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Practice and Procedure

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PRACTICE AND PROCEDURE

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In General

As in the past, this subject embraces a hodge-podge of different and unrelated topics. Some of the topics involve remedies, others procedures, and yet others, forums. I have grouped the cases inside the following headings:

(1) Contempt of Court
(2) Declaratory Judgments
(3) Form or Sufficiency of Objections
(4) Intervention of Parties
(5) Instructions to Jury
(6) Matters Appealable
(7) Non-suit and Direction of Verdict
(8) Power of Judge after Term
(9) References
(10) Service of Process
(11) Re-opening Default Judgments
(12) Venue.

I have not attempted to review all cases affecting practice and procedure, but have sought to cover the main ones.

Contempt of Court

In *State v. Weinberg*,[1] the defendant was found guilty of constructive contempt because he attempted to influence certain persons drawn for jury duty during a term of court in which proceedings were pending against the defendant's son. Neither of the men solicited by the defendant were called on the jury which tried the defendant's son but the lower court, affirmed by the Supreme Court, found the defendant guilty.

> Where there is deliberate purpose to corrupt administration of justice, accompanied by definite overt act on part of contemnor, designed to carry purpose into effect, notwithstanding failure of design, one is guilty of contempt.
>
> One interfering with or attempting to interfere with the

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1. 229 S. C. 286, 92 S. E. 2d 842 (1956).

> proper execution of legal process, or with an attempt, either on the bench or off, to influence the Court in its decision of a matter pending before it may be held guilty of contempt, . . . and all willful attempts, of whatever nature, seeking to improperly influence jurors in the impartial discharge of their duties, whether it be by conversations or discussions, or attempts to bribe, constitute contempts. . . .
>
> . . . . We cannot condemn too strongly any attempted interference with the jury, whether the attempt be successful or not; not even the love of the father for his son is justification for appellant's conduct, and the hearing judge's decision that appellant was guilty of contempt was justified by the evidence.
>
> Jurors Boseman and DuBose are to be commended for reporting appellant's conduct to the trial judge as the very heart of our system of jurisprudence is the jury; an unjust jury means an unjust Court.

Declaratory Judgments

In *City of Columbia v. Sanders, et al.*,[2] a declaratory judgment was sought to ascertain the right of the City of Columbia, as it existed prior to its merger with the City of Eau Claire, to issue further revenue bonds, on a parity with those outstanding, for the purpose of improving its water and sewer facilities. The proceeding also inquired whether the utility systems of the two cities as they existed prior to the merger had to be maintained separately thereafter in order to protect the various liens and priorities of bond holders and others in the separate systems as they existed prior to the merger. On appeal the Supreme Court stated that there was doubt whether the pleadings presented a proper case for any kind of declaratory relief, but since the rule requiring the existence of a *justiciable controversy* was somewhat relaxed where the public interest was involved the Court would make a limited declaration with respect to the issuance of further revenue bonds. The Court noted that the City of Columbia had segregated the revenues from the systems formerly operated by Eau Claire and Columbia and that no contest had arisen between the holders of the Eau Claire bonds and the holders of the bonds issued by Columbia. For

2. 231 S. C. 61, 97 S. E. 2d 210 (1957).

this reason the Court declined to go into the question of comingling of funds, rank or priority of existing liens, and the extent of claims that holders of the Eau Claire bonds might have upon the revenues of the entire system.

> We need not speculate as to what controversies may arise in the future. In short, we refuse to make any declaration for adjudication as to the rights of the existing bond holders *inter sese.*
>
> The uniform declaratory judgment act . . . *"does not require the Court to give a purely advisory opinion* which the parties might, so to speak, put on ice to be used if and when occasion might arise" . . . or *"license litigants to fish in judicial ponds for legal advice."* (Emphasis and omissions mine.)

In *Wright, et al., v. City of Florence,*[3] two members of the Civil Service Commission proceeded against the City, the Chief of Police and others, for a declaratory judgment determining the validity of an ordinance repealing an earlier ordinance whereby the Civil Service Commission was established. The Chief of Police instituted a cross-claim wherein he contended that the repeal of the ordinance creating the Civil Service Commission was designed to deprive him of his job in violation of his contractual rights. It was decided by the lower court on the pleadings. On appeal the Supreme Court reversed the lower court and dissolved the injunction which it had issued. The Court held that the statute under which the City had originally adopted its ordinance creating a Civil Service Commission was permissive and not mandatory so that the City had the inherent right to repeal its ordinance creating the Commission. The Supreme Court, however, dismissed the contention of the Chief of Police that his contractual rights had been unconstitutionally impaired by the repeal of the ordinance because that contention had not been decided by the lower court and, therefore, was not available to the Police Chief as a ground to sustain the judgment of the lower court. The Court ruled that the Chief's contention would depend upon the facts, evidence of which had not been adduced below and that this action was not the proper form of action for the adjudication of the Chief's claim.

