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Practice and Procedure

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PRACTICE AND PROCEDURE

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I. ACTIONS & PROCEEDINGS

Several acts passed by the General Assembly and some decisions of our Supreme Court are reviewed below in the discussion of this subtopic. It has proved impractical, in some instances, for me to cover in detail some of the statutes which are cited below. However, I have attempted in all instances to note what the statute covers, in order that the practitioner, having a question affected by a statute, may be advised of its adoption.

A. *Eminent Domain by Municipalities*

A 1953 Act sets out in detail the procedure for condemnation, valuation and appeal and reads:

> Whenever any municipal corporation in this State desires to become the owner of any real estate or to acquire any easement or right of way through, over or across such real estate for any corporate or public purpose for which a municipality may now condemn real estate or an interest therein . . . .[1]

B. *Suits Against Highway Department for Defects in Highways, etc.*

Two acts were passed at the 1953 session relating to suits for injuries resulting from defects in state highways. One[2] amends the existing code section to increase to $8,000 the amount which can be recovered against the Highway Department for injury or death resulting from defects in the highways, etc. It is applicable only in causes of action accruing after its approval. The other act[3] was passed for the purpose of clarifying an existing code section so as to provide that certain code sections[4] relating to suits against the High-

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1. S. C. ACTS AND JOINT RESOLUTIONS 1953, No. 225, p. 272.
2. S. C. ACTS AND JOINT RESOLUTIONS 1953, No. 53, p. 53.
3. S. C. ACTS AND JOINT RESOLUTIONS 1953, No. 287, p. 362.
4. CODE OF LAWS OF SOUTH CAROLINA, 1952 §§ 33-229 through 33-233.

way Department for injuries, "shall not apply to injuries on roads under construction when the Department is protected by an indemnity bond."

C. *Suit to Recover Taxes Paid Under Protest*

A 1954 Act[5] applicable where the "state or county charges or levies any tax whatsoever against any person," allows payment of a disputed tax under protest, and the bringing of suit within 30 days in the Common Pleas Court for the recovery of the tax. It also sets out procedure, party to be sued, venue, and so forth.

D. *Proceedings for Support of Dependents*

A 1954 Act[6] repealing the existing "Uniform Support of Dependents Act,"[7] is designed "to improve and extend by reciprocal legislation the enforcement of duties of support and to make uniform the law with respect thereto." This act is quite detailed and provides procedures for the enforcement of support decrees, apprehension of absconding and defaulting parents and spouses, etc.

E. *Declaratory Judgments*

A section[8] of the Declaratory Judgments Act provides:

> *When declaratory relief is sought all persons shall be made parties who have or claim any interest which would be affected by the declaration,* and no declaration shall prejudice the rights of parties who had or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, the municipality shall be made a party and shall be entitled to be heard. *If the statute,* ordinance, or franchise is alleged to be unconstitutional the attorney general shall also be served with a copy of the proceeding and shall be entitled to be heard. (Emphasis added.)

In *Lee v. Clark*[9] an elector and taxpayer residing in the affected school district sought a declaratory judgment holding

5. S. C. ACTS AND JOINT RESOLUTIONS 1954, No. 673, p. 1720.
6. S. C. ACTS AND JOINT RESOLUTIONS 1954, No. 548, p. 1421.
7. CODE OF LAWS OF SOUTH CAROLINA, 1952 §§ 20-311 through 20-336, repealed.
8. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-2008.
9. 224 S.C. 138, 77 S.E. 2d 485 (1953).

unconstitutional an act for the elections of school trustees, which gave a preference to women candidates. The case involved several questions under the above code section.

(1) Constitutionality of an Act: It was held that the constitutionality of an act may be challenged under the Declaratory Judgment statute.

(2) Parties: A private citizen may seek a declaratory judgment on the constitutionality of an act. He must show that he has a *substantial interest in the subject matter, and will be directly affected by the enforcement of the challenged act.*

As an elector and taxpayer, plaintiff had an interest in the enforcement of the act which he alleged invaded his political rights. The Court held that: "An individual whose civil or political rights are directly affected by a statute may have the necessary interest to challenge the validity of the statute by a declaratory judgment proceeding."

(3) Procedure: Where the constitutionality of a statute is challenged under the declaratory judgment act, the attorney general must be served with copy of the pleadings, and is entitled to be heard. Another code section[10] authorizing the attorney general in the name of the State, or, *on leave granted by a Circuit Judge, any private party,* to bring action against any person who unlawfully holds or usurps public office, etc., was held inapplicable here. Therefore, it was not essential that plaintiff obtain leave of court in order to bring the action, or that action be brought by the attorney general.

(4) Burden of Proof in declaratory judgment proceedings: *Martin v. Cantrell*[11] was a proceeding under the declaratory judgment act to have a restriction on realty invalidated. On the question of burden of proof, the Court held:

> Plaintiff seeks affirmative relief under the declaratory judgment act and of course *the burden of proof rests upon her in this action,* as well as in other actions, to prove the material allegations of her complaint by the greater weight or preponderance of the testimony. Our attention has not been called to any authority where the burden of proof in an action under the declaratory judgment act rests any less heavily upon the shoulders of the plaintiff than in the ordinary civil action. (Emphasis added.)

10. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-2256.
11. 81 S.E. 2d 37 (S.C. 1954).

F. *Controversies Involving State Boards, Commissions, etc.*

A 1954 Act[12] provides:

> The Circuit Courts of this State are hereby *vested with jurisdiction to hear and determine all questions, actions and controversies,* other than those involving rates of public service companies for which specific procedures for review are provided in Title 58, Code of Laws 1952, affecting Boards, Commissions and Agencies of the State of South Carolina, and officials of the State of South Carolina in their official capacities, *in the circuit where such question, action or controversy arises.* (Emphasis added.)

G. *Proceedings for Contempt*

In *Fagan v. Timmons*[13] appellant was ruled in contempt by the lower court for failing to comply with an order directing her to surrender certain records to a receiver. The Supreme Court held that it would not "disturb the findings of the trial court where such matters are within its jurisdiction," absent abuse of discretion. On the question of the lower court's power to rule in contempt it said:

> . . . Such power should be used sparingly and with caution having at all times regard for one's constitutional rights; it should be exercised only when necessary to prevent actual or direct obstruction or interference with the administration of justice. Within these limitations, however, the matter of determining and dealing with contempts is within the court's sound discretion, subject to the absolute provisions of the law, and its determination is final unless there is a plain abuse of discretion.

H. *Discovery*

1. Inspection of Documents: The code section allowing inspection of books, papers and documents in the possession of a party[14] provides:

> The Court before which a civil action is pending or a judge or justice thereof, may in his discretion and upon due notice, order either party to give to the other, within

12. S. C. ACTS AND JOINT RESOLUTIONS 1954, No. 624, p. 1541.
13. 224 S.C. 286, 78 S.E. 2d 628 (1953).
14. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 26-502.

> a specified time, an inspection and copy or permission to take a copy of any books, papers and documents in his possession or under his control containing evidence relating to the merits of the action or the defense therein. If compliance with the order be refused, the Court, on motion, may exclude the paper from being in evidence, or punish the party refusing or both.

In *Bradley v. Southern Weaving Co.*,[15] plaintiff sued for unpaid compensation based in part upon sales commissions. Plaintiff moved the lower court for an order requiring defendant to allow plaintiff to inspect certain records, which the court granted. Defendant, on appeal, argued that plaintiff was a competitor of defendant and might use the information to gain a competitive advantage. The Supreme Court affirmed the discovery and remanded the case to the lower court with directions to issue such orders as were necessary to produce the documents for plaintiff's inspection, ". . . But at the same time to provide reasonable and appropriate protection to the defendant against compulsory disclosure of confidential information which is wholly irrelevant to the issues in this case."

In another case, *Williams v. Southern Life Ins. Co.*[16] (considered more fully in the next section relating to examination of parties), the Supreme Court held that the code section permitting inspection of documents could not be invoked by defendant to require plaintiff to produce an insurance policy which she alleged in her complaint has been surrendered to the defendant.

2. Examination of Adverse Party: Two code sections apply to this point. The first provides: "A party to an action may be examined as a witness at the instance of the adverse party and for that purpose may be completed, in the same manner and subject to the same rules of examination as any other witness, to testify either at the trial, or conditionally, or upon commission."[17] The other section permits examination of an adverse party, "at any time before the trial," and provides the procedure to be followed.[18]

In *Williams v. Southern Life Ins. Co., supra,* the plaintiff sued two insurance companies, which allegedly induced her

15. 224 S.C. 201, 78 S.E. 2d 237 (1953).
16. 224 S.C. 415, 79 S.E. 2d 365 (1953).
17. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 26-510.
18. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 26-503.

to surrender a policy naming her as beneficiary in exchange for a refund of premiums. The defendants moved for an order permitting them to examine the plaintiff before trial with reference to the policy referred to in the complaint. The Supreme Court held that the trial judge did not abuse his discretion in denying the motion. "Apparently the defendants *seek to discover the evidence on which the plaintiff bases her cause of action. It is improper to grant an examination for this purpose.* . . . It was held . . . that an examination of a party is not allowed to prove, 'whether or not' facts are as alleged." (Emphasis added, citations omitted.)

The above case is just in result, but in the writer's opinion our Court should relax the long established concept that discovery cannot be used by a party to discover the evidence of his adversary. The statute itself contains no such limitations, and the Court by modifying this concept would create a valuable instrument for the furtherance of justice and equity.

II. PROCESS & SERVICE

A. *Service Essential to Jurisdiction of Defendant*

In *King v. Moore*[19] the Court, in quashing a purported service of process on one defendant, said:

> In the absence of voluntary submission to the jurisdiction of the Court, *one named in the summons and complaint as a defendant becomes a party only after lawful service of the summons upon him. . . . The defendant is subjected to the jurisdiction of the courts by some form of service of process.* At common law the form of service of process necessary to give the court jurisdiction over an individual defendant is personal service upon him within the State. *In the absence of a statute,* service other than personal service within the State is insufficient to give the court jurisdiction over the defendant, even though he is domiciled in the State or otherwise subject to the jurisdiction of the State. (Emphasis and omissions mine.)

