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Practice and Procedure

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PRACTICE AND PROCEDURE

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I. COURTS

A. *Jurisidiction of Judge After Leaving Circuit*

In the case of *Hines v. Farr*,[1] the Court held that the circuit judge who had heard the case, but subsequently had removed to another circuit, was without authority or jurisdiction to include in the case any matter not before the court at the trial of the case. Plaintiff, who had assigned his right of action to a bank, was therefore held not to be entitled to have the bank substituted as a party to the action.

B. *Findings of Court in Equitable Action*

A case was presented to the Court which related to the weight of the lower court's findings in equitable actions. In *Inabinet v. Inabinet*,[2] the Court was asked to reverse a decree for separate maintenance and support. The plaintiff-husband had sued for divorce on the ground of desertion. The defendant-wife counterclaimed for separate maintenance and support on the grounds that the plaintiff had refused to provide a satisfactory home for her and their child. The trial judge entered a decree dismissing the complaint and ordered maintenance for the wife. The Supreme Court held that in equity cases it would not disregard the findings of fact and conclusions of the trial judge, recognizing that since he saw and heard the witnesses, he was in a better position to evaluate their credibility. The Court further noted that a finding of constructive desertion in cases for separate maintenance need not be based upon conduct that was in itself sufficient grounds for divorce.[3] In this type of case the grounds are left to the broad discretion of a court of equity.[4]

1. 235 S. C. 436, 112 S. E. 2d 33 (1960).
2. 236 S. C. 52, 113 S. E. 2d 66 (1960).
3. See Mincey v. Mincey, 224 S. C. 520, 80 S. E. 2d 123 (1954), in which the court had held that in cases for divorce based upon constructive desertion, the abandoning party must establish misconduct on the part of the other in itself and independently constituting one or more of the recognized permitted grounds for divorce. The principle decision illustrates the more liberal attitude of the court in cases for separate maintenance and support where it is not restricted by statutory and constitutional provisions.
4. Machado v. Machado, 220 S. C. 90, 66 S. E. 2d 629 (1951).

C. *Counterclaim Beyond Jurisdictional Limit*

In the case of *Brother Int'l. Co. v. Southeastern Sales Co.*,[5] the plaintiff had initiated an action in the Richland County Court against defendant for goods sold and delivered. The defendant counterclaimed, seeking $55,000 damages for an alleged breach of contract accompanied by fraudulent acts. The plaintiff's original claim was well within the jurisdictional limit of the court.[6] The defendant moved to have the case transferred to the Court of Common Pleas, since the counterclaim exceeded the jurisdictional limit of the county court. The plaintiff demurred to the counterclaim and replied to the motion. The county court in effect overruled the demurrer by transferring the case to the Court of Common Pleas. The Supreme Court in reversing noted the general rule that jurisdiction was determined by the amount sought by the plaintiff, without reference to any defense or plea set up by the defendant.[7] The Court stated that the defendant will not be permitted to interpose a counterclaim in excess of a court's jurisdiction except insofar as it may be pleaded in defense where no affirmative relief is sought, and where the complaint is within the proper limits. A judgment in this type of action, where the defendant cannot properly plead the set-off, will not preclude a later separate action on his part.[8] Of course, the defendant may counterclaim within the jurisdictional limits by waiving the excess over the limit.

Since in the principal action the counterclaim exceeded the jurisdictional limit, the holding of the court to the effect that a portion of the defendant's claim may be used in defense is dicta. If the principle is intended to be that there will be no waiver of the remainder of the defendant's claim where a portion of that claim is used in defense, the Court may be questioned. It seems that such a procedure would amount to allowing the defendent to split a cause of action. At the same time, it should be recognized that there may be cases in which it would be unjust to allow the plaintiff to recover judgment, limiting the defendant to relief only by means of a separate and distinct suit. Difficult considerations of the effect of the prior judgment on the set-off as res judicata in

5. 234 S. C. 573, 109 S. E. 2d 444 (1959).
6. CODE OF LAWS OF SOUTH CAROLINA § 15-764 (1952).
7. DuPre v. Gilland, 156 S. C. 109, 152 S. E. 873 (1929); Corley v. Evans, 69 S. C. 520, 48 S. E. 459 (1904).
8. DuPre v. Gilland, *supra* note 4.

a later action for the remainder of the defendant's claim would arise. In the final analysis, it would seem that the better result would be to limit the defendant either to a later separate action or to a set-off within the jurisdictional limit and a waiver of the excess of the claim.

D. *Granting Motion for Pre-trial Examination Upon Unverified Complaint*

In an important decision, *Williamson v. South Carolina Elec. & Gas Co.*,[9] the Court dealt with the matter of the granting of a motion for a statutory pretrial examination of an employee of the defendant based upon an unverified complaint. The Court had previously held that such an order might properly rest upon a verified complaint.[10] The defendant argued on the basis of these cases that such a motion should be granted only upon a verified complaint and that unverified pleadings could not be considered by the court in determining whether good and sufficient cause existed for the examination. The trial court's determination that good and sufficient reason for the examination did exist was based upon the unverified pleadings supported by affidavits. The Court noted that the defendant had not properly preserved his right to appeal from this determination by the lower court.[11] However, the Supreme Court did review the pleadings and affidavits and held that good and sufficient reason did exist and that there had been no abuse of discretion by the trial judge. It was held to be proper for the judge to refer to the unverified complaint to determine the issues for the trial and a motion for examination of an adverse party, supported by affidavits, could be granted under the provisions of section 26-503, South Carolina Code of Laws (1952).