3. 229 S. C. 419, 95 S. E. 2d 215 (1956).

> . . . . It is not that a City lacks power to repeal its ordinances, but that to the extent that the repeal affects vested rights or contractual obligations it may be inoperative. Even in such a case, however, the Court will not ordinarily attempt to control the action of the Municipal Council, and if the council considers the public interest requires the repeal of an ordinance, in violation of a contract in the Municipality, the Court will not compel the specific performance of the contract but will leave the injured party to his remedy at law.

Form or Sufficiency of Objection

In an action wherein the manufacturer of a farm tractor was charged with breach of implied warranty of fitness, the defendant in *Odom v. Ford Motor Company*[4] contended that there was no privity of contract between it and the plaintiff who had purchased the tractor from a dealer. The defendant appealed from an adverse verdict on the ground *inter alia* that the lower court erred in refusing to direct a verdict or grant judgment notwithstanding the verdict for defendant. On appeal the plaintiff respondent opposed the question of lack of privity because it was not included in the grounds of the motions for non-suit and directed verdict. The Supreme Court in overruling respondent's contention held:

> While privity of contract was not mentioned *eo nomine,* appellant's position throughout the trial was that the only liability assumed by it was under the written warranty set up in the answer and if there was any other warranty made at the time of the purchase of the tractor, it was the sole obligation of Sansbury Tractor Company which was not its agent and was without authority to bind it in any manner whatsoever. After careful consideration of the grounds of the motion for non-suit and directed verdict it is our conclusion that they are broad enough to raise the question as to whether an action could be maintained against appellant on an implied warranty. It was not necessary for appellant to "brief" the point. It should be further stated that the element of privity of contract was specifically mentioned and argued on appellant's motion for judgment *non obstante veredicto* and it appears that respondent's counsel

4. 230 S. C. 320, 95 S. E. 2d 601 (1956).

participated in the argument of this question without reservation or objection. Evidently they then thought it was properly before the Court.

Two cases consider the method of objecting to want of capacity to sue. In *Bramlett v. Young*[5] the Supreme Court says:

> The appellants assert that the respondents herein had no legal capacity to bring this action. *An examination of the petition shows upon its face the capacity in which the respondents brought action.* Hence, since the capacity in which the respondents instituted this action appears upon the face of the complaint, *if the appellants desired to take advantage of or question the right to bring the action, the appellants remedy was to demur to the complaint.* . . . This they did not do, and since the objection was not made by demurrer, it is considered waived. . . .
>
> If the fact that the respondents had no legal capacity to sue did not appear upon the face of the petition, then the appellants should take advantage of such by way of answer. . . . (Emphasis and omissions mine.)

In *Clanton's Auto Auction Sales v. Campbell*[6] the ownership of an automobile was in issue and the Supreme Court had occasion to consider whether or not a general denial or a denial "upon information and belief" was sufficient to raise the issue of ownership alleged in the complaint. The Court also discussed the effect of a simple denial as being sufficient to raise an issue whether made categorically or on information and belief.

> Denial in either of the forms just mentioned with respect to the plaintiff's capacity to sue, or to facts presumptively within the defendant's knowledge, or to matters of public record, is not sufficient to put such facts in issue.
>
> Thus it was held in *Land Mortgage Investment & Agency Company v. Williams*[7] . . . that the plaintiff's corporate existence had not been put in issue by defendant's denial of knowledge or information sufficient to form a belief as to it . . . . See also *Blackwell v. First National Bank of Columbia*[8] where allegations charging a bank with negli-

5. 229 S. C. 519, 93 S. E. 873, 881 (1956).
6. 230 S. C. 65, 94 S. E. 2d 172 (1956).
7. 35 S. C. 367, 14 S. E. 821 (1891).
8. 185 S. C. 427, 194 S. E. 339 (1937).

gence in having failed to ascertain the identity of a person presenting a check endorsed by the plaintiff were held not to have been effectively controverted by the bank's denial of them "upon information and belief".

