South Carolina Law Review

Volume 5 | Issue 4 Article 11

6-1953

Recent Cases

RECENT CASES

CRIMINAL LAW: Can a Principal in Larceny be Convicted of Receiving Stolen Goods? — Defendant transferred stolen tobacco to his truck, paying the thieves for the goods which he knew had been stolen. The day following the theft, defendant sold the tobacco. At the election of the state, he was tried and convicted solely of receiving stolen goods knowing them to have been stolen. Defendant claimed that the testimony tended to prove him guilty of larceny only, which count, as to him, had been eliminated from the indictment. On appeal, HELD: Affirmed. Although a guilty participant in the theft, he took no part in the actual caption and asportation. Hence no error was committed in refusing defendant's motion for a directed verdict. *State v. Sweat,* 221 S. C. 270, 70 S. E. 2d 234 (1952).

The general rule in most jurisdictions is that one who is guilty of actual caption and asportation, whether alone or jointly with another, is not guilty of receiving stolen goods because he cannot receive them from himself. *Leon v. State,* 21 Ariz. 418, 189 Pac. 433, 9 A.L.R. 1393 (1920); *People v. Taylor,* 4 Cal. App. 2d 214, 40 P. 2d 870 (1935); *Adams v. State,* 60 Fla. 1, 53 So. 451 (1910). This rule is followed in South Carolina, where a guilty participant in larceny can be convicted of receiving stolen goods only if he took no part in the caption and asportation, but participated merely as an accessory before or after the fact. *State v. Tindall,* 213 S. C. 484, 50 S. E. 2d 188 (1948). If the two acts constitute distinct offenses, the misdemeanor of receiving is not merged in the offense of being an accessory to the felony, since the less is merged with the greater crime only when they result from the same act or a continuing transaction. *State v. Coppenburg,* 2 Strob. 273, 33 S.C.L. 132 (1847). In most states receiving stolen goods is a distinct crime, not an accessorial act to the crime. *State v. Crawford,* 39 S. C. 343, 17 S. E. 799 (1893).

An opposite rule is followed in some states, based primarily on the application of statutes defining "principals" and "guilty participants". By the provisions of some statutes receivers are made guilty of larceny, *Hutchinson v. Commonwealth,* 133 Va. 710, 112 S. E. 624 (1922); by others they are made accessories after the fact, *Edwards v. State,* 80 Ga. 127, 4 S. E. 268 (1887). *People v. Kupperschmidt,* 237 N. Y. 463, 143 N. E. 256 (1924), overruled a number of prior New York decisions and established a second rule that

the thief who delivers stolen goods to a receiver becomes his accomplice and is thus a principal in the misdemeanor of receiving stolen goods as well as a principal in larceny. The most important question under this rule is whether participation in the larceny by one accused of receiving the goods is of such a character as to make the receiving a part of the theft itself, or so distinct as to constitute the separate offense defined in the statute as receiving. *Smith v. State,* 59 Ohio St. 350, 52 N. E. 826 (1898). The general rule not allowing a principal in larceny to be convicted of receiving is inapplicable where receiving is not embraced in the caption and asportation. *Leon v. State,* 21 Ariz. 418, 189 Pac. 433, 9 A.L.R. 1393 (1920). If receiving takes place after the completion of the larceny, a confederate of the thief may be charged with the receiving. *Adams v. State,* 60 Fla. 1, 53 So. 451 (1910). Another divergence from the general rule, though in the opposite direction, is found in a number of Texas decisions holding that a conspirator in commission of theft, but not present at commission, may or may not be convicted as receiver depending on whether the thief's interest ceases at the time of delivery. *Gammel v. State,* 124 Tex. Crim. Rep. 328, 62 S. W. 2d 139 (1933). Where stolen property is turned over to a conspirator who was not present at the commission, under an agreement of division of the loot, it has been held that the person so receiving the property is a principal in the theft and connot be convicted as a receiver of stolen goods. *Byrd v. State,* 117 Tex. Crim. Rep. 489, 38 S. W. 2d 332 (1931).