E. *Original Jurisdiction*

In one case the Court considered its original jurisdiction. *Ex parte Modern Fin. Co. v. Wilbur Hicks*.[12] Plaintiff sought a writ of prohibition to enjoin the Juvenile-Domestic Relations Judge of Greenville from requiring certain debtors to pay all their income into his court and, after certain deductions for living expenses, paying the debtor's creditors proportionate

9. 236 S. C. 101, 113 S. E. 2d 345 (1960).
10. United States Tire Co. v. Keystone Tire Sales Co., 153 S. C. 56, 150 S. E. 347, 66 A. L. R. 1264 (1929); People's Bank v. Helms, 140 S. C. 107, 138 S. E. 622 (1927).
11. See McKay, *Practice and Procedure*, 12 S. C. L. Q. 80 at 102 (1959).
12. 235 S. C. 212, 110 S. E. 2d 859 (1959).

amounts of their debts, meanwhile enjoining the creditors from pursuing their legal remedies against the debtors. The respondent agreed to the Supreme Court's original jurisdiction, but the Court refused to hear the case on the merits. It said that under Supreme Court Rule 20, the Court's original jurisdiction should not be invoked where relief is available in the circuit court, unless special emergency or public interests are involved. In this case there was held to be no good reason why the circuit court could not pass on the issues. The agreement of the respondent is insufficient to invoke the Court's jurisdiction.

II. DEMURRER

A. *Appealability of Overruling Demurrer*

In *Mullins v. Celanese Corp.*, [13] the plaintiffs, as employees of the defendant, brought an action to compel their employer to cease demanding work on Sunday as a condition of employment. The defendant moved for summary judgment but the trial judge concluded that the pleadings before him raised issues of fact and denied defendant's motion. Justice Legge, speaking for the Court, stated that the motion for summary judgment by the defendant was in the nature of a demurrer[14] and that if the pleadings raised issues of law only, the denial of the order involved the merits of the case and was, therefore, appealable forthwith.[15]

The present case involved two issues, one concerning the construction of a statute and the other the constitutionality of the same statute. Both of these were held to be legal rather than factual issues and the Supreme Court, therefore, held that the judgment of the trial court should be reversed.

III. VENUE

A. *In General*

In *Garrett v. Charleston & W. C. R. R.*,[16] the Court again refused to reverse a trial judge's ruling that the defendant did not show both convenience of witnesses and that the ends

13. 234 S. C. 380, 108 S. E. 2d 547 (1959).
14. Page v. North Carolina Mut. Life Co., 207 S. C. 277, 35 S. E. 2d 716 (1945).
15. CODE OF LAWS OF SOUTH CAROLINA § 15-123(1) (1952); Elliott v. Pollitzer, 24 S. C. 81 (1886). *Cf.* Johnson v. Abney Mills, 219 S. C. 231, 64 S. E. 2d 641 (1951).
16. 236 S. C. 75, 113 S. E. 2d 256 (1960).

of justice would be promoted by a change of venue where defendant had no affidavits from prospective witnesses themselves.

B. *Suit Against Foreign Corporation*

Of more interest than *Garrett, supra,* on the venue question is *Sanders v. Allis-Chalmers Mfg. Co.*[17] Defendant, a foreign corporation, was sued in Barnwell County and moved to change the venue to Orangeburg County, supporting its motion by affidavits showing that it had a resident agent in Orangeburg who conducted defendant's business there. Plaintiff's counter-affidavit said that no place of business of defendant could be found in Orangeburg. The trial judge denied the motion. In affirming, the Court re-affirmed its previous holdings that under section 10-303, South Carolina Code of Laws (1952), a foreign corporation may be sued in any county unless it has a "residence" in some county in the state. Reviewing the cases involving "residence" of a corporation for venue purposes, the Court held that to establish "residence," it must be shown that the corporation has both an agent and an office for the transaction of business. Since defendant did not show that it had an office in Orangeburg, the Court held the trial judge was justified in refusing to change the venue. The majority opinion was strongly criticized by Justice Oxner in a dissent which said that the Court was imposing a new requirement for venue purposes, namely an office, which was not supported by past decisions.

