent.

No. 26492. | Heard April 2,  
2008. | Decided May 19, 2008.

**Synopsis**

**Background:** Two municipalities brought actions against each other, seeking annexation of the same tract of land. Cases were consolidated. The Circuit Court, Dorchester County, James C. Williams, Jr., J., granted the second municipality's motion for summary judgment. First municipality appealed.

**[Holding:]** The Supreme Court, Pleicones, J., held that first municipality failed to wait statutorily-required 30 days after notice of hearing and date of the annexation, when it published notice on April 28 and enacted ordinance on May 27.

Affirmed.

West Headnotes (4)

[1] **Appeal and Error**

↔ Extent of Review Dependent on  
Nature of Decision Appealed from

When reviewing a grant of summary judgment, an appellate court applies the same standard used by the trial court.

2 Cases that cite this headnote

[2] **Appeal and Error**

↔ Cases Triable in Appellate Court

Determining the proper interpretation of a statute is a question of law, and the

Supreme Court reviews questions of law de novo.

22 Cases that cite this headnote

[3] **Municipal Corporations**

↔ Ordinances Annexing or Detaching Territory

Municipality failed to wait until 30 days had lapsed, between date it published notice of hearing on annexation and date of enactment of annexation ordinance, as required by statute, when it published its notice on April 28 and enacted ordinance on May 27. Code 1976, § 5-3-150; § 15-29-10 (2005).

Cases that cite this headnote

[4] **Time**

↔ Days

Where a time prescription mentions only the passage of a number of days, a "day" means a calendar day, beginning and ending at midnight.

Cases that cite this headnote

**Attorneys and Law Firms**

\*\*40 Jack M. Scoville, Jr., of Georgetown, for Appellant.

Derk Van Raalte and J. Brady Hair, both of North Charleston, for Respondent.

**Opinion**

\*\*41 Justice PLEICONES.

\*108 This is a direct appeal from a grant of partial summary judgment to the City of North Charleston. The issue on appeal is whether the Town of Summerville complied with a statute which requires the publication of notice not less than \*109 thirty days prior to acting on a petition to annex real property. Because the Town of Summerville did not comply with the statute, we affirm.

## FACTS

This is an annexation dispute between neighboring municipalities. At some point in 2005, both the Town of Summerville and the City of North Charleston desired to annex a portion of real property known as the Barry Tract. In April 2005, Summerville enacted an ordinance declaring the Barry Tract annexed. Believing Summerville's annexation to be invalid, North Charleston enacted its annexation ordinance in June 2005. The municipalities sued each other, and the cases were consolidated for trial.

The record reflects that both municipalities utilized the annexation procedure set forth in S.C. Code Ann. § 5-3-150 (2004), which originates with a petition initiated by the owners of the property sought to be annexed. The statute provides that annexation is complete upon the enactment of an ordinance and requires the annexing municipality to publish notice of a public hearing "not less than thirty days before acting on an annexation petition...." *Id.* North Charleston moved for summary judgment on the question whether thirty days elapsed between April 28, 2005, the date Summerville published notice of its hearing, and May 27, 2005, the date Summerville enacted its annexation ordinance. The trial court held that thirty days had not elapsed in this period, and Summerville appealed. We certified the appeal from the court of appeals pursuant to Rule 204(b), SCACR.

## ISSUE

Did the trial court err in holding that less than thirty days elapsed between April 28, 2005, and May 27, 2005?

## STANDARD OF REVIEW

[1] [2] When reviewing a grant of summary judgment, an appellate court applies the same standard used by the trial court. *Lanham v. Blue Cross and Blue Shield of S.C., Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002). A grant of summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled

to judgment as a matter of law. Rule 56(c), SCRCP; *Tupper v. Dorchester County*, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997). Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo. *Catawba Indian Tribe v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007).

## ANALYSIS

[3] Summerville argues that under a plausible construction of the annexation statute at issue, a "day" can be measured by the lapse of twenty-four hours from a relevant time. Put in terms of the statute at issue, Summerville argues that § 5-3-150 requires that a municipality publish notice of a public hearing not less than thirty twenty-four hour periods prior to acting on an annexation petition. Summerville argues that it enacted its annexation ordinance at 5:30 p.m., May 27, and that counting the days that elapsed by twenty-four hour periods, the twenty-ninth day prior to its enacting the ordinance ended at 5:30 p.m., April 28, 2005. Summerville therefore posits that if the notification in the newspaper occurred at 5:00 a.m. the morning of April 28, it occurred midway through the thirtieth day and complied with the annexation statute's notice requirement. We disagree.

