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Practice and Procedure

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PRACTICE AND PROCEDURE

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Because of the length and complexity of this subject, I have limited this paper to cases involving civil practice and procedure in the courts. Thus I have omitted cases involving administrative law or procedure and criminal procedure, which are reviewed elsewhere herein by other members of the Bar. Nor have I reviewed the statutes recently enacted by our General Assembly which affect procedure. These are included in an excellent summary of new acts published in the 1955 Summer Edition of the *Law Quarterly*.[1]

There is little continuity in this subject and little connection between the various matters affecting procedure which I discuss hereinafter. For this reason I have divided this paper into three main parts: first, *Actions and Proceedings;* second, *Trial and Judgment;* and third, *Appeal and Review.*

In the first part, I have included cases on Certiorari, Contempt, Declaratory Judgments; and Proceedings for Separate Support and Maintenance, for Attorneys Fees Against Attachment Bonds, and to Reopen Judgments. Also, I have reviewed cases relating to Service of Process.

In the second part, *Trial and Judgments,* I have grouped cases relating to Venue, Jurisdiction of Judge of Adjoining Circuit, Right to Framed Issues in Equity Cases, Right to Jury Trial in Law Cases, and *Voir Dire* Examination of Jurors on Insurance connections. In addition, cases are cited on the Admissibility of a Deposition Whose Informality is Covered by Stipulation; Power of the Court to Order a Witness to Testify; Waiver of Objection by Cross-examination Without Reservation; and Intervention of Parties in an *In Rem* Proceeding. Finally under this heading are cases on Voluntary Non-suit as a Matter of Right, Reopening Case, and Conduct of Counsel.

Under *Appeal and Review* is first a general discussion of matters in which the Supreme Court has or has not exercised its original or appellate jurisdiction. This is followed by a section on Scope of Review, which in turn includes several subsections, and finally a case on Settlement of Record for Appeal.

Under Scope of Review in Part 3, I have assembled cases under the following subheadings (several of which are still further subdivided): Review when Points not Made Below or in Exceptions,

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1. 7 S.C.L.Q. 620 (Summer 1955).

or When Objections Are Not Timely Made. Also, Orders Which are not Appealable. Finally I have listed those cases relating to the Supreme Court's Review of Facts in Equity Cases, of Findings of Master Concurred in by Circuit Judge, and of Claims that Damages are Excessive.

I. ACTIONS AND PROCEEDINGS

A. *Certiorari*

Two cases on certiorari illustrate instances in which the writ will be allowed or refused.

In *Breeden v. S. C. Democratic Executive Committee*[2] the petitioner sought review of the action of the Executive Committee in declaring respondent nominee of the Primary. In answer to respondent's contention that actions of the Executive Committee were not reviewable in the absence of fraud or bad faith, the court said:

> Under our decisions primary elections have been given a legal status and it has long been recognized that any person interested in an election has a right to seek relief in the Courts when the tribunals designated by the party for the decision of controversies have not proceeded according to law . . . . While we have no right to review disputed testimony, we are empowered to correct any error of law made by the party tribunals and may also examine the facts for the purpose of determining whether their findings have any evidentiary support . . . . In the instant case the facts are undisputed. The questions presented are purely of a legal nature, which unquestionably this Court has jurisdiction to determine. (Citations omitted.)

The court also held that the justice of the court to whom the petition was first presented must determine initially whether the petition complied with Rule 20 of the court so as to move the Supreme Court to assume original jurisdiction.

In *Dunbar v. City of Spartanburg*[3] petitioner sought certiorari to review the actions of City Council in refusing a rezoning application. The Supreme Court held that the Council's action in refusing to modify its zoning law was legislative rather than judicial, and the Court could not compel legislative action.

> At common law and under the practice of most jurisdictions writs of certiorari will lie to review only those acts which are judicial or quasi-judicial in nature. It does not lie to review

2. 226 S.C. 204, 84 S.E. 2d 723 (1954).
3. 85 S.E. 2d 281 (S.C. 1955).

> or annul any judgment or proceeding which is *legislative, executive or ministerial rather than judicial. The writ does not lie to review the actions of an inferior tribunal or board in the exercise of purely legislative functions.* (Emphasis mine.)

The court also cited petitioner's failure to pursue his remedy at law provided by the zoning ordinance as an additional ground for denying the writ.

B. *Contempt Proceedings*

In *Long v. McMillan*,[4] the defendants, officials of the State Highway Department, appealed an order of the circuit judge ruling them in contempt. Defendants had disciplined two highway patrolmen for failing to turn into the Highway Department a pistol seized in an arrest. The patrolmen had previously been informally instructed by the trial judge, after the trial of the gun's owner, to hold the gun pending further order of the court. The Supreme Court reversed the trial judge holding:

> After the case of *State v. Stacey Huggins* was ended, Corporal Crawford inquired informally of the Judge as to what disposition should be made of the pistol he had received from Huggins. The Judge's response can in no wise be considered a valid and binding order of the Court in the Huggins case as that case had been ended . . . . . but was more of an oral directive in the form of advice which Crawford had sought for his own benefit. There was no open announcement in Court, no notation thereabout entered in the minutes, or anything done which would make such a part of the records of the Court. (Omissions mine.)

