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Proceedings for Pre-Trial Examination

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omitting quotation marks. Of course, in matter which is indented all quotation marks, whether double or single, appearing therein must be used.

Helpful Forms: In the printed transcript of Record or Return which was prepared by careful attorneys in *Norris v. Bryant et al.* in 1949 the writer found not only substantial but useful forms of petitions, notices and orders relative to pre-trial examination of parties under Sections 26-501 to 26-512. As long as there is a lack of legislative and judicial action with respect to providing for pre-trial conferences in South Carolina the above Sections, lacking though they are in aiding parties to produce before a court all the necessary facts to attain justice as well as to save time and undue expense, must be resorted to for what they are worth. Hence it is well that trial attorneys have ready access to any helpful forms that will make the Sections easier of application. Toward that end the reader will find below that part of the Transcript of Record dealing with this phase of preparedness for trial, even including the brief examination of the parties.

Attention is called to the fact that the names of the attorneys have been changed, as the writer didn't want to appear to the Bar as advertising any of its members in what would be a permanent volume. And the names which have been substituted are not fictitious; they existed among the old English barristers, the fore-runners of the American Bars of today.

PROCEEDINGS FOR PRE-TRIAL EXAMINATION

It is agreed that the following — pages contain the plaintiff's petitions and notices of motions and a correct summary of the proceedings for pre-trial examinations of the defendants, Grant, Chappell and Bryant and of Thomas J. Mitchell, the manager of the defendant, Poinsett, and to compel production of the contracts or agreements relied on by certain of the respondents as a defense to the cause of action alleged in the amended complaint. The petitions and notices of motion for the relief therein sought were served upon the parties and their counsel as provided by law.

PETITION

Omitting the caption the following is plaintiff's verified petition of September 12, 1947:

TO: THE HONORABLE COURT OF COMMON PLEAS OF HITCHIN COUNTY, SOUTH CAROLINA

Your petitioner respectfully shows:

1. That he is the plaintiff in the above entitled action which is now pending trial; that by answer in said action made defendant, Poinsett Lumber & Manufacturing Company, alleges that the truck and trailer in question were not under its supervision, control or direction and that its co-defendant, Taft Chappell, was an independent contractor engaged in the logging business at the time mentioned and that Roy Bryant was employed by him and under his sole and exclusive direction; that the petitioner is advised, the information having been furnished to the attorney for petitioner by John Breare, of the firm of Harmsworth & Harmsworth, attorneys for defendant, Poinsett Lumber & Manufacturing Company, that Poinsett Lumber & Manufacturing Company on the trial of this case intends to rely, for purpose of defense, upon a contract in writing in the possession of said defendant executed between said defendant and one S. C. Grant, a brother-in-law of the defendant, Taft Chappell; that the defendant, Taft Chappell, has told this petitioner that he hired Roy Bryant, that his brother-in-law, S. C. Grant, hired him and that Poinsett Lumber & Manufacturing Company hired Grant under a contract in writing, which said defendant had seen, to log and haul the logs from timber lands owned by Poinsett Lumber & Manufacturing Company in the mountains of Hitchin County to the sawmill of Poinsett Lumber & Manufacturing Company at Hitchin; petitioner is further informed by other persons similarly employed by Poinsett Lumber & Manufacturing Company that this is the method of operation used by said defendant in the operation of its large holdings of timber land and its sawmill in Hitchin County; that on the 18th day of July, 1947, the petitioner through his attorney, Amigel Wade, made written demand upon Messrs. Harmsworth & Harmsworth, Attorneys for Poinsett Lumber & Manufacturing Company, for a copy of the contract or that the contract be filed with the Clerk of Court of Hitchin County in order that petitioner might procure a copy thereof; that, upon information and belief, some several days thereafter Mr. William Brigg, an attorney and member or associate of the law firm of Harmsworth & Harmsworth, advised the attorney for petitioner by telephone that said law

firm would not deliver the contract to the attorney for petitioner, that they would not allow the attorney for petitioner to inspect and copy the same and would not file the same in the office of the Clerk of Court of Hitchin County in order that the attorney for petitioner might copy or inspect the same; that thereafter on the 6th day of September, 1947, the said William Brigg, upon behalf of the law firm of Harmsworth & Harmsworth, attorneys for defendants, served upon the attorney for petitioner a notice of a motion to be made before the Resident or Presiding Judge of the 13th Judicial Circuit at Gruenwald, South Carolina, on September 19, 1947; that at the time of the service of said notice of motion, as petitioner is informed and believes, petitioner's attorney again made personal demand upon said William Brigg, attorney, for a copy of the aforesaid contract; that he at said time admitted the existence of such a contract and again refused to make the same accessible in any manner to petitioner or his attorney; that Thomas J. Mitchell, a resident of Hitchin County, South Carolina, is the manager of Poinsett Lumber & Manufacturing Company at Hitchin, South Carolina, and as such manager is in the immediate control and direction of all business transactions and property and papers of said defendant in said County and is, therefore, in the possession of the aforesaid contract; that on the 11th day of September, 1947, the petitioner made personal demand upon the said Thomas J. Mitchell to be allowed to inspect the aforesaid contract as to the content thereof or to make a copy thereof or that the said Thomas J. Mitchell file the same with the Clerk of Court of Hitchin County in order that petitioner might inspect the same or make a copy thereof; that the said Thomas J. Mitchell denied the petitioner the right to in any manner secure knowledge as to the content of the contract.

2. That petitioner is informed and believes that Messrs. Harmsworth & Harmsworth, attorneys, have refused to answer by letter the letter of the attorney for petitioner requesting a copy of the contract or inspection thereof.

3. That the plaintiff was not present at the scene of the operation of the business of the defendant, Poinsett Lumber & Manufacturing Company, in the cutting and logging of timber from said defendant's lands in the mountains of Hitchin County, South Carolina, and was not present during

the hauling of said logs by truck to the sawmill of said defendant near the Town of Hitchin, which operations resulted in plaintiff's injuries; that the kind, amount and extent of the supervision, control or direction and of the right thereto is peculiarly within the knowledge of the defendant, Poinsett Lumber and Manufacturing Company, and its agents and servants, and are peculiarly within the personal knowledge of Thomas J. Mitchell, the said manager of said defendant.

4. That for the reasons hereinabove set out the plaintiff is entitled to an order of Court, pursuant to the provisions of Section 673 of the Code of Laws of South Carolina of 1942, requiring the defendant, Poinsett Lumber & Manufacturing Company, and its manager, Thomas J. Mitchell, to give to the petitioner within a specified time an inspection and copy, or permission to make a copy of the aforesaid contract upon which the said defendant intends to base its defense that an independent contractor performed the logging operations and the hauling of the logs from the lands of the defendants in the mountains of Hitchin County, South Carolina, which operations resulted in the injuries to petitioner in order that the plaintiff may have opportunity before trial to study the law with reference to the content of said contract and to study and investigate the facts surrounding the operation thereof; and further that petitioner is entitled to an order of the Court under the provisions of Section 674 through 682 of the Code of Laws of South Carolina of 1942, to an examination of the said Thomas J. Mitchell, of Hitchin, in Hitchin County, South Carolina, the manager of the defendant, Poinsett Lumber & Manufacturing Company, as in said statute provided, concerning the matter within the knowledge of the said Poinsett Lumber & Manufacturing Company and its manager, the said Thomas J. Mitchell, as to the facts and circumstances of their operation resulting in the injuries to the petitioner, and particularly as to the facts and circumstances surrounding their claimed defense that the party with whom they had contracted to perform their logging operations and hauling was as an independent contractor, responsible for injuries to the petitioner including the facts of the extent of the supervision, control or direction of Poinsett Lumber & Manufacturing Company over said operations and hauling and its right to supervise, control or direct said operations and hauling.

WHEREFORE, Petitioner prays:

(1) that the Court order the defendant, Poinsett Lumber & Manufacturing Company, and also its manager, Thomas J. Mitchell, to give to the petitioner within a specified time an inspection and copy or permission to make a copy of the aforesaid contract or contracts;

(2) that the Court order and direct the said Thomas J. Mitchell to appear in person before the Court or a Special Referee to be appointed under the provisions of Section 677 Code of Laws of South Carolina of 1942, at the time and place designated in said order, to be examined as a witness as to the content of the contract between Poinsett Lumber and Manufacturing Company and its alleged independent contractor and as to the facts and circumstances surrounding the operation which resulted in the injuries to the petitioner, including the extent of the supervision, control and direction of Poinsett Lumber & Manufacturing Company over said operations and as to its right to supervise control or direct said operations.

