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Practice and Procedure

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PRACTICE AND PROCEDURE

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The several decisions reviewed in this paper reflect no startling departures from established law. Some of the cases reviewed hereinafter are unusual in their facts or in the application of law to those facts.

As in the past, this paper is rather loosely arranged in three main parts: Remedies, Trial, and Review. Under *Remedies,* I have included decisions on Comity between State and Federal Courts; Declaratory Judgment; Remedies for Fraud; Action against Statutory Insurer; and Service of Process. Under *Trials* are cases on Discovery; Instructions to Jury; Liability for Costs; Re-opening Judgment; Venue; and Voluntary Non-suit. Under *Review* are cases on Appealability of Orders; Additional Sustaining Grounds; Exceptions; Review of Damages; Review of Findings of Lower Court; Review where Objections not Timely made; Review of Points not Raised Below; and Waiver of Objection.

REMEDIES

Comity

Sparrow v. Nerzig[1] involves comity between the State and Federal Courts. In this case plaintiff sued defendant, a resident of New York, in the State Court for damage to plaintiff's truck from a collision with defendant's automobile. Defendant counterclaimed.

Defendant's son, Stuart, then brought suit in the United States District Court against the plaintiff herein and his truck driver for personal injuries received in the wreck, to which suit answer was filed, but no counterclaim.

Thereafter plaintiff herein moved to amend his action in the State Court to make Stuart a party defendant to assert a claim against him, and recover judgment against him and his father. The lower Court granted the motion and defendants appealed.

The Supreme Court ruled that Rule 13(a), Federal Rules of Civil Procedure, had been amended in 1946 to prevent a party, required by that rule to file a compulsory counterclaim, from avoiding the rule by separate proceeding in another court. It stated that although the State Court had jurisdiction to allow the joinder of Stuart, that nevertheless:

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1. Sparrow v. Nerzig, 228 S.C. 277, 89 S.E. 2d 718 (1955).

> The existence of jurisdiction does not mean that it must be exercised and that grounds may not be shown for staying the hand of the Court! . . . . .
> The action originally instituted by Respondent in the Court of Common Pleas for Dillon County was against Milton Nerzig alone. Stuart Nerzig was in no sense a necessary party for the determination of that controversy; his joinder involved a wholly new cause of action, the subject of which was already in litigation in the District Court of the United States . . . . . .
> The Courts of our State are under no compulsion to defer to the Federal jurisdiction in cases such as the present. The Federal Courts in this State were under no compulsion to stay their hand in . . . . (Certain cases cited)
> But as in the cases last mentioned the exercise of the Federal jurisdiction would have disturbed the normal and adequate processes of litigation already pending in the State Courts, so in the case at bar would the assumption of jurisdiction by our Court of a cause of action essentially the subject of a compulsory counterclaim in the pending Federal action unnecessarily hinder the jurisdiction of the District Court and effectually defeat the purpose of its rule of procedure before mentioned. Such a course is inconsistent with that 'spirit of reciprocal comity and mutual assistance' required for the effective operation of our two systems of Courts.

The court did not reverse the lower court's order, but remanded the case with directions that the proceeding against Stuart Nerzig be abated and stayed pending final determination of the action in the Federal Court.

Declaratory Judgment

Dantzler v. Callison[2] involved a complaint by naturopaths seeking a declaratory judgment construing the State statutes relating to Naturopathic Physicians so as to allow them to administer and prescribe certain narcotic and other drugs. The State Attorney General demurred to the complaint on the ground that it did not set out facts sufficient to constitute a cause of action, and the Supreme Court held:

> It is well settled that where the complaint seeking a declaratory judgment sets forth a justiciable controversy, it is not subject to demurrer on the ground that it fails to state a cause of ac-

2. Dantzler v. Callison, 227 S.C. 317, 88 S.E. 2d 64 (1955).

> tion . . . . . In passing on a demurrer in such cases, the Court is not concerned with whether the plaintiff is right in the controversy, but is only concerned with whether he is entitled to a declaration of rights with respect to the matters alleged.

Remedies for Fraud

In *Turner v. Carey*[3] the Supreme Court held that several remedies are available to a purchaser of land who is induced to enter into a contract of purchase by fraudulent representations of the seller.

> He may, despite the fraud, elect to affirm the contract, retain the property received under it, and bring an action at law for fraud and deceit against the vendor to recover the damages sustained by reason of the fraud or misrepresentation, or, if sued for the agreed price, set-off or recoup the damages resulting from the fraud . . . . . Instead of bringing an action for damages, the defrauded purchaser may rescind the sale and recover the consideration paid. Rescission for fraud may be asserted as a defense to an action by the vendor for the purchase money or damages . . . . . .
>
> The two actions are inconsistent, the one being based on the continued existence of the sale, and the other on its abrogation, and the purchaser cannot in the one form of action secure the relief appropriate to the other . . . . . .

Action Against Statutory Insurer

In *Dobson v. American Indemnity Co.*[4] plaintiff sued the Statutory Insurer of a public motor carrier licensed by the Public Service Commission. In the complaint plaintiff set out the full amount of coverage afforded by the insurer which was in excess of that required by the Public Service Commission. The lower court struck the allegations as to full coverage, and its holding was affirmed by the Supreme Court. The Supreme Court held that ordinarily the fact that defendant is protected by liability insurance should not be made known to the jury. However, in cases where liability insurance is required by law, the amount thus required may be made known, but all in excess of the required amount is private insurance and may not be made known.