B. *Service by Publication on Resident Who Has Left the State*

19. 224 S.C. 400, 79 S.E. 2d 460 (1954), discussed also herein under "Change of Venue." See also Camp v. Petroleum Carrier Corp., 204 S.C. 133, 28 S.E. 2d 683 (1944).

In *King v. Moore, supra,* there was an attempt to serve by publication the defendant Snipes, a resident of Berkeley County, who, at the time of service was in Maryland. Service was made under the code section[20] permitting service by publication, which reads: "When the defendant, being a resident of this State, has departed therefrom with intent to defraud his creditors, or to avoid service of a summons, or keeps himself concealed therein with like intent." The court held that the above section provided a means of service only on defendants who were domiciled in South Carolina, although absent therefrom, since a South Carolina statute providing for service in Maryland on a resident of that state would be invalid. The Court then held that the burden was on plaintiffs to show that Snipes had left the state to avoid service of process, which plaintiffs had failed to prove.

C. *Amendment of Defective Proof of Service*

The code provides,[21] "At any time in its discretion and upon such terms as it deems just the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process is issued."

In *Corley v. Wells,*[22] defendant moved to set aside a judgment against him on grounds that the summons was not properly served on him, and the proof of service failed to show service properly made. The lower court granted the motions and held *that the affidavit of service could not be supplemented to cure defects.* The Supreme Court reversed the lower court under the above statute. The case was remanded with direction that findings be made whether process was properly served, and whether amendment of proof of service thereof, "would result in substantial prejudice to right of the defendants."

III. CHANGE OF VENUE

Several cases were decided on Change of Venue, but they do not present any unusual problems. They fall into two categories, the first on "convenience of witnesses and promotion of the ends of justice," the second on "residence of defendants."

20. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-451 (2).
21. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-409.
22. 224 S.C. 198, 78 S.E. 2d 186 (1954).

A. *Promotion of Convenience of Witnesses and Ends of Justice*

1. General Considerations. The code provides:[23] "The Court may change the place of trial in the following cases: . . . (3) when the convenience of witnesses and the ends of justice would be promoted by the change." (Omissions mine.)

In *Haigler v. Westbury*[24] an order granting defendant's motion for a change of venue from Dorchester County where he resided and suit was brought to Orangeburg County where the accident occurred and plaintiffs and most witnesses resided was affirmed by the Supreme Court on grounds that it promoted the convenience of witnesses and the ends of justice.

In *Hayes v. Clarkson*[25] the Supreme Court held that the lower court did not abuse its discretion in transferring a case on plaintiff's motion from Chesterfield County where defendant resided to Marion County where the accident occurred, and most witnesses but neither party resided. "The very object of our jury system in requiring jurors from the vicinage to pass upon the credibility of witnesses is the promotion of the ends of justice."

Wallace v. Dickerson Construction Co.[26] was brought originally in Darlington County against two defendants. It was first removed to the Federal Court by defendant Dickerson, then remanded to the State Court whereupon defendant Brewer moved for and was granted an order changing the place of trial to Lancaster County where he resided. Plaintiff then moved to change the place of trial back to Darlington County where the accident occurred and many witnesses resided. The lower court, affirmed by the Supreme Court, moved the case back to Darlington on the grounds that the movant had established that the convenience of witnesses would be better served by trial in that county.

This case illustrates the point that the "convenience of witnesses, etc." ground may outweigh the "residence of defendant" ground. In this connection see also the earlier case of *Roof v. Tiller*,[27] and contrast the result with the case of *King*

23. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-310.
24. 223 S.C. 517, 77 S.E. 2d 207 (1954).
25. 224 S.C. 274, 78 S.E. 2d 454 (1954).
26. 224 S.C. 396, 79 S.E. 2d 371 (1954).
27. 195 S.C. 132, 10 S.E. 2d 333, 132 A.L.R. 500 (1940).

v. Moore[28] discussed below under the *"residence"* ground. This construction is implied by the last sentence of the "residence" statute, *infra.*

2. Burden of Proof and Showing to be Made. "To authorize a change of venue under the Code section upon which defendant relies, the *burden is upon him to show that both the convenience of witnesses and the ends of justice will be promoted* by the change. *If he has made a prima facie showing as to both requirements, the burden shifts to plaintiffs to overcome the showing made as to the least one of them."*[29] (Emphasis added.)

3. Review of Orders Granting or Denying Change. Appeals from orders granting or denying change of venue on grounds of convenience of witnesses and promotion of justice have met with no success in the cases reviewed by the writer. The Supreme Court has repeatedly held: "Such a motion is addressed to the *judicial discretion* of the lower court and will be reversed only in case of *manifest legal error."*[30] (Emphasis added.)

In *Wilson v. Southern Furn. Co.*[31] the Court held that disposition of the motion for change of venue " . . . is within the discretion of the hearing court and the exercise of it will not be disturbed on appeal in the absence of an abuse of discretion or unless it is . . . *so opposed to a sound discretion as to amount to a deprivation of the legal rights of the complaining party."* (Emphasis and omissions of citations mine.)