Amigel Wade
Attorney for Plaintiff-Petitioner

NOTICE

The following notice of motion was served with the above petition:

TO: MESSRS. HARMSWORTH & HARMSWORTH, GRUENWALD, SOUTH CAROLINA, ATTORNEYS FOR THE DEFENDANTS IN THE ABOVE ENTITLED ACTION, AND TO MR. THOMAS J. MITCHELL, HITCHIN, SOUTH CAROLINA, THE MANAGER OF POINSETT LUMBER & MANUFACTURING COMPANY:

YOU ARE HEREBY NOTIFIED that based upon the pleadings in this action and upon the attached petition and affidavit, the undersigned, the attorney for the plaintiff in the above entitled action, will move before the Resident or Presiding Judge of the 13th Judicial Circuit at Chambers or in open Court in Gruenwald County Court House, at 10:00 o'clock, A.M., on September 19, 1947, or as soon thereafter as counsel may be heard and upon the conclusion of the hearing of the motion in said action heretofore made by attorneys

for defendants and at said time noticed, for an order requiring the defendant, Poinsett Lumber & Manufacturing Company, and Thomas J. Mitchell, its manager, to (1) give to the plaintiff, the petitioner herein, within a specified time an inspection and copy or permission to make a copy of the contract relied upon by the defendant, Poinsett Lumber & Manufacturing Company, to establish its defense that an independent contractor was responsible for injuries to plaintiff-petitioner which said contract is more particularly described in the annexed petition; (2) an order requiring the said Thomas J. Mitchell, the Manager of Poinsett Lumber & Manufacturing Company, to appear before the Court or a Special Referee appointed by the Court under the provisions of Section 677 of the Code of Laws of South Carolina of 1942, to be examined as a witness as to the contract and the content thereof referred to in the annexed petition and upon which the defendant, Poinsett Lumber & Manufacturing Company, intends to rely to establish its defense that an independent contractor is alone responsible for the injuries to the plaintiff, and as to the facts and circumstances surrounding the logging and hauling of logs from the lands of the defendant, Poinsett Lumber & Manufacturing Company, in the mountains of Hitchin County, South Carolina, to its sawmill at Hitchin, South Carolina, and as a result of which operations the injuries to the plaintiff-petitioner resulted. The plaintiff-petitioner will ask the Court that the order specify particularly that the plaintiff-petitioner be allowed to examine as a witness the said Thomas J. Mitchell particularly as to the content of any written or verbal contract relating to the cutting, logging and hauling of logs from the lands of the defendant, Poinsett Lumber & Manufacturing Company, in the mountains of Hitchin County, South Carolina, to its sawmill located near the Town of Hitchin, and as to the control and right of control over the said operations exercised and retained by the defendant, Poinsett Lumber & Manufacturing Company.

Hitchin, South Carolina
September 12, 1947.

Amigel Wade
Attorney for Plaintiff-Petitioner

FIRST ORDER

After a hearing on the above petition and notice Judge Martin made an order on June 8, 1948, as follows:

This matter comes before me upon application of the plaintiff for a pre-trial examination of the defendants, Roy Bryant, Taft Chappell and S. C. Grant, and of Thomas J. Mitchell, Manager of the defendant, Poinsett Lumber and Manufacturing Company, and upon an application of the plaintiff to require the defendant, Poinsett Lumber and Manufacturing Company, to give to the plaintiff within a specified time an inspection and copy or permission to make a copy of the contract relied upon by the defendant, Poinsett Lumber and Manufacturing Company, or that such defendant be required to file such contract with the Clerk of Court of Hitchin County in order that the plaintiff may make a copy thereof or inspect the same.

The matter was heard by me at Hitchin, South Carolina, on June 8, 1948. Mr. William Brigg of the firm of Harmsworth & Harmsworth appeared for the defendants named in the amended complaint other than S. C. Grant. No appearance was made by the defendant, S. C. Grant. The plaintiff and subrogee were represented by their attorneys of record.

The Court is engaged in a term of General Sessions Court of Hitchin County and could not at this time undertake to fully dispose of all questions raised by the applications. However, the Court is of the opinion that the plaintiff is entitled to an immediate examination of Mr. Thomas J. Mitchell, Manager of Poinsett Lumber and Manufacturing Company, as to the contents of any contract or contracts then existing between the said Poinsett Lumber and Manufacturing Company, as to the contents of any contract or contracts then existing between the said Poinsett Lumber and Manufacturing Company and any of the defendants named in the amended complaint relating to the logging and hauling operations growing out of which the plaintiff was injured, and further the Court is of the opinion that the defendant, Poinsett Lumber and Manufacturing Company, and its manager, Thomas J. Mitchell, should be compelled to immediately make such contract or contracts as existed available to the plaintiff in order that the plaintiff and the statutory subrogee may have a pre-trial inspection and copy thereof, or that such de-

fendant, and its manager be required to file the contract or contracts with the Clerk of Court of Hitchin County for such purpose.

Therefore, upon motion of the Attorneys for the plaintiff and subrogee in this action,

IT IS ORDERED that Mr. Thomas J. Mitchell, Manager of Poinsett Lumber and Manufacturing Company, do personally appear and present himself before Hon. W. E. Findley, a member of the Hitchin Bar, as a Special Referee, at his office in the South Carolina National Bank building in Hitchin, South Carolina, at 10:30 o'clock, A.M., on Friday, June 11, 1948, then and there and at such other and further time as by the Referee may be so directed, to be examined under oath by the Attorneys for plaintiff and subrogee, as to any contract or contracts between the defendant, Poinsett Lumber and Manufacturing Company, and any of the defendants named in the amended complaint in anywise relating to the logging and hauling operations growing out of which the plaintiff, Fields F. Norris, was injured.

IT IS FURTHER ORDERED that upon said examination that the defendant, Poinsett Lumber and Manufacturing Company, be and they are hereby required to then and there produce any such contract or contracts relating to such logging and hauling operations in order that the plaintiff may have pre-trial access to such contract or contracts and the content and provisions thereof.

IT IS FURTHER ORDERED that the Special Referee do immediately upon the conclusion of said hearing make and file with the Clerk of this Court his report of the testimony taken and that he do file with said report the contract or contracts herein ordered to be produced.

IT IS FURTHER ORDERED that any and all other issues raised by the motions of the plaintiff and subrogee for pre-trial examination of the other named defendants and for the further pre-trial examination of Mr. Thomas J. Mitchell, Manager of Poinsett Lumber and Manufacturing Company, as set forth in the motions presented, be and the same are hereby reserved.

Let a certified copy of this Order be personally served upon Mr. Thomas J. Mitchell, the manager of Poinsett Lumber

and Manufacturing Company, by the Sheriff of Hitchin County.

The provisions of this Order shall also apply to the pending case of H. G. Ellenburg against the same defendants.

June 8, 1948.

J. ROBT. MARTIN, JR.,
Presiding Judge, 13th Judicial Circuit, Hitchin, South Carolina

PRE-TRIAL TESTIMONY OF THOMAS J. MITCHELL

Pursuant to the foregoing order the testimony of Thomas J. Mitchell was taken before W. E. Findley, Special Referee, and an alleged contract produced. The document produced is the same one that was offered in evidence by the defendants as the contract between Poinsett and Grant. Thomas J. Mitchell testified before the Special Referee as follows:

EXAMINATION BY MR. CURLING

Mr. Thomas J. Mitchell, being first duly sworn testified as follows:

Q. Mr. Mitchell, are you the manager of Poinsett Lumber and Manufacturing Company?

A. Yes, sir, "Works Manager."

Q. What do you mean by "Works Manager"?

A. That is the title which I hold.

Q. Do you appear here today as manager of Poinsett Lumber and Manufacturing Company under order of Judge Martin dated June 8, 1948, made in the separate cases of Fields Norris and H. G. Ellenburg against Poinsett Lumber and Manufacturing Company and others?

A. Yes, sir.

Q. Were you acting as manager of Poinsett Lumber and Manufacturing Company on or about April 13, 1948?

A. Yes, sir.

Q. At the time Fields F. Norris and H. G. Ellenburg were injured?

A. I was Works Manager at that time.

Q. Did you then have and do you now have supervision over all the business affairs and operations of Poinsett Lumber and Manufacturing Company?

A. Repeat the question.

Q. Did you then have and do you now have supervision over all the business affairs and operations of Poinsett Lumber and Manufacturing Company?

A. Yes, sir.

Q. Did you have supervision over the plant at Hitchin at the time of the injuries of Fields F. Norris and H. G. Ellenburg?

A. Yes, sir.

Q. Did you have supervision over the timber lands at the time of the injuries?

BY MR. HARMSWORTH:

We object to that question. Under the order of the Court our friends have the right to examine Mr. Mitchell with reference to the contract and relation but we do not want to go any further about the supervision of the timber lands in any way. Mr. Mitchell had said that he has authority at the time to act for Poinsett Lumber and Manufacturing Company and that is as far as we want to go.

BY MR. CURLING:

We are merely asking these questions for the purpose of ascertaining whether or not Mr. Mitchell knows about the contracts and content thereof and unless he has supervision over the timber he might not have known about the contracts.

BY MR. HARMSWORTH:

We have no objection if you will rephrase the question to ask if Mr. Mitchell has responbility and personal knowledge about the contracts relative to the timber lands.

BY MR. CURLING:

Q. As stated by Mr. Harmsworth, I understand you have authority and responsibility to know about the contracts relative to cutting, logging and hauling logs?

A. Yes, sir.

Q. You understand that you have been required by order of Judge Martin made in the cases dated June 8, 1948, to appear here today to be examined under oath as to any contract or contracts between Poinsett Lumber and Manufacturing Company and the other defendants named in the amended complaint in anywise relating to the logging and hauling operations growing out of which Fields F. Norris and H. G. Ellenburg were injured?

A. Repeat the question.

Q. You understand that you have been required by order of Judge Martin made in the cases dated June 8, 1948, to appear here today to be examined under oath as to any contract or contracts between Poinsett Lumber and Manufacturing Company and the other defendants named in the amended complaint in anywise relating to the logging and hauling operations growing out of which Fields F. Norris and H. G. Ellenburg were injured?