3. Turner v. Carey, 227 S.C. 298, 87 S.E. 2d 871 (1955), *see also* Edens v. City of Columbia, 228 S. C. 563, 91 S.E. 2d 280 (1955).
4. Dobson v. American Indemnity Co., 227 S.C. 307, 87 S.E. 2d 869 (1955).

Service and Process

In *H. S. Chisholm, Inc. v. Klinger*[5] the proceeding was commenced by service of a rule to show cause instead of a summons. Certain defendants moved to dismiss the proceeding on the ground that action should have been commenced by service of a summons. The Supreme Court ruled that although the Code provides that action shall be commenced by service of a Summons, nevertheless, where the rule to show cause complies substantially with the prerequisites for a summons, its use rather than a summons will be excused. "While this order was not 'subscribed by the plaintiff or his attorney' surely a notice and a command issued by the Court itself should be as efficacious as one issued by the party to an action or his attorney . . . . . ".

Sturgeon v. Thornton[6] had occasion to consider who was empowered to make service of process on an inmate of the penitentiary. Service in this case was made by a special Deputy Sheriff who had been thus appointed by the Sheriff of Richland County, rather than by that Worthy, himself, or the Superintendent of the penitentiary. Appellant objected that he was not properly served, but the Supreme Court held that Sections 10-436 and 53-83, CODE OF LAWS OF SOUTH CAROLINA, 1952, must be construed together. Although the former section provides that service upon inmates of certain institutions shall be made by the Sheriff or by the Superintendent of the institution, the latter section empowers Special Deputies appointed by the Sheriff to make "service of process in civil and criminal proceedings only", so that the Special Deputy's service in this case was held proper.

Morgan v. State Farm Mutual Insurance Company[7] is of considerable interest and concern to insurance companies and other non-residents who are served by substituted service of process, since it determines when the time for answering begins to run. In this case service of process was made on the State Insurance Commissioner as agent for the defendant, and he in turn forwarded the summons and complaint to defendant at its Jacksonville office where it was received a day or so later. Twenty-one days after service on the Insurance Commissioner the defendant tendered its answer to plaintiff's attorney who declined to accept it. The lower court refused to extend the time so as to allow defendant to answer. On appeal

5. H. S. Chisholm, Inc. v. Klinger, 229 S.C. 8, 91 S.E. 2d 538 (1955).
6. Sturgeon v. Thornton, 227 S.C. 294, 87 S.E. 2d 821 (1955).
7. Morgan v. State Farm Mutual Insurance Co., 229 S.C. 44, 91 S.E. 2d 723 (1956).

the Supreme Court held that the time for answering began to run from the day the process *was served* on the Insurance Commissioner rather than from the day it *was received* by the defendant at its home office. Also, on the appeal, the Supreme Court declined to decide or consider the applicability of the Code section allowing double time where service is by mail on the ground that this point had not been presented to the lower court.

Discovery

In *Ellen v. King*[8] the Supreme Court held that the Code Section[9] providing for pre-trial examination of an adverse party did not allow it as a matter of right, but rather that such examination could only be conducted by leave of court for good cause shown. The court held that allowance of the right lay within the sound judicial discretion of the court, and rejected the argument of the defendant-appellant that a 1923 amendment to the statute requiring that the moving party obtain leave of court before examining his adversary applied only when the adversary resided in another county.

However, in *Stepp v. Horton,*[10] the Supreme Court held that the trial Judge properly exercised his discretion in allowing the plaintiff to examine defendant's claim agent in advance of trial to ascertain whether or not one of the individual co-defendants was an agent of the corporate defendants, which the court held was essential to the plaintiff's proof of his case.

Instructions to the Jury

In *Swindler v. Peay*[11] the defendant, sued for running over plaintiff's cow, counterclaimed and was awarded damages for injuries to his automobile. Plaintiff on appeal sought a new trial because the trial Judge had refused certain of his requests to charge and also because the Judge had charged a penal statute in a civil case. The Supreme Court held that the requested instructions had been covered in substance in the trial Judge's general charge, and, "it is not error for the Court to refuse requests to charge, even when they contain correct and applicable statements of the law, if their substance is fairly covered in the instructions given."

The court answered plaintiff's objection to the charge on the criminal statute, "The rule that the violation of a statute is negligence *per se* is, by its very nature, especially applicable to statutes imposing

8. Ellen v. King, 227 S.C. 481, 88 S.E. 2d 598 (1955).
9. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 26-501.
10. Stepp v. Horton, 227 S.C. 432, 88 S.E. 2d 258 (1955).
11. Swindler v. Peay, 227 S.C. 157, 87 S.E. 296 (1955).

upon persons specific duties for the protection of others, and consequently penal in character."

In *Wright v. Harris*[12] the Supreme Court granted defendant a new trial on the ground that the lower court erred in instructing the jury on the law relating to breach of contract with intent to defraud accompanied by fraudulent acts in an action for fraud and deceit. The court said that it was reversible error for the lower court to charge a correct principle of law as governing a case when such principle was inapplicable to the issues on trial. "Conflicting and irrevelant instructions constitute reversible error and a trial Judge ought to take care not to confuse the jury by charging on legal principles which are inapplicable to the case on trial."