At present three different views are held in the United States concerning a principal in larceny being guilty of the crime of receiving. One view, appearing to be the majority rule, with which South Carolina is in accord, holds that the only principals in larceny who may be convicted of receiving are those who did not engage in the actual caption and asportation. In addition, the receiving must be subsequent to the completed theft. A second view, as in New York and a few other jurisdictions, makes all principals, even the thief himself, open to conviction for receiving. A third, represented by some Texas cases, allows none of the larceny principals, artificial as well as actual, to be convicted of receiving stolen goods. The purpose of the statutes which make receiving stolen goods a crime is not to inflict dual punishment on the thief, but rather to extend the power of the law to reach those persons such as "fences", who are immune to the conviction of larceny itself. An extreme application of a statute, as shown by the New York view, tends to overlook the

purpose for which these statutes were designed, while the other two views appear to keep this purpose in mind.

HARVEY L. GOLDEN.

MORTGAGES: Interest on Unliquidated Demands. — Mortgagee's devisee brought a mortgage foreclosure action against mortgagor, a physician, who sought to offset reasonable value of medical services rendered to mortgagee and his family from 1915 to 1940. The lower court rendered a decree allowing the offset and awarded interest on the annual unliquidated and open accounts from the year 1915. On appeal, HELD: interest on the offset, which was unliquidated, was properly allowed from year 1932, but interest for services rendered during the period 1915 to 1931 was improperly allowed in view of execution of renewal note in 1931 calculated by crediting value of services to mortgagee's employees. Mortgagor's failure at that time to demand and obtain credit for value of services to mortgagee and his family was considered a waiver to any claim of interest on this amount. *Anderson v. Purvis,* 220 S. C. 259, 67 S. E. 2d 80 (1951).

As a general rule interest is not allowed on running accounts as long as they remain open and unliquidated, *Burriss v. Burriss,* 113 S. C. 370, 101 S. E. 863 (1919); *Edwards v. Dargan,* 30 S. C. 177, 8 S. E. 858 (1888); *Skirving v. Executors of James Stobo,* 2 Bay 233 (S. C. 1799), unless there is some statutory provision that permits it, *Empson Packing Co. v. Hopkins,* 66 Colo. 421, 182 Pac. 876 (1919); *Browning v. El Paso Lumber Co.,* 140 S. W. 386 (Tex. Civ. App. 1911), or unless there is some express or implied contract between the parties providing interest shall be paid. *Lee v. Hill,* 92 S. C. 114, 75 S. E. 273 (1910). Also interest may be allowed on open or unliquidated accounts where there is some custom or usage to that effect. *South Carolina v. Port Royal & Augusta Rwy.,* 89 Fed. 565 (C.C.D. S. C. 1898); *Searson v. Heyward,* 1 Speers 249 (S. C. 1843). Interest on open or unliquidated accounts may also be allowed where an administrator has been guilty of fraud or imposition. *Conyer's Adm'r. v. Magrath,* 4 McCord 392 (S. C. 1827). It has been repeatedly held by the law courts that interest on open or unliquidated demands is not allowable. *Bolch v. Smith,* 126 S. C. 338, 119 S. E. 909 (1923); *Fairfield v. Bonner,* 2 Hill 468 (S. C. 1834). The common law rule that interest does not accrue on open or unliquidated accounts, however, is not binding

upon a court of equity. *Pettus v. Clawson,* 4 Rich. Eq. 92 (S. C. 1851); *Gaskins v. Bonfils,* 79 F. 2d 353 (10th Cir. 1935). Equity may allow interest on demands not bearing interest at law but in its discretion may withhold it. *Pettus v. Clawson, supra.* Interest will be allowed according to the equities of the case. *Epworth Orphanage v. Long,* 207 S. C. 384, 36 S. E. 2d 37 (1945); *Brown v. Smith,* 3 Rich. Eq. 465 (S. C. 1851); *Woerz v. Schumacher,* 161 N. Y. 530, 56 N. E. 72 (1900). Where there are laches in prosecuting a claim not bearing interest at law, equity generally refuses to allow interest. *Brown v. Smith, supra.* Laches will not be imputed, however, to infants, and equity will allow interest where he prosecutes his rights within the statutory period. *Pettus v. Clawson, supra.* Interest for personal services is not allowed because such actions ordinarily originate in law courts. *Farrand v. Bouchell,* Harper 83, (S. C. 1823); *Knight v. Mitchell,* 3 Brev. 506 (S. C. 1814). And as previously pointed out, law courts refuse to grant interest on open or unliquidated demands. *Bloch v. Smith, supra.* Because the amount is not ascertainable, interest cannot be computed until judgment is rendered. *People v. Wilcox,* 207 N. Y. 743, 101 N. E. 174 (1913).