C. *Declaratory Judgment — Sufficiency of Complaint*

In *Foster v. Foster*[5] plaintiff sought a declaratory judgment to determine the rights and estates of the various parties under a will. Certain defendants demurred that the complaint did not set out a cause of action. The lower court overruled the demurrer and the Supreme Court sustained it, saying:

> The Complaint here states the facts from which it is apparent that a justiciable controversy, actual or potential, between the respondents on the one hand and the appellants on the other, exists as to their respective rights and estates under Item 4 of the Will . . . . *The question now is not whether the construction advanced by the respondents is correct, but whether they are en-*

4. 86 S.E. 2d 477 (S.C. 1955).
5. 226 S.C. 130, 83 S.E. 2d 752 (1954).

titled to have the Will construed . . . . 'The test of sufficiency of such a complaint is not whether it shows that the plaintiff is entitled to a declaration of rights in accordance with his theory, but whether he is entitled to a declaration of rights at all. Even though the plaintiff is on the wrong side of the controversy, if he states the existence of a controversy which should be settled by the Court under the declaratory judgment law, he has stated a cause of suit.'

'. . . If rights are so clear that there is no uncertainty or dispute as to them, a demurrer upon that ground would lie. But where the Complaint in such an action does not seek affirmative relief, a demurrer cannot properly be addressed to it on the ground that the facts alleged would not legally support a judgment sustaining the claim of the plaintiff, because he does not claim direct relief, but only a declaration of his rights.' (Emphasis and omissions mine.)

D. *Proceeding for Separate Support and Maintenance — Grounds*

In *Forester v. Forester*[6] the Supreme Court said:

There is no statute in this state undertaking to fix the grounds for separate maintenance and support. This is left to the broad discretion of the Court of Equity . . . .

The grounds upon which alimony should be allowed are best stated in *Wise v. Wise,* 60 S.C. 447, 38 S.E. 794, 802, after a review of the decisions in this State: "(1) Desertion of the wife by the husband, without just cause . . . . (2) Where the husband inflicts upon his wife, or threatens her with, bodily injury, amounting to the *saevitia* of the civil law, which is defined 'to be personal violence actually inflicted or menaced, and affecting life or health.' (3) Where the husband practices such obscene and revolting indecencies in the family circle, and so outrages all the sentiments of delicacy and refinement characteristic of the sex that a modest and pure-minded woman would find these grievances more dreadful and intolerable than the most cruel inflictions upon her person." (Omissions mine.)

E. *Proceeding Against Attachment Bond — Attorney's Fee*

In *Knighton v. Bramlett*[7] the plaintiffs sued defendants as principal and surety on an attachment bond to recover attorney's fees and damages. Earlier, in another proceeding, the defendants had attached an automobile, and the attachment was dissolved on the

6. 226 S.C. 311, 85 S.E. 2d 187 (1954).
7. 226 S.C. 133, 83 S.E. 2d 753 (1954).

ground it had been improperly issued. The court held that reasonable attorney's fees were allowed in actions against plaintiffs' attachment bond, if the attachment was dissolved, and also, that it was not necessary that these claims be asserted in the proceeding to dissolve the attachment.

> Suit on the bond could only be brought in a subsequent cause of action by service of a summons and complaint upon the principal and surety, as no cause of action on the bond existed until the dissolution of the attachment.

F. *Proceeding to Reopen Judgment — Mistake or Excusable Neglect*

In *Marthers v. Hurst*[8] the defendant moved to reopen a judgment which had been taken against him when he undertook to handle his own case, and was absent when it was tried.

Upholding the lower court's denial of the motion, the Supreme Court said:

> It is well established that a motion of this kind is addressed to the sound discretion of the Circuit Judge whose ruling will not be disturbed in the absence of a clear showing of abuse of discretion . . . . It is equally well settled that it is incumbent upon the party seeking relief under this section to show (1) *that the Judgment was taken against him 'through his mistake, inadvertence, surprise, or excusable neglect'; and* (2) *that he has a meritorious defense.*
>
> We need not consider the question of meritorious defense, for it clearly appears that there was no abuse of discretion on the part of Judge Moss in holding that appellant had failed to show excusable neglect. (Emphasis mine.)

However, in *Brock v. Brock*,[9] the Supreme Court reversed the lower court on the ground that it had abused its discretion in allowing the defendant to reopen the judgment which had been taken against him in a divorce action. The record disclosed that defendant had completely disregarded all proceedings in the lower court and all orders which had been served upon him until after the decree of divorce had been rendered. When he then moved to vacate the decree, his motion was granted by the lower court. The Supreme Court, citing Section 10-1213,[10] which allows the lower court, in its discretion, to reopen the judgment taken against a party "through his mistake, inadvertence, surprise or excusable neglect", said:

8. 86 S.E. 2d 581 (S.C. 1955).
9. 225 S.C. 261, 81 S.E. 2d 898 (1954).
10. CODE OF LAWS OF SOUTH CAROLINA, 1952.

> The foregoing section is an exclusive remedy and takes the place of a petition for rehearing or a bill of review . . . .
> The affidavit not only fails to support respondent's contention that the judgment was entered through mistake, inadvertence, surprise, or excusable neglect, but it reveals that respondent failed to exercise the slightest care. Therefore, *there was a lack of due diligence as required by law . . . and this court has held that one who is wilfully or inexcusably in default deserves no consideration from the court.* (Emphasis and omissions mine.)

G. *Service of Process*

In *Foster v. Morrison*[11] the court held that after a foreign corporation, previously domesticated in South Carolina, had formally withdrawn from the State and did no business here, service of process upon the Secretary of State of South Carolina could not confer state court jurisdiction when the cause of action arose in a foreign State.

In *Peoples Nat'l Bank v. Manos Brothers, Inc.*[12] the court held a Georgia divorce invalid because the defendant in that proceeding had not been properly served by publication as required by the laws of Georgia, and that proper service is essential for jurisdiction of the defendant.

> The well established rule is that when a constructive service by publication is relied upon *the published notice must correctly identify the parties to the action and accurately state their names, especially that of the defendant upon whom service is thus thought to be made* . . . .