In *Sample v. Reserve Life Insurance Company*[13] the Supreme Court granted a new trial to the defendant insurance company sued on its policy because the trial Judge had instructed the jury that a provision of the policy that to receive benefits the insured must be under a doctor's care was "ineffective as a matter of law". The court said, "The language used in this portion of the policy is plain and unambiguous, and to us it is a valid portion of the contract of insurance and is as effective as any other portion of the contract." The court declined to consider this same provision as a ground that the trial Judge erred in refusing to direct a verdict because this point had not been presented to the trial Judge as such a ground.

In *Jackson v. Solomon*[14] the Supreme Court held that the lower court did not err in denying appellant's verbal request that the Judge charge the doctrine of *last clear chance,* made for the first time when the Judge had completed his charge, excused the jury, and asked for exception to the charge. The Supreme Court held that the last clear chance doctrine had to be pleaded affirmatively, but had not been. Appellant was therefore not entitled to any charge thereon even assuming (which it did not decide) that such a defense was ever available to a defendant.

In *Brown v. Hill*[15] the Supreme Court overruled appellant's exception that the trial Judge erroneously failed to charge the pleaded defense of "negligence of a third party", on the ground that the defendant had not requested the trial Judge to charge that defense when given the opportunity to do so. The trial Judge had recalled

12. Wright v. Harris, 228 S.C. 144, 89 S.E. 2d 97 (1955).
13. Sample v. Reserve Life Insurance Co., 227 S.C. 206, 87 S.E. 2d 476 (1955).
14. Jackson v. Solomon, 228 S.C. 225, 89 S.E. 2d 436 (1955).
15. Brown v. Hill, 228 S.C. 34, 88 S.E. 2d 838 (1955).

the jury and charged them on "unavoidable accident". The Supreme Court said:

> If counsel conceived that by such reference to the fourth defense the trial Judge had incorrectly stated the issue, he should have called the Judge's attention to such misstatement; if he had desired a more detailed charge or further instruction with regard to the fourth defense, he should have requested it. Having done neither, he cannot now complain.

Liability for Costs

In *South Orange Trust Company v. Connor*[16] plaintiff sought foreclosure of a second mortgage which it claimed it held as an innocent purchaser for value. The referee and Circuit Judge found that the plaintiff was not an innocent purchaser. Although they allowed judgment in favor of the plaintiff, they taxed all costs against plaintiff. On appeal the Supreme Court held:

> Liability for costs in the Circuit Court in equity cases is generally controlled by the decision of the Circuit Judge, and the exercise of his discretion in such matters will not be interfered with except for clear abuse of discretion or for violation of some principle of law. The ordinary rule that costs must be taxed in favor of the prevailing party against the losing party, Section 10-1601 South Carolina Code of Laws of 1952, is not necessarily binding on the Chancellor and is only effective in equity cases when not otherwise ordered by the Court.

Re-opening Judgment[17]

In *Royal Liverpool Insurance Group v. McCarthy*[18] plaintiff had recovered judgment by default against an automobile dealer in an action for conversion of an automobile, and the defendant applied to the court to re-open the judgment. The application was granted by the lower court apparently on grounds of excusable neglect. The Supreme Court on appeal reversed the lower court and re-established

16. South Orange Trust Co. v. Connor, 228 S.C. 218, 89 S.E. 2d 372 (1955).

17. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-1213, provides: "The court may, in its discretion and upon such terms as may be just, at any time within one year after notice thereof relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect and may supply an omission in any form in any respect to the provisions of this Code the court may, in like manner and upon like terms, permit an amendment of such proceeding so as to make it conformable thereto."

18. Royal Liverpool Insurance Group v. McCarthy, 229 S.C. 72, 91 S.E. 2d 881 (1956).

the judgment on the ground that one of the prerequisites to the re-opening of a judgment is that the defendant must show at least *prima facie* that he has a meritorious defense. The court held that since the defendant had failed to make such a showing the lower court erred as a matter of law in allowing defendant to re-open.

In *Weathers v. Gary*[19] plaintiff sued for damages on the ground that defendant had sold plaintiff an ice-making machine which was unsatisfactory for the purpose. Summons and complaint were served April 15, 1953, defendant made no answer, and plaintiff was granted judgment by default June 26, 1953. Thereafter, the manufacturer of the ice-making machine, not a party to the proceedings, furnished plaintiff with a new ice-making machine which apparently also failed to give satisfaction. In January of 1954 plaintiff turned his judgment against defendant over to the Sheriff for execution. Subsequently, the Sheriff made a return *nulla bona*. On June 19, 1954, plaintiff secured an order for supplemental proceedings against the defendant on the judgment setting the hearing thereon for August 11, 1954. The hearing was continued, but on August 16, 1954, defendant notified plaintiff that he would move to set aside the judgment, re-open the case, file answer, and go to trial on merits. Defendant's motion to re-open was granted whereupon plaintiff appealed. The Supreme Court reversed the lower court saying:

> When a man has a case in Court the best thing he can do is attend to it with the amount of attention a man of ordinary prudence usually gives his important business . . . . . When the judgment was enrolled, knowledge thereof was imputed to defendant, and such adjudication ought not to be lightly set aside, and it cannot be set aside unless the method provided by Code Section 10-1213 is strictly followed. *An essential provision of this section is to apply for relief within one year.* (Emphasis)

Among the reasons given by the lower court for allowing the defendant in the above case to re-open was that plaintiff's acceptance of the second ice-making machine from the manufacturer in place of the first ice-making machine created in effect a novation between plaintiff and defendant. This was strongly criticized by the Supreme Court which said, "It was error for the Court to grant defendant relief which he neither sought nor was entitled to under his motion."