In the case at bar it will be noted that in paragraph 3 of the first defense the denial of plaintiff's ownership of the Ford automobile is categorical and not upon information and belief. But apart from that denial upon information and belief in paragraph 4 was sufficient to put plaintiff's ownership in issue. Such ownership was not a matter of public record or presumptively within defendant's knowledge, and to put plaintiff to the proof of it did not require specific and unqualified denial. Moreover if, as plaintiff contends, the denial was insufficient its insufficiency was apparent on the face of the first defense, rendering that defense subject to demurrer. But plaintiff did not demur, and obviously considered the issue of ownership as having been raised, for it offered evidence thereabout. (Omissions mine.)

Intervention of Parties

In *Long Manufacturing Co. v. Manning Tractor Co.*[9] the manufacturer of machinery had brought suit against its dealer for balance due on machines sold by the manufacturer to the dealer. Thereafter the dealer and certain other persons who had bought machines from the dealer moved that such others be made parties - defendant on the ground that the machines purchased by them had been defective and the purchasers and dealer desired to assert counter-claims against the plaintiff. The Circuit Judge denied the motion and was sustained by the Supreme Court.

The Court decided that the petitioners seeking to become parties did not come within the provisions of Section 10-203, Code of Laws of South Carolina 1952, permitting a person to be made a defendant "who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination of settlement of the questions involved," nor did they come within the provisions of Section 10-219, Code of Laws of 1952, permitting the Court to bring in other parties "when a complete determination of the controversy could not be had without their presence." The

9. 229 S. C. 301, 92 S. E. 2d 700 (1956).

Court held that the controversy lay between the plaintiff manufacturer and the defendant dealer; and none of the petitioners were liable for the debt of the dealer to the manufacturer. Since any liability would be the sole obligation of the dealer, the Court found that a complete determination of the controversy could be had without bringing in the petitioners as additional parties. In any event, the bringing in of additional parties would have been left much to the discretion of the trial judge.

Instructions to the Jury in the Language of the Statute

In *Field v. Gregory*,[10] involving a collision between motor vehicles, the appellant objected that the trial judge failed to charge a request submitted by appellant as to the law applicable where two vehicles enter an intersection at approximately the same time. The Supreme Court, observing that the trial judge had charged the specific language of the Code Section around which appellant's requested instruction was modeled, said:

> As a general rule where the law governing a case is expressed in a statute, the Court in its charge not only may, but should, use the language of the statute, and may, indeed, be guilty of error if it employs language which constitutes a departure in an essential respect from the statute. However, it is not error to qualify the wording of the statute so as to conform it to the construction given by the reviewing courts. . . .
>
> The particular complaint of the appellants is that the Court failed to explain as to what "entering an intersection at approximately the same time" meant. It is well settled that words used in a statute must be given their ordinary and popular signification, unless there is something in the statute requiring a different interpretation. There are no words used in this statute which have any unusual legal meaning. When the Judge charged the jury in the language of the statute, this was sufficient in this particular case. . . . (Omissions mine.)

Matters Appealable

In Re Paslay's Appeal[11] involved some rather interesting facts. The petitioner had secured an order in the lower court

10. 230 S. C. 39, 94 S. E. 2d 15 (1956).
11. 230 S. C. 55, 94 S. E. 2d 57 (1956).

enjoining the Master from delivering a deed to property bid in at a judicial sale on several grounds including one that the property had been sold at an inadequate price and another rather novel ground that petitioners had been prepared through their attorney to bid considerably more for the property and the attorney "made every reasonable effort to attend the sale, but due to mechanical failure of his automobile at a distance from the place of sale, he was unable to arrive at the place of sale" on time. The respondents appealed to the Supreme Court from the order granting the injunction and the petitioner below moved to dismiss the appeal in the Supreme Court on grounds that the order of the circuit court was not appealable. The Supreme Court sustained the appeal saying:

> Appeal lay from the restraining order or temporary injunction. Section 15-123(4) of the Code of 1952 authorizes appeal from, quoting, "an interlocutory order or decree in a Court of Common Pleas granting, continuing, modifying or refusing an injunction . . . ."
>
> We have found that the restraining order or injunction was improvidently issued; there was no merit in the petition and the returns should have been adjudged sufficient and the petition dismissed. It follows that it was an error to refer the matter to the Master. (Omissions mine.)