In answer to the contention that the *idem sonans* doctrine might be applied where the name of the party to be served was misspelled, the court said:

> The doctrine of *idem sonans is not properly applicable in divorce cases, for the obvious reason that the plaintiff well knows the true name of the defendant* . . . .
> 'The corrupt practices in divorce proceedings could hardly be aided by the Court's better than to open the door for a variance between the actual name of the defendant in the records and that in the notice constituting the service and giving the Court's jurisdiction.' (Emphasis and omissions mine.)

11. 226 S.C. 149, 84 S.E. 2d 344 (1954).
12. 226 S.C. 257, 84 S.E. 2d 857 (1954).

II. TRIAL AND JUDGMENT

A. *Venue*

In each of the cases discussed below the Supreme Court emphasized the principle that findings by the trial judge on motions for change of venue will not be disturbed if sustained by evidence in the absence of the showing of manifest abuse of discretion. It is the application of this principle which explains the apparent difference in result of some of the cases herein cited.

The grounds for change of venue considered in the cases are (1) convenience of witnesses and promotion of the ends of justice, and (2) residence of the defendant. The confusion arises where one party relies on one ground and his adversary on the other. The results in the cases cited indicate that the first ground is the stronger.

In *McKinney v. Noland Co.*[13] the accident occurred in Greenville County where plaintiff and most of the witnesses to the accident and subsequent events resided. Suit was brought in Spartanburg County where the individual and corporate defendants resided, and plaintiff moved for a change of venue to Greenville. The Supreme Court sustained the order of the lower court, changing the place of trial to Greenville from the county of defendant's residence, on the ground that the plaintiff had made a sufficient showing as to convenience of witnesses, *etc.* and the findings of the trial judge were not unsupported by evidence, nor an abuse of discretion.

However, in *Rice v. Hartness Bottling Works,*[14] the court again affirmed the trial judge, although a contrary result was reached. Plaintiff, a resident of Richland County, brought suit against the defendant corporation in Spartanburg County for an accident which occurred in Union County. Plaintiff moved to change venue to Union County on the grounds of convenience of witnesses, *etc.* and on the ground that a fair and impartial trial could not be had in Spartanburg County. The Supreme Court reiterated that the decision of the trial judge "will not be disturbed on appeal in the absence of a clear showing of abuse of discretion amounting to manifest error of law" and held that there was no showing that a fair and impartial trial could not be had in Spartanburg County or that the convenience of witnesses, *etc.* would be seriously impaired. Plaintiff had urged that the police officers who investigated the wreck and certain eye witnesses resided in Union County. Plaintiff also was hospitalized there. Defendant argued that its corporation offices and agents were in Spartanburg County, one of its eye-witnesses resided there, as did

13. 86 S.E. 2d 807 (S.C. 1955).
14. 86 S.E. 2d 67 (S.C. 1955).

the operator of the wrecker which brought in plaintiff's car, and that it was important that a Spartanburg jury pass upon the credibility of the defendant's witnesses.

In *Warren v. Padgett*,[15] plaintiff, a resident of Hampton County, brought suit in Hampton County for injuries received there against a resident of Hampton County and a resident of Jasper County. The Jasper County resident, Padgett, moved to change the venue to his home county on the grounds of his residence and averred that his co-defendant, Fuller, was joined *malafide* in order to hold the case in Hampton County. Padgett charged that Fuller had defaulted and could not respond to judgment. The trial court denied the motion for change of venue and the Supreme Court affirmed the lower court saying:

> The right of a resident defendant to trial in the county of his residence has been aptly described by this Court as a substantial right . . . and he who asserts the right to sue a defendant in a county other than his residence must at least balance the testimony showing such right of departure . . . . and it becomes necessary to determine the question of whether or not a defendant is a bona fide defendant or an immaterial one merely joined for the purpose of permitting the action to be tried in a county other than that of the residence of the real defendant.

The court held that even though the Hampton County defendant could not respond to judgment and had defaulted, there was no sufficient showing that a real claim did not exist against him.

In *Trawick v. One 1952 International Pickup, etc.*[16] venue was not involved, but rather the right of the owner of a motor vehicle sued *in rem* to intervene as a party defendant. However, the following dictum by the court is of interest on the question of venue:

> Conceivably the order of intervention may prevent a multiplicity of actions, and this is not a case where the issue of venue may be raised, since respondent and appellant are residents of the same county. However, if the question of venue were present, *appellant would not be deprived of his right to complete his action in rem against the defending vehicle in the county of attachment* . . . . (Emphasis mine.)

Finally, in *Bruner v. Seaboard Airline R. Co.*[17] the Supreme Court affirmed the trial judge's order transferring the place of trial from

15. 225 S.C. 447, 82 S.E. 2d 810 (1954).
16. 225 S.C. 321, 82 S.E. 2d 275 (1954).
17. 226 S.C. 177, 84 S.E. 2d 557 (1954).

Darlington County to Richland County. In that case plaintiff sued under the Federal Employer's Liability Act for injuries received in Georgia. There were no witnesses in Darlington County, most witnesses being residents of Georgia. The Supreme Court held there was no manifest abuse of discretion by the trial judge in finding that the convenience of witnesses, including out of state witnesses, would be better served by requiring them to attend trial in Richland County, which the Georgia witnesses could reach by defendant's main line, and where plaintiff himself resided.

B. *Jurisdiction, Judge of Adjoining Circuit*

In *Peoples National Bank v. Manos Brothers, Inc.*[18] the resident judge disqualified himself and one of the parties moved to bring the matter before the judge of the adjoining circuit, serving notice on the adverse parties, but without filing the necessary affidavit that there was no judge resident or special within the circuit. The case was heard, all parties being represented, by the judge of the adjoining circuit and he, after hearing, notified the parties of the non-filing of the affidavit which was then filed *nunc pro tunc*. After the judge had ruled on the case one defendant objected that he lacked jurisdiction because the affidavit was not filed at the time of hearing. The Supreme Court held that the affidavit did not create jurisdiction, but was merely evidence of it and could be filed *nunc pro tunc*.