Again in *Antrum v. Hartsville Production Credit Association*[20] the Supreme Court affirmed the order of the lower court denying

19. Weathers v. Gary, 228 S.C. 105, 88 S.E. 2d 871 (1955).
20. Antrum v. Hartsville Production Credit Association, 228 S.C. 201, 89 S.E. 2d 376 (1955).

defendant the right to re-open and have set aside a foreclosure sale and have the deed to the purchaser cancelled when plaintiff's petition therefor was filed four years after the original decree in foreclosure.

Venue

In *Witherspoon v. Spotts and Co.*[21] an action for death was brought in Clarendon County against Hunter, a resident of Lancaster County, and Sharpe Construction Company of Clarendon County. Hunter moved to change the venue to the County of his residence, contending that Sharpe was an immaterial defendant joined only to retain venue in Clarendon County. The lower court found as a fact that Sharpe was an immaterial defendant and ordered venue changed to Lancaster County. Plaintiff appealed this order on the ground that Hunter, having answered generally before moving to change venue, had waived his right to do so. The Supreme Court overruled this contention to follow its prior decision in *Brown v. Palmetto Baking Company,*[22] "That answer in an action does not constitute waiver of the right to remove a case to the proper County for trial." The court also held that the lower court's findings that Sharpe was an immaterial defendant would not be disturbed on appeal absent manifest error.

In *Simmons v. Cohen*[23] plaintiff sued three defendants, one a resident of New York, one a resident of Charleston County and one a resident of Colleton County, for an automobile collision which occurred in Charleston County, some thirty-one miles from the Charleston County Court House and seventeen miles from the Colleton County Court House. The Colleton defendant moved before the lower court to change the place of trial to the county of his residence on the ground that this would tend to promote the ends of justice and the convenience of witnesses, and also on the ground that the Charleston defendant was joined solely for the purpose of retaining venue in Charleston County. The trial Judge overruled the motion on the grounds that convenience of witnesses, etc., would be better served by retaining venue in Charleston County, and the Supreme Court, on appeal, held that the trial Judge had properly exercised his discretion and that his ruling would not be upset unless the appellant showed that the court had committed a manifest abuse of sound judicial discretion, which the appellant had not shown.

21. Witherspoon v. Spotts and Co., 227 S.C. 209, 87 S.E. 2d 477 (1955).
22. Brown v. Palmetto Baking Co., 220 S.C. 38, 66 S.E. 2d 417 (1951).
23. Simmons v. Cohen, 227 S.C. 606, 88 S.E. 2d 679 (1955).

Beard v. Billups Petroleum Co.[24] is an interesting decision on what will, or will not, "promote the ends of justice" as that ground is included in the venue statute. This suit, for malicious prosecution, was originally brought in Richland County for a cause of action which arose in Aiken County, in which latter County all of the proposed witnesses save one non-resident of this State resided. The lower court denied the Motion to change the venue to Aiken County on grounds that a speedier trial could be had in Richland County which would tend to "promote the ends of justice". The Supreme Court reversed the lower court holding that although rulings of the trial court on questions of venue ordinarily lie within that court's sound judicial discretion and thus will be reversed only for manifest error, nevertheless, the prospect of a speedier trial in Richland County did not outweight the showing that the convenience of witnesses in this case would have been better served by a trial in Aiken County. The court also adverted to the rule that it was desirable that a jury of the vicinage pass upon the creditability of witnesses, all but one of whom resided in Aiken County.

In *Holden v. Beach*[25] a resident of Kershaw County brought suit in that County for injuries received on a carnival ride at Myrtle Beach, in Horry County, against the defendant who resided in the latter County. The defendant moved for, and was granted, a change of venue from Kershaw County to Horry County on the grounds that the accident and the ride which caused it were in Horry County and trial in that County would serve the convenience of witnesses and promote the ends of justice. The lower court granted the motion and was sustained by the Supreme Court which held that trial in place of residence was a valuable right of the defendant, and that although the convenience of plaintiff's witnesses might be better served by trial in Kershaw County that of defendant's witnesses would be better served in Horry County. The trial Judge's ruling thereon did not manifest an abuse of sound discretion, hence would not be disturbed.

In *Melton v. Melton*[26] the plaintiff instituted this proceeding against his former wife (whom he had already divorced) to have their marriage annuled on the grounds that she fraudulently concealed certain facts from him prior to marriage which would have prevented his marrying her had he known them. Action was brought in Greenville County, where the parties had lived as husband and wife, but

24. Beard v. Billups Petroleum Co., 228 S.C. 481, 90 S.E. 2d 685 (1955).
25. Holden v. Beach, 228 S.C. 234, 89 S.E. 2d 433 (1955).
26. Melton v. Melton, 227 S.C. 183, 87 S.E. 2d 485 (1955).

respondent applied for and was granted a change of venue to Anderson County, the place of her residence for many years.

The husband appealed, contending that the CODE OF LAWS OF SOUTH CAROLINA, 1952, § 10-301, required that the action be tried in Greenville County because the "subject of the action" (not explained) lay there. The Supreme Court overruled this contention and held that the instant proceeding did not fall within those categories set out in Section 10-301, but rather was controlled by Section 10-303 that "In all other cases the action shall be tried in the County in which the defendant resides at the time of commencement of the action."