C. *Discretion of Trial Judge*

In the case of *Bryant v. Aiken Petroleum Co.*,[18] the Supreme Court was asked to review a decision from below denying defendant's motion for a change of venue. While many of the witnesses for the defendant were residents of Charleston County, the county to which the defendant had requested removal, certain of the plaintiff's witnesses could more conveniently testify in the original county of suit. The Supreme Court affirmed the trial court, stating that it was well-settled that the decision as to change of venue is addressed to the discretion of the trial judge and will not be reversed unless there is manifest error of law.[19]

17. 237 S. C. 133, 111 S. E. 2d 201 (1959).
18. 234 S. C. 300, 108 S. E. 2d 95 (1959).
19. Herndon v. Huckabee Transp. Co., 231 S. C. 364, 98 S. E. 2d 833 (1957); McCauley v. McLeod, 230 S. C. 380, 95 S. E. 2d 611 (1956).

In addition to various rules regarding proper venue, section 10-310, South Carolina Code of Laws (1952), provides that the venue may be changed when there is reason to believe that a fair and impartial trial cannot be had in the proper county or when the convenience of witnesses and the ends of justice would be promoted by the change. In *South Carolina E. & G. Co. v. Aetna Ins. Co.*,[20] an action on a fire insurance policy, the venue was laid in Lexington County. Defendants moved for a change of venue, supporting their motion by affidavits alleging, *inter alia*, that plaintiff was the largest taxpayer in Lexington County and was very popular there. The Supreme Court affirmed the trial judge's refusal to change the venue, holding that since a motion to change venue is addressed to the trial judge's discretion, his decision will not be reversed unless he is manifestly wrong. The burden is on the defendant to show that convenience of witnesses and the ends of justice would be promoted by the change, and no witness affirmed that it would be inconvenient to try the case in Lexington. Furthermore, popularity alone is not a proper ground to support change of venue.

In *Graham v. Beverly*,[21] plaintiff sought to sue defendant, a resident of Horry County, in Marion County. After defendant successfully moved venue to Horry, plaintiff sought to have the case changed back to Marion, supporting his motion by twenty-three affidavits that Marion would be more convenient. Only two affiants (plaintiff and a passenger) were eye-witnesses. The Supreme Court affirmed the trial judge's refusal to remand, holding that no abuse of discretion was shown.

IV. DISCOVERY

One interesting case involved the scope of discovery allowable under our somewhat limited state discovery practice. *Dunlap v. Metropolitan Life Ins. Co.*,[22] was an action by a dentist to compel continued payment of disability benefits. Defendant moved and obtained an order requiring plaintiff to submit records of his stocks and bond transactions. On appeal, the Supreme Court reversed, concluding that under the substantive law private income from investments will

20. 230 S. C. 340, 110 S. E. 2d 165 (1959).
21. 235 S. C. 222, 110 S. E. 2d 923 (1959).
22. 235 S. C. 206, 110 S. E. 2d 856 (1959).

not divest an insured from the benefits of a disability policy. The Court held that a party is not required to submit to examination on matters wholly irrelevant to the issues and, therefore, that part of the pre-trial discovery order should be reversed.

V. TIME WITHIN WHICH PLEADING MUST BE SERVED

A. *Late Answer Permitted*

In two cases the Court permitted answering after time had expired, affirming the lower court in one case and reversing in the other. *Holliday v. Holliday*[23] involved a suit for divorce by a husband in the Court of Common Pleas which was begun the same day as a suit for separate maintenance by the wife in the county court. While negotiations proceeded in the county court suit, the time for answering the common pleas complaint expired, and the husband there obtained a reference and a Master's Report recommending the husband be granted a divorce. The wife then moved for permission to answer which the trial judge granted. The Supreme Court held that the trial judge should not be reversed unless (1) his decision was controlled by some error of law, or (2) his order was based on factual considerations without any evidentiary support. Under the circumstances, including the nature of the action (divorce), the fact that negotiations were pending, and the haste with which the common pleas action was pushed, the trial judge was held to have committed no abuse of discretion.

In *McGhee v. One Chevrolet Sedan*,[24] the Court permitted answering where application was made on the twenty-first day after the summons without complaint was served on an automobile which had been stolen from the owner in Florida and which had been attached and served without notice having reached the owner. The Court held that where meritorious defense is shown and prompt application is made, the statute permitting late answer should be liberally construed.

B. *Service by Mail*

In *Ex parte Wessinger*,[25] the Court construed section 10-465, South Carolina Code of Laws (1952), which provides

23. 235 S. C. 246, 111 S. E. 2d 205 (1959).
24. 235 S. C. 37, 109 S. E. 2d 713 (1959).
25. 235 S. C. 239, 111 S. E. 2d 13 (1959).

that when service is by mail, "double the time required in cases of personal service shall be given." Plaintiff had sought to utilize this section to permit him to serve by mail notice of appeal from condemnation award two days after statutory time had expired. But the Court held the statute inapplicable and that the statute gives the recipient double time, not the party making the service by mail.

VI. AMENDMENT TO PLEADINGS

Section 10-692, South Carolina Code of Laws (1952), permits amendments to the pleadings by the trial court in various circumstances, one being "(d) when the amendment does not change substantially the claim or defense, conforming the pleading or proceeding to the facts proved." Applying this section in *Gary v. Jordan*,[26] the Court permitted amendment of the complaint after close of plaintiff's case in an action for misrepresentation based on the sale to plaintiff of diseased cattle, by substituting the phrase "tested by the defendant" for the phrase "sold to the plaintiff." The Court held that such amendment effected no substantial change in the plaintiff's claim and hence was properly allowed.