C. *Right to Framed Issues in Equity Cases*

In *Greenwood Lumber Co. v. Cromer*[19] plaintiff sought inter alia to restrain defendants from disposing of certain property. One defendant contended that a deed was given by her under alleged duress and should be set aside. She moved before the trial judge for an order framing issues for the jury on her cross-action to set aside the deed. The trial judge, having ordered a general reference, denied defendant's motion and she appealed. The Supreme Court sustained the lower court on the ground that in an equity case it was in the discretion of the trial judge to determine whether or not to frame issues for a jury, and that this discretion had been properly exercised by the lower court.

D. *Right to Jury Trial — Law Cases*

In *Legette v. Smith*[20] plaintiffs proceeded under the Declaratory Judgment Act to bar defendant from inheriting from the estate of his wife whom he had accidentally shot while trying to kill another.

18. 226 S.C. 257, 84 S.E. 2d 857 (1954).
19. 225 S.C. 375, 82 S.E. 2d 527 (1954).
20. 85 S.E. 2d 576 (S.C. 1955).

The judge submitted the factual issue to the jury, which found for the defendant. Thereafter the judge granted judgment *non obstante veredicto* for plaintiffs, and defendant appealed. The Supreme Court, reversing the lower court, said:

> *An issue that is essentially one at law is not transformed into an equitable one by the fact that declaratory rather than investive relief is sought . . . .*
> Had appellant commenced an action against respondents for the possession of his portion of the estate, it cannot be doubted that he and they would have been entitled to a jury trial as a matter of right, the issues being essentially legal and not equitable . . . . Respondents cannot, by invoking the declaratory judgment procedure and thus reversing the position of the parties, deprive him of his constitutional right. The factual issues being legal in character, their determination by the jury was conclusive on the trial judge. It matters not that appellant's demand that they be determined by a jury was made under the mistaken belief that the action was in equity rather than at law. The trial judge properly viewed it as one at law, and so submitted the issues to the jury. (Emphasis and omissions mine.)

In *Turner v. Byars*[21] plaintiff sought partition of realty and one of the defendants who occupied the premises claimed title under a contract of sale and prayed specific performance thereof. This defendant objected to the matter being referred to the Master. The court said:

> Appellant contends he is entitled to a jury trial. Undoubtedly he would be if the basic issues were purely legal in nature and the contest related solely to title. But there is no contest as to the holder of the legal title . . . . Appellant's claim is based upon an alleged contract to purchase from these heirs. He seeks specific performance of that contract — equitable relief. Under these circumstances we think a general order of reference was proper . . . .

E. *Voir Dire Examination of Jurors — Insurance*

In *Wood v. England*[22] plaintiff sued for injuries in an automobile accident, and asked that the jury venire be examined on *voir dire* as to their connection, if any, with certain insurance companies. The trial judge denied the request and plaintiff appealed.

21. 85 S.E. 2d 100 (1955).
22. 226 S.C. 73, 83 S.E. 2d 644 (1954).

The Supreme Court held that the record did not evidence that any insurance company was involved in the case,

> . . . hence there is no showing that appellant was in anywise prejudiced by the ruling of the trial judge under the circumstances in denying the request and no abuse of discretion in the absence of which the order appealed from should be affirmed.

The court also noted that it was a long standing principle in such cases as this that reference to insurance in evidence or argument was ground for mistrial; and that to inform the jury before-hand that insurance might protect one of the parties would tend to carry the jury away from the real issues and lead them to regard carelessly the rights of the defendant on the ground that someone else would have to pay the verdict.

F. *Deposition — Admissibility Where Informality Covered by Stipulations*

In *Adams v. Willis*[23] plaintiff sought specific performance of an option to purchase realty, and objection was raised as to existence of evidence to prove notice of renewal of lease containing the option. Evidence to prove this fact was contained in a deposition to which defendant had objected on the ground that it had not been mailed to the Clerk of Court, and was in other respects irregular. The Supreme Court, holding the deposition admissible, said:

> However valid these objections might be in an ordinary case, in this action a stipulation had been entered into between the parties. Notice of the taking of the deposition had been given by the respondents, setting forth the time and place . . . . Attorneys for the appellant consented to the time and place of taking the deposition, and further stipulated that, 'same shall be mailed by the above named notary public to E. Inman, Special Referee . . . .'
>
> Ordinarily, a deposition is sent to the Clerk of Court, but here it was mailed to the Special Referee by agreement. In view of the stipulation we think that the trial judge correctly held that there was a substantial compliance with the statutory requirements, and that the deposition was admissible. (Omissions mine.)

G. *Power of Court to Order Witness to Testify*

In *Greenwood Lumber Co. v. Cromer*[24] the trial judge denied a

23. 225 S.C. 518, 83 S.E. 2d 171 (1954).
24. 225 S.C. 375, 82 S.E. 2d 527 (1954).

motion to frame issues and ordered a general reference, directing one defendant to appear before the Master after 10 days notice, and prior to the reference, to answer questions of the Master or the plaintiff. This defendant appealed the order, alleging that it violated the provisions of the State and Federal Constitutions protecting him from self-incrimination. The Supreme Court sustained the trial judge, holding:

> A trial Court of course has inherent power to require the appearance of witnesses even as Counsel for either side may require the presence and testimony of witnesses. The protection afforded by the rule against self-incrimination may not be injected to invalidate a subpoena or the Court's order to appear. An Order in this case, or the subpoena in some other case, is not invalid merely because of the possibility that the witness sought to be questioned may possibly be asked some question, the answer to which might tend to incriminate him. Were the rule otherwise, each witness might determine for himself whether or not he should answer a subpoena to the Court and could refuse to appear because he felt he might be asked some question the answer to which would incriminate him, even though his fears be purely imaginary.