In *Packet Delivery Co. v. State Motor Lines*[27] suit was brought in Charleston County against a domestic motor carrier whose headquarters was in Darlington County, for an accident which occurred in Williamsburg County. Defendant moved for and was granted a change of venue from Charleston to Darlington County on the grounds that it had no place of business, property or agent in Charleston County, and its principal place of business was in Darlington County. The Supreme Court reversed the lower court to return the case to Charleston County, holding that in suits against domestic motor carriers venue is controlled by CODE OF LAWS OF SOUTH CAROLINA, 1952, § 58-1470 providing: "An action may be brought against a motor carrier licensed under article three of this chapter in any county through which the motor carrier operates." The Supreme Court held that this Code Section supersedes all others relating to venue so far as domestic motor carriers are concerned.

In *Hopkins v. Sun Crest Bottling Co.*[28] the court had occasion to consider a different statute affecting the place of suit against ordinary domestic business corporations. Thus the Supreme Court held that a domestic corporation could not be sued in a County where it did not transact business and own property under a Code Section allowing suit against a domestic corporation and conferring jurisdiction therein "In any County where such domestic corporations shall own property and transact business."[29] There apparently was no question that the defendant bottling company transacted business in Darlington County, but the case turned on the question of whether or not it owned any property in that County. It was conceded that defendant owned certain empty bottles and crates in

27. Packet Delivery Co. v. State Motor Lines, 228 S.C. 336, 89 S.E. 2d 922 (1955).
28. Hopkins v. Sun Crest Bottling Co., 228 S.C. 287, 89 S.E. 2d 755 (1955).
29. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-421.

the hands of retailers in Darlington County which were picked up and regularly exchanged from time to time. The court held that these articles had not such a permanent situs in Darlington County as would permit suit against the defendant there. "It was never the intention of the Legislature that property so transitorily in the County should be considered the ownership of property therein, within the meaning of Section 10-421."

Voluntary Nonsuit

In *Caulder v. Skipper*[30] the plaintiff before trial in the State Court moved for voluntary nonsuit without prejudice which was resisted by the defendants and denied by the lower court. Defendants opposed the granting of the nonsuit on the ground that they were entitled to a speedy trial since the pending suit was injuring their business; that one of the defendant's principal witnesses might not be available at a later date; that the plaintiff was dismissing the action in the State Court for the purpose of moving to another State so that he could reinstitute the action in the Federal court which would deprive certain defendants of the right of trial in their home County, and finally that certain of the defendants were planning to sell their business and the sale could not be negotiated until the suit was disposed of. The Supreme Court reversed the lower court and entered an order of nonsuit without prejudice on the ground that:

> The true rule is that a voluntary nonsuit should be granted in the absence of a showing of *legal prejudice* to the defendants, and the discretion of the hearing Judge thereabout is brought to play only upon a showing that legal prejudice would result from the granting of the motion for a nonsuit.

The court decided that the objections of the defendant did not establish "legal prejudice", which was not created merely by the fact that defendants might be subjected to another suit.

Appealability of Orders

In *Smith v. Traxler*[31] the trial Judge granted a non-suit and later on application of the plaintiff, set aside his order of non-suit to grant a new trial on ground that there had been evidence for the jury's consideration. The defendant appealed from the order granting the new trial, which plaintiff contended was not appealable.

30. Caulder v. Skipper, 228 S.C. 606, 91 S.E. 2d 321 (1956).
31. Smith v. Traxler, 228 S.C. 418, 90 S.E. 2d 482 (1955).

The Supreme Court reversed the order granting a new trial and re-established the order of non-suit holding:

> The Court granted a non-suit upon the legal ground that the evidence was insufficient to warrant submission of the case to the jury. It was not granted because of some failure of proof which might be supplied upon another trial, but upon the ground that the evidence introduced affirmatively showed plaintiff was not entitled to recover. Plaintiff could have appealed from the order granting this non-suit. If he had, the issue before this Court on such an appeal would have been whether there was sufficient evidence to warrant submission of the case to the jury, which is precisely the question now before us. Instead of appealing directly to this Court, plaintiff sought to remedy the alleged error by a motion for a new trial. The trial Judge granted this motion because he conceived that error at law had been committed in granting a non-suit.

The court then held that where the granting or refusal of a new trial was based solely on an error at law, the order therefor was appealable, but if it was based upon a question of fact or one of law and fact, the order would not be appealable. The court held that when a new trial was granted because the trial Judge believed he had erroneously granted a non-suit or a direction of verdict, his order would involve a question of law and would be appealable, and it held that the facts of this case distinguished it from the earlier decision of *Agnew v. Adams*[32] relied upon by defendant.

Additional Sustaining Grounds

In *Johnson v. Life Insurance Company of Georgia*[33] the corporate defendant had moved for and been granted judgment *non obstante veredicto* by the lower court. On appeal it submitted as additional sustaining grounds for the judgment *non obstante veredicto,* an objection which it had urged only in support of its alternative motion for new trial in which the lower court had not ruled. The Supreme Court said:

> This contention is not appropriate under Section 7 of Rule 4 as an additional ground 'upon which this Court will be asked to sustain the rulings or judgment below' for it relates in fact to the corporate respondents' alternative motion for a

32. Agnew v. Adams, 24 S.C. 86 (1885).
33. Johnson v. Life Insurance Company of Georgia, 227 S.C. 351, 88 S.E. 2d 260 (1955).

new trial, upon which the lower Court did not rule. We shall consider it, therefore, not under the rule, but in relation to the further proceedings for which the case must be remanded.