Although the courts have recognized the principle that equity will allow interest on unliquidated or open accounts where it would be inequitable to withhold it, such principle has been rarely invoked in South Carolina. In the instant case, had the physician initiated an action to collect for services rendered, it is reasonably deducible that interest would not have been allowed since the case would have been adjudicated by the law court. Thus the decision reached in the instant case points out differences in results obtained which depend entirely on whether an action is brought in law or equity. Regardless of this conflict, rules of equity have become so firmly implanted in our decisions that no departure appears probable. Because of the peculiar circumstances of this case, the result is therefore in conformity with established equitable principles.

G. ROSS ANDERSON, JR.

PROPERTY: Adverse Possession By Mortgagee. — Plaintiff's intestate died owning land subject to a mortgage. Defendant purchased and became assignee of the mortgage in 1926 and was thereupon put in possession of the land by plaintiffs, heirs of the intestate, all parties believing the assignment to be an absolute conveyance. Since

1926 defendant has claimed uninterruptedly as owner of the fee. Plaintiffs contend mortgagor-mortgagee relationship still exists and bring action for possession of the land. The trial court held that the defendant had acquired title in the property by adverse possession. On appeal, HELD: Affirmed. The mortgagor-mortgagee relationship was repudiated and no longer existed; therefore the defendant acquired title to the property by adverse possession. *Fogle v. Void,* .... S. C. .... (Jan. 31, 1953).

By statute, South Carolina is a lien state, whereby title remains in the mortgagor until a foreclosure and sale is made of the mortgaged property. S. C. CODE § 45-51 (1952). A mortgage on realty, therefore, does not convey title but constitutes only a lien to satisfy the debt. *Prudential Insurance Co. of America v. Lemmons,* 159 S. C. 121, 155 S. E. 591 (1930). Thus mortgages are nothing more than security for debts in South Carolina. *Marshall v. Crawford,* 45 S. C. 189, 22 S. E. 792 (1894). The authorities are in agreement that the mortgagee, in possession as such, cannot claim title by adverse possession, *Frady v. Ivester,* 129 S. C. 536, 125 S. E. 134 (1923); *Lipscomb v. Talbot,* 243 Mo. 1, 147 S. W. 798 (1912). This legal relationship, however, does not prevent a mortgagee in possession from holding adversely to the mortgagor's legal title, nor preclude him from perfecting legal title in himself by adverse possession, *Frady v. Ivester, supra; Ham v. Flowers,* 214 S. C. 212, 51 S. E. 2d 753 (1949), provided he distinctly disavows and repudiates the mortgage relationship and notice thereof is brought home to the mortgagor. *Ham v. Flowers, supra.* When the mortgagor has knowledge that the mortgagee is no longer holding the land as mortgagee, then the holding is adverse, *Frady v. Ivester, supra,* but until notice of this repudiation is given to the mortgagor, a quasi-trustee relationship exists and possession will not be regarded as adverse. *Morgan v. Morgan,* 10 Ga. 297 (1851). The maxim, "once a mortgage, always a mortgage," continues only so long as the debtor-creditor relationship exists and does not extend to an agreement whereby the creditor surrenders his rights as a creditor and the mortgagor his right as the holder of legal title. *Brockington v. Lynch,* 119 S. C. 273, 112 S. E. 94 (1920). To acquire title by adverse possession the holding must be adverse, open, notorious, exclusive, hostile and continuous for the period of possession, *Weston v. Morgan,* 162 S. C. 177, 160 S. E. 436 (1928); *Southern Railway Co. v. Mayer,* 159 S. C. 332, 157 S. E. 6 (1931), and the possessor must hold the property in his own right and not for another, *Sumner v. Murphy,* 2 Hill 488, 27 Am. Dec. 397 (S. C. 1834). The person so holding must be in actual possession of the

land. *Bailey v. Irby,* 2 Nott & McC. 343, (S. C. 1820). Actual residence, however, is not essential, *Lewis v. Pope,* 86 S. C. 285, 68 S. E. 680 (1910); nor is it necessary that the owner of the property know of the possessor's hostile possession, when it is so notorious that he should have known by ordinary diligence. *Graniteville Co. v. Williams,* 209 S. C. 112, 39 S. E. 2d 202 (1946). To be hostile there must be the intention to dispossess the owner. *Ouzts v. McKnight,* 114 S. C. 303, 103 S. E. 561 (1920). When all the necessary elements of adverse possession are present and the mortgagor-mortgagee relationship has been repudiated and no longer exists, title may then be vested in the mortgagee as in any other adverse holder. *Frady v. Ivester, supra.*