B. *Residence of Defendant*

1. General Considerations. The code provides:[32]

> In all other cases the action shall be tried *in the county in which the defendant resides* at the time of the commencement of the action. *If there be more than one defendant,* then the action may be tried *in any county in which one or more of the defendants to such action resides* at the time of the commencement of the action. If none of the parties shall reside in the State the action shall be tried in any county which the plaintiff shall designate in his complaint. *This section is subject, however,*

28. 224 S.C. 400, 79 S.E. 2d 460 (1954).
29. See note 24 *supra.* Also see Wilson v. Southern Furniture Co., 224 S.C. 281, 78 S.E. 2d 890 (1953).
30. See note 24 *supra.*
31. 224 S.C. 281, 78 S.E. 2d 890 (1954).
32. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-302.

to the power of the court to change the place of trial in certain cases as provided by law. (Emphasis added.)

In one case arising under this statute, *King v. Moore*,[33] action was brought in Berkeley County, where the accident occurred, naming as defendants one Snipes, a resident of that county, and Moore and Calcutt, who were residents of Florence County. The Florence residents were served first and had filed and argued motions for change of venue to their home county before service by publication was attempted on Snipes, who had left the State. Snipes appeared specially and moved to quash service upon him. The trial judge denied both motions, but was reversed by the Supreme Court, which held the purported service upon Snipes was invalid and therefore did not bring him into the case as a party.[34] With Snipes eliminated, only the two Florence County residents were left and the Supreme Court held that they were entitled to trial in their home county, under the above statute.

In *Peters v. Double Cola Bottling Co.*,[35] suit was brought by plaintiff in Dorchester County against one Kizer, a retailer residing in that county, and a bottling corporation whose headquarters was Columbia. Plaintiff's complaint alleged that she became ill from a soft drink made by the defendant bottler which she purchased in Kizer's store. The bottling company moved for a change of venue to Richland County, on ground that the joinder of Kizer was not bona fide, being solely for the purpose of maintaining venue in Dorchester County. The lower court denied the motion and was sustained by the Supreme Court.

The Supreme Court held that the facts alleged in the complaint set out a cause of action under the Pure Food and Drug Act as well as at common law. Since the Act makes it unlawful to *sell or manufacture* deleterious food, a cause of action was alleged against both defendants, and the joinder was not mala fide. "Where two defendants who reside in different counties are sued jointly, the statute provides that the case may be tried in either of the two counties."

Certain earlier decisions on mala fide joinder are cited in

33. See note 28 *supra*.
34. This feature of the case is discussed herein under "Process & Service."
35. 224 S.C. 437, 79 S.E. 2d 710 (1954).

the footnote.[36] They may be of some aid to attorneys moving for change of venue under the "residence of defendant" statute.

2. Matters to be considered by lower court in ruling on motion. " . . . The court is mindful that the *lower court sits as judge and jury* and in ruling upon the issue, *may go beyond the pleadings to determine whether or not the defendant is material and bona fide.* A defendant may be mala fide, so as to require the granting of a motion to change venue even though the allegations (and proof apparently available) may be sufficient to submit the case to the jury . . . . And so, whether or not a cause of action is stated in the complaint is not always controlling."[37] (Emphasis and omissions mine.)

IV. TRIALS & JUDGMENTS

A. *Juror—Disqualification for Relationship to Party*

The Code provides in part:[38] "The Court shall, on motion of either party to the suit, examine on oath any person who is called as a juror therein to know *whether he is related to either party.* If it appears to the Court that the juror is not indifferent to the cause, he shall be placed aside." (Omissions and emphasis mine.)

In *Smith v. Quattlebaum*[39] the losing party, after the trial, learned that one of the jurors was related to the prevailing party within the sixth degree and moved for a new trial on this ground. The motion was denied on the finding that the verdict rendered was sustained by the evidence and the juror did not know of any kinship with the plaintiff until after the trial was in progress.

In construing the above code section the Supreme Court held that there is no statute fixing the degree of affinity or consanguinity which will disqualify a juror as a matter of law, and that the matter of disqualification on this ground was within the sound discretion of the trial judge. It said: *"It is not by reason of consanguinity or affinity* that a juror becomes disqualified, but in the exercise of the discretion of the trial

36. Rosamond v. Lucas Kidd Motor Co., 183 S.C. 544, 191 S.E. 516 (1937); White v. Nichols, 190 S.C. 45, 1 S.E. 2d 916 (1939); Dunbar v. Evins, 198 S.C. 146, 17 S.E. 2d 137 (1941); Reynolds v. Atlantic Coast Line R. Co., 217 S.C. 16, 59 S.E. 2d 344 (1950).
37. See note 35 *supra.* Also see cases cited in note 14 *supra.*
38. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 38-202.
39. 223 S.C. 384, 76 S.E. 2d 154 (1953).

judge, *he is subject to disqualification because of possible interest* in the case." (Emphasis added.)