Exceptions

Supreme Court Rule No. 4, Section 6,[34] provides:

> Each exception must contain a concise statement of one proposition of law or fact which this Court is asked to review, and the same assignment of error should not be repeated. Each exception must contain within itself a complete assignment of error, and a mere reference therein to any other exception then or previously taken or request to charge, will not be considered. The exceptions should not be long or argumentative in form.

In all affection I cannot resist the temptation to comment that the Supreme Court in its application of this rule to cases before it, reminds me of a story told on a prominent Columbian, who, when he was asked if he attended Church regularly, replied "Sometimes." However, I do not suggest that the practitioner test the leniency of the court by disregarding this rule — he might "get religion" the hard way.

The Supreme Court applied Rule 4, Section 6, in *Scott v. Independent Life & Accident Insurance Company,*[35] characterizing an exception as "Entirely too general, vague, and indefinite to be considered . . ." which charged "His Honor erred, it is respectfully submitted, in holding that a cause of action had been stated in the Complaint." The court conceded that on occasion it waived enforcement of the Rule, saying:

> In the *Brady* case[36] we waived the breach of the rule and considered the exception because it was found to embrace a meritorious assignment of error. In some instances, however, we have absolutely refused to consider exceptions framed in violation of the rule.

In *Brown v. Hill*[37] appellant's second exception was:

> The Court erred in failing to grant appellant's motion for a

34. CODE OF LAWS OF SOUTH CAROLINA, 1952 Vol. 7, p. 429.
35. Scott v. Independent Life & Accident Insurance Co., 227 S.C. 535, 88 S.E. 2d 623 (1955).
36. Brady v. Brady, 222 S.C. 242, 72 S.E. 2d 193 (1952).
37. Brown v. Hill, 228 S.C. 34, 88 S.E. 2d 838 (1955).

new trial on the grounds stated in such motion, it being submitted:

(a) That it was error to refuse the requests to charge by appellant No. 6, 8 and 9 as expressly set forth in the motion by appellant . . .

(c) That the verdict of the jury was contrary to the evidence and the law.

The Supreme Court said "this exception does not comply with the requirements of Rule 5, Section 6 of this Court, and might for that reason be disregarded . . . We have considered it, however, and find it without merit." The Court then disposed of subdivision (a) of this exception on its merits, but said "Subdivision (c) is too general to be considered."

In *Shea v. Glens Falls Indemnity Co.*[38] the Supreme Court observed that an exception (not quoted) which charged that the lower court erred in admitting testimony concerning plaintiff's financial status, and in refusing to instruct the jury that such evidence should in no way affect their verdict, violated Rule 4, Section 6, because it stated more than one proposition of law or assignment of error.

Review of Damages

Johnson v. Life Insurance Company of Georgia[39] was a suit for slander against an insurance company and its agent. When a verdict was rendered against both defendants for $25,800 actual damages and $10,000 punitive damages the trial Judge granted judgment notwithstanding the verdict for the corporate defendant and granted a new trial to the individual defendant unless plaintiff remitted $8,500 of the verdict for actual damages and all of the verdict for punitive damages. The plaintiff appealed, and the Supreme Court held that although it found no error in the trial Judge's ruling as to actual damages, that he did commit error in requiring plaintiff to remit *all* punitive damages where the suit charged slander *per se*. The cause was remanded to the lower court for its further consideration of the excessiveness of both actual and punitive damages, the Supreme Court saying:

The trial Judge has wide discretionary power to reduce the amount of a verdict which in his opinion is excessive, and his judgment, in the exercise of that power, will rarely be dis-

38. Shea v. Glens Falls Indemnity Co., 228 S.C. 173, 89 S.E. 2d 221 (1955).
39. Johnson v. Independent Life & Accident Insurance Co., 227 S.C. 351, 88 S.E. 2d 260 (1955).

turbed . . . . . But this power has its limitations, and does not extend to striking down *in toto* a verdict which has support in the evidence.

Turner v. Carey[40] is rather involved in its facts. Plaintiff brought suit against defendant alleging defendant had fraudulently sold him a defective house, demanding reimbursement of all sums paid by plaintiff, including payments on a second mortgage to defendant, and offering to return the house. Later in another proceeding the holder of the first mortgage on the house brought foreclosure against plaintiff as mortgagor and the present defendant as second mortgagee and in that proceeding the amounts owed under the first and second mortgages were established, the property was sold, and a deficiency judgment was entered in favor of the present defendant against the plaintiff for the amount of the second mortgage. There was no appeal by plaintiff from the foreclosure proceedings nor from the order wherein plaintiff's application to consolidate the present proceeding with the foreclosure proceeding, was denied.

Thereafter the instant case came on to trial, and the jury brought in a verdict of $4,265 for the plaintiff. The plaintiff's counsel then moved for a determination of whether or not the jury's verdict in this case took into consideration and eliminated the prior deficiency judgment against plaintiff which defendant had secured in the foreclosure proceeding. The trial Judge held that since fraud was found in the instant proceeding, the transaction on which the deficiency judgment was based had been vitiated, and accordingly he ordered that the deficiency judgment be satisfied and plaintiff's judgment in the amount of $4,265 against the defendant be allowed to stand.