In the instant case the court followed the view of most jurisdictions. When a man knows that another claims and is enjoying that which belongs to him, and neglects to prosecute his claims in the courts when there is nothing to prevent his doing so, he should be and is rightly barred from making his claims after an unreasonable time, as prescribed by statute. The fact that a person was a mortgagee at one time should not and does not take away any of his rights, nor does it add to them. The instant case seems to be sound as it follows the rule which discourages the making of stale demands.

EMORY B. BROCK.

CRIMINAL LAW: Time for Argument. — Appellant and twenty-one others were indicted and convicted of conspiring together to set up and exposing to be played a certain lottery commonly known as the "numbers game." None of the defendants offered evidence in order to have the right to the opening and the closing arguments after all evidence was in. The trial judge, over defendants' objection, allowed each defense attorney only five minutes in which to reply to the state's argument. On appeal, HELD: reversed. The trial judge, in limiting each attorney for the various defendants to five minutes closing argument, unreasonably exercised his power of limiting argument to less than the two hours statutory period otherwise allowed. *State v. McIntire,* 221 S. C. 504, 71 S. E. 2d 410 (1952).

In all criminal prosecutions the accused shall enjoy the right to be fully heard in his defense by himself or by his counsel or both. S. C. CONST., Art. I, Sec. 18 (1895). The state must make the opening argument because of its burden to establish the guilt of the accused, and the defendant is entitled to hear the position of the

state. *State v. Atterberry,* 129 S. C. 464, 124 S. E. 648 (1923). The defendant in criminal cases has a right to the concluding argument before the jury when he introduces no testimony on the trial. *State v. Brisbane,* 2 Bay 451 (S. C. 1802). But where a witness, introduced by one of two prisoners tried jointly, is also examined by the other, both will be regarded as having introduced evidence and the state is entitled to the concluding argument. *State v. Huckie,* 22 S. C. 298 (1884); *State v. Chreitsburgh,* 4 McCord 30 (S. C. 1826). An accused who has the right to open and reply after all evidence is in may waive either or both of such rights, and if he declines to open, he will still retain the right to make the closing argument to the jury. *State v. Garlington,* 90 S. C. 138, 72 S. E. 564 (1911). The defendant by introducing evidence loses the right to make the opening and closing arguments. *State v. Gellis,* 158 S. C. 471, 155 S. E. 849 (1930). The order in which arguments on behalf of the prosecutor and of the defendant shall be made, *State v. Garlington, supra,* and the time allowed, are generally in the sound discretion of the trial court. *State v. Shores,* 31 W. Va. 491, 7 S. E. 413, 13 Am. St. Rep. 875 (1888). South Carolina, however, provides that no attorney, solicitor, or counsellor shall be allowed to occupy more than two hours of the time of the court in the argument of any cause, unless he shall first obtain the special permission of the court to do so. S. C. CODE § 56-143 (1952). This limitation was intended to prevent abuse of the broad constitutional guaranty of the right to be fully heard in defense. It gives accused two hours in which to argue his case as a matter of right and additional time as a matter of grace. *State v. Ballenger,* 202 S. C. 155, 24 S. E. 2d 175 (1942). If, before the argument commenced, counsel for the defendant were informed that they would be limited to the time allowed by law, this limitation is enforceable. *State v. Jones,* 29 S. C. 201, 7 S. E. 296 (1888). The Code limits the time for argument, unless special permission be first obtained, and leaves the court the discretionary power to fix a shorter time limit in criminal cases. *State v. Blackstone,* 113 S. C. 528, 101 S. E. 845 (1917). This discretion is abused by limiting the argument by the defense to one hour in a prosecution for murder where some twenty-five witnesses have testified during the trial. *State v. Cash,* 138 S. C. 167, 136 S. E. 222 (1925); *State v. Ballenger, supra.*

The ruling of the trial court prevented a free hearing for the accused and was thus reversed by the supreme court. The length of time for reply to be permitted at each trial has to be decided on the basis of the case before the trial court. Where there are a

large number of defendants the judge should grant more time than the statutory period. A set period of time would not provide sufficient flexibility to provide for a full hearing of each defendant when there are a number of defendants involved. In fact, the statute itself would be unconstitutional had it not allowed the court power to vary the time as required by the necessities of each case. The courts maintain a balance by using a test which is flexible and capable of meeting varying circumstances. The decision of the trial court will not be disturbed on appeal unless the court has erred sufficiently in its exercise of discretion so that a full hearing was not given each accused.