VII. EVIDENCE

A. *Proving Alleged Joint and Concurrent Acts of Negligence*

Johnson v. Charleston & W. C. Ry.[27] was a wrongful death action arising from a crossing accident. A verdict was found for the plaintiff in the trial court, and on appeal, the defendant railway argued that the plaintiff had alleged joint and concurring acts of negligence, every one of which, defendant asserted, must be proved under the authority of *Osteen v. Atlantic Coast Line Ry.*[28] In *Osteen* the complaint had alleged four specific acts of negligence, then asserted that in the absence of *any* of the alleged acts, the accident would not have occurred. In the case under discussion, before setting out certain alleged acts of negligence, the complaint alleged that the death resulted from " 'the joint and concurrent tortious acts . . . (of the defendant and its agents), combining and concurring in the following particulars . . .' "[29]

26. 236 S. C. 144, 113 S. E. 2d 730 (1960).
27. 234 S. C. 448, 108 S. E. 2d 777 (1959).
28. 119 S. C. 438, 112 S. E. 352 (1922).
29. 234 S. C. 448, at 462, 108 S. E. 2d 777, at 783.

The Court first pointed out that the statement of Justice Fraser in the *Osteen* case on which defendant relied was not in the main opinion of that en banc decision, but admitted that it was probably correct in light of the unusual allegation in the complaint that the accident would not have occurred absent any one of the acts of negligence. Absent this allegation in the present complaint, the Court held the plaintiff was entitled to recover on proof of any one of the alleged acts of negligence.

B. *Scintilla Rule*

The Court once again in *Jackson v. Jackson*[30] has thrown doubt upon the question of whether South Carolina still follows the scintilla rule. The Court stated that there should be a directed verdict only where reasonable minds could draw but one inference from the testimony. While South Carolina in recent years has continued to follow the scintilla rule *eo nomine*, by defining a scintilla of evidence in terms of reasonable men it has achieved essentially the same result as other jurisdictions which have abandoned this rule. It may be that the Supreme Court is ready to abandon its previous adherence to form and state the South Carolina rule in the simple terms of reasonable conclusion.

VIII. TRIAL

A. *Counsel's Argument to Jury*

Several points concerning the propriety of counsel's argument to the jury were decided in the case of *Johnson v. Charleston & W. C. Ry.*[31] Defendant appealed from a verdict for plaintiff in a wrongful death action arising from a crossing accident.

The Court first held it proper for counsel to use a blackboard for purposes of illustrating arguable points to the jury. It was pointed out that the same rules apply to such visual arguments as are applicable to oral arguments. Any points illustrated must have a reasonable foundation in the evidence or be fairly arguable therefrom. Although abuse of the visual aids to argument may be so flagrant as to warrant a new trial, control of the use of such aids rests in the sound discretion of the trial judge.

30. 234 S. C. 291, 108 S. E. 2d 86 (1959).
31. 234 S. C. 448, 108 S. E. 2d 777 (1959).

The second point concerned the proper use of the blackboard. Defendant relied on two grounds of alleged impropriety: (1) that calculations were made by plaintiff's counsel by use of figures not drawn from the testimony; and (2) multiplication of the decedent's annual income by his life expectancy. Defendant had made timely objection that part of the figures used were not drawn from the evidence, and had requested a charge that the calculations were not evidence but mere argument. The trial judge expressed his opinion that they were used only as argument, and invited defendant to offer written instructions on the point. Defendant did not do so, and the Supreme Court held that there was no error in the court's refusal to give the requested charge.

The final point was decided adversely to the defendant because of his failure to make timely objection. The final arguments to the jury were made in this case in November, 1957. When the defendant made his new trial motion in August, 1958, he first raised the point that plaintiff's counsel had improperly argued that a human life, in Allendale County, where the case was tried, was worth as much as a life in Hampton or Charleston counties, and that juries in Allendale should make wrongful death awards comparable to those of the other two counties. At the hearing of the new trial motion, plaintiff's counsel denied making such statements, and offered to make an affidavit to that effect. On appeal, the Supreme Court stated the general rule that any objections the defendant had to the arguments of opposing counsel should have been raised at the time of the argument, and that only in flagrant cases where prejudice appeared would the point be considered after the verdict was rendered. To decide the question on appeal would require the determination of a factual question on which the trial court had not passed, thus the new trial motion was held properly denied on this point.

B. *Questions for Jury*

In the case of *Dean v. Temptron, Inc.*[32] and *Edwards v. Great Am. Ins. Co.*[33] the court held that where the evidence was conflicting, the issues were properly left to the jury. It is the jury's duty also to pass upon the credibility of the

32. 234 S. C. 532, 109 S. E. 2d 167 (1959).
33. 234 S. C. 404, 108 S. E. 2d 582 (1959).

witnesses. If the jury's verdict is not wholly unsupported by the evidence, the Supreme Court will affirm.