Summerville's argument fails on its own terms. Assuming that the lapse of thirty sequential twenty-four hour periods provides the measuring stick, 5:30 p.m., May 27, and 5:00 a.m., April 28, are separated by 29 days, 12 hours, and 30 minutes. Converting thirty days to a number of hours of required notice, the statute would then mandate that notice be published "not less than [720 hours] before acting on an annexation petition...." *Id.* In this case, publication and action were separated by 708 hours, 30 minutes. As a \*\*42 quantitative reality, this is less than thirty days.<sup>1</sup>

<sup>1</sup> Summerville attempts to draw a distinction between a requirement of "not less than thirty days" and a fictional requirement of "at least thirty days," but this distinction suffers from a similar flaw. If a brief filed in court must be not less than four pages in length, a three and one-half page brief would not suffice.

\*111 In fact, S.C.Code Ann. § 15-29-10 (2005) provides a specific method for computing time for publication of notices. The statute provides that “[t]he time for publication of legal notices shall be computed so as to exclude the first day of publication and include the day on which the act or event, of which notice is given, is to happen or which completes the full period required for publication.” *Id.* Using this method, April 28, the day of publication, is excluded. Counting forward, May 27 is twenty-nine days from the publication of the notice. Thus, using the statutory counting method for legal notices, we conclude that Summerville did not comply with the relevant public notice requirement in this case.

The parties offer additional arguments on alternative methods of counting time, but those arguments are largely inconsequential. North Charleston posits that Summerville's argument fails even under its own ordinance dealing with computation of time. While North Charleston is correct, it is clear that a local ordinance cannot, absent some authorization or directive, control how time is computed under a state statute. Similarly, this Court's rules contain procedures for computing time, *see* Rule 6, SCRCP and Rule 234, SCACR, and while these rules unquestionably apply in their respective spheres, they are neither dispositive nor are they helpful in answering the question at hand. In this case, a statute requires that published notice precede a public meeting by a specific time period, and a separate statute specifically explains how time is to be computed for the publication of legal notices.

Summerville's more basic argument about how a “day” is defined is not supported by our precedent. We have held that “[t]he word ‘day,’ in its common acceptance, means a civil day of twenty-four hours, beginning and ending at midnight,” *Corwin v. Comptroller Gen.*, 6 S.C. 390, 399 (1875), and that “[f]ractions of days are not recognized in our laws.” *Williams v. Halford*, 64 S.C. 396, 402, 42 S.E. 187, 189 (1902). *Corwin* interprets the word “day” in the context of the South Carolina Constitution's requirement that the Governor veto and return a bill or resolution within three days (Sundays excepted) or the bill shall become law,<sup>2</sup> and *Williams* dealt with the predecessor \*112 to Rule 6(a), SCRCP's rule on computation of time, found in the 1893 Code of Civil Procedure at § 407. These cases instruct that where a time requirement does not

speak in terms of specific hour periods, the Court will not interpret a day to mean anything other than a calendar day. *See also Cleveland v. Calvert*, 54 S.C. 83, 86, 31 S.E. 871, 872 (1899) (applying § 421 of the 1893 Code, the predecessor of the current publication statute, and concluding that notice appearing twenty-one days prior to action complied with statutory requirement of three weeks' notice). We adhere to this pronouncement, and note that where the legislature desires for the passage of a specific number of hours to precede an action, it has shown a propensity for writing precisely such a requirement. *See, e.g.*, S.C.Code Ann. § 5-15-130 (2004) (containing a notice requirement of specific hours).

2 The requirement is now five days. *See* S.C. Const. Art. IV, § 21.

[4] The fact that there are multiple rules for computing time is not all together surprising. As far back as the 1870 Code, South Carolina's statutory law contained separate rules for computing time periods spelled out in procedural rules and time periods for the publication of legal notices. *See* 1870 Code of Civ. Pro. §§ 421, 422. Accordingly, old civil procedure cases relied on the version of the procedural rule then in effect, and old publication cases pulled from the applicable publication rule. All of this simply means that the method for computing time in a particular case may be prescribed by statute, court rule, local ordinance, or some other authority, and the answer we supply today is that where a time prescription mentions only \*\*43 the passage of a number of days, a “day” means a calendar day, beginning and ending at midnight.