B. *Instruction to Jury and Objections Thereto*

1. Statute—objections and requests to charge out of presence of jury. The following act, passed in 1953,[40] is of importance to trial lawyers. It provides:

> In all cases tried before a jury, other than cases in a magistrate's or municipal court, after the court has delivered to the jury a charge on the law in the case, the court shall temporarily excuse the jury from the presence of counsel and litigants in order to give counsel and litigants an opportunity to express objections to the charge or request the charge of additional propositions made necessary by the charge, out of the presence of the jury.

No cases construing the above act have come to the writer's attention. In those cases below which might have been affected by it, it was not before the Court.

In *Reese v. National Surety Corp.*,[41] it was held that the trial judge did not commit error in refusing a special request to charge submitted by a party, where he had already covered the requested matter in his general charge.

2. Counsels' duty to advise trial judge of error in rulings or instructions. The appellant charged that the trial judge had instructed the jury on certain elements of damages on which there was no evidence. The Supreme Court held:

> . . . we think the deficiency in the testimony in these particulars *should have been called to the Court's attention.* The rule is well established in this state that *an instruction upon an issue as to which there is no evidence is not reversible error unless the attention of the Court is called to that fact.*[42] (Emphasis and omissions mine.)

Myers v. Evans[43] applies a different rule. In that case plaintiff sued for injuries received when she was struck by a truck while crossing the highway. On appeal, plaintiff excepted to an instruction of the trial judge based on a code section[44] which was inapplicable under the evidence.

40. S. C. ACTS AND JOINT RESOLUTIONS 1953, No. 28, p. 28.
41. 224 S.C. 489, 80 S.E. 2d 47 (1954).
42. See note 41 *supra.*
43. 81 S.E. 2d 32 (S.C. 1954).
44. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 46-435.

On the matter of counsels' failure to call the erroneous ruling to the trial judge's attention the Supreme Court held that:

> The question of the applicability of the statute did not arise for the first time during the charge. It was necessarily discussed on respondents motion for nonsuit, one ground of which was that appellant was guilty of contributory negligence as a matter of law. . . . In overruling this motion the trial judge did not eliminate this statute but ruled that it was 'a matter for the jury'. It is obvious that throughout the trial the Court deemed this statute relevant. . . . Appellant's counsel certainly had no right to assume that the charging of the statute was mere inadvertence on the part of the trial judge. It is not a case of *misstatement of issues but an erroneous construction.* . . .[45] (Emphasis and omissions mine.)

C. *Default Judgment—Unliquidated Claims*

A 1953 Act[46] authorizes the Court of Common Pleas on motion of plaintiff to refer any issues in any default case whether the cause of action, "be in contract or *tort,*" and whether the claim be "liquidated or unliquidated" and to hear the allegations of the plaintiff "in term time or at chambers" and to "render judgment for the plaintiff for such relief as his allegations and proof may warrant."

In *Patrick v. Wolowek*[47] the Supreme Court held this act had no retroactive effect and could not validate a default judgment rendered before its passage by a judge without a jury in a tort case for unliquidated damages. Accordingly, it set aside the judgment which had been rendered by the Circuit Judge without a jury.

D. *Nonsuit and Direction of Verdict*

1. Grounds. In *Simmons v. Service Life & Health Ins. Co.*[48] the Supreme Court overruled an order of the lower court granting a nonsuit and held: "Involuntary nonsuit on the merits is proper only when the evidence of the plaintiff *affirmatively shows as a matter of law* that he is not entitled to the relief sought in the complaint." (Emphasis added.)

45. See Steinberg v. S. C. Power Co., 165 S.C. 367, 163 S.E. 881 (1932). Also, on "inadvertence" of trial judge in using the word "defendant" instead of "plaintiff" in his charge, see Smalls v. LaRoache, 93 S.C. 45, 75 S.E. 1016 (1912).
46. S. C. ACTS AND JOINT RESOLUTIONS 1953, No. 114, p. 137.
47. 81 S.E. 2d 717 (S.C. 1954).
48. 223 S.C. 407, 76 S.E. 2d 288 (1954).

In an appeal from refusal of the lower court to direct a verdict, the Court in *Davenport v. Woodside Cotton Mills Co.*[49] held:

> . . . The well established rule in this state is that *if there is any testimony whatever to go to the jury* on an issue involved in a cause, *or even if more than one inference can be drawn from the testimony,* then it is the duty of the judge to submit the cause of action to the jury. This is true, even if witnesses for the plaintiff contradict each other, or if a witness himself makes a conflicting statement. The credibility of witnesses is entirely for the jury. . . . (Emphasis added.)

In *Cannon v. Motors Insurance Corp.*,[50] involving the question of ownership of an automobile, the Supreme Court reversed the direction of verdict below on the ground that there was evidence to go to the jury on the issue of title, saying, " . . . *If the evidence is susceptible of only one reasonable inference, the question is no longer a question for the jury but one of law for the Court,* otherwise, the issue or issues become a question of fact for the consideration of the jury . . . ." (Emphasis and omissions mine.)