C. *Mistrial*

In *Kirven v. Lawrence*,[34] a case was submitted to the jury at 11:40 a.m. At 4:35 p.m., the judge left the court after giving the clerk instructions to dismiss the jury with a mistrial if it had not reached a decision by 11:00 p.m. At 11:00 p.m. the clerk knocked on the jury room door, and one of the jurors responded and asked for fifteen minutes more deliberation. The same occurred at 11:15. The plaintiff objected, but defendant wanted to let the jury continue deliberating. At 11:30, the jury returned a verdict for the plaintiff. On defendant's appeal on the ground that the jury had been "coerced" into continuing deliberation, the Court held that the defendant had acquiesced in letting the jury deliberate the extra half hour. Furthermore, the Court held that the clerk's conversations with a juror at the jury room door did not constitute "multiple returns" which would, under section 38-303, South Carolina Code of Laws (1952), require a mistrial. The Court said a "return" implies a voluntary return by the jury.

D. *Discretion of Trial Judge*

In the case of *Corley v. South Carolina Highway Dept.*,[35] the court considered the question of whether the trial judge had committed error by refusing to give a requested charge that the jury was not to take into consideration the fact that there might be further damages. The defendant had agreed to move certain buildings from a right-of-way which it had purchased from the plaintiff and restore them to their equivalent condition on another portion of the plaintiff's land. The plaintiff brought the action alleging that the building had not been properly restored and was in fact badly damaged. The jury returned a verdict in favor of the plaintiff. Mr. Justice Taylor spoke for the Court in affirming the decision below. He noted that the verdict was well within the testimony as to the value of the building and that it did not appear from the record that the jury considered any damages other than those which naturally and logically flowed

34. 235 S. C. 380, 111 S. E. 2d 692 (1959).
35. 234 S. C. 504, 109 S. E. 2d 164 (1959).

from the acts complained of.[36] The Court, therefore, would not consider the question of whether future damages to the building could be proven under a general allegation of damages or whether such damages must be specially pleaded.

An unusual point was involved in the case of *Dean v. Temptron, Inc.*,[37] where during the course of the plaintiff's testimony he had referred to one of the witnesses for the defendant as an "unmitigated liar". The defendant argued that the trial judge should have declared a mistrial on the basis of this improper statement. The Supreme Court pointed out that while the statement of the plaintiff was certainly improper, the determination of whether it precluded an impartial consideration of the case by the jury was a matter resting within the sound discretion of the trial judge. The trial judge had promptly admonished the witness and cautioned the jury that the remark was improper. The Supreme Court held that there had been no abuse of discretion by the trial judge in refusing to order a mistrial.

IX. DIRECTED VERDICT

A. *Creating Jury Issue by Cross-Examination of Opponent's Witness*

In the case of *Jackson v. Jackson*,[38] the court held, in accord with its prior decisions, that the defendant may elicit sufficient evidence upon cross-examination of the plaintiff's witnesses to avoid a directed verdict.[39] Also, the court noted that it was for the jury to pass upon the credibility of the witnesses and the weight of the evidence, taking into consideration the witnesses' interest in the result, the accuracy of her recollections and all other evidence that would tend to refute or discredit her testimony.[40] To justify a court in directing a verdict, there must be nothing in the circumstances tending to create distrust of the truthfulness of the testimony.[41]

36. Crozier v. Charleston & W. C. Ry. Co., 222 S. C. 121, 71 S. E. 2d 805 (1952). *Cf.* Hobbs v. Carolina Coca Cola Bottling Co., 194 S. C. 543, 10 S. E. 2d 25 (1940). See also Henry Sonneborn & Co. v. Southern Ry. Co., 65 S. C. 502, 44 S. E. 77 (1903).
37. 234 S. C. 532, 109 S. E. 2d 167 (1959).
38. 234 S. C. 291, 108 S. E. 2d 86 (1959).
39. Greenville County v. Stover, 198 S. C. 240, 17 S. E. 2d 535 (1941); Eargle v. Sumter Lighting Co., 110 S. C. 560, 96 S. E. 909 (1917).
40. Jones v. Atlanta-Charlotte Airline Ry. Co., 218 S. C. 537, 63 S. E. 2d 476, 26 A. L. R. 2d 297 (1951).
41. Green v. Greenville County, 176 S. C. 433, 180 S. E. 471 (1935).

It seems that under the facts of this case, the holding of the court is correct since the defendant's cross-examination of two policemen who were witnesses for the plaintiff tended to contradict portions of the plaintiff's testimony. Thus, the credibility of the plaintiff was properly in issue and for the jury's decision. It would be improper, however, to extend the principle of this case to other cases wherein there has not been contradiction of the plaintiff's testimony. Certainly, where there is substantially uncontradicted evidence, the case should not be left to the jury simply upon the question of credibility.