A. Yes, sir.

Q. Do you understand that you have been required to produce and to give to the Referee at this hearing any contract or contracts relating to such logging and hauling operations in order that the plaintiff may have access to such contract or contracts and the content and provisions thereof before the trial of these suits and that the Referee is required to file such contract when produced with the Clerk of Court.

BY MR. BRIGG:

The order requires that the contract be produced for inspection but not to file it with the Clerk of Court.

BY MR. CURLING:

The order clearly says that it is to be filed with the Clerk of Court.

MR. CURLING READING FROM ORDER:

"IT IS FURTHER ORDERED that the Special Referee do immediately upon the conclusion of said hearing make and file with the Clerk of this Court his report of the testimony taken and that he do file with said report the contract or contracts herein ordered to be produced."

Q. Do you have the contract?

A. I have.

Q. Will you present it to the Referee?

A. I will.

A contract was presented to the Referee by Mr. Thomas J. Mitchell. The Referee received the contract in evidence and identified it as Exhibit "A". The contract so received and identified being between Poinsett Lumber & Manufacturing Company, First Party, and S. C. Grant, Second Party, and bearing date February 3, 1945, identified as logging contract No. 41.

BY MR. BRIGG:

May it please the Court about the filing of the contract in the Clerk's office, the order provides: "Further the Court is

of the opinion that the defendant, Poinsett Lumber and Manufacturing Company, and its manager, Thomas J. Mitchell, should be compelled to immediately make such contract or contracts as existed available to the plaintiff in order that the plaintiff and the statutory subrogee may have a pre-trial inspection and copy thereof, or that such defendant, and its manager be required to file the contract or contracts with the Clerk of Court of Hitchin County for such purpose." We are presenting the contract and our friends have the right to inspect and make a copy of it but we do not see the need of filing it in the Clerk's office.

BY MR. CURLING:

On the trial of this case we may desire to present this testimony and the contract to the Court and may desire to offer the testimony and contract in evidence.

BY MR. BRIGG:

The paper is in evidence without filing it in the Clerk's office.

BY MR. CURLING:

The order provides by its terms that it be filed with the Clerk of Court.

BY THE REFEREE:

I will read the contract and order and act accordingly.

BY MR. CURLING:

Q. Mr. Mitchell, was the contract which you have presented the only contract in existence between Poinsett Lumber and Manufacturing Company and any of the defendants named in this amendment complaint at the time of the injuries?

A. Yes, sir.

Q. The only contract between Poinsett Lumber and Manufacturing Company and S. C. Grant?

A. The only one.

Q. Is this the only contract between Poinsett Lumber and Manufacturing Company and Taft Chappell?

A. There was no contract with Chappell.

Q. Is this the only contract between Poinsett Lumber and Manufacturing Company and Roy Bryant?

A. There was no contract with Bryant.

Q. Was there any other contract existing between Poinsett Lumber and Manufacturing Company and any of the defendants?

A. No contract.

Q. Mr. Mitchell was there at any time any additional or supplemental contract between the defendant, S. C. Grant and the defendant, Poinsett Lumber and Manufacturing Company?

A. No, sir.

Q. Was there ever any verbal or written changes or alterations of the terms and provisions of the contract?

A. There was not.

Q. Mr. Mitchell, was there at any time any waiver or consent upon the part of Poinsett Lumber & Manufacturing Company to waive or release any provision of this contract?

A. The contract stands.

Q. Mr. Mitchell, was there at any time any verbal contract of any kind between Poinsett Lumber and Manufacturing Company and any of the defendants?

A. No, sir.

Q. No contract whatsoever except the one produced?

A. No, sir.

PETITION

Omitting the caption the following is plaintiff's verified petition of May 28, 1948:

TO: THE HONORABLE COURT OF COMMON PLEAS OF HITCHIN COUNTY, SOUTH CAROLINA:

Your petitioner respectfully shows:

1. That he is the plaintiff in the above entitled action which is now pending trial; that by answer in said action made defendant, Poinsett Lumber & Manufacturing Company, alleges that the truck and trailer in question were not under its supervision, control or direction and that its co-defendant, Taft Chappell, was an independent contractor engaged in the logging business at the time mentioned and that Roy Bryant was employed by him and under his sole and exclusive direction; that the petitioner is advised, the information having been furnished to the attorney for petitioner by John Breare, of the firm of Harmsworth and Harmsworth, attorneys for defendant, Poinsett Lumber & Manufacturing Company, that Poinsett Lumber & Manufacturing Company on the trial of this case intends to rely, for purpose of defense, upon a contract in writing in the possession of said defendant executed between said defendant and the defendant, S. C. Grant, who

is a brother-in-law of the defendant, Taft Chappell; that the defendant, Taft Chappell, has told this petitioner that he hired Roy Bryant, that his brother-in-law, S. C. Grant, hired him and that Poinsett Lumber & Manufacturing Company hired Grant under a contract in writing, which said defendant has seen, to log and haul the logs from timber lands owned by Poinsett Lumber & Manufacturing Company in the mountains of Hitchin County to the sawmill of Poinsett Lumber & Manufacturing Company at Hitchins; petitioner is further informed by other persons similarly employed by Poinsett Lumber & Manufacturing Company that this is the method of operation used by said defendant in the operation of its large holdings of timber land and its sawmill in Hitchin County; that on the 18th day of July, 1947, the petitioner through his attorney, Amigel Wade, made written demand upon Messrs. Harmsworth & Harmsworth, Attorneys for Poinsett Lumber & Manufacturing Company, for a copy of the contract or that the contract be filed with the Clerk of Court of Hitchin County in order that petitioner might procure a copy thereof; that, upon information and belief, some several days thereafter Mr. William Brigg, an attorney and member or associate of the law firm of Harmsworth & Harmsworth, advised the attorney for petitioner by telephone that said law firm would not deliver the contract to the attorney for petitioner, that they would not allow the attorney for petitioner to inspect and copy the same and would not file the same in the office of the Clerk of Court of Hitchin County in order that the attorney for petitioner might copy or inspect the same; that thereafter on the 6th day of September, 1947, the said William Brigg, upon behalf of the law firm of Harmsworth & Harmsworth, attorneys for defendants, served upon the attorney for petitioner a notice of a motion to be made before the Resident or Presiding Judge of the 13th Judicial Circuit at Gruenwald, South Carolina, on September 19, 1947; that at the time of the service of said notice of motion, as petitioner is informed and believes, petitioner's attorney again made personal demand upon said William Brigg, attorney, for a copy of the aforesaid contract; that he at said time admitted the existence of such a contract and again refused to make the same accessible in any manner to petitioner or his attorney; that on the 11th day of September, 1947, the petitioner made personal demand upon the said Thomas J.

Mitchell to be allowed to inspect the aforesaid contract as to the content thereof or to make a copy thereof or that the said Thomas J. Mitchell file the same with the Clerk of Court of Hitchin County in order that petitioner might inspect the same or make a copy thereof; that the said Thomas J. Mitchell denied the petitioner the right to in any manner secure knowledge as to the content of the contract.

2. That petitioner is informed and believes that Messrs. Harmsworth & Harmsworth, attorneys, have refused to answer by letter the letter of the attorney for petitioner requesting a copy of the contract or inspection thereof.

3. That the plaintiff was not present at the scene of the operation of the business of the defendant, Poinsett Lumber & Manufacturing Company, in the cutting and logging of timber from said defendant's lands in the mountains of Hitchin County, South Carolina, and was not present during the hauling of said logs by truck to the sawmill of said defendant near the Town of Hitchin, which operations resulted in plaintiff's injuries; that the content of any contract or arrangement between Poinsett Lumber & Manufacturing Company and the other named defendants for such logging and hauling and the kind, amount and extent of the supervision, control or direction as between said parties and of the right thereto is peculiarly within the knowledge of the defendants, Roy Bryant, Taft Chappell, and S. C. Grant.

4. That for the reasons hereinabove set out the plaintiff is entitled to an order of Court under the provisions of Section 674 through 682 of the Code of Laws of South Carolina of 1942, to an examination of the said Roy Bryant, Taft Chappell and S. C. Grant, as in said statute provided, concerning the matter within the knowledge of the said Roy Bryant, Taft Chappell and S. C. Grant as to the facts and circumstances of their operation referred to in the amended complaint herein and resulting in the injuries to the petitioner, and particularly as to the facts and circumstances, terms and conditions of the contract or arrangement between the defendants to this action as to the logging and hauling of logs and growing out of which operations the plaintiff was injured.

WHEREFORE, Petitioner prays that the Court order and direct the said Roy Bryant, Taft Chappell and S. C. Grant to appear in person before the Court or a Special Referee to be appointed under the provisions of Section 677 Code of

Laws of South Carolina of 1942, at the time and place designated in said order, to be examined as a witness hereinabove set out as to the logging operations, the terms and conditions thereof, which operations resulted in the injuries to the petitioner, including the extent of the supervision, control and direction of Poinsett Lumber and Manufacturing Company over said operations and as to its right to supervise, control or direct said operations.

AMIGEL WADE
JOHN CURLING, JR.
Attorneys for Plaintiff-Petitioner and Attorneys for the Statutory Subrogee.

