South Carolina Law Review

Volume 11
Issue 5 *SPECIAL ISSUE 3-A*

Article 20

Spring 1959

Appellate Practice

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but the interest of all will be properly protected and maintained.' "

The *Faber* case, quoted from in the *Evans* case should be carefully read before applying Section 10-205.

APPELLATE PRACTICE

This subject covers a wide field and it is suggested to young practitioners that they read carefully Title 7, Vol. 1 of the 1952 Code from page 355 through page 401. Since appeal now is mostly statutory in this State, to be familiar with the foregoing provisions gives one a practical foundation for appellate work. At the same time a thorough checking of the annotations thereunder must not be lost sight of and every Section should be brought up-to-date by reference to the latest Code Supplement.

However, it should be noted that in dealing with any particular tribunal one cannot safely go by the Sections included in Title 7, Vol. 1, since the legislature in some other Section relating to a particular tribunal may have entirely changed the course of appealing. Take for example Sections 7-341 to 7-344, which provide for the right of appeal from a county court to the circuit court. That Section is applicable generally to county courts unless a special provision as to the right of appeal is found in one of the Sections establishing a particular county court. Such Sections exist and take the place of Sections 7-341 to 7-344. For example, Sections 15-779 and 15-830 provide, respectively, that the right of appeal from the Richland and Spartanburg County Courts shall be direct to the Supreme. All the Sections relating to other county courts must be carefully checked as to the right of appeal, just like each such court must be checked as to its jurisdiction, entry of its judgments and various other phases or steps that can seriously affect the rights of one's client.

It is also very important to know Rules of the Supreme Court 1 to 29 and 33, and to be familiar with the annotations thereunder. Each Supplement to Vol. 7 of the Code relative to such Rules should always be checked carefully to see if any changes have been made and also that one may become familiar with the up-to-date annotations construing and applying the rules.

It should be noted that not only Rules of the Supreme Court but also Rules 49 and 50 of the Circuit Court come into the appellate picture. The syllabus in *State v. Cottingham* (1953), 224 S. C. 181, 77 S. E. 2d 897, gives one a clear idea of what is now necessary to properly get an appeal before the Supreme Court. There one finds as follows:

> Where solicitor's affidavit, declaring that transcript of record for appeal had not been timely filed, was before trial court on motion to dismiss, and transcript of trial had never been requested by appellants of official stenographer, dismissal of appeal was proper, even in absence of certificate of clerk that transcript of record for appeal had not been filed. Code 1952, §§ 7-401 et seq., 7-409; Rules of Supreme Court, rule 1 et seq.; Rules of Practice for Circuit Court, rules 49, 50.

That case clears away the fog that existed prior thereto as to whose function it is to dismiss an appeal which has not been timely perfected and filed and also that four days notice is now all that is necessary instead of the former time limit of ten days. One who is preparing an appeal should read the case thoroughly.

What is Appealable? The common law allowed no review by a higher court via writ of error unless a judgment was final. An interlocutory judgment — one that only finally decided a certain phase of a case — was not reviewable. That has now been changed by statute or rule of court in many jurisdictions, one of which is South Carolina Section 15-123 which provides for 4 kinds of intermediate or interlocutory judgments from which an appeal may be taken. As to what these are, five pages of annotations fully cover the subject, and should be carefully read.

The rule in South Carolina used to be as shown by *Hamer v. Hillcrest Land Co.* (1932), 165 S. C. 298, 163 S. E. 727, wherein it was held: " '. . . that there could be no appeal from a verdict merely; that there must be a judgment.' " That was the law in this State until Section 7-5 was passed in 1934. That Section allows an appeal to be taken from a verdict though there is no judgment based thereon. In *McCants v. W. Va. Pulp etc. Co.* (1953), 223 S. C. 467, 76 S. E. 2d 614, one finds the following at page 469:

> Appellant cites and relies upon decisions which were rendered before enactment of the present Sec. 7-5 of the

Code of 1952. Under it, if the order of the Court of Common Pleas should be likened to a verdict, it was at once appealable and, having served notice of appeal to this court, appellant was bound to proceed upon the schedule which is fixed by the statutes governing such appeals.