H. *Waiver of Objection by Cross-Examination Without Reservation*

In *Richardson v. Register*[25] the exception to which the court applied this ruling is not set out. However, the following excerpt from the opinion is important to trial counsel.

> One of these witnesses also testified *over objection* that he had long ago cut poles on the disputed area thinking that it was land of Johnson, plaintiff's grantor; *but he was cross-examined without reservation on the same subject,* which renders exception thereto untenable. (Emphasis mine.)

In this connection, see also *Munn v. Asseff*[26] where the Court observed:

> There was no objection of consequence to the testimony supporting all allegations of the Complaint, and defense counsel cross-examined plaintiff's witnesses freely on all issues without reservation . . . .

but denied new trial on other grounds.

25. 87 S.E. 2d 40 (S.C. 1955).
26. 226 S.C. 54, 83 S.E. 2d 642 (1954).

I. *Intervention of Parties*

In *Trawick v. One 1952 International Pickup, etc.*[27] plaintiff brought an action *in rem* for damages against defendant's truck and the truck owner moved to intervene as a party defendant. The trial judge ordered the owner to be made a party and directed plaintiff to serve an amended complaint on the owner, allowing her 20 days in which to file an answer. The plaintiff appealed and the Supreme Court, reversing the lower court in part, held:

> The Circuit Court has the right to permit an owner to intervene in an action *in rem* and set up his rights to the attached vehicle, but an order of intervention should not require an amendment of the pleadings, for, as stated heretofore, it may be that a cause of action does not exist against the intervenor.

J. *Voluntary Nonsuit as a Matter of Right*

In *Wildhagen v. Ayers*[28] plaintiffs failed to comply with the court order to make the complaint more definite and certain within 30 days and applied to the Circuit Court for additional time in which to comply which was denied. Plaintiffs then immediately moved for an order allowing them to take a voluntary non-suit, without prejudice, but the trial judge, after hearing on the motion, struck their complaint because of plaintiffs' failure to comply with his prior order, and by implication denied the motion for voluntary non-suit. Plaintiffs appealed, and the Supreme Court reversed the lower court on two grounds. First, that there was no motion by the defendant for dismissal of the complaint and the only matter before the court was appellant's motion for non-suit; second, there was no showing that the defendant would be prejudiced by allowing plaintiff to take a voluntary non-suit and plaintiffs' motion therefore should have been granted. The court said:

> The rule which has been established by our decisions since the code . . . is that *the granting of a voluntary nonsuit is within the discretion of the Court but denial of a motion therefor is not discreet in the absence of some good reason for resultant prejudice to the defendant* . . . . Moreover, the discretionary power of the Court is called into action only where the circumstances are such that a termination of the action would be unjust or inequitable to the legal rights of defendant or others. (Emphasis and omissions mine.)

27. 225 S.C. 321, 82 S.E. 2d 275 (1954).
28. 225 S.C. 384, 82 S.E. 2d 609 (1954).

K. *Reopening Case*

In *Smith v. Jasper County Board of Education*[29] the Supreme Court overruled appellant's exception that the trial judge erred in allowing plaintiff to introduce additional testimony after she had closed her case.

> Plaintiff-respondent closed her evidence and appellant moved for non-suit, whereupon *the Court on its own motion reopened plaintiff's case and allowed her to put in additional testimony. Ordinarily, as here, that was within the discretion of the Court, and no abuse is shown* . . . . (Emphasis mine.)

L. *Conduct of Counsel*

In *Belue v. City of Greenville*[30] appellant contended inter alia that the trial judge erred in not granting a mis-trial on the ground that plaintiff's counsel persisted in asking his witnesses leading questions. The court observed:

> During the examination of respondent's witnesses, counsel for appellant interposed frequent objections to the form of the questions asked by respondent's counsel; and these objections were, in most instances, sustained, the Court cautioning opposing counsel against leading his witnesses. Even where the trial Court has permitted leading questions, reversal for that cause rarely follows, and then only when it appears that the judicial discretion within which such matters apparently rest, has been abused, and prejudice has resulted . . . . No such showing is made here. (Omissions mine.)

In *Nelson v. Charleston & Western Carolina Rwy. Co.*[31] defendant excepted to the failure of the lower court to order mistrial on ground that the argument of plaintiff's counsel to the jury was improper and highly prejudicial. The Supreme Court said:

> As this case is being remanded for a new trial on other grounds, it is not necessary that we pass directly upon these exceptions, and we shall not do so. We cannot pass unnoticed, however, the fact, apparent from the record, that after the trial judge had ruled such argument improper and admonished counsel to desist from it, he repeatedly persisted in returning to it. Regardless of the correctness or incorrectness of the trial judge's ruling as to the impropriety of counsel's argument, the ruling had been made, and it was highly improper of counsel to disregard it.

29. 86 S.E. 2d 738 (S.C. 1955).
30. 226 S.C. 192, 84 S.E. 2d 631 (1954).
31. 86 S.E. 2d 56 (S.C. 1955).

III. APPEAL AND REVIEW

A. IN GENERAL

The following cases reviewed again under this sub-article are more fully covered elsewhere. They are considered chiefly for the purpose of classifying the grounds on which the Supreme Court has exercised or declined to exercise its original or appellate jurisdiction.

The Supreme Court exercised its original jurisdiction by certiorari to review errors of law of the governing tribunal of a political party in declaring a party nominee in *Breeden v. S. C. Democratic Executive Committee*,[32] but declined to issue the writ to review the action of a city counsel in refusing to alter its zoning ordinances in *Dunbar v. City of Spartanburg*.[33] The distinction between the two cases was that the subject reviewed in the first case was judicial, whereas the subject whose review was declined in the second case was legislative.