NOTICE

The following notice of motion was served with the above petition:

TO: THE DEFENDANTS, ROY BRYANT, TAFT CHAPPELL AND S. C. GRANT, AND TO MESSRS. HARMSWORTH & HARMSWORTH, ATTORNEYS OF RECORD FOR THE NAMED DEFENDANTS OTHER THAN S. C. GRANT:

YOU ARE HEREBY NOTIFIED that based upon the pleadings in this action and upon the attached petition and affidavit, the undersigned, the attorneys for the plaintiff and statutory subrogee in the above entitled action will move before the Presiding Judge of the 13th Judicial Circuit in open court or at chambers in the Hitchin County Court House at 10:00 o'clock, A.M., on Monday, June 7, 1948, or as soon thereafter as counsel may be heard, for an order requiring the defendants, Roy Bryant, Taft Chappell and S. C. Grant, to appear before the Court or a Special Referee appointed by the Court under the provisions of Section 677 of the Code of Laws of South Carolina of 1942, to be examined as a witness as to the contract and the content thereof referred to in the attached petition and as to the facts and circumstances surrounding the logging and hauling of logs from the lands of the defendant, Poinsett Lumber and Manufacturing Company, in the mountains of Hitchin County, South Carolina, to the sawmill of said defendant at Hitchin, South Carolina, and as a result of which operations the injuries to the plain-

tiff-petitioner resulted. The plaintiff-petitioner will ask the Court that the order specify particularly that the plaintiff-petitioner be allowed to examine as a witness the defendants, Roy Bryant, Taft Chappell and S. C. Grant, particularly as to the content of any written or verbal contract or arrangement relating to the cutting, logging and hauling of logs by the other defendants from the lands of the defendant, Poinsett Lumber and Manufacturing Company, in the mountains of Hitchin County, South Carolina, to its sawmill located near the Town of Hitchin, and as to the control and right of control over the said operations exercised and retained by the defendant, Poinsett Lumber and Manufacturing Company.

Hitchin, South Carolina
May 28, 1948.

AMIGEL WADE
JOHN CURLING, JR.

Attorneys for Plaintiff-Petitioner and Attorneys for the Statutory Subrogee.

VERBAL ORDERS ON APPLICATION FOR PRE-TRIAL EXAMINATIONS

Thereafter at hearings had after proper notice before Judge Martin upon the two foregoing petitions and notice of motions at Gruenwald on July 13, 1948, and on July 16, 1948, Judge Martin made the following verbal orders: That as a matter of law plaintiff was entitled only to (1) the content of the alleged contract between Poinsett Lumber & Mfg. Co. and Grant; (2) the content of the alleged contract or verbal agreement between Grant and Chappell; and (3) to know whether or not the defendant truck and trailer at the time plaintiff was injured were operating under the terms of such contracts and agreements. Judge Martin on July 16, 1948, by verbal order directed that the defendants, Grant and Chappell, appear personally before him in open Court immediately before the call of the case for trial to be there before the trial personally examined only as to the content of the contracts and agreements and as to whether or not the truck and trailer at the time plaintiff was injured was operating under the terms of the contracts or agreements.

VERBAL ORDER OF JUDGE MARTIN AT COMMENCEMENT OF TRIAL

The following is the record of what transpired and the verbal order of Judge Martin made just prior to the commencement of the trial.

By Mr. Wade:

Your Honor, before we read the pleadings, there is a matter we wish to take up.

The Court:

All right, Mr. Bailiff, take the jury back to their room. If they need anything, see that they get it.

(Jury retires).

By Mr. Harmsworth:

If the Court please, we object to going into this at this time. The plaintiffs ask for information as to the contract between the defendant Grant and the defendant Chappell. We, as your Honor will recall, supplied an affidavit, which the attorneys for the plaintiffs objected to. The plaintiffs said they have not been informed about it. It is Thursday and it is reported to us the plaintiff has served twenty-five witnesses. I don't see any point in further delaying the matter, perhaps putting it in a situation where we can't finish this case before we go into a pre-trial examination. Your Honor, they have had all the information they are entitled to. That is the only thing they are entitled to and we suggest — —

The Court:

Let the record show, Mr. Stenographer, that at an appropriate time, the plaintiff, thru counsel, made a motion before this Court to examine two of the defendants under the Statute; that this Court at that time held that the plaintiffs were entitled to certain information and would order the examination of the parties requested on two issues: first, as to whether or not there existed a contract between — who are they, Mr. Curling?

By Mr. Curling:

It would be between S. C. Grant and Taft Chappell.

The Court:

Between Grant and Chappell.

By Mr. Curling:

That is — —

The Court:

Just a minute.

By Mr. Curling:

There are two of them.

The Court:

As to whether there is a contract between Grant and Chappell; as to whether such contract was oral or written and the terms thereof. Second, as to whether the truck in question at the time and on the occasion in question was being operated under the terms of the alleged contract.

Counsel for the defendants and the plaintiff had a conference before this Court and it was suggested that the matter might be facilitated by the presenting of a written statement containing the above information that the Court had ruled the plaintiff entitled to. Some days later, counsel re-appeared before this Court, and plaintiff, thru his attorneys, object to certain information or certain statements, rather, contained in the statements of Grant and Chappell, at which time this Court determined to allow an examination of the two parties in open Court on these issues upon the call of the case. I am limiting you strictly to those two issues as to those two witnesses.

By Mr. Curling:

I have two questions for — —

The Court:

Very good. Call him around. You don't need any explanation.

PRE-TRIAL TESTIMONY OF DEFENDANT, S. C. GRANT

S. C. Grant, was then called to the stand, was sworn and testified as follows:

MR. S. C. GRANT, (Pre-Trial Examination), being duly sworn, testified as follows:

Direct Examination by Mr. Curling:

Q. Are you S. C. Grant?

A. That is right.

Q. You are one of the defendants in this action?

A. Yes, sir.

Q. Mr. Grant, was there a contract or agreement between you and Poinsett Lumber & Manufacturing Co. whereby you were to cut timber on lands of — —

By Mr. Brigg:

May it please the Court — —

The Court:

Let him finish.

By Mr. Curling:

Q. Poinsett Lumber Co. in Oconee County and haul the logs to the pond of Poinsett Lumber Co. at Hitchin?

The Court:

Don't answer it now. Read it again.

By Mr. Brigg:

Your Honor — —

For goodness sake, let me see the question. Read it again.

By Mr. Curling:

Q. Was there a contract or agreement between you and Poinsett Lumber Co. whereby you were to cut timber on lands of Poinsett Lumber Co. on Wright's Creek in Oconee County and haul the logs to Poinsett Lumber Co. at Hitchin?

The Court:

Just ask him if there was a contract. You are setting out what you contend are the terms of it. Let him tell what the terms are.

By Mr. Curling:

I just want to know if he had a contract.

The Court:

It is awful simple to ask him if he had a contract between Poinsett Lumber Company — what is your objection?

By Mr. Brigg:

The written contract has already been introduced. Now, the only issue here is the contract between Mr. Chappell and Mr. Grant.

The Court:

That is all he is entitled to.

By Mr. Curling:

Your Honor, as to the witness Grant, I believe I am entitled to know whether or not he had a contract and whether he was operating under it, and as to whether or not Chappell had a contract or agreement, and if he was operating under it.

The Court:

If this witness Grant had a contract with who?

By Mr. Curling:

With Poinsett.

The Court:

That was not the purpose of this examination.

By Mr. Curling:

I understood that was, Sir; and the motion, I believe, sets that out.

The Court:

My understanding was it was whether or not this defendant Grant had a contract as between he and Chappell.

By Mr. Curling:

Yes, sir, you know you asked me that question. I was intending to tell you in addition we wanted to know those other two. I have four questions to ask.

The Court:

I don't care if you have a hundred — the only two I have allowed are the two I indicated — whether there is a contract between this defendant and Chappell. If so, the terms of that contract. If you want to ask him that I will allow it. That is what I have ruled, that you have — —

By Mr. Curling:

I want to know two questions.

The Court:

I have ruled on it, Mr. Curling:

By Mr. Curling:

Mr. Grant, was there an agreement or contract between you and Taft Chappell, the other defendant in this action, for the hauling of logs from Wright's Creek in Jocassee to the Poinsett plant at Hitchin?

A. We had a verbal contract.

The Court:

A little louder.

A. We had a verbal contract for $12.50 a thousand board feet.

By Mr. Curling:

Q. All right, Mr. Grant, at that time, on February 13, 1945, at the time the Plaintiff, Fields Norris, was injured, was the truck described in the complaint engaged in hauling logs pursuant to such contract or verbal agreement — was it operating under that agreement at the time Norris was injured?

A. Yes, sir.

By Mr. Curling:

That is all.

Very good. What is the other — —

I don't know that it would be necessary when one witness testifies — I guess we had better examine Mr. Chappell.

PRE-TRIAL TESTIMONY OF DEFENDANT, R. T. CHAPPELL

MR. TAFT CHAPPELL, being duly sworn, (Pre-trial examination), testified as follows:

DIRECT EXAMINATION BY MR. CURLING:

Q. You are R. T. Chappell?

A. Yes, sir.

Q. A defendant in this action?

A. Yes, sir.

Q. Mr. Chappell, did you have an agreement with Mr. Grant for hauling those logs, a verbal agreement?

A. Yes, sir.

Q. Was the truck described in the complaint at the time that Fields Norris was injured operating pursuant to that contract?