The following helpful quotation is from the opinion in *Spartan Mills v. Law,* 186 S. C. 61, 194 S. E. 653, 655: "This appeal is from a decree in equity and is a final determination of the rights of the parties. The decree of Judge Sease orders judgment for the respondents, which decree is a judgment. 'The judgment issues from the court not from the attorneys or the clerk.' *Clark v. Melton,* 19 S. C. 498. *As stated in the Sherbert case,* [*Sherbert v. School District*], *supra* [169 S. C. 191, 168 S. E. 391], respondent's point is more technical than substantial. Supreme Court rule 4, par. 3, provides that the 'nature of the order of judgment appealed from' should be set forth, but the rule does not provide that the entry of the judgment is required. Nor does section 781, Code of Laws of 1932 [now Section 7-405], require the entry of the judgment, but only refers to 'an order, decree or judgment granted or rendered.' The entry of a judgment is merely a ministerial act and for the purposes of notice, lien, and enforcement."

Attention is also called to the fact that statutory appeal such as exists in American jurisdictions, including South Carolina, is entirely different from appeal in the old English set-up, which was of civil law origin. Then it was a review only in equity and the cause was heard on its merits de novo, i.e., evidence was taken and the appellate court decided all factual issues again; in other words the cause was tried de novo.

Statutory, or code appeal as it is sometimes called, provides for review in both law and equity cases. In a law case, like the old common law writ of error, appeal now is only for correcting errors of law. It also provides for review of an equity case but with a modification of old equity appeal, in that, though the appellate tribunal can pass on issues of fact as well as law, and reverse findings of the chancellor, it cannot re-try the cause on the merits by having evidence adduced before it, i.e., it does not try it over again.

Statutory Appeal in Equity Case: It should also be noted that the South Carolina Supreme Court cannot even review findings of fact in equity cases when, under Section 10-1457, issues have been submitted to a jury under Circuit Rule 28, not for mere enlightenment of the court, but for their determination, and their verdict has not been set aside. See also Art. 5, Section 4 of the Constitution of 1895. When it has not been set aside, the appellate review is then like that in a law case and only errors of law can be considered. Section 15-122.

Under Sections 10-1057 and 10-1457, when applied in connection with Circuit Court Rule 28 and Art. 5, Section 4 of the 1895 Constitution, one should be familiar with the decision in *Johnstone v. Matthews* (1937), 183 S. C. 360, 191 S. E. 223, and also *In re Nightingale's Estate* (1937), 182 S. C. 527, 189 S. E. 890. As said in the *Johnstone* case at page 366:

> But we are of opinion, and so hold, that the provision of Section 593 of the Code as to the force of the verdict, here relied on by the appellants, can only mean under the plain language used, that when issues of fact in equity cases are framed under that section to be tried by a jury, and such issues are submitted to them and findings thereon are made by them under the statute, such findings, if there is any evidence to support them, are conclusive of the issues submitted; and the presiding Judge, in such case, can only affirm the verdict or set it aside and order a new trial. In his discretion, however, he may, during the course of the trial, and before such findings are made, withdraw the case from the jury and decide the issues for himself; or, instead of withdrawing them, he may have the jury, should he so desire, to make findings upon the issues as framed for his aid and enlightenment in determining the judgment to be rendered. And this last is what Judge Rice here did. The defendants made a motion, before and at the conclusion of the testimony, that the Judge withdraw the case from the jury, on the ground of entire failure of proof by the plaintiffs, and write an order sustaining the validity of the mortgage and dismissing the complaint. He declined to do this, but stated, in substance and effect, that he would submit the case to the jury for the information of the Court, and that he would not be bound by their verdict. Also, in his charge to the jury, he indicated to them that their findings on

> the issues submitted would be merely to assist him in arriving at the truth, but that the decree of the Court would declare what the truth was. Clearly, as we have said, Judge Rice, instead of withdrawing the case from the jury, as in his discretion he could have done, had them to make findings upon the issues before them merely for the enlightenment of his conscience. This he could do. There was no error, therefore, in his refusal to accept their findings and in rendering judgment contrary thereto.

Where, however, issues are submitted to a jury for their final decision and not for the enlightenment of the chancellor, their decision or verdict is conclusive as in a law case and an appeal to the Supreme Court can be only on errors of law and not on the facts.