The defendant appealed this order to the Supreme Court which held:

> The trial Judge clearly erred in holding that the verdict for damages in a tort action for fraud and deceit vitiates any contract which a purchaser has been fraudulently induced to enter. It is true that a judgment in an action for rescission or to set aside a transaction for fraud would ordinarily have that effect, but the bringing of an action for damages for fraud and deceit is an affirmation of the contract entitling the injured party, if fraud is shown, to recover such damages in the tort action as will compensate him for any loss sustained. It was upon this theory that the instant case was tried . . . . . If the trial Judge felt that the verdict was inadequate, or against the

40. Turner v. Carey, 227 S.C. 298, 87 S.E. 2d 871 (1955).

> greater weight of the evidence, he was empowered to set it aside and grant a new trial, but he could not invade the province of the jury and substitute his verdict for theirs. (Omission mine)

In *Mock v. Atlantic Coast Line Railroad Company*[41] the defendant appealed from the order of the lower court denying it a new trial on the basis of excessive damages where the jury awarded $50,000 actual and $15,000 punitive damages for the death of a twelve year old boy. The Supreme Court held that although the verdict was very large, it was not so excessive as to indicate that the trial Judge abused his discretion in not granting a new trial. The court held that it would not exercise its power to strike down the judgment of the lower court except, "in those rare instances in which the amount of the verdict is so shockingly excessive as manifestly to show that the jury was actuated by passion, partiality, prejudice, or corruption."

In *Jackson v. Solomon*[42] defendant appealed from the award of damages for injuries in an automobile collision which the trial Judge had cut from $36,000 to $29,000 by order granting a new trial *nisi*. In such order the Judge had stated that the amount of the verdict did not indicate caprice, prejudice, or passion.

The Supreme Court held that although it believed the verdict to be high that it was not so excessive as to indicate prejudice, caprice, passion, etc., such as to require that the Supreme Court set it aside *in toto* and grant a new trial.

Review of Findings of Lower Court

In *Seagle v. Montgomery*[43] the Court said:

> The issue of title by adverse possession being one of law, our factual review of it is limited to determination of whether there was any evidence reasonably sustaining the judgment of the lower Court.

In *Frazier v. Frazier*[44] a divorce proceeding, the court held that the finding of the trial Judge:

> will not be disturbed unless it appears that such findings are without evidenciary support or are against the clear preponderance of the evidence.

41. Mock v. Atlantic Coast Line Railroad Co., 227 S.C. 245, 87 S.E. 2d 830 (1955).
42. Jackson v. Solomon, 228 S.C. 225, 89 S.E. 2d 436 (1955).
43. Seagle v. Montgomery, 227 S.C. 436, 88 S.E. 2d 357 (1955).
44. Frazier v. Frazier, 228 S.C. 149, 89 S.E. 2d 225 (1955).

> It is the established law in this state that in an equity case, this Court may reverse the findings of fact of a Circuit Judge or a Judge of a county Court, when the appellant satisfies this Court that the preponderance of the evidence is against the finding of the lower Court.

The court has held that findings of a master concurred in by a Circuit Judge are not reviewable *in a law case* if there is evidence to sustain them, but are reviewable *in an equity case* where such findings are against the clear preponderance of the evidence. *Carolina Savings Bank v. Ellis.*[45] Thus in the first instance the court may look only to see whether there is any evidence to sustain the findings, but in the second instance it may go further and weigh the evidence making its own finding despite evidence to the contrary.

In *South Orange Trust Company v. Conner*[46] the Supreme Court refused to set aside the finding of the referee concurred in by the Circuit Judge that appellant was not an innocent purchaser for value of the note and mortgage which it sought to foreclose, on the ground that there was ample evidence to sustain such findings. Also in *Maxwell v. Smith,*[47] the Supreme Court held that the preponderance of the evidence sustained the concurrent findings of Master and Circuit Judge as to respondent's alleged *laches* and therefore such findings would not be disturbed on review. See also *Graves v. DuBose*[48] where the Supreme Court declined to set aside concurrent findings of Master and Circuit Judge in a case where the plaintiff brought ejectment proceedings against the defendant who resisted on the ground that he was her common law husband.

Review Where Objections Not Timely Made

In *Goolsby v. Goolsby*[49] the Supreme Court observed:

> Incidentally, an objection to testimony taken by a referee (Master) must be made before him, as it was in this case, it comes too late if first made by exception to his report. [Citing *Tompkins v. Tompkins,* 18 S.C. 1 (1882); *Cardwell v. Brewer,* 19 S.C. 602 (1883)].

Review of Points Not Raised Below

The Supreme Court reiterated the principle that issues not raised or argued before the lower court could not be considered on appeal

45. Carolina Savings Bank v. Ellis, 174 S.C. 69, 176 S.E. 355 (1934).
46. South Orange Trust Co. v. Conner, 228 S.C. 218, 89 S.E. 2d 372 (1955).
47. Maxwell v. Smith, 228 S.C. 182, 89 S.E. 2d 280 (1955).
48. Graves v. DuBose, 229 S.C. 123, 92 S.E. 2d 134 (1956).
49. Goolsby v. Goolsby, 229 S.C. 101, 92 S.E. 2d 57 (1956).

by the Supreme Court except matters relating to jurisdiction. *Reno v. Manufacturers and Jobbers Finance Corporation*[50].

Thus in an appeal by the defendant from the order of the lower court denying it additional time in which to answer, the Supreme Court in the case of *Morgan v. State Farm Mutual Insurance Company*[51] refused to consider the applicability of a statute doubling the time where service is made by mail for the reason that the appellant had not raised or argued the applicability of the statute before the lower court.