MATTIE BELLE WILBURN.

INSURANCE: Acceptance of Application by Failure to Reject. —Plaintiff was solicited by the insurer for life insurance, for which the plaintiff and her husband made application. The first premium for each policy accompanied the application. Later the insurer returned the plaintiff's policy but not the one of her husband. The plaintiff did not know of the rejection of her husband's application until three months after application date. Previous to notice of rejection, her husband was killed. Plaintiff brings this action to recover under husband's policy. Defense was that there was no contract until the insurer accepted the application by issuing the policy. Jury found for the plaintiff. On appeal, HELD: affirmed. Acceptance of application for policy could be reasonably implied and insurer was estopped to assert that there was no contract of insurance. *Moore v. Palmetto State Life Insurance Company,* 73 S. E. 2d 688 (S. C. 1953).

A contract of insurance, like any other contract, is complete and binding only when an offer made by one party is accepted by the other. Neither the offer nor the acceptance, however, need be in any particular form. Any acts or words showing an intention to make an offer and to give an acceptance are sufficient to establish a binding contract. VANCE, INSURANCE 209 (3d ed. 1951). An application for life insurance is a mere offer or proposal and, until accepted, no contractual relationship exists between the applicant and the insurance company. *Keller v. Provident Life and Accident Insurance Company,* 213 S. C. 339, 49 S. E. 2d 577 (1948). "There is a conflict of authorities as to whether legal obligations arise only

after a contract of insurance has been made, or whether in certain circumstances a legal duty arises, from the relationship created during the negotiations between an applicant for insurance and the insurance company, to act promptly upon the application, and to inform the applicant whether the offer is accepted or rejected." *Bekhen v. Equitable Life Assurance Society of United States,* 70 N. D. 122, 293 N. W. 200, 209 (1940). Under the latter view, where it is shown that the offeror is the plaintiff, silence by the offeree will constitute acceptance if there is a "duty" to speak, as distinguished from the mere right to speak. *Day v. Caton,* 119 Mass. 513 (1876). The offeree has been held to have been under a duty to notify the offeror of his rejection of an offer which he has induced. *Cole-McIntyre Norfleet Co. v. Holloway,* 214 S. W. 817 (Tenn. 1919). Failure to notify applicant could cause him to be lulled into the belief that he is covered by insurance or it could put him to prejudicial delay in seeking protection elsewhere. *Tobacco Redrying Corp. v. United States Fidelity and Guaranty Co.,* 185 S. C. 162, 193 S. E. 426 (1939). These cases are based on a test of moral duty, by which the courts may determine whether the insurer has acted reasonably in notifying applicant of rejection of application. The offeree's omission to return the premium has been deemed a sufficient communication of his acceptance, because he is under a duty either to return the premium or accept the offer. This is why a few cases, albeit a distinct minority, have held that undue delay in notifying the applicant of the rejection of his application will constitute an acceptance of the policy. *American Life Insurance Co. of Alabama v. Hutcheson,* 109 Fed. 2d 424 (6th Cir. 1940), *cert. denied,* 310 U. S. 625 (1940); *DeFord v. New York Life Insurance Co.,* 75 Colo. 146, 224 Pac. 1049 (1924); *Strand v. Bankers' Life Insurance Co. of Lincoln,* 115 Neb. 357, 213 N. W. 349 (1927). An insurance company is entitled to a reasonable time within which to investigate and act on the application, and if death occurs before expiration of that reasonable period, no liability results. *Harding v. Metropolitan Life Insurance Co.,* 188 So. 177 (La. 1939). "Mere delay by the insurer, although unreasonable, in acting upon an application for insurance does not, under the majority view, raise any implication of acceptance, nor does it estop the insurer to deny the existence of a contract." VANCE, INSURANCE 225 (3d ed. 1951). This tends to establish an objective standard test as contrasted to the moral duty test mentioned above. Under the minority rule, it is usually a jury question as to whether the insurer was guilty of unreasonable delay

in acting on an original application of insurance. The facts of each case differ, and it is impossible to lay down any hard and fast rule as to the number of days, weeks or months the insurer has in which to act. If it is clear that there has been no unreasonable delay, the court will so hold as a matter of law. *Harding v. Metropolitan Life Insurance Co., supra.* It has been held that sixty-two days of delay was not unreasonable. *Rocky Mount Savings & Trust Company v. Aetna Life Insurance Co.,* 201 N. C. 552, 160 S. E. 831 (1931).