And *Young v. Levy* (1945), 206 S. C. 1, 32 S. E. 2d 889, leaves no doubt as to the applicable rule. At page 11 Justice Stukes declared:

> I do not question the authority of *Alderman v. Alderman,* 178 S. C., 9, 181 S. E., 897, 105 A. L. R., 102, upon the point of the propriety of the rule there stated and applied, to wit, that concurrent factual findings of the master and trial Judge in an equity case will not be disturbed upon appeal unless they are without evidence to support them or are against the clear preponderance of the evidence. It is a coincidence that I was of counsel in that case and argued for the rule which was already well established by prior decisions. The case has since been cited too many times to admit doubt of its authority. But this rule of the decisions ("court-made law") should not be so construed as to conflict with the constitutional powers and duties of this Court. The latter are set forth in considerable detail in our Constitution of 1895, Art. 5, and I quote in part Section 4: "And said Court shall have appellate jurisdiction only in cases of chancery, and in such appeals they shall review the findings of fact as well as the law, except in chancery cases where the facts are settled by a jury and the verdict not set aside, and shall constitute a Court for the correction of errors at law under such regulations as the General Assembly may by law prescribe."

In South Carolina a foreclosure decree usually settles all the rights of the parties and leaves nothing to be done but to make a sale and dispose of the proceeds in accordance with the decree. The sale is the execution of the decree and therefore only a ministerial act. The right of review exists when the decree is signed.

Record in Clerk's Office should Always Show Jurisdiction of a Limited Court: However, it should be noted that, in the final disposition of a foreclosure action, it is best that the record in the clerk's office be completed and should always show the final disposition of the cause under the decree, and hence the careful practitioner will get the chancellor, now referred to as judge, to sign an order confirming the sale and disposition of the proceeds. This is then filed with the clerk and becomes a part of the record in the clerk's office. This would also apply in claim and delivery actions, where the value of personal property can affect jurisdiction. This would be especially true of county courts; as is shown, for example, by Sections 15-654 and 15-764.

In this connection another sugestion can save future trouble. In cases involving land and the value thereof, courts of limited jurisdiction, such as county courts, have value limitations under which their jurisdiction, or power to hear and determine, depends. So that there will be no doubt in the record in the clerk's office, one should always see to it that such value is established the very first thing in the trial and that the judge signs an order stating the value, so that there will be something which can go to the clerk's office to get on the journal or minutes of the court, since nothing in the stenographer's notes ever goes to that office.

The writer recalls a foreclosure case in the early days of the Richland County Court in which the judge noticed that the mortgage debt was $2700. The jurisdiction of the court couldn't then exceed $3000. He at once asked for evidence as to value of the mortgaged land. It was very conflicting, ranging from $2500 to $3400. He decided that it was not over $3000, dictating his decision to the court stenographer but signing no order to that effect, as neither attorney presented any such order for his signature. The case was then referred to the Master. A decree was finally signed and the land sold to satisfy the debt.

Three years thereafter a prospective purchaser of the land, through his attorney, turned down the title on the ground that the foreclosure deed was void because the land at that time was worth over $3000 and therefore the court had no jurisdiction. The court stenographer had destroyed his notes; there was no order signed by the judge on record in the clerk's office, so the matter was open to the vagaries of human testimony, since at most there was only the probability that there existed a prima facie presumption that a court of limited jurisdiction had the power of foreclosure over that particular piece of land.

There is a conflict of authority in America as to whether there is such a prima facie presumption, or, if there is, whether it becomes conclusive if the record doesn't show a lack of jurisdiction. 21 C. J. S., pages 149 to 154. See *Alloqui v. Duran,* (Tex.), 60 S. W. (2) 808. South Carolina has not directly decided the question, but *Moore v. Moore* (1938), 187 S. C. 144, 197 S. E. 507, leads one to the conclusion that, if the point is raised during the trial, the *record had better show* what the decision was, especially if it be in favor of the court's jurisdiction.

Fortunately, however, in the instant case, the attorneys agreed that if the judge would sign an affidavit that at the time of foreclosure he had, upon evidence taken in court, decided the land was valued at not over $3,000, the title would be passed. The affidavit was signed and the sale went through but look at what the result might have been, had the attorneys not agreed as they did, in view of another attorney's oversight 3 years previously.

What Orders are Reviewable and What are Not: Here one finds either statutes or rules of court functioning, and also a resulting conflict of authority in interpreting and applying the same. With regard to Section 15-123 of the Code, the differences are such that the only safe course is to check the annotations thereunder. One finds that an order involving the merits is really one affecting a substantial right and vice versa. *Blakely and Copeland v. Frazier,* 11 S. C. 123 (1877), and *Henderson v. Wyatt* (1876), 8 S. C. 112.