A. Yes, sir.

Q. That is all.

The Court:

Very good, all right, bring the jury.

(Jury Returns — Pleadings read).

PLAINTIFF'S TESTIMONY AND EVIDENCE

The jury had been excluded from the court room during the foregoing pre-trial examination of Grant and Chappell. The jury were returned to the court room, were sworn and the pleadings thereupon read. The pre-trial testimony of the defendants, Grant and Chappell, shown hereinabove was then read to the Court and jury by the Court Reporter. The pre-trial testimony of Thomas J. Mitchell taken before the Special Referee and shown herein under proceedings for pre-trial examination was read to the jury. Only his testimony was read showing that his company, the defendant, Poinsett, had a contract with Grant to log and haul logs and that the defendant truck and trailer were operating under the contract when the plaintiff was injured. The alleged contract was not in any way offered in evidence by the plaintiff and no objection was made thereto by defendants' counsel.

How to Preserve Questions for Review: Hubbard v. Rowe (1939), 192 S. C. 12, 5 S. E. 2d 187, is one of the leading cases as to how to preserve questions for review. It also laid down the rule, which is different from some other jurisdic-

tions, that in appealing from an error of law no motion for a new trial is necessary, since the trial judge had made a final ruling. As said at page 19:

> In matters of appeal, so far as it appears, all that this Court has ever required is that the questions presented for its decision must first have been fairly and properly raised in the lower Court and passed upon by that Court. Of course, as to questions specifically affecting the verdict, or other questions not specifically ruled on, the Court below must of necessity be given an opportunity on motion for a new trial of passing upon and correcting such matters before they can or will be reviewed by this Court on appeal. The decided cases relied on by the respondent go no further than that.
>
> In *Detheridge v. Earle,* 3 S. C., 396, cited by appellant, syllabus 2, which correctly states the holding of the Court, reads as follows: "For error of law, a new trial may be granted on appeal from the judgment, though no motion for a new trial was made before the Circuit Judge."
>
> In *Brice v. Hamilton,* 12 S. C., 32, decided in 1879, where a similar question was considered, the Court said: "A general objection is made by the defendants to the effect that no application was made to the Circuit judge for a new trial, but the appeal is directly from the judgment, and, therefore, as they contend, the exceptions taken at the trial cannot be heard. There is no ground for such an objection. It was competent for the plaintiffs to have moved before the Circuit Court for a new trial, but as the objections to the verdict relate to matters of law alone, and could be heard in this court, the appellants were not bound to submit them to the Circuit judge, on a motion for a new trial, before appealing to this court. There is no provision of the code exacting any such condition to an appeal to this court, and no antecedent practice from which such a rule could be inferred. An appeal from a judgment involves any intermediate order involving the merits and necessarily affecting the judgment (Code, §11), and this includes all rulings and charges material to the judgment."

It may be noted that the above decision should also be carefully read by an attorney starting trial practice in this State

as it bears upon various phases of conduct concerning which every trial attorney should know.

In some jurisdictions, if there is a ruling against one during a trial, he must note an "exception" to same there and then so that it will appear on the trial record otherwise one may lose his right to move for a new trial or to appeal from such ruling. This is not the rule in South Carolina. All that is necessary in this State is to have the trial record show a final ruling. Then one may move before the trial judge for a new trial on that ground or, if it is a ruling on a matter of law, one may go directly to the Supreme Court on a proper exception to such final ruling. It should be noted at this point that the word "exception" is now used in this State only in appealing. It should no longer be used in the court below. Although Section 10-1462 refers to "A motion for a new trial on a case or exceptions . . . , " the practice has been for sometime now to use the word "grounds" in place of "exceptions" in the trial court when making a motion for a new trial thus keeping the latter word only for use in appealing from a lower to a higher court. In that way confusion is avoided. Hence one finds in *Hubbard v. Rowe, supra,* that the Supreme Court would not consider a certain question because there was no "exception" in the appellate record bringing up such question before it. As said at page 24 of that decision:

> The contention of Hubbard that the trial judge erred in holding that the relationship of master and servant did not exist between him and the company, cannot be considered by this Court for the reason that that question is not properly before us, there being no exception taken to such ruling of the Court below.

Briefs:

1. Follow the Supreme Court Rules, as amended to date.
2. TITLE page on front, identical with that for "Transcript of Record" through the name of the last party in the cause. From there on, it will contain either "BRIEF OF APPELLANT" or "BRIEF OF RESPONDENT" or "BRIEF OF AMICUS (or AMICI) CURIAE", or "REPLY BRIEF OF APPELLANT", in each instance with the names of the attorneys presenting the particular BRIEF placed underneath and last, and somewhat to the right of the center of the page.

3. INDEX of contents, inside of front page. (This page not be numbered.)

4. INDEX to cases or Table of cases, statutes, and constitutional provisions cited or discussed, or better still, TABLE OF AUTHORITIES, on front of page facing that with "INDEX". The back or reverse side of this page should be blank. (These pages must not be numbered.)

5. QUESTIONS PRESENTED should be numerically listed on front of first page. If they go over onto the reverse side of that page, do not begin anything else on that reverse side. (Page with "QUESTIONS" is the first to be *numbered.*)

6. STATEMENT should be next; this statement should be an enlargement of the STATEMENT contained in the "Transcript of Record" or "RETURN", and should contain concisely stated the salient facts supporting the side of the case which the BRIEF represents. When referring to the facts always locate by stating folio numbers where the court may find them in the Transcript of Record, thus (f. 18) or (ff. 18-20).

Note that the Transcript of Record, as required by Rule 5, has folio numbers on the side, each number including approximately 100 words. These folios are necessary for use in the Briefs, or in oral argument, to call to the attention of the Court and the other side where certain facts are located; not only on which page, but exactly on what part of such page. Hence the folios are absolutely necessary. Usually the average printer knows how to use them but the attorney should always check on it, as he should on everything else going before the Supreme Court.

7. POINTS AND AUTHORITIES (or in lieu of that: ARGUMENT).

8. Divisions of the above in No. 7 should be as follows: (Corresponding to the numerical order of the questions as stated under No. 5 *supra.*)

The following forms will be helpful in framing and preparing a Brief:

QUESTION
ENJOINING A CRIMINAL PROSECUTION

(The following is a repetition of the question as stated under No. 5 and should be ITALICISED):

Can a court of equity enjoin officers of the State Highway Department from prosecuting persons for violation of a criminal law with respect to payment of a license fee or revenue tax, when it is contended the law is unconstitutional and void? (Exceptions 4 and 5.)

9. Then comes argument on the above point or question. After that will come the next QUESTION, the division treating it being numbered with the Roman numeral as follows:

II

(Note: that plenty of space should be left between the divisions treating each question. One (1) inch should do.)

10. The Respondent at the end of his BRIEF should have a division entitled REPLY TO APPELLANT'S BRIEF (in this type). This should treat the questions argued by the Appellant in the same order as they appear in the Appellant's Brief. However, in some instances it may be wise, depending on the subject, not to separate the reply but to put all argument on any one point in respondents' main Brief, thus avoiding undue repetition.
11. Every Brief should be concluded under the title "CONCLUSION". The conclusion should not contain more than 100 to 150 words, summarizing very briefly the points made and concluding with the thought that the judgment below should not stand, as the case may be.
12. All Briefs should be "Respectfully submitted," with the names of respective attorneys appearing thereunder; and under their names whether they are "Attorneys for Respondent" or "Attorneys for Appellant."

Specimen of Part of Brief: For the case involving these questions, see *Stovall v. Sawyer, Chief Hwy. Comm'r.* (1936), 181 S. C. 379, 187 S. E. 821.

QUESTIONS PRESENTED

1. Can a court of equity enjoin officers of the State Highway Department from prosecuting persons for violation

of a criminal law with respect to payment of a license fee or revenue tax, when it is contended the law is unconstitutional and void? (Exceptions 4 and 5).

2. (a) Is the first sentence of Section 5899 unconstitutional and void as being an unlawful delegation of legislative authority?

   (b) If it is, then is not the regulation of the State Highway Department, passed pursuant thereto, also void as unlawful exercise of legislative authority?

   (c) If the first sentence of that section is not void, then is not the regulation void as exceeding the authority granted by the section?

3. If the first sentence of Section 5899 is unconstitutional and void, does that render the entire section or all of Sections 5896-5900 unconstitutional and void?

4. Is the last sentence of Section 5897 a condition precedent to bringing suit so that non-compliance with the provisions thereof would bar respondents from maintaining their suit?

STATEMENT

This action was brought by the respondent to enjoin the appellants from arresting or interfering with the respondents in the operation of their automobiles upon the highways of the State of South Carolina, and also to enjoin the appellants from enforcing or attempting to enforce the regulation of the State Highway Department defining the term "non-resident."

The respondents, Louis Stovall and E. B. Collins, are bank examiners, and the respondent, C. H. Lambertson, is a tabulating accountant. They are employees of the United States under the supervision and control of the Farm Credit Administration at Washington, D. C., having their cars in this State solely for pleasure and convenience. They are residents of other States, owning automobiles duly licensed therein. In the performance of their official duties, they travel in and through many States, often remaining in no one State more than several days or a few weeks at a time, and seldom staying in oue State for a total of ninety days in any one year. They had not at the time of their arrest or threatened arrest been in the State of South Carolina for a period of ninety

days nor had any of their respective cars been regularly or periodically used in this State for busines or commercial purposes. (ff. 2-8; f. 22; ff. 40-59.)