X. TIMELY PRESERVATION OF RIGHTS

A. *Timely Objection*

In *Edwards v. Great Am. Ins. Co.*,[42] the court was faced with a question involving the waiver of a forfeiture provision in an insurance policy. The defendant attempted to argue on appeal that the local agent was only a soliciting agent and, therefore, could not waive the contract provisions. The Supreme Court speaking through Mr. Justice Legge, disallowed this ground of appeal because the point had not been raised in the trial court and, therefore, was not available in the Supreme Court. The Court also refused to consider questions not presented in the lower court in other cases.[43]

In the case of *Van Dolson v. Earles*,[44] the Court held that if no objection is raised to an erroneous charge, any possible objections will be waived. The Supreme Court also held in this case that where no demand for interest was made in the complaint and no mention of interest was made in the charge to the jury or in the verdict, it was error for the trial judge to allow interest from the date of demand upon an unpaid claim, on the ground that to allow interest not demanded in the complaint would permit a recovery in excess of the sum prayed for.

The case of *Mahaffey v. Mahaffey*[45] was one of several cases involving the necessity of raising objection at the proper time. After charging the jury, the trial judge had excused the jury and given counsel an opportunity to express any

42. 234 S. C. 404, 108 S. E. 2d 582 (1959).
43. Williamson v. South Carolina Elec. & Gas Co., 236 S. C. 101, 113 S. E. 2d 345 (1960); Hines v. Farr, 235 S. C. 436, 112 S. E. 2d 33 (1960).
44. 234 S. C. 593, 109 S. E. 2d 456 (1959).
45. 236 S. C. 64, 113 S. E. 2d 72 (1960).

objections or to request additional charges.[46] The appellants, having raised no objection at that time to the charge, were held to have no right to question it on appeal.[47] However, as noted above, the court did decide the case on the merits in spite of this deficiency.

XI. RES JUDICATA AND LAW OF THE CASE

A. *In General*

Two cases involved the sometimes elusive doctrine of "the law of the case." In *Turbeville v. Gordon*[48] plaintiff sued for the balance due for construction of a house. Formerly, defendant had demurred on the ground that the complaint showed on its face that plaintiff sought to charge defendant on an oral promise to pay another's debts, but the Supreme Court had overruled the demurrer, holding that the complaint could be construed as alleging that defendant was the primary obligor. After remittitur, defendant raised the same defense by answer and obtained a judgment on the pleadings. On appeal the Court reversed, holding that its former decision as to the construction which might reasonably be placed on the complaint was the law of the case and judgment for defendant on the pleadings was error.

A more difficult case is *Dukes v. Hygrade Food Prod. Corp.*[49] The plaintiff sued for the balance due on an electrical contracting job for defendant's plant. Defendant answered, alleging, *inter alia*, that a long and complicated contract was involved, which was too complicated for a jury, and asked for a reference. The reference was refused and no appeal was taken. Subsequently, at the trial of the case before another judge, the judge on his own motion ruled that the issues were too complicated for a jury and referred the matter to a referee. The Court reversed, holding that the first judge's order denying reference was the law of the case and cited Circuit Rule 60 which forbids a judge from granting an order on application therefor if such order has been refused in whole or part by another judge. With due respect for our Court, it seems to this writer that the fact

46. CODE OF LAWS OF SOUTH CAROLINA § 10-1210 (1952).
47. G. A. C. Finance Corp. v. Citizens and Southern Nat'l Bank, 234 S. C. 205, 107 S. E. 2d 315 (1959); Tute v. Lambusca, 231 S. C. 429, 99 S. E. 2d 39 (1951).
48. 236 S. C. 57, 113 S. E. 2d 68 (1960).
49. 236 S. C. 69, 113 S. E. 2d 254 (1960).

the judge on his own motion decided to refer the matter makes Rule 60 inapplicable. Futhermore, it seems that the judge who is trying the case should have greater latitude in issuing an order, even if the question has been passed on by a prior judge, when the issues are such that they do not become fully apparent until the case is being tried.

In the case of *Hines v. Farr*[50] the Court held that a judgment in a prior action is res judicata in a subsequent action between the same parties where the same subject matter is involved and the adjudication in the former suit was of the precise question sought to be raised in the second suit. The plaintiff, a grading contractor, brought this action against the defentant for the amount due on a contract. In a previous action between the same parties, the Court had held that the present plaintiff was not entitled to arbitration of the contract and that the decision of the architect was final. The defendant was held to be barred from raising the defense that there had been no arbitration of the architect's certificate.

B. *Collateral Attack Upon Judgment*

In the case of *Singleton v. Mullins Lumber Co.*,[51] Justice Legge attempted to clarify the South Carolina decisions regarding attacks upon final judgments of courts in this state. In this case, the Court held that an equitable proceeding which sought equitable relief and had for its very purpose the overthrow of a final judgment was not a collateral attack upon a prior judgment.