In the exercise of its appellate jurisdiction, the Supreme Court declined to give relief in those matters lying within the trial court's discretion, absent an abuse of discretion. On this ground it declined to set aside orders of the lower courts granting or denying change of venue in *McKinney v. Noland Company*,[34] *Rice v. Hartness Bottling Works*,[35] *Warren v. Padgett*,[36] and *Bruner v. Seaboard Air Line Railroad Co.*[37] Again it declined to interfere with the lower court's exercise of its discretion in refusing to frame issues for the jury in an equity case, *Greenwood Lumber Co. v. Cromer*,[38] or its denial of a motion to question the jury venire on *voir dire* as to the members' connection with certain insurance companies not involved in the case of *Wood v. England*.[39] Again it confirmed the trial court's discretion to allow plaintiff to reopen her case and put in additional evidence after she had closed. *Smith v. Jasper County Board of Education*.[40]

However, the Supreme Court reversed the order of the lower court denying plaintiff the right to take a voluntary non-suit on the ground that the denial constituted an abuse of discretion where the rights of the defendant would not have been prejudiced. *Wildhagen v. Ayers*.[41]

The Supreme Court affirmed the complaining party's right to a

32. 226 S.C. 204, 84 S.E. 2d 723 (1954).
33. 85 S.E. 2d 281 (S.C. 1955).
34. 86 S.E. 2d 807 (S.C. 1955).
35. 86 S.E. 2d 67 (S.C. 1955).
36. 225 S.C. 447, 82 S.E. 2d 810 (1954).
37. 226 S.C. 177, 84 S.E. 2d 557 (1954).
38. 225 S.C. 375, 82 S.E. 2d 527 (1954).
39. 226 S.C. 73, 83 S.E. 2d 644 (1954).
40. 86 S.E. 2d 738 (S.C. 1955).
41. 225 S.C. 384, 82 S.E. 2d 609 (1954).

jury trial on law questions in a declaratory judgment proceeding, *Legette v. Smith,*[42] but held that the appellant had no right to a jury trial where the question involved was in equity. *Turner v. Byars.*[43]

B. SCOPE OF REVIEW

1. *Points Not Raised Below or in Exceptions*

The Supreme Court will not review matters where the complaining party has not preserved his rights in the lower court *and* an appeal. Thus it will not consider points not presented or objected to below, or not included in exceptions on appeal. Furthermore, it will not pass upon exceptions which are too general to raise the point of error.

In *Carroway v. Carolina Power & Light Co.*[44] plaintiff appealed from a direction of verdict for the defendant, and asked the Supreme Court to consider and apply to the case a statute which had not been brought before the lower court. The Supreme Court said, "This we decline to do because this code section was not presented to or considered by the court below. It is, therefore, not properly before us."

In *Miller v. Miller*[45] where defendant, in proceeding for divorce *a mensa et thoro,* on appeal argued that plaintiff was not entitled to alimony because of her refusal to accept a bona fide offer by defendant to take her back and resume marital relations, the Supreme Court said:

> This question does not appear to have been raised in the court below. Not only was no offer of this kind made in the answer, but on the contrary, appellant alleged that 'it is impossible for the parties to reside together as husband and wife.' This defense is not mentioned in the Master's Report, appellant's exceptions to this report or in the circuit decree. It cannot be raised here for the first time.

In *Nelson v. Charleston and Western Carolina Railway Co.*[46] the defendant *inter alia* excepted that the trial judge erred in failing to hold that the verdict as to actual and punitive damages "was excessive". The Supreme Court held that when a verdict was merely unduly liberal, the trial judge alone has the power to set it aside or to reduce it by granting new trial nisi. On the other hand, where damages are so grossly excessive as to indicate the jury was influenced by passion or prejudice, or other improper considerations, it is the

42. 85 S.E. 2d 576 (S.C. 1955).
43. 85 S.E. 2d 100 (S.C. 1955).
44. 226 S.C. 237, 84 S.E. 2d 728 (1954).
45. 225 S.C. 274, 82 S.E. 2d 119 (1954).
46. 86 S.E. 2d 56 (S.C. 1955).

duty of the trial court or the Supreme Court to set it aside absolutely. The court implied that the exception as to damages in this case was not sufficiently explicit to raise the point of error saying: "The language of the exception, which charges merely that the verdict 'was excessive' is not such as to raise the issue that it is of the second class; and with the first we have no concern."

In *Peoples National Bank v. Manos Brothers, Inc.*[47] the Supreme Court refused to consider appellant's argument objecting to non-joinder of certain parties.

> This contention is not embodied in any of appellant's exceptions, and is therefore not entitled to consideration. *Furthermore, the objection of non-joinder was not made in the lower court, and is not available when made for the first time here.*

Again, on another objection, the Court said:

> In their brief, appellant's counsel urged that the testimony of the witness should not have been considered because the interpreter was not sworn. *The point was not raised by any exception, and therefore will not be considered.* (Emphasis mine.)

In *Zemp Const. Co. v. Harmon Brothers Const. Co.*[48] the defendant objected at the trial to the court's allowing parol evidence to explain a written instrument but included no exception to the ruling in his appeal. The Supreme Court said: "The correctness of this ruling is not before us because no exception was taken to it." In the same case the court passing upon appellant's exceptions to the failure of the trial court to direct a verdict or order judgment *non obstante veredicto* said:

". . . This Court is confined to the sole issue of whether it was error to refuse appellant's motion for direction of a verdict *on the ground on which such motion was rested at the trial.*" (Emphasis mine.)