As pointed out in the *Blakely* case, *supra,* beginning at page 134:

> The jurisdiction of this court extends to all appeals from intermediate orders and final judgments in actions

where such order or judgment involves the merits. 15 Stat. 868. An order involving merely the exercise of discretion on the part of the court making it is not appealable, as error of law cannot be alleged as against such an order. 1 Wait Prac. 465. When, however, the order affects a substantial right, necessarily affecting the judgment, it must be regarded as involving the merits. The term "merits" is not very clearly defined. It certainly embraces more than the questions of law and fact, constituting the cause of action or defence. As it regards the principles of construction, the necessary means of attaining an end stand upon the same ground of privilege as the end itself. If, then, a party is entitled to an appeal as a means of securing a proper judgment, he is presumably entitled to such appeal, in order to secure that without which the judgment could not be rightfully had. The word "merits" naturally bears the sense of including all that the party may claim of right in reference to his case. Nor is any authority brought to notice that limits the sense to any particular class of rights among those that have a tendency to control the results of cases. The expression "affecting the judgment," employed by the statute (15 Stat. 868) must be regarded as equivalent, in the sense of that statute, to the other expression, "involving the merits," as defining the cases to which that jurisdiction shall extend. They must be regarded as different definitions of the same case. In Section 11 of the code, as it originally stood, the expression was, "involving the merits and necessarily affecting the judgment." As that section now stands, the review of judgments, and intermediate orders upon direct appeal from such judgments or orders, extends to all cases "involving the merits," the other words being omitted, while as it regards intermediate orders, brought up for review by an appeal from the final judgment, the expression employed to limit the jurisdiction is "necessarily affecting the judgment," omitting the words "involving the merits." It is evident that the words "involving the merits," is used in its large significance in the original text of the code, as appears from the character of the terms limiting it to cases where the judgment was necessarily affected. On the other hand, in the amendment of 1873, this limi-

tation is dispensed with, presumably as unnecessary, and the terms there employed are treated as equivalents. Whatever can be regarded as affecting the necessary means of obtaining a judgment, must be regarded as affecting the necessary means of obtaining a judgment, must be regarded as affecting the judgment itself.

It may be concluded from the foregoing that whenever a substantial right of the party to an action material to obtaining a judgment in such action is denied, a right of appeal lies to this court. Prior to the recent amendment of the code relating to the place of trial, the defendant could not, as matter of right, claim that a trial should be had in the county of his residence. In those cases where the venue was not fixed by the nature of the cause of action itself, it was the right of the plaintiff to select the place of trial, subject only to the limitation that such place of trial must, when any of the parties reside within the state, be in some county where one or more of such parties, either plaintiff or defendant, resides. If the defendant desired to effect a change, it could only be obtained by the order of the court on the grounds specified by law. It is evident that under the law as it now stands, the defendant may claim of right that the trial should be had in the county where he resides, in cases of the class to which the present belongs. If, then, it is material to his defence that the jury, convened to try his case, should be drawn, summoned and empaneled in the manner prescribed by law, so that the denial of right, in this respect, entitles him to an appeal, it is manifest that to change it from a vicinage other than that designated by law, is an error in a matter involving a substantial right material to his defence, and thereby necessarily affecting the judgment. The conclusion reached renders a new trial necessary.

So, the application of Section 15-123 resolves itself into case law, and if one doesn't check the cases to date he is liable to go astray. For example, one will find that an order striking a portion of a pleading is appealable. *Miles v. Charleston Light and Water Co.* (1909), 87 S. C. 254, 69 S. E. 292; whereas an order refusing to strike out a pleading or a part thereof is not appealable. *Cooper v. A. C. L. Ry. Co.* (1905), 78 S. C. 562, 59 S. E. 704.

Discretionary Orders: Some authorities, as for example Sunderland in his TRIAL & APPELLATE PRACTICE, 2nd Ed., class involuntary nonsuit and direction of verdict among discretionary orders. This is a grave mistake, since any such order turns not on any factual issue but solely on a matter of law, and as to the latter, a judge has no discretion. If he did have that power, a judge could change even basic law at will with resulting chaos to society.

In South Carolina a voluntary nonsuit, which doesn't involve purely a matter of law is, as heretofore stated, a matter of discretion. In a number of South Carolina cases one is told that a judge is to exercise discretion, but in no case is there given anything by which to measure that discretion. A clear case with a definite yardstick on the subject is *Bailey v. Taffe* (1866), 29 Cal. 422, which says:

> The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gratia,* but a legal discretion, to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice. In a plain case this discretion has no office to perform, and its exercise is limited to doubtful cases, where an impartial mind hesitates. If it be doubted whether the excuse offered is sufficient or not, or whether the defense set up is with or without merit *in foro legis,* when examined under those rules of law by which Judges are guided to a conclusion, the judgment of the Court below will not be disturbed. If, on the contrary, we are satisfied beyond a reasonable doubt that the Court below has come to an erroneous conclusion, the party complaining of the error is as much entitled to a reversal in a case like the present as in any other.