## CONCLUSION

We hold that summary judgment was properly granted in favor of the City of North Charleston on the question whether less than thirty days elapsed between April 28, 2005, the date Summerville published notice of its hearing, and May 27, 2005, the date Summerville enacted its annexation ordinance. The order of the circuit court is

**AFFIRMED.**

Town of Summerville v. City of North Charleston, 378 S.C. 107 (2008)

662 S.E.2d 40

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TOAL, C.J., MOORE, WALLER and BEATTY, JJ.,  
concur.

Parallel Citations

662 S.E.2d 40

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67 S.C. 296

Supreme Court of South Carolina.

WILLIAMS et al.

v.

HALFORD et al.

Aug. 4, 1903.

Appeal from Common Pleas Circuit Court of Colleton County; James J. Izlar, Special Judge.

Action by Julia Williams and J. H. Williams against J. R. Halford et al. From decree for plaintiffs, defendants appeal. Reversed.

West Headnotes (2)

[1] Time

↔ Notices and Process

Under Code, § 2881 (See Code 1942, § 706), requiring that reasonable notice, not less than 10 days, must be given in writing by party proposing to take a deposition de bene esse, notice served on the tenth, to take testimony on the twentieth, is insufficient.

3 Cases that cite this headnote

[2] Trial

↔ Issues to Be Submitted

A wife and child sued under Code, § 2368 (See Code 1942, § 8695), providing that if any citizen of the state shall convey by deed to his mistress or bastard child, he having a lawful wife and child living, property for the benefit of such mistress or child, such conveyance shall be void as to the lawful wife and child for such amount as shall exceed one-fourth of his estate, and defendants set up a paramount title by denial of the allegations of the complaint that their title was derived by gift, and also set up an independent title by adverse possession. Held, that the issue should be

submitted to the jury, by whose finding the court would be bound.

1 Cases that cite this headnote

Attorneys and Law Firms

\*207 Howell & Gruber, for appellants. Griffin & Padgett, for respondents.

Opinion

GARY, A. J.

This action was brought under section 2368 of the Code of Laws, which is as follows: "If any person who is an inhabitant of this state, or who has any estate herein, shall have already begotten, or shall hereafter beget, any bastard child, or shall live in adultery with a woman, the said person having a wife or lawful children of his own living, and shall give, or settle, or convey, either in trust or by direct conveyance, by deed of conveyance, by deed of gift, legacy, devise, or by any other ways or means whatsoever, for the use and benefit of the said woman with whom he lives in adultery, or of his bastard child or children, any larger or greater proportion of the real value of his estate, real or personal, after payment of his debts, than one-fourth part thereof, such deed of gift, conveyance, legacy or devise, made or hereafter to be made, shall be null and void, in favor of wife and legitimate children, for so much of the amount or value thereof as shall or may exceed such fourth part of his real and personal estate." The complaint alleges that the plaintiffs are the widow and son of James J. Williams, alias Halford, and that the defendants J. R. Halford, Harriet Turner, and Laura Abbot, are the illegitimate children of the said James J. Williams, alias Halford, begotten of Jane Crosby, after his marriage with Julia Williams. That Jane Crosby, alias Halford, died in 1894, and James J. Williams in 1896. That in 1871 James J. Williams conveyed certain real and personal property described in the fourth paragraph of the complaint to Jane Crosby, in trust for his children by the said Jane Crosby; and that the said personal property, with its increase, was in the possession of Jane Crosby at the time of her death, but belonged to James J. Williams. That in 188\_ James J. Williams caused the said Jane Crosby to sell

certain lands therein mentioned to S. M. J. Carter; that the funds arising from such sale were supplemented by the personal funds of James J. Williams, and were reinvested in the purchase of certain lands therein described. That in 1892 James J. Williams, without consideration, conveyed to Jane Crosby all his real and personal estate of whatever kind soever. That in 1881 Jane Crosby conveyed certain of the property hereinbefore mentioned to her children by James J. Williams. That since the decease of James J. Williams the children born of Jane Crosby as aforesaid, for and in consideration of \$100, conveyed to the defendant J. W. Halford certain of the property described in the complaint.