In *Hall v. Walters*[49] the court held that the motion for *judgment non obstante veredicto* was properly overruled under Circuit Court Rule No. 79 *where defendants had not previously moved for direction of verdict.*

In *Marthers v. Hurst*[50] defendant appealed *inter alia* from a judgment for punitive damages but the Supreme Court said:

> *There was no motion for a nonsuit or directed verdict either*

47. 226 S.C. 257, 84 S.E. 2d 857 (1954).
48. 225 S.C. 361, 82 S.E. 2d 531 (1954).
49. 85 S.E. 2d 729 (S.C. 1955).
50. 86 S.E. 2d 581 (S.C. 1955).

> *as to actual or punitive damages. This precludes appellant from raising now any question as to the sufficiency of the evidence* . . . . It is true that due to appellant's negligence, he was not present at the trial nor represented by counsel, but this did not relieve him of the necessity of complying with the rules. (Emphasis and omissions mine.)

2. *Review When Objection Not Timely Made*

a. Late filing of affidavit when judge not available within the circuit. In *Peoples National Bank v. Manos Brothers, Inc.*[51] the Supreme Court held that the failure of the parties to file an affidavit that no judge was within the circuit before arguing the case before the judge of the adjoining circuit was not jurisdictional, and could be cured by filing such affidavit *nunc pro tunc*. When one party made no objection to the late filing until after the judge had rendered his decree, the Supreme Court held that the objection came too late, distinguishing this case from *In re Bowen*[52] where objection to a non-filing of such affidavit had been timely made.

b. Prejudicial Remarks of Judge. In *Brown v. Singletary*[53] the trial judge inadvertently failed to excuse the jury while commenting on the evidence in ruling on defendant's request for directing a verdict. Conceiving that his remarks might have been prejudicial to plaintiff, he called the matter to the attention of plaintiff's counsel. Plaintiff's counsel made no objection until after the jury had found for the defendant, whereupon plaintiff moved for and was granted a new trial by the trial judge.

Defendant appealed to the Supreme Court which reversed the order for a new trial on the ground that plaintiff should have objected when given the opportunity to do so, saying:

> Not having done so, he cannot take his chances of a successful issue, reserving vices in the trial, of which he has notice, for use in case of disappointment in the result.

3. *Instructions to the Jury*

In *Hall v. Walters*[54] plaintiff sued a labor union and certain of its officials for conspiracy in assault and battery upon him, and the trial judge instructed the jury on conspiracy and *respondeat superior*. Defendants did not object, but appealed to the Supreme Court which said:

51. 226 S.C. 257, 84 S.E. 2d 857 (1954).
52. 186 S.C. 125, 195 S.E. 253 (1938).
53. 85 S.E. 2d 738 (S.C. 1955).
54. 85 S.E. 2d 729 (S.C. 1955).

> Act No. 27 of Feb. 20, 1953, 48 Stat. 28 provides that after the Court shall have charged the jury, they shall be excused and in their absence counsel may enter objections to the charge or request additional instructions. That procedure was carefully followed in the trial of this case, after the jury had been instructed on the law of conspiracy and also the union's liability *respondeat superior, whereupon it was incumbent upon counsel to object to the charge in that respect in order to save the point for appeal,* which was not done in this case although expressly solicited by the Court. It is, therefore, not now available to appellants. (Emphasis mine.)

In *Munn v. Asseff*[55] the court again had occasion to apply the 1953 Act relating to exceptions to the charge:

> Orderly procedure requires that objections be timely made . . . . . It has already been pointed out that appellant was given ample opportunity to object to the charge of the law, or to request additional propositions, and expressed satisfaction with the charge. The many cases decided by this Court to the effect that there is an obligation on counsel to assist the Court by requesting additional charges or amplification, now finds legislative support and sanction in Act No. 27 . . . .
> Before this act it was customary for trial judges to ask counsel after the charge if there were additional requests, but it was not covered by rule or statute. Submitting the question in the absence of the jury allows counsel to more fully discuss the law and freely express his views and accordingly, increases his responsibility . . . .
> . . . We conclude that having failed to request amplification of the charge, complaint may not now be made . . . . (Omissions mine.)

The statute was again applied in *Richardson v. Register*[56] where the defendant, although given the opportunity to do so, failed to object at the conclusion of the charge.

In *Belue v. City of Greenville*[57] plaintiff secured judgment against the defendant for water damage to plaintiff's property. The judge charged the jury on future damages to which defendant failed to object. Although the statute above noted was not cited, the Supreme Court, speaking of the charge, said:

55. 226 S.C. 54, 83 S.E. 2d 642 (1954).
56. 87 S.E. 2d 40 (S.C. 1954).
57. 226 S.C. 192, 84 S.E. 2d 631 (1954).

> This view was expressly stated by the presiding Judge in his charge to the jury; and if appellant construed it as a misstatement of the issues, the matter should have been brought to the attention of the trial judge at that time. This not having been done, appellant's present contention cannot now be considered.

See also *Marthers v. Hurst*[58] where the court held that a defendant who undertook to handle his own case, but missed the trial and suffered a judgment, could not on appeal object that the trial judge failed to charge certain matters where no request therefor was submitted to the court by the defendant.

4. *Other Matters*

In *Evans v. Evans*[59] plaintiff filed exceptions to the Master's report. Three months thereafter, defendant served notice on plaintiff that he would move before the court for trial, "on issues raised by plaintiff's exceptions". Later the case was submitted to the trial court on briefs, without oral argument, and defendant in his brief, for the first time, raised the point that the plaintiff's exception to the Master's report was too general to justify a review of the case. The Supreme Court held that the objection came too late.

> . . . we are of the opinion that appellant was not in a position to raise the question of insufficiency of the exception for the first time, in his brief, and that his conduct relative thereto was such as to amount to a waiver of the question of its form.