In regard to silence or inaction as acceptance, theoretically acceptance is but the expression of a condition of the mind and may be evidenced by passive as well as by active conduct by the offeree. *Coffin v. Planter's Cotton Co.,* 124 Ark. 360, 187 S. W. 309 (1916). The conduct of the offeree in previous dealing or in earlier stages of the existing negotiation may have justified the offeror in understanding silence as assent. If he does so understand, there is a contract. I WILLISTON, CONTRACTS § 91C (1936). South Carolina is not strictly in accord in this view. Cases have held that silence is not considered acceptance unless so agreed by the parties, nor will there be a contract until an "act" of acceptance by the offeree has taken place, and silence by offeree does not amount to acceptance. *Raysor v. Berkeley County Railway & Lumber Company,* 26 S. C. 610, 2 S. E. 119 (1887); *Stacy v. Cherokee Foundry & Machine Works,* 70 S. C. 178, 49 S. E. 223 (1904). This view is further substantiated by a later South Carolina case that held that acceptance of proposal for insurance must be evidenced by some act that binds accepting party, and mental resolution that can be changed is not sufficient. *Hodge v. National Fidelity Insurance Co.,* 221 S. C. 33, 68 S. E. 2d 636 (1952). It has, however, been stated authoritatively that a retention of the application and premium payment for an unreasonable and unwarranted length of time may raise an inference of acceptance. 12 APPLEMAN, INSURANCE LAW AND PRACTICE § 7226 (1943). Thus where the relations between parties have been such as to justify the offeror to expect a reply, or when the offeree has come under some duty to communicate either a rejection or acceptance, his failure to communicate his rejection or to perform this duty, may result in a legal assent to the terms of the offer. *Lechler v. Montana Life Insurance Company,* 48 N. D. 644, 186 N. W. 271 (1921); RESTATEMENT, CONTRACTS § 72. Actions by the agent may have caused the applicant to take the failure to reject by the insurer as acceptance. *Fleming v. Pioneer Life Insurance*

Company, 178 S. C. 226, 182 S. E. 577 (1935). A more recent South Carolina case affirms this by stating that upon the filing of an application, it is the duty of the insurer to act upon it with reasonable promptness and, in the meantime, to refrain from doing anything reasonably calculated to mislead the applicant. *Keller v. Provident Life & Accident Insurance Company,* 213 S. C. 339, 49 S. E. 2d 577 (1948). Where an offeree solicits the offer through its agent, this, in the light of the relations of the parties or other surrounding circumstances, may justify the offeror, as a reasonable man, interpreting the offeree's silence after receiving the offer as acceptance. 1 WILLISTON, CONTRACTS § 91C (1936). Constantly appearing in leading cases supporting the aforementioned statement is the rule, "Contracts may be implied from circumstances as well as by written papers and oral agreements, and insurance contracts are no exception to the rule as numerous cases, textbooks and digests clearly attest." *Reck v. Prudential Insurance Company of America,* 116 N. J. L. 44, 184 Atl. 777, 778 (1936). It is held in many jurisdictions that where no policy was actually issued or delivered, there is a strong presumption that there was no contract. *Equitable Life Assurance Society v. McElroy,* 83 Fed. 631, 28 C.C.A. 365 (8th Cir. 1897). "It is a well settled rule, established by the great weight of authority, that mere delay in passing upon an application for insurance cannot be construed as an acceptance thereof by the insurer which will support an action *ex contractu.*" *Thornton v. National Council Junior Order, U.A.M.,* 110 W. Va. 412, 158 S. E. 507 (1931).