Two of the respondents, Louis Stovall and C. H. Lambertson, came into the State on September 2, 1935. They were arrested on September 17, 1935, by patrolmen of the State Highway Department on the charge of unlawfully operating their cars on September 11, 1935, upon the State Highways without obtaining South Carolina, 1935, license plates. On September 18, 1935, they were tried and their cases dismissed by the Magistrate. They, and others similarly situated including the respondent, Collins, were immediately threatened with arrest on the identical charge. (ff. 17-24.) That there was thereafter such immediate threat of arrest was found by his Honor, Judge Bellinger, to be a fact. (f. 101.)

POINTS AND AUTHORITIES (or ARGUMENT)

I

ENJOINING A CRIMINAL PROSECUTION

Can a court of equity enjoin officers of the State Highway Department from prosecuting persons for violation of a criminal law with respect to payment of a license fee or revenue tax, when it is contended the law is unconstitutional and void? (Exceptions 4 and 5.)

Argument as to questions 2, 3, and 4, which will come next, each question being dealt with under the proper Roman numeral placed in the middle of the page. After them will come the conclusion as next outlined.

CONCLUSION

His Honor, Judge Bellinger, properly held that a court of equity acquired jurisdiction of the cause. The first sentence of Section 5899 is invalid as an unconstitutional delegation of legislative authority and the regulation of the State Highway Department, defining the term "non-resident", is void as an unlawful exercise of such authority. The first sentence of Section 5899 can be declared invalid without affecting the remainder of that Section or without affecting Sections 5896-5900. The last sentence of Section 5897 does not create a condition precedent and, if it did, the respondents, Louis Stovall and C. H. Lambertson, have fully complied with the con-

dition. The injunction as granted should stand, restraining the appellants from enforcing or attempting to enforce the regulation of the State Highway Department.

Respectfully submitted,

_____

_____

Attorneys for Respondents.

Exceptions: South Carolina carries a case up for review on exceptions which are contained in the last main subdivision of the Transcript of Record. When the legislature abolished the old writ of error, this state did away with the incidents necessary to its use, among which was assignment of error for review. However, Section 6 of Supreme Court Rule 4 tells us that each exception "must contain within itself a complete assignment of error." So, the old common law is still used to the extent of aiding in framing the statutory "exception." Again it should be recalled that the Rule also warns one that "each exception must contain a concise statement of one proposition of law or fact"; also that the proposition must be distinctly and specifically stated.

Each exception must be concise, definite, neither long or argumentative in form, and must contain only one assignment of error. Supreme Court Rule 4, Section 6. If this Rule is not conformed to, the reviewing court will not consider the exception, unless it waives the attorney's failure, which in its discretion it can do but seldom does, except in rare cases such as those involving a life or death sentence.

As pointed out in *Scott v. Independent Life and Acc. Ins. Co.* (1955), 227 S. C. 535, 88 S. E. 2d 623, at page 537:

> The sole exception on this appeal is as follows: "His Honor erred, it is respectfully submitted, in holding that a cause of action has been stated in the complaint."
>
> The foregoing exception is entirely too general, vague, and indefinite to be considered. Rule 4, Section 6 of this Court; *Dendy v. Waite,* 36 S. C. 569, 15 S. E. 712; *Swygert v. Wingard,* 48 S. C. 321, 26 S. E. 653; *Brady v. Brady,* 222 S. C. 242, 72 S. E. (2d) 193, 194. The last mentioned case involved an appeal from a judgment sustaining an oral demurrer. The only exception was couched in the following language: " 'That his Honor, the trial judge, erred in sustaining the oral demurrer to the com-

> plaint upon the ground that the complaint did not state a cause of action, the error being that the complaint does state a cause of action.'" The Court held that it was too indefinite and did not comply with Rule 4, Section 6.
>
> In the *Brady case* 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. [Cases cited.] See also *State v. Hollman* (1958), 232 S. C. 489, 102 S. E. 2d 873.

Only matters that have been ruled on below can be reviewed, otherwise the appellate court would be exercising original jurisdiction, and hence would not be a reviewing court at all. In other words, the judge below must have been "put in the wrong." As said in *Elliott v. Page* (1914), 98 S. C. 400, 82 S. E. 2d, at page 402:

> . . . In the first place, his Honor, the Circuit Judge, was not requested to rule upon the question, and as he made no ruling upon it, it is not properly before this Court of consideration. . . .
>
> See also *Waltz v. Equitable Life Assurance Society of U. S.* (1958), ... S. C. ....., 104 S. E. 2d 384, 391.

The theory must be the same in both trial and reviewing courts, otherwise the two courts would be passing on different questions. The rule is briefly stated in *Wilson v. So. Ry. Co.* (1923), 123 S. C. 399, 115 S. E. 764, at page 405:

> The only exception which imputes error to the trial Court in refusing the motion for a new trial (6 and 7) are very properly predicated upon and confined to the grounds of that motion as made in the Circuit Court. [Cases cited.]

And at page 408 one finds:

> . . . To that portion of the Judge's charge so announcing and applying the legal measure of defendant's liability, there was no exception taken either upon the motion for a new trial in the Court below or upon the appeal to this Court. Indeed, the case seems to have been tried by both parties without objection upon the theory that the whole of the land claimed by the plaintiff had been appropriated by defendants for railroad purposes, and

that, if such appropriation was in excess of the rights acquired by the railroad under the original entry, the plaintiff was entitled to an award of permanent damages. The appellant's exceptions must therefore be considered in the light of the general rule that the theory pursued in the trial Court with respect "to the relief sought and grounds therefor" must be adhered to in the appellate Court. 3 C. J., pp. 730, 737, §§ 625, 630.

It should be noted in passing that the rule stated in the first syllabus of the *Wilson* case, *supra,* is now no longer the law because of the change made by Code Section 7-5 which now allows an appeal from a verdict, even though no judgment has been entered.

In framing one's exceptions for appeal one cannot be too careful. This is illustrated by *Planters Fertilizer etc. Co. v. McCreight* (1938), 187 S. C. 483, 198 S. E. 405. At page 488 one finds:

This appeal is from the two orders above mentioned. The exceptions for appeal are:

"1. The trial Judge erred in striking out the following from the first paragraph of the third defense in the answer of the defendant: 'And the sum of $2500.00 paid by defendent to plaintiff by his said promissory note and chattel mortgage, which the plaintiff accepted and agreed to credit on the said account of the defendant, aggregating * * *.'

"Specification: The said allegations so stricken from the answer of the defendant state a valid partial defense by way of payment and was, therefore, not irrelevant.

"2. The trial judge erred in granting the order to examine the defendant before trial.

* * * * * * *

It will be observed that the first exception without the "specification" would be too general. It would violate that part of Section 6, Rule 4 of the Rules of the Supreme Court, which provides: "Each exception must contain a concise statement of one proposition of law or fact which this Court is asked to review. * * *" In numerous cases this Court has declined to consider such exceptions. Appellant has elected to rely upon a single specification of error in respect to the stricken allegations. That speci-

fication of error in respect to the stricken allegations. That specification assigns error on the part of the Circuit Judge for the reason that the allegations so stricken "state a valid partial defense by way of payment and was, therefore, not irrelevant." We might agree with appellant with respect to this specification, but that would be of no avail to him. The motion to strike was made upon the ground that said allegations were "sham, frivolous and/or irrelevant." There is a wide difference in the legal definition or meaning of these terms. We have no way of knowing whether the Circuit Judge granted the motion because he found that said allegations were sham or because he found them to be frivolous or irrelevant. In appellant's brief we find this: "The Trial Judge did not make any findings of fact or conclusions of law other than the very general conclusion that the particular portion of the third defense in the answer should be stricken. Counsel and parties are left in the dark as to the findings of fact and conclusions of law upon which the order is predicated."

It will be seen, therefore, that, although we might agree with appellant as to his single "specification" we would not be warranted in reversing the order appealed from. The Court will sometimes relax its rules in order that a litigant may not through inadvertence suffer material loss, but such a situation cannot arise in this case. Respondent contends that the note and mortgage were given merely as security for that much of appellant's obligation under the contract. Appellant contends that they were given in part payment of said obligation and accepted as such. He admits, however, that the mortgage debt is still unpaid. Taking either view of the transaction appellant's liability growing out of his contractual relations with respondent would remain the same. His indebtedness to respondent has neither been increased nor diminished.

See also *Riddle v. George* (1936), 181 S. C. 360, 187 S. E. 524, as to when the Court will waive compliance with its Rules.

When Circuit Court Rule 76 Must be Used: If there was a legal insufficiency of evidence, i.e., no scintilla or reasonable inference to carry a case to the jury, one must be careful in

South Carolina to make a motion for a nonsuit or directed verdict under Circuit Court Rule 76, else there can be no appeal on that point, just like we have already ascertained that there could be no chance of obtaining a judgment notwithstanding the verdict, though, but for such omission, one might readily have obtained such a judgment. Hence, we gather as we go along that an attorney through ignorance, oversight, or plain carelessness can lose a client's cause anywhere along the line, all of which crystalizes before one a rule of conduct: study thoroughly for each cause; do not overlook that which is necessary and be careful at every step along the procedural path. The pitfalls are many; so are the "musts"; the "maybe's" are few and far between.