In *Coffee v. Anderson County*[51] a suit for injuries received from a highway defect, the Court held that verdict could not be directed if, considering the evidence most strongly against the moving party, there was a scintilla of evidence to carry the case to the jury.

In *Barnwell v. Elliott*[52] a suit by an employee injured by falling lumber, the Court held: " . . . *even though a non-suit should have been granted* at conclusion of plaintiff's testimony, *yet, if the deficiency was supplied* either on direct or cross examination of defendants' witnesses, neither a nonsuit nor a directed verdict could be granted at the conclusion of all the testimony." (Emphasis mine.)

2. Prior Adjudication of Negligence of Person not Party. In *Gillespie v. Ford*,[53] plaintiff sued defendants for property damage and loss of consortium of his wife arising out of an intersection collision between plaintiff's automobile, driven by his wife, and an automobile operated by defendant. In a com-

49. 225 S.C. 52, 79 S.E. 2d 369 (1954).
50. 224 S.C. 368, 79 S.E. 2d 371 (1954).
51. 224 S.C. 477, 80 S.E. 2d 51 (1954).
52. 80 S.E. 2d 748 (S.C. 1954).
53. 81 S.E. 2d 44 (S.C. 1954).

panion case by the wife,[54] she was, on appeal, found guilty of contributory negligence as a matter of law, and for this reason, the trial judge in the present case granted a nonsuit in the husband's action. The Supreme Court reversed the order of nonsuit, on the grounds that, "The causes of action in the two cases are entirely different and distinct, and the judgment in favor of the defendants in an action on one is not a bar to an action on the other. On this point the authorities are practically unanimous."[55]

3. Order Directing Verdict and Granting Nonsuit. In *Simmons v. Service Life & Health Ins. Co.*,[56] plaintiff sued defendant for fraudulent breach of contract, seeking actual and punitive damages for alleged wrongful lapse of an insurance policy. At trial, defendant put up no testimony, and moved for a *nonsuit on the issue of punitive damages* at the close of plaintiff's case. The trial judge *on his own motion* directed a verdict for plaintiff on the issue of actual damages, and ordered a nonsuit on punitive damages. The plaintiff appealed for a new trial on grounds that there was evidence justifying submission of the case to the jury on the issue of *punitive* damages, but asked in his brief that the judgment for actual damages be affirmed. Defendant did not appeal. The Supreme Court granted a new trial on both actual and punitive damages, declining to sustain plaintiff's request for affirmance of the judgment of actual damages, "in the first place *because no such proposition is presented by his exceptions*, and secondly because only *his evidence was heard* in the trial under review."

It is difficult to understand why the Supreme Court set aside the lower court's direction of verdict for actual damages, when neither party appealed from this ruling. The reasons given by the Court, quoted above, invite further questions. For this reason the writer has noted hereinafter a few propositions of law, which indicate either that the relief granted is out of line with precedent, or else, that it overrules such precedent.

First: A trial judge can order a nonsuit or direct a verdict either on his own motion or on motion of counsel in the case, as was held in *Gobbel v. Columbia Rwy. Gas & Elec. Co.*[57]

54. See Gillespie v. Ford, 222 S.C. 46, 71 S.E. 2d 596 (1952).
55. See Priester v. Sou. Ry. Co., 151 S.C. 433, 149 S.E. 226 (1929).
56. 223 S.C. 407, 76 S.E. 2d 288 (1953).
57. 107 S.C. 367, 93 S.E. 137 (1917).

Second: "No exception was taken to the ruling and, right or wrong, it is *the law of the case.*"[58] Various examples of application of law of the case doctrine to rulings of the trial judge not objected to nor appealed from, include: Instructions to the jury[59]; order overruling demurrer[60]; or confirming sale by receiver[61]; or refusing leave to bring in a party.[62]

Third: " 'Although there are exceptional cases, the general rule is that a plaintiff or defendant cannot appeal or prosecute a writ of error from or to a judgment, order, or decree in his own favor, since he is not aggrieved thereby'."[63]

E. *Exemption of Certain Insurance Proceeds From Process.*

A 1953 Act[64] amending the code by adding a new section, provides:

> When the proceeds of a life insurance policy, becoming a claim by death of the insured, are left with an insurance company under a trust or other agreement, the benefits accruing thereunder after the death of the insured shall not be transferable, nor subject to computation or incumbrance, nor to legal process except in an action to recover for necessaries, if the parties to the trust or other agreement so agree.