As was brought out in the dissenting opinion in the instant case, the question was not whether the agent tried to mislead the applicant, but whether she was actually misled. It could be reasonably assumed from the facts of the case that she only "hoped" that the policy had been issued and that she did not at any time "believe" that it had. Failure to notify applicant should only be deemed acceptance when in honest and practical understanding it would be so considered. This is, of course, in accord with the objective standard test rather than a test of moral duty. There is no definite rule in South Carolina by which we may predict what the courts will do when a particular factual situation arises as to when acceptance of an application by the insurer takes place. This is true in that factual situations, as well as the innumerable policy contracts, will invariably differ. If a manner of acceptance is not expressly stipulated in the policy contract or if it is alleged that the stipulation has been waived by some overt act of the insurer, the question should be left in the hands of the jury. When this situation arises, the question will be regarded

in the light most favorable to the insured, in that the insurer was the party which actually formulated the policy contract.

LESTER L. BATES, JR.

CORPORATIONS: Authority of Agent to Bind Corporation to Life Employment Contract. — Plaintiff was injured while in defendant's employ. Defendant's district superintendent promised plaintiff a lifetime job if plaintiff would forbear to bring suit for his injuries. Years later plaintiff was discharged without cause. Plaintiff recovered in the lower court. On appeal, HELD: reversed. The evidence was insufficient to support a finding that company agent, who allegedly made contract with plaintiff, had authority to enter into contract, or that company was by its conduct estopped from denying that agent had authority. *Pullman Co. v. Ray,* 94 A. 2d 266 (Md. 1953).

Even though a corporate officer or agent may be generally authorized to hire, it is generally considered that he has no implied authority to make an agreement for life employment, *Chesapeake & P. Tel. Co. v. Murray,* 84 A. 2d 870 (Md. 1951); *Heaman v. E. N. Rowell Co.,* 261 N. Y. 229, 185 N. E. 83 (1933); WILLISTON, CONTRACTS § 1652 (Rev. ed. 1938). There may be an exception however where the agreement for lifetime employment is in consideration of the release of a claim for damages. *Heckler v. Baltimore & O. Ry. Co.,* 167 Md. 226, 173 A. 12 (1934). In *Maxson v. Michigan Cent. R. Co.,* 117 Mich. 218, 75 N. W. 459 (1898), it was held that a division superintendent had no implied authority to bind the company to life employment, in consideration of the settlement of a claim for damages on account of injuries. Under New York law an oral contract of permanent life employment made by a corporation through its vice president was unenforceable without authorization or ratification by directors. *Starr v. Superheater Co.,* 102 F. 2d 170 (7th Cir. 1939). In *Chesapeake & P. Tel. Co. v. Murray, supra,* it was held that a president of a corporation does not possess authority to hire employees for life. One having general authority, as manager or otherwise, to make contracts of employment is not usually empowered thereby to enter into agreements for life employment. *General Paint Corp. v. Kramer,* 57 F. 2d 698 (10th Cir. 1932). Where the agent has been held out as having such authority to employ injured person for life as an incident to settlement of an injury claim, such

a contract will be enforced. *Royster Guano Co. v. Hall,* 68 F. 2d 533 (4th Cir. 1934). In *Louisville & N. R. Co. v. Cox,* 145 Ky. 667, 141 S. W. 389 (1911), in discussing a permanent employment contract the claims agent had made, the court held that, if the corporation authorized him to make settlement, it cannot escape liability on the ground that agent exceeded his authority since such settlement was within the apparent scope of his authority. There may conceivably be other instances where the general rule will not be followed, as where peculiarly valuable and necessary services cannot otherwise be secured; but authority to employ on such terms is never lightly to be implied, but only in consequence of the weightiest considerations. *General Paint Corp. v. Kramer, supra.* Thus even the suggested exception to, or qualification of, the general rule is itself subject to the limitation that no authority to make contracts for life employment, even in consideration of a release, will be implied where contracts of that type are neither usual in the course of the duties for which the agent is employed nor reasonably necessary to completely and properly perform these duties. *Fisher v. Lumber Co.,* 183 N. C. 485, 111 S. E. 857 (1922); *Babicora Development Co. v. Edelman,* 54 S. W. 2d 552 (Tex. Civ. App. 1932).