In another case involving the appealability of order of the lower court, *Sparks v. D. M. Dew & Sons, Inc.*,[12] the Circuit Judge refused to order that certain allegations be stricken from the complaint upon the ground that they were irrelevant and redundant and the defendant appealed. The Supreme Court dismissed the appeal holding:

> An order refusing to strike allegations in pleadings as irrelevant and redundant is not appealable . . . .
>
> Upon trial, however, appellant will not by the order appealed from or this opinion be precluded or in any wise prejudiced in its efforts to exclude such testimony as may be offered in support of the allegation sought to be stricken from the complaint. Appeal dismissed.

12. 230 S. C. 507, 96 S. E. 2d 488 (1957).

Non-Suit and Direction of Verdict

In *Johnson v. Atlantic Coast Line Railroad Company*,[13] plaintiff in an action for wrongful death, moved for and was granted a voluntary non-suit without prejudice for the purpose of procuring a proper appointment as administratrix, it being conceded that she was not duly appointed when the action was instituted. In its order the lower court also attempted to pass upon the rights of the alleged beneficiaries in a subsequent action which might be brought and the defendant appealed, not only from the granting of the non-suit but, also, from the ruling as to the rights of beneficiaries in future actions. The Supreme Court affirmed the lower court in result, but stated:

> It was unnecessary and thereby improper to pass upon the "rights" of the alleged beneficiaries and any subsequent action which may be brought. It was therefore error to do so, and the soundness of the conclusions will not be examined; appellants pertinent contentions of error are saved for re-assertion by them in any future action which may be brought upon the same cause, if they be so advised . . . . Ordinarily, as here, a plaintiff is entitled on Motion before trial to an Order of voluntary non-suit without prejudice, in the absence of *resulting legal prejudice to the defendant*. . . . Appellants argue only the difficulty in locating their witnesses, if a new action should be brought and tried; but liability to defend another action does not constitute legal prejudice. (Emphasis and omissions mine.)

In *Chastain v. United Insurance Company*,[14] plaintiff sued defendant charging that it had refused to pay or honor certain hospital sickness claims and had wrongfully, unlawfully and fraudulently lapsed her hospital and sickness insurance policy. The respondent admitted issuing the policy but contended that it had exercised its option, reserved in the policy, to refuse to renew the same, and had declined to pay the claim presented because the sickness involved was not contracted during the term of the policy as required therein. The trial judge, at the close of plaintiff's case, granted a non-suit on the ground that the only reasonable conclusion to be

13. 229 S. C. 329, 92 S. E. 2d 847 (1956).
14. 230 S. C. 465, 96 S. E. 2d 464 (1957).

reached was that plaintiff's condition existed prior to the issuance of the policy and was not covered by its terms.

On the question of the alleged wrongful lapse of the policy the Supreme Court said:

> It must be borne in mind that we are here dealing with a divisible insurance contract and not a continuous contract of insurance for life subject to forfeiture for nonpayment of premiums. The policy in question is for a definite and fixed term. It can correctly be denominated a term policy. It cannot be renewed or continued without the consent of both parties. *When the insurer refused to consent to a renewal of the contract, it was acting within the reserved rights under the policy. Having so acted the insured cannot complain....*

The Court then considered whether or not the claim came within the policy clause insuring "against loss of time on account of sickness *contracted during the term of the policy*". The record disclosed the fact that the cancer from which claimant suffered had been treated surgically before the policy in question had been taken out, which fact was established by plaintiff's own witness, a surgeon. The Court concluded that the Circuit Judge correctly held the evidence was susceptible of only the one reasonable inference that the appellant had cancer prior to the delivery of the policy.

> Since there was only one reasonable inference that could be deduced from the evidence, it became a question of law for the Court. It was proper, therefore, for the Trial Judge to grant a non-suit.

In *Young v. Charleston and Western Carolina Railway Company*,[15] action was brought against the railroad for the wrongful death of one Bennie Young who, apparently, after consuming a quart of whiskey, lay down at night on the railroad track where he was struck by the train. The Supreme Court, by divided opinion, held the railroad liable under the Last Clear Chance Doctrine and left it up to the jury to determine whether or not the railroad was negligent in failing to provide sufficient lights to apprehend the prostrate decedent on its track.

> There being sufficient evidence regarding one of the specifications as to require consideration of a jury, the

15. 229 S. C. 580, 93 S. E. 2d 866 (1956).