F. *Jurisdiction of Judge After* Sine Die *Adjournment.*

In *Smith v. Quattlebaum*[65] defendant moved before the trial judge after sine die adjournment of the court for a new trial on evidence discovered after the trial that a juror was related to plaintiff. The trial judge denied the motion on grounds discussed elsewhere herein,[66] and the Supreme Court affirmed him, but held on the question of the judge's powers after court adjournment:

> Generally, when a trial judge adjourns his court *sine die,* he loses jurisdiction of a case finally determined in

58. Wilson v. Dove, 118 S.C. 256, 110 S.E. 390 (1922).
59. Hinson v. Roof, 128 S.C. 470, 122 S.E. 488 (1924); Falls v. Carolina Power & Light Co., 117 S.C. 327, 109 S.E. 93 (1921).
60. Prather v. Clover Spinning Mills, 215 S.C. 103, 54 S.E. 2d 529 (1949).
61. Utley v. S. W. Wilson & Sons, 205 S.C. 469, 32 S.E. 2d 654 (1944).
62. C. I. T. Corp. v. Corley, 196 S.C. 339, 13 S.E. 2d 440 (1941).
63. Wilson v. Southern Railway Co., 123 S.C. 399, 114 S.E. 764 (1923); See also Towill v. Southern Railway Co., 131 S.C. 425, 127 S.E. 559 (1925).
64. S. C. ACTS AND JOINT RESOLUTIONS 1953, No. 367, § 3, p. 509.
65. 223 S.C. 384, 76 S.E. 2d 154 (1953).
66. See IV (A), this work, "Jurors, etc."

that term, except under special circumstances. An *exception* to this general rule is *a motion for new trial on after or newly discovered evidence*. There is no sound reason why a motion for new trial *on after-discovered evidence disqualification of a juror,* alleged as such, should not be within the same category as the motion referred to in the preceding paragraph. (Emphasis and omissions mine.)

V. APPEAL & REVIEW

A. *Grounds Not Raised Below.*

In *Industrial Equipment Co. v. Montague*[67] the Supreme Court reiterated the rule that the appellate court will not consider a point not raised or decided by the court below. However, in *Town of Forest Acres v. Seigler*[68] the Court made an exception to this rule. In that case, a contest of a municipal annexation, the matter was heard by the lower court in 1952 before the 1952 Code had been ratified. The Supreme Court held that it would consider the question of whether or not the provisions of the 1952 Code relating to annexation of property were retroactive, where the public interest required its prompt determination, even though this ground was not and could not have been presented to the court below when the case was heard.

B. *Exception Not Argued on Appeal.*

In *Reese v. National Surety Co.*,[69] the Supreme Court held that an exception not argued on appeal is presumably abandoned.

C. *Order Granting or Refusing a New Trial.*

In *Turner v. Carey*[70] on appeal from an order of the lower court granting a new trial to plaintiff on grounds of inadequate damages, the Supreme Court held:

> It is well settled in this state that an order granting or refusing a new trial when *based solely on an error of law is subject to review* by this court, but when the order is *based upon questions of fact or upon both questions of law and fact, it is not appealable.*
>
> . . . The well settled rule is that this court *cannot review* an order granting or refusing a new trial except for

67. 224 S.C. 510, 80 S.E. 2d 114 (1954).
68. 224 S.C. 166, 77 S.E. 2d 900 (1953).
69. See note 41 *supra.*
70. 223 S.C. 477, 76 S.E. 2d 671 (1953).

> error of law, as *the court is without jurisdiction to review the judgment of the circuit court on questions of fact.* . . . (Emphasis and omissions mine.)

Thus, in *Tedder v. Coca-Cola Bottling Co. of Darlington,*[71] the Supreme Court refused to set aside the trial judge's order denying defendant a new trial on grounds of excessive verdict. The trial judge held as a fact that he observed nothing in the trial of the case indicating any passion, prejudice or other improper considerations which influenced the jury. "It must be remembered that *findings of the trial judge* in this particular connection *are entitled to great and almost conclusive weight* and will not be disturbed ordinarily." (Emphasis mine.)

In *Miller v. Atlantic Coast Line R. R. Co.*[72] the Supreme Court refused to overrule the order of the trial judge denying a new trial to defendant on grounds of excessive verdict, saying: "Under our cases, the question of whether or not a verdict is excessive is addressed to the sound discretion of the trial judge, subject, of course, to the limitation that this court will intervene in the case of an abuse of discretion. . . ."

See also *Nichols v. Craven*[73] where the Supreme Court dismissed appeal from order of the lower court granting a new trial on grounds that the verdict was inadequate.

D. *Findings of Fact of Master Concurred in by Circuit Judge in Equity.*

In *Newton v. Batson*[74] the Court reaffirmed the oft-recited principle that: "It is the settled law of this state that *in an equity case findings of fact by a master concurred in by a circuit judge* will not be disturbed on appeal unless it is shown that such findings are without any evidence to support them or are against the clear preponderance of the evidence." (Emphasis added.)

In *Ives v. Ives*[75] the Supreme Court applied the same rule in an appeal from an order of the circuit judge affirming the master, in a proceeding brought to reform the description of a deed. The above rule has long been followed by our Court. It appears unusual, however, when we consider the section

71. 224 S.C. 46, 77 S.E. 2d 293 (1953).
72. 81 S.E. 2d 335 (S.C. 1954).
73. 224 S.C. 244, 78 S.E. 2d 376 (1953).
74. 223 S.C. 545, 77 S.E. 2d 212 (1954).
75. 223 S.C. 461, 76 S.E. 2d 471 (1953).

of the State Constitution relating to the jurisdiction of the Supreme Court[76] which provides, in part, that the Supreme Court, " . . . shall have appellate jurisdiction only in cases of Chancery, and in such appeals they shall review findings of fact as well as law, except in Chancery cases where the facts are settled by a jury and the verdict not set aside. . . ."