Necessity of Motion for a New Trial: In some jurisdictions, a motion for a new trial is a condition precedent to appealing. That is true even as to matters definitely ruled on by the judge during the trial process. This inconsistently gave him "two bites at the cherry", and caused additional waste of time and expense. South Carolina has a more consistent and practical rule heretofore noted in *Hubbard v. Rowe* (1939), 192 S. C. 12, 5 S. E. 2d 187. One doesn't have to move for a new trial as to matters definitely ruled on by the judge during the trial. However, as to matters that only could be ruled on by him after the trial, such as whether upon learning after verdict rendered a juror improperly viewed the place of the collision prior to a rendition of the verdict, or was taken to dinner by an attorney in the cause, or whether a new trial should be granted on after-discovered evidence, a motion for a new trial is necessary, since then is the first chance the court below will have had to make a ruling on any such matters, and until there is such final ruling below there is no right of review.

Appeal in Equity Cases: Where cases are referred to the Master, exceptions must be taken to the Master's report, otherwise, if questions as to errors are later raised, they will not be considered on appeal. As said in *Wise v. Picow et al.* (1958), 232 S. C. 237, 101 S. E. 2d 651, at page 244:

> The defendants also complain that the Court was in error in allowing interest from February 1, 1954, the effective date of the termination of the contract here in question.

> A review of the record shows that the defendants did not raise this question before the Master nor was there any exception to the Master's Report when he recommended that the sum found by him to be due plaintiff bear interest from the date of the termination of the contract.
>
> We have held in numerous cases that it is not proper to consider questions which were not raised in exceptions to the Master's Report. [Cases cited.]

The power of the Supreme Court in equity cases as to passing on the facts is very different from that in law cases, except where a jury verdict appears on the equity scene. As Justice Taylor pointed out in *Dobson v. Atkinson* (1957), 232 S. C. 12, 100 S. E. 2d 531, at page 16:

> This Court has jurisdiction in appeals in equity to find the facts in accord with our view of the preponderance or greater weight of the evidence, in the absence of verdict by jury. *Gilbert v. McLeod Infirmary,* 219 S. C. 174, 64 S. E. (2d) 524, 24 A. L. R. (2d) 60; *Wise v. Wise,* 60 S. C. 426, 38 S. E. 794; *Forester v. Forester,* 226 S. C. 311, 85 S. E. (2d) 187; and an action for divorce is within the equity jurisdiction of the Court. Accordingly the evidence must be considered in the light of the well settled rule that in an equity case findings of fact by a Master or Referee, concurred in by the Court, will not be disturbed by this Court on appeal unless it appears that such findings are without evidentiary support or against the clear preponderance of the evidence. *Archimbault v. Sprouse,* 218 S. C. 500, 63 S. E. (2d) 459; *Mincey v. Mincey,* 224 S. C. 520, 80 S. E. (2d) 123, 126; *Oswald v. Oswald,* 230 S. C. 299, 95 S. E. (2d) 493.
>
> See also *Simonds v. Simonds* (1957), 232 S. C. 185, 101 S. E. 2d 494.

By comparison, in an action at law, even where the case is tried by a judge without a jury, his findings have the same force and effect as a verdict of a jury, and unless he has committed some error of law or the evidence is reasonably susceptible of only the opposite conclusion, his findings must be accepted by the Supreme Court. *Robinson v. Carolina Casualty Ins. Co.* (1958), 232 S. C. 268, 101 S. E. 2d 664.

Reviewing and Appealing Workmen's Compensation Cases: There is no doubt now what the necessary procedure must be as to reviewing and appealing such cases. As pointed out by Justice Legge in *Wall v. C. Y. Thomason Co. et. al.* (1957), 232 S. C. 153, 101 S. E. 2d 286, at page 155:

> Procedure for review by the full Commission of the award of the hearing commissioner is prescribed by Section 72-355 of the 1952 Code, and for appeal to the court of common pleas from the award of the full Commission by Section 72-356. If no application is made for review of the hearing commissioner's award, that award becomes effective as the award of the Commissioner. *McDonald v. Palmetto Theaters,* 196 S. C. 38, 11 S. E. (2d) 444.
>
> Section 72-357 provides that upon the filing in the court of common pleas of a certified copy of an award unappealed from the court "shall render judgment in accordance therewith." The language of the section is mandatory; and the rendition of judgment in such case is ministerial rather than judicial, for the award is subject to review only by the appeal procedure to which we have referred.
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> Appeal to the court of common pleas from the Commission's award is governed by the same principles that apply in ordinary civil actions, Code, Section 72-356, and that court can consider only matters that were before the Commission and as to which error has been specifically assigned. *Jones v. Anderson Cotton Mills,* 205 S. C. 247, 31 S. E. (2d) 447; *Bush v. Gingrey Brothers,* S. C., 100 S. E. (2d) 821.

Constitutional and Jurisdictional Questions: As to a constitutional question, it must be raised below, when possible, i.e., at the "earliest opportunity," else there is waiver. *Salley v. McCoy,* 186 S. C. 1, 195 S. E. 132. This, of course, doesn't apply to jurisdiction of the subject matter. The latter can be raised at any time, even for the first time in the appellate court. As to the question of jurisdiction the Supreme Court may raise the point itself. *Henderson v. Wyatt* (1876), 8 S. C. 112. Where a contract is against good morals, or where there is an agreement to stifle a prosecution, *Wight v. Rindskopt,* 43 Wis. 344, it is even the duty of the judge of his own

motion, if necessary, to dismiss the cause. South Carolina would probably adopt a similar rule.

Some years ago the writer was sitting in a South Carolina courtroom. The plaintiff's attorney had just finished reading the complaint to the jury, when Judge Watts asked the attorney if the suit was by a prostitute claiming that the defendant had given her a venereal disease. The attorney said: "Yes, Your Honor." Judge Watts immediately turned to the Clerk and said: "Mr. Clerk, this case is dismissed. Courts don't hear such matters. Call the next case."

In this State Sec. 10-547 providing that there shall be no waiver of the objection that no cause of action is stated by a failure to demur applies only to the trial court. The objection can't be raised for the first time in the Supreme Court. *Montgomery v. Robinson* (1912), 93 S. C. 247, 76 S. E. 188.

As declared by the Court at page 251:

> Section 169 [now 10-647] of the Code of Procedure provides that, if the objections to a complaint which are mentioned in section 165 as grounds of demurrer, when they appear upon the face of the complaint, are not raised either by demurrer, or answer, when they do not appear upon the face of the complaint, "the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the Court, and the objection that the complaint does not state facts sufficient to constitute a cause of action." It follows that the two objections excepted are not waived by the failure to raise them by demurrer on answer; but it does not follow that they cannot be waived at all. Some of the cases, construing this section, hold that these objections can be raised at any time and at any stage of the preceedings. While this statement is true, in a way, it is somewhat misleading; for instance, it has been held that the objection for insufficiency cannot be raised for the first time in this Court. Therefore, it is waived by a failure to raise it in the Circuit Court. *Miller v. Hughes*, 33 S. C. 526, 12 S. E. 419; *Green v. Green*, 50 S. C. 529, 27 S. E. 952. And it is quite certain that, once it has been properly raised and decided, it cannot be raised again.

However, this State would doubtless follow the rule adopted elsewhere as to necessary or indispensable parties. Where

one of them is omitted, a judgment obtained would be non-operative and therefore ineffectual. Such a question can be raised for the first time in the appellate court. *Shearer v. Murphy,* (Kan.) 66 Pac. 240.

Time for Obtaining Review: In South Carolina, the statutes limiting the time for appealing are jurisdictional and mandatory. The 10 day period provided by Sec. 7-405 can't be extended by the courts. *Stroup v. Duke Power Co.* (1949), 216 S. C. 79, 56 S. E. (2d) 745. That case at page 84 laid down the rule as follows:

> We agree with respondent that the Court of Common Pleas rose not later than March 19th and that notice of intention to appeal served twelve days thereafter was not within time. In reaching this conclusion, we have not overlooked the rule that statutes should be construed liberally in favor of the right of appeal but "there is a limit beyond which the most liberal construction cannot go." *Haughton v. Order of United Commercial Travelers of America,* 108 S. C. 73, 93 S. E. 393, 394. The time prescribed by statute within which notice of appeal must be given cannot be enlarged or extended by the courts. *Palmer v. Simons,* 107 S. C. 93, 92 S. E. 23, and cases cited.

The 10 day period can, of course, be extended by agreement but an attorney should not enter into such an agreement without first consulting his client. Since such time period is mandatory, it behooves an attorney not to put off until the last day serving the required notice, since he may become ill or some other emergency may prevent compliance.

Another error in the Code annotations should be noted here. The old case of *Bank v. Gary* (1881), 14 S. C. 571, is cited under Section 7-405 as showing that such notice "need not be in writing." Sec. 7-4 says it *must* be in writing. This section governs.

It is probable that South Carolina would follow the rule adopted by several other jurisdictions that where delay is due to the court or to fraud of the adversary, a court has inherent power to relieve an appellant from the strict time limit. See *Smythe v. Boswell,* (Ind.) 20 N. E. 263 and *Schmuck v. Missouri, etc. Ry. Co.,* (Kan.) 116 Pac. 818.