> motion for non-suit, directed verdict, and judgment *non obstante veredicto* were properly over-ruled . . . .
> Under the doctrine of Last Clear Chance, which prevails in this State, even though the deceased negligently exposed himself to a risk of danger while intoxicated or became intoxicated after a negligent exposure to danger, if he was upon the track in a helpless condition and those in charge of the train discovered him, or in the exercise of ordinary care should have discovered him in such a perilous situation in time to avoid injury to him by the exercise of ordinary care, the railroad company would be liable. (Omissions mine.)

Power of Judge after Term

In *Barnett v. Piedmont Shirt Corporation*,[16] the Circuit Judge had heard defendant's demurrer during the term and filed his Order sustaining the demurrer after the term had ended and he had left the Circuit. In the Order the judge neglected to give the plaintiff the right to amend and when plaintiff's ex parte called this to the judge's attention he granted a leave to file an amended answer under a supplemental Order in which he stated *inter alia*:

> It was my intention to grant plaintiff the right to amend her complaint if she should be so advised, but I inadvertently omitted inserting a provision in said Order to this effect.

Defendant appealed from the second Order on the ground that the Circuit Judge lacked jurisdiction to issue it and the Supreme Court held:

> The power of a Circuit Judge, after he has left the Circuit, to issue an order on a matter heard by him while presiding within the Circuit, is unquestioned . . . . Judge Moss' *Order of January 20, 1956, sustaining the demurrer*, was as effective and as final, as if it had been issued during the term at which he had presided. *Upon its issuance his jurisdiction of the matter, except for the correction of merely clerical errors, ended* . . . .
> In the case before us the Order of February 8, 1956, involved material amendment of the Order of January 20th, not correction of a mere clerical error. Under the authorities before cited, we are of the opinion that Judge

16. 230 S. C. 34, 94 S. E. 2d 1 (1956).

> Moss was without jurisdiction to issue it, and that it was therefore, null and void.

References

The two cases hereinafter reviewed consider respectively the questions: first, when may a reference be ordered in a law case, and second, what procedures must be followed by a referee in receiving evidence and preparing his report in a case where a reference is required.

In *Taylor v. Cecil's Inc., et al.*,[17] the plaintiff, a subcontractor on a school construction project, brought suit against the prime contractor, his surety, and others for balances allegedly due him for work performed on the job. Certain other parties were permitted to intervene and file claims against plaintiff and certain of the defendants for materials supplied to the project and various answers and defenses between the various parties ensued. Over objection of the defendant trustees, a general order of reference was made whereby all issues were referred to the Master to take the testimony and report his findings of facts and conclusions of law, the lower court having concluded:

> That the answers raised equitable issues and that the numerous transactions would involve long and tedious accounts, which warranted reference rather than trial by jury.

The defendant trustees appealed and their appeal was sustained by the Supreme Court which said:

> The action is at law and the pleadings do not indicate such long and complicated accounts that it would not be practicable for a properly instructed jury to comprehend and adjust the issues between the parties. *An account must not only be long, but so complicated as to be beyond the comprehension and finding of the jury, in order for the action to be compulsorily referable* . . . .

The Supreme Court observed that the only "accounting" referred to in the pleadings was in a reply by plaintiff to one of the counterclaims wherein plaintiff claimed a percentage discount on certain purchases. The Court said:

> . . . complication in the required calculation is not evident, if the claims to the discounts should be sustained by the evidence found by the verdict of the jury.

17. 229 S. C. 182, 94 S. E. 2d 268 (1956).

> The Code provides that the reference statute shall not be construed, "so as to deprive any party of a trial by jury of any case or issue upon which he is entitled to a trial by jury as a matter of right under the practice in effect prior to February 7, 1928." . . . the trustees would be so deprived in this case if the order of reference should be affirmed. (Emphasis and omissions mine.)

In a divorce proceeding, *Elrod v. Elrod*,[18] the Supreme Court reversed the order of the lower court granting the plaintiff husband a divorce against his wife for desertion and remanded the case for further proceedings below. When the case was initially heard by the Special Referee the Referee on several occasions had refused the defendant the right to put in the record certain testimony which the referee thought was inadmissible. Furthermore, the Referee's report contained no statement of facts but merely an averment that:

> After careful consideration of all the testimony and the plaintiff's deposition herein, I find as a fact that the material allegations of the complaint herein are true and correct in their entirety.