In *Munn v. Asseff*,[60] *supra,* the court said:

> Having failed to raise objection by demurrer, or motion to strike, or by answer, and having failed to move for a non suit or directed verdict as to actual damages, or object to the charge of the law, the first four points which appellant now seeks to make could not be raised by a motion for a new trial on circuit nor in this Court. After the verdict appellant may not change his entire theory. Orderly procedure required that objection be timely made.

5. *Orders Not Appealable*

In *Thomas & Howard Co. v. Fowler*[61] defendants appealed an order requiring them to make their counterclaim more definite and

58. 86 S.E. 2d 581 (S.C. 1955).
59. 85 S.E. 2d 726 (S.C. 1955).
60. See note 55 *supra.*
61. 225 S.C. 354, 82 S.E. 2d 454 (1954).

certain by setting out certain information which was wholly within their knowledge. The Supreme Court said:

> 'It is sometimes difficult to determine whether an order granting or refusing a motion to make a pleading more definite and certain deprives a party of some substantial right so as to make it appealable before final judgment'.

It held, however, that the order in the instant case was not appealable and dismissed it on the grounds that there was no showing that substantial rights of the appellant were invaded by the order.

In *Gardner v. Mutual Benefit Health & Accident Association*[62] defendant appealed from an order of the lower court denying its motion to strike certain allegations of the plaintiff's complaint. The Supreme Court, after noting ". . . the question of whether or not the order under review is appealable was not raised and hence not before the court", affirmed the order of the lower court without specifically deciding whether or not the order under review was appealable.

6. *Review of Facts in Equity Cases*

In *Forester v. Forester*[63] plaintiff sued her husband for separate support and maintenance, which the lower court allowed. The husband appealed, and the Supreme Court reversed the lower court, saying:

> 'We have 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.' . . . In *Wise v. Wise* . . . which involved the same issues as the case at hand, it was concluded . . . 'Whatever differences of opinion may once have existed as to the rule which should govern where an appellant, as in this case, asks this court to reverse the findings of fact by the circuit judge in an equity case, it must now . . . be regarded as settled that this court may reverse the findings of fact by the circuit court when the appellant satisfies this court that the preponderance of the evidence is against the findings of the circuit court'. (Citations omitted.)

7. *Review of Findings of Master Concurred in by Circuit Judge*

In *Miller v. Miller*[64] the circuit judge concurred in the findings of the Master that the wife was entitled to separate maintenance. The Supreme Court said:

62. 226 S.C. 219, 84 S.E. 2d 637 (1954).
63. 226 S.C. 311, 85 S.E. 2d 187 (1954).
64. 225 S.C. 119, 82 S.E. 2d 119 (1954).

> On this appeal there must be applied the well settled rule that in an equity case, findings of fact by a Master or referee, concurred in by a circuit judge, will not be disturbed by this court unless it appears such findings are without evidentiary support or are against the clear preponderance of the evidence.

See also *Peoples National Bank v. Manos Brothers Inc.*[65] where the court again applied the rule that such concurrent findings "will not be disturbed unless they are without support in the evidence or are against the clear preponderance of the evidence."

In *Royal Crown Bottling Company, Inc. v. Chandler*[66] the appeal chiefly involved a controversy between the parties as to the amount of attorneys' fees which were owing for services rendered in a tax refund case. The Circuit Court had confirmed the referee's findings that there was a contract between plaintiffs and respondents, their counsel, providing for attorneys' fees of 20% of the recovery. On appeal by the attorneys the Supreme Court reversed the findings of the Master and circuit judge as to the amount of attorneys' fees to be paid on the ground that the findings below were against the preponderance of the evidence.

8. *Review of Claim That Damage Excessive*

In *Nelson v. Charleston and Western Carolina Railway Co.*[67] a new trial was ordered on other grounds, but answering appellant's contention that damages awarded below were excessive, the Supreme Court said:

> . . . this court will not undertake to set aside a verdict because its amount is such as to indicate merely undue liberality on the part of the jury. The power in such case to set it aside, or reduce it by granting new trial nisi, rests with the trial judge alone. It is only when the verdict is so grossly excessive as to indicate that the jury was moved by passion or prejudice or other considerations not founded on the evidence and the instructions of the trial court that it becomes the duty of this court, as well as the trial court, to set it aside absolutely.

In *Hall v. Walters,*[68] where defendant union and union officials contended that excessive punitive damages had been awarded plaintiff in his suit for assault and battery, the Supreme Court said:

> . . . We cannot say that the amount of the verdict in this case is

65. 226 S.C. 257, 84 S.E. 2d 857 (1954).
66. 226 S.C. 94, 83 S.E. 2d 745 (1954).
67. 86 S.E. 2d 56 (S.C. 1955).
68. 85 S.E. 2d 729 (S.C. 1955).

such as to shock the conscience of the court or to show that it was the result of prejudice, passion, or other improper motive, *in the absence of which this court will not reverse.* (Emphasis mine.)

C. SETTLEMENT OF RECORD FOR APPEAL

In *Peoples National Bank v. Manos Brothers, Inc.*[69] appellant objected that the lower court, in settling the record for appeal, required the inclusion in the "Statement" of a paragraph which appellant charged was argumentative in support of the lower court's judgment, and thereby violated Rule 4, Section 3, of the Supreme Court. The Supreme Court overruled the objection, saying:

> While the paragraph above quoted is not strictly 'necessary to a proper understanding and decision of the questions to be decided', it does not materially encumber the record, and no prejudice by reason of its inclusion has been shown. *In the exercise of his judgment settling the appeal record the circuit judge is entitled to reasonable latitude.*

69. 226 S.C. 257, 84 S.E. 2d 857 (1954).