The 10th, 11th, 12th, and 13th paragraphs of the complaint are as follows:

"(10) That all property, both real and personal, in possession of the said Jane Crosby, alias Jane Halford, at her decease, of whatsoever kind or description, was conveyed to her by the said James J. Williams, alias James J. Halford, and Miner Carter, was, and is, in fact, the personal earnings and property of him, the said James J. Williams, alias James J. Halford, and was conveyed to her, the said Jane Crosby, alias Jane Halford, while they were living together in adultery, and she to her children, all of which was illegal, null, and void; which said deeds and conveyances were made for the express purpose of evading section 1887 of the Revised Statutes of South Carolina.

(11) That the said James R. Halford, B. F. Halford, J. W. Halford, Harriet Turner, and Laura Abbott have been receiving the rents and profits of said estate property, and have disposed of and wasted the personal property of said estate of the value of \$800, more than one-fourth of the value of said estate.

(12) That the plaintiff Julia Williams is entitled to one undivided third part of three-fourths of said estate, and J. H. Williams to two-thirds of three-fourths thereof.

(13) That J. E. Halford, B. F. Halford, J. W. Halford, Laura Abbott, and Harriet Turner were entitled to one-fifth each of one-fourth of the entire estate."

The defendants J. R. Halford, B. F. Halford, and Laura Abbott answered the complaint as follows:

"First, for a first defense: (1) That they deny each and every allegation in the said complaint contained, and allege that they and their codefendants, Harriet Turner and J. W. Halford, are the exclusive owners of all the lands mentioned and described in the complaint.

Second, for a second defense: (1) That neither the plaintiffs nor their ancestors, nor predecessors nor grantors, were seised or possessed of the premises described in the complaint within 10 years last past before the commencement of this action. (2) That these defendants' ancestress, Jane Halford, under whom they claim, entered into possession of the premises described in the complaint under claim of title, exclusive of any other right, founding such claim upon a written instrument as being a conveyance of the premises in question, and there has been a continued occupation and possession by the said Jane Halford of the premises included in this instrument under such claim for more than 10 years past before the commencement of this action and before the death of the said Jane Halford." The third paragraph alleges the erection of certain improvements therein described.

His honor the presiding judge submitted the following issues to the jury, to which the answers are attached, to wit: "(1) Are the defendants the exclusive owners of all the lands mentioned in the complaint? Answer. Yes. (2) Did James J. Williams intermarry with one Julia Albriton, in the state of Florida, in 1852? Answer. Yes. (3) Is J. H. Williams, the plaintiff herein, the legal son of said marriage? Answer. Yes. (4) Are both the said Julia Williams, the wife, and J. H. Williams, the son, now alive? Answer. Yes. (5) Did the said James J. Williams afterwards leave the state of Florida, come to the state of South Carolina, change his name to J. J. Halford, and while his wife, Julia, was alive, contract a second marriage with one Jane Crosby, and cohabit with her until his death? Answer. Yes. (6) Are the defendants the fruit of the marriage entered into between James J. Halford and Jane Crosby? Answer. Yes. (7) Did the said James J. Halford during his lifetime make the conveyances of his property as mentioned and set forth in the complaint herein? Answer. Yes. (8) Did the said Jane Halford, on the 6th January, 1881, in consideration of natural love and

affection, convey the lot or parcel of land described in paragraph five (5) of the complaint to her children? Answer. Yes. (9) Was the 200- acre tract mentioned in paragraph 4 of the complaint, and conveyed with other property by James J. Halford to Jane Halford in trust for the children of the said James J. and Jane Halford, sold at the instance of James J. Halford, and the proceeds reinvested in the purchase of that certain lot of land in the town of Walterboro? Answer. No.”

In commenting on these issues, his honor the presiding judge instructed the jury as follows: “The question here of legal title is raised by the pleadings, and must go to the jury, according to the rule established by our courts. Yet this does not prevent the court from submitting other issues to the jury for determination along with the question of title. And, while you may find for the defendants on the question of legal title, you may find such facts which would enable the court, when the cause comes up for hearing on the equity side of the court, to do justice among the parties, and in that court resort to the process of partition, if necessary to obtain the proper results. The issues which you must determine upon the pleadings, including legal title to the premises in question, are stated in the issues which I have submitted to you. The answer of the jury to these questions is necessary to determine the rights of the parties, and to secure to them, respectively, their rights on the equity side of the court. Now, while under the strict principles of the law, so far as the legal title is concerned, you may, if you find the other facts outside of the legal title to be true, not be able to find the legal title in the plaintiffs, and be compelled to find for the defendants, or, in other words, while you may be compelled to say, in answer to the issue of title raised, that it is in the defendants, still this finding would not be inconsistent with your other findings of fact. For under the law the legal title may be in the illegitimate child or children, yet the lawful wife or child or children might, by reason of a violation of the act, still have such an interest or right in the property over the one-fourth part thereof as would in equity be preserved and secured on them.”