What Effects Transfer of Jurisdiction: Where usable, a writ of error is not considered brought until it is filed in the

court which rendered judgment. This doesn't apply in South Carolina because as heretofore noted the writ has been abolished in this State.

Appeal, Need for Properly Perfecting: In South Carolina an appeal to the Supreme Court has not been "brought" until it has been "perfected and Docketed" with the Clerk of that Court. Supreme Court Rules 1 and 18. This means that until those two rules have been complied with the lower court retains jurisdiction, except that under Rule 18 the Supreme Court shall have jurisdiction *only* for granting a stay of proceedings when a certified copy of the notice of appeal with proof of service thereof is filed with the Clerk of that Court.

As pointed out by Justice Stukes in *State v. Cottingham et al.* (1953), 224 S. C. 181, 77 S. E. 2d 897, at page 186:

> The necessity for punctual and orderly perfection of appeals has been pointed out, and the requirement enforced, in many late cases. [Cases cited.] The following concisely stated conclusion, applicable here, is taken from the last cited decision, 202 S. C. at page 316, 24 S. E. (2d) at page 518: "There is no dispute that the Transcript of Record was not served upon respondent and filed in the office of the Clerk of this Court within the time required by the rules. Nor did appellant undertake to apply to a Court of competent jurisdiction for additional time in which to perfect his appeal. Therefore, the motion of respondent to dismiss the appeal is granted."

Justice Stukes at page 185 calls attention to the fact that now only "Four days' notice of motion" to dismiss is necessary and not "ten days' notice"; and also on that same page he gives the following rule as to the respective powers of the trial court and the Supreme Court to dismiss an appeal for failure to abide by Supreme Court Rule 1:

> "Since the jurisdiction proper of this court, to the exclusion of the circuit court, does not attach until the filing of the 'return,' before an appeal is perfected as required by section 384, Code of Civ. Procedure (1912), it is within the power of the circuit court to dismiss an appeal by determining and declaring that the appeal to this court has been abandoned, or the right of appeal waived, by failure to take the steps required by law to

perfect such appeal. [Cases cited.] No return having then been filed in this Court, Judge Townsend clearly had jurisdiction to hear and determine defendant's motion to dismiss plaintiff's unperfected appeal."

In using Circuit Court Rule 49, care must be taken to compare it with the Supreme Court Rules and wherever there is the least inconsistency, the latter Rules govern. In fact, except for how a case for appeal is to be settled by the Circuit Judge, this Rule is seldom, if ever, used. When it does come into the picture, it also applies now to a County Court Judge. Sections 15-615 and 15-616. Sections of like import will be found in the special chapters of the Code pertaining to specific county courts.

Appeals from County Courts: Sections 7-341 to 7-344, which give the right of appeal from a county court to the Circuit Court, should not be followed without first referring to the particular county court Articles in the Code of 1952, beginning with that on page 556 of Volume 2.

The above sections are part of a General Act and govern only where a county court Act fails to provide for appeals. Thus far, every such Act has provided for appealing directly to the Supreme Court, as one will find, for example, in Sections 15-678, 15-699.17, 15-742, 15-779, and 15-830. In non-support cases tried in the Marlboro County Court one "may" appeal to the "court of common pleas of the county". Section 15-699.18.

As to the procedure on appeal from such courts, it is the same as that from Circuit Courts, which will hereinafter be discussed.

There are no applicable rules of court for these tribunals. Sections 7-301 to 316 govern. Section 7-302 provides a time period for appealing of five days. This period is mandatory. If appeal is from a magistrate's court, the magistrate must be served personally, or his clerk, if there is one, must be so served. This is also mandatory. Section 7-304. If the notice of appeal can not be served in either of the above ways, it may be served by leaving it with the Clerk of the Appellate Court. It has to be in writing, and service may be by mail. Section 7-4.

The legislature has no power to take entirely away from the Circuit Court the right and duty to hear such appeals.

At most, it can only give County Courts concurrent jurisdictions. *Strickland v. S. A. L. Ry.* (1918), 112 S. C. 67, 98 S. E. 853. At page 68, it is stated:

> The question for decision in this case is whether the provision of section 3 of the act creating a County Court for Richland county (30 Stat. 156), which confers upon that Court exclusive jurisdiction to hear and determine appeals in all civil cases from magistrates' Courts, is constitutional.
>
> The provisions of the Constitution bearing upon the question are found in sections 1, 15, and 23 of article V . . .
>
> Section 15 confers upon the Court of Common Pleas jurisdiction in all civil cases, and appellate jurisdiction in all cases within the jurisdiction of magistrates' Courts, since they are inferior Courts from which appeals are not allowed directly to the Supreme Court. Where the Constitution confers jurisdiction upon a Court, the legislature cannot take it away. Therefore, the legislature cannot deprive the Court of Common Pleas of jurisdiction in any civil case, nor of appellate jurisdiction in cases within the jurisdiction of magistrates' Courts except by providing for a direct appeal from these Courts to the Supreme Court. But the power conferred upon the legislature (by section 1) to establish County Courts, and other Courts inferior to Circuit Courts, carried with it, by necessary implication, the power to invest such Courts with jurisdiction, which necessarily must be of cases within the jurisdiction of the Circuit Courts, since they had already been invested with jurisdiction in all civil and criminal cases, and the exception of certain cases implies power to confer upon them jurisdiction in such others as the legislature may determine. But the power so implied must be exerted so as to avoid conflict with the express provisions of the Constitution. This may be done by conferring upon such inferior Courts concurrent jurisdiction with that vested in the Court of Common Pleas, since that does not deprive the latter of the jurisdiction vested in it by the Constitution. In conformity with this principle, the legislature made the original jurisdiction of the County Court concurrent with that of the Court of Common Pleas; but, in violation of it

and of the express provision of the Constitution, it attempted to give the County Court exclusive jurisdiction of appeals from the Court of magistrates.

As the legislature clearly had the power to give the County Court concurrent jurisdiction of such appeals, and as the greater includes the less, so much of the act as gives the County Court jurisdiction of such appeals is valid, and only so much of it is void as attempts to make that jurisdiction exclusive. It follows that the County Court has concurrent jurisdiction with the Court of Common Pleas to hear such appeals.

A magistrate must make a "return" to the reviewing court. If he declines to do so, he can be mandamused, for without that "return" there would be nothing for the reviewing court to hear.

So that all the pertinent facts will go up for review, thereby allowing the reviewing court to pass on the case as heard below, the magistrate is under a duty to take down in writing the testimony. Section 7-313. Of course, he is not expected to take it down verbatim like a stenographer, but he must at least take down all important facts in condensed form. If he should not be doing so, one of the attorneys should courteously call the omission to his attention, else there would be waiver, and there would be no case for appeal, or, at most, one that would not be the same as that actually tried. *City of Greenville v. Latimer* (1907), 80 S. C. 92, 61 S. E. 224, gives the rule at page 93:

* * * A jury need not be summoned unless the defendant demands it, but the taking of the testimony as required is a duty devolving upon the magistrate or mayor without any demand on the part of the defendant. The defendant may doubtless by conduct waive his right to have the testimony so taken or estop himself from raising objection on that ground, but the mere failure to demand that the testimony be taken as required by law is not a waiver. All that appears in this case is that the defendant did not ask that the testimony be taken down in writing and signed by the witnesses.

It might seem desirable in some mayor's courts, pressed with numerous cases, to dispense with this requirement which calls for some pains and consumption of time, but

> the due protection of the party charged with crime in his right of appeal and the means which compliance with the statute would afford in preventing or punishing perjury are weightier considerations.

See also *Lake City v. Gilliland* (1915), 101 S. C. 152, 85 S. E. 312.

It is always best in an important case to agree that the stenographer of one of the attorneys be sworn and have that person take down the testimony and also any motions or other important judicial steps that enter into the trial. Then if there is an appeal, a transcript can be had.

The testimony must always be reduced to writing and signed by the witnesses. As pointed out in *City of Sumter v. Hogan* (1913), 96 S. C. 302, 80 S. E. 497, at page 305:

> The requirement that the testimony should be reduced to writing, and signed by the witnesses during the trial, related to the procedure, and the failure to comply with it, was a mere irregularity which could be waived. *City of Abbeville v. Gooseby*, 93 S. C. 370, 76 S. E. 977.
>
> It was the duty of the defendant's attorney, to call the court's attention to such irregularity as soon as he discovered it, otherwise it would be deemed to have been waived. *State v. Norton*, 69 S. C. 454, 48 S. E. 280.
>
> The fact that the defendant's attorney gave notice, that he would require the testimony to be reduced to writing, did not absolve him from his duty to make such oversight known, as soon as discovered, if he intended to rely upon the objection, that there was a failure to comply with said requirements, as a ground of appeal. Furthermore, his request that the testimony should be reduced to writing was complied with. The reason of the rule is thus stated in the case of *Lee v. McLeod*, 15 Nev. 163: "A party ought not to be permitted to take the chances of a verdict in his favor, and wait until after the verdict is rendered against him, before making any objection. If, with a full knowledge of all the facts, he proceeds with the trial and takes the chances, he ought, in justice and fair dealing, to submit to the consequences."