There had been a foreclosure and sale decree rendered against the present plaintiff and others in 1909. In the present action, some fifty years after the prior decree was rendered, the plaintiff seeks to have the earlier foreclosure decree set aside and to have herself declared the owner of the property in question, alleging that there had been no legal service of process upon her in the prior action. However, the testimony of the plaintiff in the trial of the present case, concerning the service of process upon her in the earlier action, had two versions: (1) that she had been served by the plaintiff himself in the earlier foreclosure action, which testimony the Supreme Court held should not have been

50. 235 S. C. 436, 112 S. E. 2d 33 (1959).
51. 234 S. C. 330, 108 S. E. 2d 414 (1959).

admitted on grounds of the Dead Man's Statute,[52] and (2) that she had not been served at all. The Court held this latter version to be "negative" testimony (*i.e.*, not involving a "transaction" with the deceased), which holding led to the main point decided in the case—whether the plaintiff could maintain this equitable action to set aside the prior judgment. This necessitated Justice Legge's discussion of the earlier South Carolina decisions regarding the distinction between direct and collateral attacks on final judgments.

After pointing up the earlier decisions and their presumptions in favor of the validity of a final judgment, Justice Legge then analyzed the cases dealing with direct and collateral attacks, and concluded that all of them could be classified in the following manner:

> (a) The only direct attack is by motion or other proceeding in the cause in which the judgment is rendered;
>
> (b) Every other attempt to overthrow a judgment is a collateral attack;
>
> (c) Collateral attack will lie only where the defect or infirmity is apparent upon the face of the record or judgment;
>
> (d) Direct attack will lie not only for defect or infirmity apparent upon the record of the judgment, but also for a hidden defect or infirmity for proof of which resort must be had to evidence dehors such record;
>
> (e) The judgment may also be attacked, for defect or infirmity not apparent upon its record, by a separate, independent suit in equity.[53]

Justice Legge then pointed up the apparent inconsistency between classification (e) and classifications (a), (b) and (c). However, this conflict, he asserts, disappears when the term "collateral attack" is limited to *actions at law*. To support his conclusion that a suit in equity attacking a final judgment is not a collateral attack, he relies upon the statement in *Southern Porcelain Mfg. Co. v. Thew*[54] that " 'the validity of the judgment cannot be called in question in any subsequent *action at law.*' " (Emphasis added)

The Court proceeded to place two limitations upon its holding that an equitable proceeding attacking a final judg-

52. CODE OF LAWS OF SOUTH CAROLINA § 26-402 (1952).
53. 234 S. C. 330, 108 S. E. 2d 414 (1959).
54. 5 S. C. 5 (1873).

ment was a direct and not a collateral attack: (1) "such a suit can be maintained only upon grounds entitling the plaintiff to equitable, as distinguished from legal, relief;" and (2) "such a suit must have for its very purpose the impeachment or overthrow of the judgment; its attack upon the judgment may not be presented as an issue incidental to some other, independent purpose."[55]

Although this case was held to be a direct attack upon the judgment, the evidence was held insufficient to overcome the presumptions which have been established in favor of a final court decree.

XII. APPEALS

A. *Scope of Review*

In the case of *Chapman v. Scott*,[56] the Court reviewed a foreclosure action in which the defendant claimed the right to credit insurance proceeds paid to the plaintiff against the mortgage indebtedness. This claim had been disallowed by the circuit judge. Since the proceeding was in equity, the Court reviewed both the challenged findings of fact as well as matters of law,[57] concluding, however, that the evidence preponderated in favor of the respondent and affirmed the circuit judge.

In *Charles A. Allen, Inc. v. Island Co-op Ass'n.*[58] the plaintiff brought an action for breach of contract and sought to attach the proceeds of a draft held by a bank. The central issue in the case was whether the bank owned the draft or was simply acting as a collection agent for Island Co-op. The Master admitted evidence to the effect that an employee of the Co-op had compromised a prior claim upon a similar draft. In reversing, the court stated that evidence as to this arrangement was inadmissible and, therefore, the defendant's evidence was uncontradicted. Judgment was granted for the defendant.

The scope of the Supreme Court's review in law and equity cases is an elusive concept, and the Court considered this in several cases. In *Davis v. Sparks*,[59] an equity matter (mortgage foreclosure), the Court refused to reverse two con-

55. 234 S. C. 330, at 348, 108 S. E. 2d 414, at 423.
56. 234 S. C. 469, 109 S. E. 2d 1 (1959).
57. Twitty v. Harrison, 230 S. C. 174, 94 S. E. 2d 879 (1956).
58. 234 S. C. 537, 109 S. E. 2d 446 (1959).
59. 235 S. C. 326, 111 S. E. 2d 545 (1959).

current findings of fact. The Court said the appellant had to show that the findings of fact are "without evidentiary support" or are "against the clear preponderance of evidence," and appellant had not shown this. In *Johnson v. Johnson*[60] and *Campbell v. Christian*,[61] both law cases, the Court refused to reverse findings of fact by lower courts, holding that if there is "any evidence" to support the trial judge's factual conclusions, they would not be upset.

B. *Statement of Exceptions*

The Court, in the period under discussion, considered several cases arising under Supreme Court Rule 4, section 6. In *Fruehauf Trailer Co. v. McElmurray*,[62] the trial judge had struck the answer of the defendant as sham, frivolous and irrelevant and granted judgment on the pleadings to the plaintiff. The defendant excepted to the granting of the plaintiff's motion, "the assigned error being the court granted plaintiff's motion made upon that ground." Mr. Justice Taylor noted numerous cases[63] in which the Court had stated that "every ground of appeal ought to be so distinctly stated that the court may at once see the point it would be called upon to decide." The object of an exception is to present some distinct principle or question of law which the appellant claims to have been violated in the trial of the case. Where these tests have not been met and the exception is too general, vague and indefinite, the Court will refuse to consider the appeal.