It is held in most jurisdictions that a corporate officer or agent has no implied authority to make lifetime employment contracts unless authorized by the directors, even in situations where the contract is made to avoid suit against the corporation. Other jurisdictions, basing their opinions on estoppel and ratification, hold the corporation liable on the theory that the corporation has held the agent or officer out as having implied or apparent authority to enter into such contracts for the corporation. This line of reasoning represents situations where the application of the general rule would result in great injustice to the employee. This latter view, holding the corporation estopped to disclaim liability, seems to be the better and more logical holding; a corporation should not be allowed to reap the benefits of a contract and then deny such contract by pleading *ultra vires* on the part of the agent.

JAMES M. ARTHUR.

INSURANCE: Right of Insured in Recovery for Compromise by Insured With Third Party: Reasonableness of Compromise. — Insured sued insurer under a liability policy to recover amount paid to third party in settlement of claims and for attorney's fees. Claims of

third party included claims not covered by liability policy. Insurer refused to defend insured, stating that none of the claims came within coverage of policy. The court awarded judgment for the insured without examining merits of third party's claims, holding that where several claims are joined some of which are covered by policy and where insurer refuses to defend the action, the insurer is liable for the sum paid by the insured in a reasonable compromise of the claims. On appeal, HELD: reversed. The insurer was liable only for the amount of the compromise that pertained to those claims covered by the policy. The reasonableness of the compromise cannot be construed without some examination of the merits of the claims. *Employer's Mutual Liability Insurance Co. of Wisconsin v. Hendrix,* 199 F. 2d 53 (4th Cir. 1952).

When an insurer unjustifiably refuses to defend an action against insured, insured may make a reasonable settlement with injured party, provided that insured acts in good faith and uses due care and prudence, and brings action against insurer for amount of compromise. This result is obtained notwithstanding clause in policy making policy void if insured makes settlement without insurer's consent. *St. Louis Dressed Beef & Provision Co. v. Maryland Casualty Co.,* 201 U. S. 173 (1906); *Hardware Mutual Casualty Co. v. Hilderbrant,* 119 F. 2d 291 (10th Cir. 1941); *Independent M. & Cream Co. v. Aetna Life Insurance Co.,* 68 Mont. 152, 216 Pac. 1109 (1923). Where there appears to be a reasonable possibility that the third party's claims are not covered by the policy, the insured has been held to have not only the right but the duty to make a settlement and then sue the insurer for reimbursement. *Fidelity & Casualty Co. of New York v. Stewart Dry Goods Co.,* 208 Ky. 429, 271 S. W. 444 (1925). Such settlement is not conclusive upon the insurer as to the questions of the coverage of the policy or the validity of the injured party's claims. *Brinkman v. Western Automobile Indemnity Ass'n.,* 205 Mo. App. 71, 218 S. W. 944 (1920); *Anderson & Co. v. American Mutual Liability Insurance Co.,* 211 N. C. 23, 188 S. E. 642 (1936). Where there are several injured parties, the insured cannot settle with one, sue the insurer for that amount, then settle with the others, and sue for these later amounts, as the first action is a bar to later suits, *Floyd v. American Employers' Insurance Co. of Boston,* 187 S. C. 344, 197 S. E. 385 (1938); nor is the insurer liable where the settlement is excessive. *Elliott v. Casualty Ass'n. of America,* 254 Mich. 282, 236 N. W. 782 (1931); *Anderson & Co. v. American Mutual Liability Insurance Co., supra.* There is a narrow view that the insured

cannot recover from the insurer the amount of a settlement made before an action is brought, even though the amount of the settlement is less than the cost of defending the suit. *U. S. Fidelity & Guaranty Co. v. Cook,* 186 Miss. 840, 192 So. 24 (1939). But where the insurer agrees to defend the suit, the insured can still settle for amounts that may be recovered in excess of the policy without violating any clause of the policy, *Pickett v. Fidelity & Casualty Co.,* 60 S. C. 477, 38 S. E. 160 (1901), and a clause prohibiting settlement for the amount in excess of the coverage of the policy is void. *General Accident, Fire & Life Assurance Corp. v. Louisville Home Tel. Co.,* 175 Ky. 96, 193 S. W. 1031 (1917).

The decision of the Court of Appeals is unquestionably sound and correct. The reasonableness of the compromise is an essential element of the insured's right to be reimbursed by the insurer. Reasonableness can only be determined by an examination of the merits of the claim. Though the question of what is reasonable may make application of the rule difficult in some cases, a fair and just result cannot otherwise be obtained.

ALVIN L. MCELVEEN, JR.