See *Miller et al v. Gulf Ins. Co.* (1925), 132 S. C. 78, 129 S. E. 131, for a full discussion of "abuse of discretion." As that case at page 82 will show, the writer as a young judge was taught a salutary lesson he never forgot:

> In the discussion of the matter of the "abuse of discretion" by the presiding Judge in this case, it must be understood that the Court is guided by the principle an-

nounced in *Norris v. Clinkscales*, 47 S. C. 488; 25 S. E., 797:

"And the appeal will lie, not because of any so-called 'abuse of discretion' — a phrase unhappily framed, because implying a bad motive or wrong purpose — but because his ruling may appear to have been made on grounds and for reasons clearly untenable."

The motion to have the sheriff made a party defendant was, under the circumstances, so just and reasonable that it should have been granted unless it appeared to the trial Judge, in the exercise of his discretion, that some good reason existed for refusing it. The sheriff was the principal obligor upon the bond. The plaintiffs' cause of action was based upon his alleged negligence and mismanagement; no one was better qualified to explain the doubtful circumstances of the transaction than the sheriff. The surety company, upon payment of the plaintiffs' demand, would be entitled to indemnity from the sheriff; it could not possibly be detrimental to the interests of the plaintiffs, if entitled to recover, to have a judgment against two rather than one. It would be a serious detriment to the surety company, sued alone, to have to pay the judgment and then institute an action against the sheriff for indemnity in his own county. It is in the line of public policy that all differences between interested parties be adjusted in the one litigation.
And further on page 83 the Court continued:

The only explanation, we do not consider it a reason, which the trial Judge gave for his refusal, was that "it was not necessary or desirable" that the sheriff be made a party. Granting that he was not a necessary party, that it was not *necessary*, why was it not *desirable*? He gives no reason for this conclusion; we do not see how it was possible for him to have done so. If no reason appears to support the exercise of a judicial discretion, the Court's action was necessarily arbitrary; if arbitrary it was technically an abuse of discretion.

Furthermore, the decision of the case, with the sheriff a party, would asure against the reproach which would most probably result from a verdict against the insurance company in Richland County and a verdict in favor of the sheriff in Florence County, both based upon the

identical charge of mismanagement on the part of the sheriff.

It occurs to us that every conceivable ground was present to induce the conclusion that the bringing in of the sheriff as a party defendant was just, reasonable, and in line with the policy of the law "to prevent a multiplicity of suits and that there may be a complete and final decree between all parties interested"; certainly "a consummation devoutly to be wished," a desirable result.

Waiver of Right to Review: No citation of authority is needed for the assertion that no court will hear a moot question; not even will the plea for a declaratory judgment be entertained relative to such a question. However, what about one who pays a judgment waiving a right to appeal? There is a split of authority with no case in this State. The majority hold that there is the element of involuntariness in the picture and hence no waiver because otherwise the judgment can be collected through force at extra cost and most probably at a sacrifice of the debtor's property. *Cleveland etc. Ry. Co. v. Nowlin* (1904), 163 Ind. 497, 72 N. E. 257. Others hold that payment is a waiver unless execution has been issued. *Cowell v. Gregory* (1902), 130 N. C. 80, 40 S. E. 849.

As shown by the *Nowlin* case, *supra,* an important factor enters where a public utility pays an award of compensation for eminent domain to the clerk of court and takes possession of the property in line with its duty to the public. Since the use of the property is for the public's benefit and time is usually of the essence, the utility's right to appeal should not be considered waived.

Also, a party obeying a writ of mandamus doesn't waive his right to appeal. *State v. Young,* 66 S. C. 115. As said in that case at page 121:

> . . . The appellants had the right to appeal from the order of the Circuit Court allowing the writ of mandamus to issue. *Pinckney v. Jones,* 2 Strob., 250; *Matthews v. Nance,* 49 S. C., 322, 27 S. E., 408. The appeal, however, did not act as supersedas. *Pinckney v. Jones, supra.* The compliance by the appellants with the writ of mandamus was not voluntary but compulsory, as they would have subjected themselves to proceedings in contempt if they had refused to obey the writ. To sustain the contention

of the respondents would practically deny to the appellants the right of appeal.