The Supreme Court, commenting on the Referee's refusal to receive the testimony, held:

> It was the duty of the Referee to take all testimony offered even though he regarded it as inadmissible . . . . Section 10-1409 (South Carolina Code, 1952) requires a Master or Referee to decide any objection made to testimony and if deemed inadmissible, "he shall take the same, subject to such objection, but shall not incorporate such testimony so held by him inadmissible with the rest of the testimony in the body of his report but shall append the same separately at the end of his report."
>
> The Special Referee in this case clearly erred in refusing to follow the foregoing procedure and we cannot say that such error was not prejudicial.
>
> The Supreme Court ruled that the error on the part of the Special Referee was not cured by the statement in the lower court's order that the judge had reviewed and considered all of the "offers of proof made and the statement of the attorney for the defendant as to other matters of proof he would have been able to have submitted,"

18. 230 S. C. 109, 94 S. E. 2d 237 (1957).

> saying: "but we do not think the error can be corrected in this manner." *Appellant was entitled to have the testimony in the record for review by the Circuit Court and this court.*

Referring to the form of the report the Supreme Court held:

> The record further discloses another serious departure from practice. Section 10-1412 provides: "the Referee or Master must state the facts found and the conclusions of law separately." Here the Referee made no effort to state the facts found by him. . . as stated in *Moore v. Johnson,* 7 S. C. 303, "the facts should be stated briefly, distinctly and independently of any view taken of the law of the case." It is only in this way that a case tried before a Master or Referee can be intelligently reviewed on appeal. (Emphasis and omissions mine.)

Service and Process

In *Ward v. Miller, et al.,*[19] service was made on a non-resident motorist involved in an accident in this State by sending copy of summons and complaint to the Chief Highway Commissioner as provided in Section 10-441, 1952 Code. After 20 days had elapsed defendant tendered an answer to plaintiff's counsel who declined to accept service because the time had expired. Defendant then gave notice that he would move the court for an order holding that he was not in default or, in the alternative, allowing him to file answer. The motions were denied. Defendant then appealed to Supreme Court on the contention that where an agent designated by statute accepts service of process double time should be allowed within which to answer under the provisions of Section 10-465, Code of Laws of 1952. The Supreme Court denied this contention, saying:

> We have found no statute relating to service upon the Chief Highway Commissioner of the Summons and Complaint which provides for double time. On the contrary, Section 46-104 of the 1952 Code of Laws provides that service of process upon the Chief Highway Commissioner shall have legal force and validity as if served on the defendant, personally. There can be no doubt that the statutes . . . make the Chief Highway Commissioner

19. 230 S. C. 288, 95 S. E. 2d 482 (1956).

an agent of the non-resident motorist. This Court has likewise so held.

The Court held that the section doubling the time where service was effected by mail was inapplicable for the further reason that it did not apply historically to summons or other process or of any paper to bring a party into contempt. Thus *the act had no application to the service of a summons by mail.*

In *Bargesser v. Coleman Company*[20] the plaintiff attempted to secure jurisdiction over a foreign corporation by service upon a local dealer who purchased the corporation's products for resale. The corporation, appearing specially, moved to dismiss such service on the grounds that it was not doing business in the State, maintained no office and had no agent within the State, and the person served was not its agent. The trial judge denied the motion and held that the motion presented questions of fact to be determined by a jury. The Supreme Court reversed the lower court, saying:

> The primary purpose of a motion of a foreign corporate defendant to dismiss the service of a summons and complaint upon its supposed agent is to question the jurisdiction of the Court, because the corporation is not doing business in this State nor has it an agent upon whom service can be made. It is not for a jury to say whether the Court has jurisdiction but this should be decided by the trial judge. The motion to dismiss is grounded solely upon the alleged fact that the Court does not have jurisdiction of the defendant. Matters of fact alleged in a motion to dismiss, if controverted, must be determined by the Court.

Re-Opening Default Judgments

In *Ward v. Miller*[21] the Supreme Court strictly enforced the provisions of the law requiring that answer be served within twenty (20) days after service of process and refused to disturb the lower court's order denying the defaulting defendant right to have the cases re-opened and to file answer. Thus the Supreme Court considered Code Section 10-609 (Code of Laws, South Carolina, 1952) which would have

20. 230 S. C. 562, 96 S. E. 2d 825 (1957).
21. 230 S. C. 288, 95 S. E. 2d 482 (1956).

empowered the lower court "in its discretion and upon such terms as may be just" to permit an answer to be filed after time is run, but said:

> A motion under the above quoted section was addressed to the sound discretion of the Court and where the Court refuses to allow an answer to be filed, the appellant in order to prevail in this Court must show that there was a clear abuse of discretion by the Trial Judge.