E. *Finding by Trial Judge in Law Case.*

Land v. Franklin Natl. Ins. Co.[77] was an action on a marine policy covering a speed boat damaged by sinking when hull planking opened from torque of heavy engine at full throttle. The trial judge found that the boat was seaworthy and held the insurance company liable. On appeal, the Supreme Court held:

> More important than our view of the evidence on this feature, and conclusive of the evidence is the consideration that the *trial court expressly found that the boat was seaworthy* when insured and afterward, and *supported by evidence, the finding is conclusive upon appeal, in this, a law case.* (Emphasis added.)

Knight v. Hilton[78] involved a partition of realty and respondent claimed title to one parcel by adverse possession. The circuit judge reversed the master and found that plaintiff had title by adverse possession. The Supreme Court said:

> The circuit judge held respondent had established title by adverse possession. *This being a legal issue, it must be conceded that his conclusion is binding on this court* if there is any evidence reasonably tending to sustain it. . . . However, the facts before us are undisputed and the question is purely a legal one. (Emphasis added.)

The Supreme Court then held that there was not sufficient evidence to sustain the circuit judge's finding and reversed and remanded the case for further proceedings below.

In *Austin-Griffith, Inc. v. Goldberg,*[79] plaintiff builders sought to foreclose mechanic's liens and defendant owners pleaded certain offsets. By consent of the parties the matter was referred to a referee, and the circuit judge affirmed the

76. CONSTITUTION OF THE STATE OF SOUTH CAROLINA, Art. 5, § 4; CODE OF LAWS OF SOUTH CAROLINA, 1952, Vol. 7, p. 173.
77. 225 S.C. 33, 80 S.E. 2d 420 (1954).
78. 224 S.C. 452, 79 S.E. 2d 871 (1954).
79. 224 S.C. 372, 79 S.E. 2d 447 (1953).

referee on some counts, and reversed him on others. On appeal, the Supreme Court held:

> . . . It should be stated that on the disputed issues of fact arising in this case, *either party had the right to a jury trial* . . . . However, no such right was asserted and *by consent* of the parties *the case was referred as if it were one in equity. . . . We have, therefore, determined the facts in accordance with our view of the preponderance of the evidence.* (Emphasis mine, citations omitted.)

F. *Power of Supreme Court to Reverse Nisi.*

In *Padgett v. Calvert Fire Ins. Co.*,[80] action was brought under a $100 deductible automobile policy. The Supreme Court ordered a new trial unless plaintiff remitted on the record the $100 deduction, holding: "The Supreme Court may affirm *nisi* where damages improperly allowed can be segregated."

VI. JURY SERVICE, COSTS AND TERMS OF CIRCUIT COURTS

The following acts are merely noted as information without discussion of their provisions.

A 1954 Act provides that in those counties where the Common Pleas Court is held during the same week as the General Sessions Court, jurors called for General Sessions shall also be used for Common Pleas.[81]

Two acts were adopted fixing the fees to be charged by the Clerks of Court of Horry County[82] and Jasper County[83] for the filing of pleadings, etc., in the Common Pleas Court.

Several acts were passed changing, extending or rearranging terms of Common Pleas or General Sessions Courts for various counties or circuits. I have merely listed the counties or circuits affected without further discussion of the changes themselves.

The acts relate to terms of court in Beaufort County,[84] Berkeley and Charleston Counties,[85] Calhoun County,[86]

80. 223 S.C. 533, 77 S.E. 2d 219 (1954).
81. S. C. ACTS AND JOINT RESOLUTIONS 1954, No. 569, p. 1445.
82. S. C. ACTS AND JOINT RESOLUTIONS 1953, No. 68, p. 67.
83. S. C. ACTS AND JOINT RESOLUTIONS 1953, No. 6, p. 8.
84. S. C. ACTS AND JOINT RESOLUTIONS 1953, No. 333, p. 440.
85. S. C. ACTS AND JOINT RESOLUTIONS 1953, No. 65, p. 64.
86. S. C. ACTS AND JOINT RESOLUTIONS 1953, No. 34, p. 34.

Dillon County,[87] Fairfield County and York County,[88] Greenwood and Laurens Counties,[89] McCormick County,[90] Sumter County,[91] and the Tenth Circuit.[92]

87. S. C. ACTS AND JOINT RESOLUTIONS 1953, No. 32, p. 32, and No. 25, p. 26.
88. S. C. ACTS AND JOINT RESOLUTIONS 1953, No. 206, p. 253.
89. S. C. ACTS AND JOINT RESOLUTIONS 1953, No. 247, p. 311.
90. S. C. ACTS AND JOINT RESOLUTIONS 1954, No. 545, p. 1418.
91. S. C. ACTS AND JOINT RESOLUTIONS 1954, No. 555, p. 1432.
92. S. C. ACTS AND JOINT RESOLUTIONS 1954, No. 689, p. 1749.