The circuit judge refused a motion for a new trial as to the finding of the jury upon the issue of title. The cause was then called on calendar No. 2. After considering the testimony, the circuit judge rendered his decree, which concludes as follows: “It is therefore ordered

and adjudged that it be and hereby is referred to the master of Colleton county to take testimony and report to this court the value of the several tracts or parcels of land conveyed by J. J. Williams, alias J. J. Halford, and by Miner Carter, to Jane Crosby, alias Jane Halford, at the time the same came into her possession; also the value of all the personal property transferred by said deeds, or any or either of them, and which passed into the possession of the said Jane Crosby, alias Jane Halford, thereunder for the benefit of herself and children, whether the said real and personal property was conveyed in trust or otherwise; also the indebtedness of the said J. J. Williams, alias J. J. Halford, at the time of making, or causing to be made, any of the deeds of conveyance in question; also the rents and profits of the real estate so conveyed since the death of the said J. J. Williams, alias J. J. Halford, over and above all permanent improvements enhancing the value thereof and all taxes paid thereon by the defendant. And that said master do further report, under the principles herein announced, whether the amount of said real and personal property exceeded one-fourth of the clear value of the property, real and personal, at the time of the conveyances, or any or either of them, were made by the said J. J. Williams, alias J. J. Halford, and the amount of the excess over and above the one-fourth thereof. And it is further ordered and adjudged that the defendants have ten days from the hearing of said report, or any exceptions thereto and order therein, to elect whether or not they will pay the sum, if any, ordered by the court in excess of one-fourth to be paid to the plaintiffs and retain the property; and, if the defendants shall fail or refuse to elect within the time aforesaid, the plaintiffs have leave to apply to this court for a writ or writs of partition to enforce their rights under this decree, in order that a proper and necessary result in the said cause may be obtained; but in case the said report and order therein shall be that the value of the property in question does not exceed one-fourth in value of the clear value of the said property, after deducting the amount of the indebtedness of the said J. J. Williams, alias J. J. Halford, after the payment of all his just debts at the time of the conveyances as aforesaid, then that the title of the defendants stands confirmed, and the complaint be dismissed. It is further ordered and adjudged that the parties have leave to apply for further orders in the cause, either in open court or at chambers, upon due notice upon the coming in of the master's report,

and that all questions as to the costs of said action be reserved until the order of the court is made on said report."

The appellants' exceptions are numerous, but, under the view which this court takes of the case, many of them present merely abstract questions, and therefore need not be considered.

We will first consider the question whether the presiding judge submitted the question of title to the jury in proper form under the pleadings in this case, or gave due effect to the finding of the jury. In order that the plaintiffs may be able to get relief by the assertion of their equitable rights under the statute hereinbefore mentioned, it is incumbent on them to establish the fact that the defendants derive their title from the father of the alleged bastards. But a bastard is allowed to purchase property even from his putative father, if it is founded upon valuable consideration. *King v. Johnson*, 2 Hill, Eq. 624. In the case just mentioned the court uses this language: "The obligations between parents and children are reciprocal. On the parent devolves the duty of maintaining, educating, and providing for the child; in return for which the child owes obedience and assistance during minority, and reverence and respect always; and it follows necessarily that, if in law either is absolved from those obligations, so also is the other. Now it is very clear that the putative father is not entitled in law to the custody of his natural child, in opposition to the claims of the mother, nor is he bound to provide for it further than is required by express enactments of the Legislature. 2 Kent's Com. (1st Ed.) 178. The child cannot inherit from the father, and the extent to which the father can provide for his illegitimate child is limited by the act above referred to. The father is not, therefore, entitled in law to the services of his natural child. It is said, however, that when the other assumes and discharges the duties of a parent, corresponding duties arise on the part of the natural child; and this is true so long as this relation exists. But these relations are merely conventional, and, being voluntary, may be dissolved at pleasure. Not so as to the relations between the father and his legitimate children. The obligations between them are imposed by law, and neither can be dissolved from them. The right of the putative father to the custody and services of his natural child must therefore arise out of contract, in which the parties are at liberty to