The Court then cited precedent that where the lower court is invested with discretionary powers such power is absolute, and, when exercised, is final since discretion is unlimited and bounded by no rule except the good sense and integrity of the party empowered to exercise it so that in the absence of an express right to appeal it necessarily follows that its exercise is unappealable. The Court held that the only exception to this rather strict rule was where there had been an abuse of discretion, which the appellant had the burden of proving.

Although it may appear to some that the Court had dealt rather harshly with the errant defendant who unsuccessfully sought leave in the lower court to file answer after the time had expired the Supreme Court was more lenient in two cases where defendants had suffered judgments by default several years previously. These two decisions should be carefully studied by counsel as the taking of default judgments is rather a commonplace procedure particularly in many actions on contracts such as foreclosure of mortgages and the like. In *Knight v. Martin*[22] the plaintiff had brought suit against the defendant for goods sold and delivered by service of summons and complaint on August 6, 1954. Nearly two months later, October 2, plaintiff's counsel filed an affidavit of default and secured judgment thereon against the defendant. One year and nine months later on 11th May, 1956, defendant's counsel moved to vacate the judgment on grounds not set out in the opinion. The Motion was denied by the lower court whereupon the defendant appealed. The Supreme Court, adverting to Section 10-1531 S. C. Code of Laws 1952 governing the rendition of judgments by default in actions on contract, said:

It provides that when an action is for the recovery of

22. 230 S. C. 460, 96 S. E. 2d 473 (1957).

> money only, judgment may be given for the plaintiff by default if the demand is unliquidated and the plaintiff itemized account, append thereto an affidavit that it is true and correct, and that no part of the sum sued for has been paid by discount or otherwise and a copy thereof be served with the summons and complaint. . . .
> The statement attached to the complaint in this case is so deficient, when measured by the requirements of the statute, that it hardly needs discussion to conclude that plaintiff was not entitled to judgment without proof to the Court of his claim. The judgment is void and it was error not to vacate it.

The Court refused to consider certain evidence which plaintiff's counsel had sought to add to the record at the time of the Hearing below on the defendant's motion to vacate, saying:

> *The validity of the judgment is to be tested by the status of the action at the time of the rendition of the default judgment, and it cannot be bolstered by facts dehors the record as it existed at that time.* (Emphasis and omissions mine.)

The Supreme Court vacated and set aside the judgment.

Broome v. Broome[23] also involved a failure by the plaintiff to comply with the provisions of Section 10-1531, South Carolina Code of Laws, 1952, and the lower court allowed the defendants to re-open a default judgment taken against them more than three years previously. The plaintiff's suit had been for breach of an alleged contract whereby the defendants were to pay him a weekly salary and a percentage of the net profits of a certain business owned by the defendants. Action was instituted around April 1, 1952 and on May 7, 1952, plaintiff's counsel filed an affidavit of default and, without testimony, secured a judgment by default against the defendants, based solely upon the summons and verified complaint, and the affidavits of service and of default. The Circuit Judge, whose order was adopted by the Supreme Court, held that the plaintiff's claim of an alleged breach of contract was not liquidated, and said:

> The complaint does not contain an itemization of any amount, nor is there any itemized claim attached to and made a part of the complaint.

23. 230 S. C. 155, 94 S. E. 2d 439 (1956).

> Since plaintiff's claims for damages are principally unliquidated, his proof should have been made in open court by the taking of testimony, and the failure to do so warrants the relief demanded . . . .
>
> The petitioner, or plaintiff, also challenges the right of the respondent to move to vacate after a delay of approximately three years. *The record does not reveal when the defendants received notice of the rendition of the default judgment, or the date when they had knowledge thereof.* As far as can be assumed from the showing made, the petitioners are not guilty of any (un) reasonable delay in moving to vacate. (Emphasis and omissions mine.)

The *Broome* and *Knight* cases illustrate and emphasize the need for strictly following the statute when securing default judgments in actions on contracts. It is to be noted that in one of the cases the Supreme Court affirmed the decree of the lower court allowing the defaulting defendant the right to re-open and reversed the order of the lower court in the other case when it denied the defendant the right to re-open. On the other hand, in the tort case adverted to in the beginning of this note the Supreme Court affirmed the action of the lower court in denying the defaulting defendant applications for leave to file answer even though these applications were made shortly after the time for answer had expired.