Jurisdictional Amount: South Carolina doesn't have any intermediate appellate courts, so the problem of jurisdictional amount as being decisive of what court has the power of review doesn't arise. In those jurisdictions where the problem arises, the definite rule is that only those matters which are then in dispute are to be considered in determining what court has reviewable power. 4 C. J. S. 159 and *Hilton v. Dickinson* (1883), 108 U. S. 165, 2 Sup. Ct. 424. It is likewise generally held that the amount stated in the complaint and not the amount stated in the prayer shall govern. This latter rule is like that used in this State to determine jurisdiction of a court of limited jurisdiction, such as a county court, as to whether it has the power to try a particular case. *Williams v. Workman* (1920), 113 S. C. 487, 101 S. E. 833. In that case it was held at page 488:

> This is an action for claim and delivery, tried in the County Court for Richland County. There is only one question in the case, and that is the question of jurisdiction. The jurisdiction of the County Court is limited to $3,000. The prayer of the complaint reads:
>
> "Wherefore, the plaintiff demands judgment for the possession of the automobile above described, for damages in the sum of twenty-five hundred ($2,500) dollars, the costs of this action, and such other and further relief as may be just and proper."
>
> The verdict was for the plaintiff for the possession of the car or its value, $1,250, if possession could not be had. The record further shows that on the trial of the case the plaintiff claimed that he was entitled to the possession of the automobile in question, or its value, $1,250, if it could not be had, and damages for each day it had been retained by the defendant, in the sum of $5 to $10 per day, whichever amount the jury thought proper. The record does not show the exact time of the detention, but 60 days is a liberal allowance.
>
> The appellant contends that the plaintiff's claim was for $2,500 damages and an automobile valued at $1,250, or $3,750, so that the amount in controversy exceeded the jurisdiction of the Court by $750. There is no doubt

> that the amount in controversy at the trial was well within the jurisdiction of the County Court. The question is: Do the complaint and affidavit show that the amount claimed is in excess of, or fail to show that the case is within, the limited jurisdiction of the County Court? It shows neither. It needs no citation of authority to show that the prayer of the complaint is no part of the complaint....

Right of Appeal or Review of Orders of Administrative Tribunals: In *Southern Ry. Co. v. Public Service Commission* (1939), 195 S. C. 247, 10 S. E. 2d 769, the Court said that technically speaking there can be no appeal, in the strict sense, from an administrative body to a court, even where a statute uses the word "appeal"; that it would be a "statutory right of review." The court said further that section 8254 [now Section 58-124] provided for a review by way of an action in the Court of Common Pleas, and that, if no "statutory review" was provided for, the administrative body, since it could not enforce its own orders, must make application to a court. At such a hearing there would be indirectly afforded a review in that the validity of such order would have to be judicially determined. And any party aggrieved by such an administrative order would, of course, have the right to go to a court for relief. As said at page 254:

> It is doubtless true that any right to appeal from the orders of a public utility commission is founded upon constitutional or statutory provisions. And even where the statutes provide for an appeal it is said that the Court does not, strictly speaking, exercise appellate jurisdiction, since there can be no appeal in the legal sense from the order of an administrative body. 51 C. J., 70, 71. Hence the provision in Section 8254 for an action in the Court of Common Pleas for Richland County. But assuming that there is no statutory authority for any sort of review of an order of the Public Service Commission relating to railroads, we are nevertheless of the opinion that the instant action may be maintained. It is quite clear that the commission is without power to enforce its own orders, but that application must be made to the Courts for the enforcement thereof, and this incidentally involves the judicial determination of the validity of such orders. Likewise we are of opinion that an ag-

> grieved party would have the right to apply to the Court for relief against the threatened or attempted enforcement of an invalid order. . . .

It is to be noted, however, that the court in the above case had to distinguish *City of Columbia v. Tatum et al.* (1934), 174 S. C. 366, 177 S. E. 541, because of the legal effect of Section 58-101, 58-114, and 58-124, the language of which did not include railroads. In *So. Ry. Co.* case, which involved a "public utility" as defined in Section 58-101, the reviewing tribunal was under the duty of exercising its "own independent judgment on the questions of both fact and law" as provided in Section 58-124. Whereas in the *Tatum* case a railroad was involved and therefore Section 58-124 did not apply and as the Court said in the *So. Ry. Co.* case, *supra:*

> . . . And it is our considered judgment that upon a judicial review of an order of the Public Service Commission relating to railroad companies, of the character now before us, the true rule is that the commission's findings of fact are *prima facie* correct and should not be set aside unless clearly against the weight of the evidence. . . .