However in *Maxwell v. Smith*[52] the appellant for the first time on his appeal to the Supreme Court questioned the jurisdiction of the Richland County Court to enjoin him from the violation of certain restrictive covenants on real estate. The Supreme Court held:

> It is of course immaterial that the jurisdictional issue was not raised in the lower Court, for it is elementary that the trial Court's jurisdiction of the subject matter may be questioned for the first time upon appeal. But we find no merit in appellant's contention here.

The court then decided that the monetary limitation imposed on the Richland County Court did not effect its jurisdiction in cases such as that.

Waiver of Objection

In *Wright v. Gilbert*[53] plaintiff brought suit for false imprisonment against defendants. On appeal, the Supreme Court declined to rule whether or not the lower court erred in admitting certain testimony as to plaintiff's state of mind, on the grounds that the defendants by cross examining on the subject without reservation of their objection, and also by introducing evidence thereon had waived their objection to the testimony.

In another case, the Supreme Court had occasion to consider the question of whether or not the parties had waived their objection to the jurisdiction of the court over their persons. In *H. S. Chisholm, Incorporated v. Klinger,*[54] the Supreme Court, affirming the lower court's holding that it had jurisdiction of the defendants, said:

> There is another compelling reason to sustain the lower Court.

50. Reno v. Manufacturers, etc., Finance Corp., 222 S.C. 401, 73 S.E. 2d 277 (1952).
51. Morgan v. State Farm Mutual Insurance Company, 229 S.C. 44, 91 S.E. 2d 723 (1956).
52. Maxwell v. Smith, 228 S.C. 182, 89 S.E. 2d 280 (1955).
53. Wright v. Gilbert, 227 S.C. 334, 88 S.E. 2d 72 (1955).
54. H. S. Chisholm, Inc. v. Klinger, 229 S.C. 8, 91 S.E. 2d 538 (1956).

'A voluntary appearance of a defendant is equivalent to personal service of the summons upon him.' Code 10-406.1. As the above advertences to the record show, appellants first appeared to contest the jurisdiction of the Court because service upon them was outside of the State. Upon the overruling of that and reference to the Master they appeared before him, participated generally in the reference without reservation, and contested the action on the merits, moved to dismiss on the merits, and thereafter belatedly made the presently argued point that they should have been served with summons rather than Rule to Show Cause. The question of jurisdiction of their persons was waived by appellants under all of these circumstances.

The court went on to hold that the appellants had utterly failed to conform to the procedure required of a defendant who would preserve a jurisdictional question after adverse ruling upon it, citing CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-648 *et seq.* See also, *South Carolina State Highway Department v. Isthmian S. S. Co.*[55]

In *Royal Crown Bottling Co. v. Chandler*[56] the Supreme Court held that the defendant resident of Richland County did not waive his right to move for change of venue to the County of his residence because he had previously consented that the place of venue be fixed by the Court in Greenville County at a time when a resident of Greenville County was a co-defendant. When the Greenville resident was eliminated as a co-defendant the Supreme Court held that it was proper for the Richland County defendant to move for change of venue to Richland County.

Where the answer alleged plaintiff was a wealthy man and plaintiff had not moved to strike such allegation, the Supreme Court held in *Shea v. Glens Falls Indemnity Co.*[57] that plaintiff waived his right to object to the trial court's admission of testimony on the subject.

The court held that if appellant conceived it improper that evidence be admitted as to his wealth, he should have availed himself of the remedy provided by CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-606, providing: "If irrelevant or redundant matter be inserted in a pleading it may be stricken out on motion of any person aggrieved thereby." The Court held:

55. South Carolina State Highway Department v. Isthmian S. S. Co., 210 S.C. 408, 43 S.E. 2d 132 (1947).
56. Royal Crown Bottling Co. v. Chandler, 228 S.C. 412, 90 S.E. 2d 489 (1955).
57. Shea v. Glens Falls Indemnity Co., 228 S.C. 173, 89 S.E. 2d 221 (1950).

> The appellant is not now in position to complain that the evidence introduced concerning his wealth was objectionable, he having made no motion to strike this allegation from the answer. This court has in numerous cases held that it is not error to admit testimony in support of irrelevant allegations where there is no motion to strike out such allegations . . .

Dismissal of Appeal

In *Pee Dee Farms Corporation v. Johnson*[58] defendant, after having served Notice of Intention to Appeal from an Order directing a verdict for the plaintiff, failed to perfect Appeal. Plaintiff moved before the Circuit Judge to dismiss the Appeal, and the Appeal was dismissed. The Supreme Court said:

> It is unquestionable that under the rules of the Circuit Court and of this Court, that the Court below had jurisdiction to entertain motions to dismiss where the noticed Appeal had not been perfected. (The Court then cited certain statutes and decisions) . . . the last named case holding that where a case and exceptions are not filed as required by Rule 49 of the Circuit Court, that the Circuit Court should dismiss the Appeal. See also, *McDonald v. Palmetto Theatres,* 196 S.C. 38, 11 S.E. 2d 444, to the effect that after an Appeal is perfected and docketed under Rule 1 of this Court, the Circuit Court's jurisdiction ceases, the implication being clearly that before perfection and docketing the circuit court has jurisdiction.

58. Pee Dee Farms v. Johnson, 227 S.C. 396, 88 S.E. 2d 254 (1955).