At times, preparation of the statement of exceptions is one of the most difficult matters in prosecuting an appeal, as a case may be dismissed if the exceptions are not properly prepared. In *Polson v. Burr*,[64] the Court held in an action growing out of a three-vehicle collision that the exception that the judge "erred in not permitting a joinder of parties" was too general. Furthermore, the Court could not intelligently consider the matter because of the transcript of record failed to include the judge's order appealed from.

60. 235 S. C. 542, 112 S. E. 2d 647 (1960).
61. 235 S. C. 102, 110 S. E. 2d 1 (1959).
62. 236 S. C. 141, 113 S. E. 2d 756 (1960).
63. See, *i.e.*, Hewitt v. Reserve Life Ins. Co., 235 S. C. 201, 110 S. E. 2d 852 (1959); Brady v. Brady, 222 S. C. 242, 72 S. E. 2d 193 (1952); Gordon v. Rothberg, 213 S. C. 492, 50 S. E. 2d 202 (1948).
64. 235 S. C. 216, 110 S. E. 2d 855 (1959).

Hewitt v. Reserve Life Ins. Co.[65] is more interesting to practicing lawyers because it gives some guidance in preparing exceptions. The exceptions simply stated that the trial judge erred in not granting judgment *non obstante veredicto* or a new trial. The Court said:

> The object of an exception is to present some distinct principle or question of law which the appellant claims to have been violated by the Court in the trial of the case from which the appeal is taken, and to present it in such form that it may be properly reviewed.

In the case of *Mahaffey v. Mahaffey*,[66] the Court was presented with an appeal from a case involving a will. The defendant appealed on the grounds that the trial judge had committed error in permitting the question "Is the will good?" to be put before the questions "Was there a lack of mental capacity?" and "Was there undue influence?" upon special interrogatories. The Court held that this failed to specify sufficiently the grounds upon which the appellant objected to the order of the questions and, therefore, violated Supreme Court Rule 4, section 6. Mr. Justice Legge, however, for the court, went on to rule that the plaintiff had not raised the objection at the proper time before the trial court and also ruled against the plaintiff on the merits. These latter holdings are discussed in other sections of this article.

C. *Failure to Perfect Appeal*

In *Associated Petroleum Carriers v. Mutual Properties, Inc.*,[67] the Court reversed a lower court's refusal to dismiss an appeal for failure of appellant to serve a proposed transcript within thirty days after notice of intention to appeal. The Court said that if a proposed transcript cannot be served in time, appellant should either get opposing counsel's consent to an extension, or on four days' notice, move for a court order extending time. All this must be done within the thirty-day period.

D. *Matters Appealable*

In *Gary v. Jordan*[68] the Court reaffirmed the well-settled proposition that a party must reserve his prior objection to a witness' testimony or counsel's questions when he later

65. 235 S. C. 201, 110 S. E. 2d 852 (1959).
66. 236 S. C. 64, 113 S. E. 2d 72 (1960).
67. 235 S. C. 195, 110 S. E. 2d 861 (1959).
68. 236 S. C. 144, 113 S. E. 2d 730 (1960).

questions the witness about the same subject matter. Otherwise, the original objection is held to have been waived. Furthermore, the Court will not consider a matter on appeal if the lower court has not passed upon it. *Campbell v. Calvert Fire Ins. Co.*[69] In this case the defendant sought to raise the defense that the insured did not give timely notice to insurer, not having raised it in the pleadings.

Ordinarily an order refusing a motion to strike is not appealable,[70] but such an appeal was permitted in *Thomas v. Colonial Stores, Inc.*,[71] because the motion to strike defendant's second defense was in the nature of a demurrer, involving the merits and going to the heart of the defense.

XIII. FEDERAL CASES

Fourth Circuit Court of Appeals' cases from South Carolina did not present any novel procedural points. The two cases arising with procedural points merely reaffirmed the established proposition that in considering a motion for directed verdict, the court must accept as true all facts favorable to the plaintiff which the evidence tends to prove and resolve all reasonable inferences against the defendant. If there is more than one reasonable inference, the case must go to the jury. *Grooms v. Minute-Maid,*[72] *Town of Ninety-Six v. Southern Ry.*[73]

69. 234 S. C. 583, 109 S. E. 2d 572 (1959).
70. CODE OF LAWS OF SOUTH CAROLINA § 15-123 (1952); Cooper v. Atlantic Coast Line Ry. Co., 78 S. C. 562, 59 S. E. 704 (1905).
71. 236 S. C. 95, 113 S. E. 2d 337 (1960).
72. 267 F. 2d 541 (4th Cir. 1959).
73. 267 F. 2d 579 (4th Cir. 1959).