It is also rather strongly implied in the *Broome* case that the defendants were entitled to *notice of the rendition of the default judgment against them.* The case apparently throws the burden on the party seeking to sustain the judgment to show that the defendants are given notice of the judgment or had knowledge thereof since in the absence of showing such notice or knowledge the defendants were not chargeable with unreasonable delay in waiting three years for moving to vacate the judgments taken against them.

Venue

In the case of *Hodge v. Reserve Life Insurance Company,*[24] a resident of Darlington County brought suit in that county against a foreign insurance corporation for alleged fraud and deceit in the sale to him of a policy of sickness insurance and

24. 229 S. C. 326, 92 S. E. 2d 849 (1956).

in the receipt of premium thereupon after issuance. The defendant moved for an order changing the place of trial to Florence County upon the ground that the action was *ex delicto* and it had no agent and maintained no office in Darlington County. The lower court denied the motion under Section 10-307 of the 1952 Code which provides in part "all suits brought against . . . insurance companies doing business in this State may be brought *in the County where the loss occurs* . . . . " The Supreme Court reversed the lower court and changed the place of trial to Florence County.

> (This) is not an action for breach of the conditions of the policies or for loss occurring thereunder . . . .
> We think the phrase, "where the loss occurs" contemplates loss from a casualty insured against under the terms of the policy . . . . The action in hand is not for a loss sustained under the policy referred to in the complaint, but in tort for damages resulting from the alleged fraud, deceit and misrepresentations as to the coverages of the policies. (Omissions mine.)

In *W. C. Caye and Company, Inc. v. Saul*,[25] the plaintiff instituted a proceeding in Richland County to foreclose the chattel mortgage against a defendant who was a resident of Edgefield County but who had voluntarily surrendered the chattel to the plaintiff in Richland County. The defendant moved to transfer the place of trial to the county of his residence. The lower court denied the motion under its interpretation of Section 10-301 1952 Code which provides *inter alia*:

> Actions for the following causes must be tried in the County in which the *subject of the action . . . is situated* . . .
>
> (4) For the recovery of personal property distrained for any cause.

The Supreme Court reversed the Order of the trial court and directed that the venue be changed to Edgefield County, the place of residence of the defendant, on the ground that since the chattel in question had been voluntarily surrendered to the plaintiff before the action was instituted, therefore the action was hardly one for the recovery of personal property. Rather, said the Court, the action was for the foreclosure of a chattel mortgage.

We reached the conclusion that where an action is

25. 229 S. C. 306, 92 S. E. 2d 696 (1956).

brought for the foreclosure of a chattel mortgage, the property embraced within said mortgage being in the possession of the person instituting the action for foreclosure, the case should be tried in the County of the residence of the defendant. (Insertions, emphasis and omissions mine.)

Three other decisions relating to the place of trial of actions present no unusual principle. The Court merely applied the rule recited many times that the moving party in order to prevail must make a prima facia showing that both the convenience of witnesses and the ends of justice will be promoted by the change, that motions of this kind must be addressed to the lower court, whose rulings thereon will not be disturbed unless the facts demonstrate that the court committed a manifest abuse of sound judicial discretion. Thus in *McCauley v. McLeod*,[26] the Supreme Court held that the Circuit Judge did not abuse his discretion by refusing to transfer a cause to Kershaw County where the automobile accident had occurred, from Clarendon County where the case had previously been sent on motion of the defendant to transfer the case to the place of his residence. In *Dison v. Wimbly*,[27] the Court declined to reverse an Order of the lower court returning the case to Dorchester County where the accident had occurred and action had originally been brought from Aiken County to which the proceeding had been transferred on motion of the defendant to transfer the place of trial to the county of his residence. Again, in *Jackson v. Powers*,[28] plaintiff originally brought his action against the defendants in Marion County, the place of their residence, and then moved before the Circuit Judge to transfer the place of trial to Marlboro County where the accident occurred on the ground that the transfer would serve the convenience of witnesses and promote the ends of justice. The Circuit Judge granted the motion. The Supreme Court affirmed him on the ground that the motion to change the place of trial was addressed to the sound discretion of the judge who heard it and his ruling thereon would not be disturbed except upon a clear showing of that discretion "amounting to manifest error of Law."

26. 230 S. C. 380, 95 S. E. 2d 611 (1956).
27. 230 S. C. 187, 94 S. E. 2d 877 (1956).
28. 230 S. C. 371, 95 S. E. 2d 624 (1956).