stipulate for themselves. There is certainly nothing in these relations to prevent the father from rewarding the child for its labor, or being its agent to invest the proceeds; on the contrary, in despite of the stern policy which alienates the bastard from his putative father, nature has bound them together by ties which cannot be severed; and it is impossible to resist the feeling that there is a moral duty imposed on the father to aid the child when he can do so without violating the law or doing wrong to others. I am well aware that there is much danger of abuse in the application of this principle, and that without great circumspection it will be made a cover for evading the act, but of its correctness there can be no question; and abuses may be guarded against by requiring clear and unequivocal evidence of the fairness and reasonableness of the transaction. Of this the present case may serve as an example; for it is apparent the defendant's testator was a mere drone in the hive, and that the land conveyed to the defendants is a very inadequate compensation for the long and faithful services of the defendants, out of the proceeds of which it was paid for."

The appellants denied the allegations of the complaint that their title was derived from James J. Williams as a gift, and likewise set up an independent title by adverse possession. This was sufficient to raise the question of paramount title, in the trial of which by the \*210 jury the plaintiffs are required to be the actors. *Bank v. Peterkin*, 52 S. C. 236, 29 S. E. 546, 68 Am. St. Rep. 900. The presiding judge does not seem to have considered the issue of title as arising out of chancery, and that its submission to the jury was for the enlightenment of the conscience of the court; but it is evident he did regard the title upon which the appellants relied as sufficient to defeat the equitable rights of the plaintiffs under the statute in case it was established to the satisfaction of the jury. The question of title was not a legal issue arising out of chancery, the submission of which to the jury was for the enlightenment of the court's conscience. If the presiding judge, when he submitted to the jury the issue, "Are the defendants the exclusive owners of all the lands mentioned and described in the complaint?" meant "exclusive owners" as against the equity of the plaintiffs, then he should have regarded the verdict as sufficient to defeat the plaintiffs' equity; while, on the other hand, if he did not intend that the jury should find a verdict that would defeat the equitable rights of

the plaintiffs, he misconceived the scope of the issue of title raised by the pleadings. Upon the trial of the legal issue of title by the jury, it is incumbent upon the plaintiffs to introduce testimony tending to prove all the material requirements of the statute alleged in the complaint, in order to show that the title of the appellants is not paramount to their right to assert their equity under the statutes. The defendants may defeat the case as made by the plaintiffs' testimony either by the introduction of testimony directly contradicting it, or may show that valuable consideration was paid for the property, or that they have an independent title arising from any other facts. We desire, however, it should be distinctly understood that we do not undertake at this time to decide whether the defense of adverse possession is available or applicable in this case, as such question is not properly before us for consideration, and is therefore left open. This is a case in which the circuit court might find it advisable to direct the jury to find a special verdict as to the manner in which the appellants had title to the land under section 283 of the Code.

Having reached the conclusion that there should be a new trial upon the question of title, and that the pleadings raise a question of title in the appellants paramount to the claim of the plaintiffs, and which would therefore defeat it if sustained by the testimony, we do not deem it proper to decide any other question except that as to the time of serving notice to take testimony *de bene esse*. Notice to take the testimony of Julia Williams *de bene esse* was served on the defendants' attorneys on the 10th day of November, 1902, and the testimony was taken on the 20th day of November, 1902. Section 2881 of the Code of Laws requires that "reasonable notice, not less than

ten days, must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record." It will be observed that the notice required shall be not less than 10 days. This case comes within the principle announced in *Adkins v. Moore*, 43 S. C. 173, 20 S. E. 985, in which the court says: "The defendants were entitled to full twenty days from the time of service of the complaint till the day therein fixed for trial, and, as they were required to appear on the twentieth day from the service thereof, the time was shorter than that required by law." It is true, section 407 of the Code provides that "the time within which an act is to be done, as herein provided, shall be computed by excluding the first day and including the last," but this was not a case in which the defendants were required to act "within" 10 days. When such is the requirement, the party is in time if he acts on the tenth day, for that is "within" 10 days. If, however, the party is entitled to a notice of "not less than 10 days," he is not required to act until the expiration of 10 days, or, in other words, after 10 days. The notice in this case was not sufficient, unless "within" and "not less than" or "after" mean the same thing, which cannot be successfully contended.

It is the judgment of this court that the judgment of the circuit court be reversed, and that the case be remanded to that court for a new trial upon the issue of title, and for such further proceedings as may be necessary under the pleadings.

#### Parallel Citations

45 S.E. 207