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## Practice and Procedure

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## PRACTICE AND PROCEDURE

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## INTRODUCTION

As in the past, this topic has proven a hodge-podge of unrelated subjects. For this reason, we have attempted to organize the many cases reviewed under the topics herein-after noted. The order in which the topics fall is opened with the occurrences which are preliminary to trial, then continues with those during trial, and finally winds up with those matters affecting review.

Therefore, the topics covered are the following:

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## I. SERVICE OF PROCESS ON FOREIGN CORPORATIONS

Two rather interesting cases relate to securing jurisdiction of foreign corporations; one involves mail order insurance companies, the other a bank.

The cases of *Ross v. American Income Life Ins. Co.* and *Ross v. American Standard Ins. Corp.*,<sup>1</sup> which were consolidated on appeal, involved an action for fraudulent breach of an insurance contract and one for fraud and deceit in inducing plaintiff to enter into an insurance contract. Both defendants were Indiana corporations not licensed to do business in South Carolina and having no office, agents or property here. The plaintiff had taken out a policy by mail with the second defendant above, which corporation was later reinsured with the first defendant, and sometime later the latter company cancelled the plaintiff's policy. The question, raised by special appearance and motion to vacate service, was whether jurisdiction of the defendants was obtained by service on the South Carolina Insurance Commissioner under the terms of the South Carolina Uniform Unauthorized Insurers Act,<sup>2</sup> the pertinent portion of which is as follows:<sup>3</sup>

The issuance and delivery of a policy of insurance or contract of insurance or indemnity to any person in this State or the collection of a premium thereon by any insurer not licensed in this State, as herein required, shall irrevocably constitute the Commissioner and his successors in office the true and lawful attorney in fact upon whom service of any and all processes, pleadings, actions or suits arising out of such policy or contract in behalf of such insured may be made.

The Court referred to the tremendous growth in the mail order insurance business in recent years, the problems where an insured has to go to a foreign jurisdiction, the enactment of substituted service statutes by many states, and the settlement of the due process question by the decision of the U. S. Supreme Court in *McGee v. International Life Ins. Co.*<sup>4</sup>

It then held that the action for fraudulent breach of contract, though permitting punitive damages, is one *ex contractu* and not *ex delicto*, and is clearly within the scope of the above-quoted act authorizing service on the Insurance Com-

1. 232 S. C. 433, 102 S. E. 2d 743 (1958).

2. CODE OF LAWS OF SOUTH CAROLINA, 1952 §§ 37-261 *et seq.*

3. *Ibid.*, § 37-265.

4. 355 U. S. 220 (1958).

missioner in "actions or suits arising out of such policy or contract." The Court went on to hold, however, that an action for fraud and deceit in the inducement, which is an action *ex delicto*, is not one arising out of a policy of insurance, because in such action the insured elects to treat the policy as void and his measure of damages is based on the premiums paid and not on the policy benefits. The motion to vacate service in the fraudulent breach action was correctly denied, but that in the fraud and deceit action should have been granted.

In *Bank for Savings and Trusts v. Towe*,<sup>5</sup> a special appearance by a foreign bank was set aside, and service on the attorney who had represented the bank in an earlier declaratory judgment proceeding was held sufficient to ascertain jurisdiction.

The bank previously had sought a declaratory judgment to determine the rights of certain classes of persons in a pension trust fund which it administered as trustee, and the bank did not perfect its appeal from an order which held a certain class eligible to participate and left the action open for others similarly situated to intervene.

The Supreme Court held that since the attorney who had represented the bank had not been dismissed and the order in the earlier proceeding had left the action open to allow others to intervene, service on the attorney was proper.

## II. VENUE

The oft-discussed question of venue vs. jurisdiction, or jurisdiction of the person vs. jurisdiction of subject-matter, was before the court in *Taylor v. Wall*.<sup>6</sup> The action was brought in Aiken County by residents of that county against a resident of McCormick County for failure to perform a paving contract on Aiken County real estate in a workmanlike manner, but the complaint did not allege the residence of the defendant. The defendant, attempting to follow Section 10-642,<sup>7</sup> demurred on the ground that the court had no jurisdiction of the person of the defendant or the subject of the action, contending that the cause of action was for breach of contract and he was entitled to have it tried in the county of his residence.

5. 231 S. C. 268, 98 S. E. 2d 539 (1957).

6. 231 S. C. 683, 100 S. E. 2d 400 (1957).

7. CODE OF LAWS OF SOUTH CAROLINA, 1952.

The Court upheld the overruling of the demurrer on the ground that it did not appear on the face of the complaint that there was no jurisdiction of the person or of the subject of the action, and found it unnecessary to pass on whether the action was one for injury to real property or for breach of contract, since the defendant had not appropriately raised this question. It pointed out that his proper remedy was to move to change the place of trial pursuant to Section 10-310,<sup>8</sup> on the ground that the county designated in the complaint was not the proper county. The decisions in *Brigman v. One 1947 Ford*<sup>9</sup> and earlier cases were relied upon in reaching the decision, and the principle that jurisdiction of the person may be waived, but jurisdiction of the subject matter cannot be waived even by consent, was reaffirmed.

If the McCormick County residence of the defendant had appeared on the face of the complaint, would the demurrer lie? Based on the language of the *Brigman* case the cause "cannot be dismissed but must be transferred to the proper county where the court does have jurisdiction." Your reviewer respectfully submits that when the Court speaks of "jurisdiction of the person" in these cases it is really referring to "venue" rather than "jurisdiction".

In *Thomas & Howard Co. v. Marion Lumber Co.*<sup>10</sup> an order of the Civil Court of Horry refusing a change of venue to Marion County was reversed and the change granted. The defendant was a domestic corporation with its principal place of business, office and agents in Marion County, which therefore was its legal residence. It made occasional deliveries of lumber in Horry County when such was purchased from the plant in Marion. The Court held this was not sufficient to constitute the owning of property or transacting of business as contemplated by Section 10-421, and found the instant case very close to that of *Hopkins v. Sun Crest Bottling Co.*<sup>11</sup> where a similar result was reached.

The respondent also argued that appellant should have made a special appearance and motion to dismiss because the Civil Court of Horry lacked jurisdiction of the person of the appellant, rather than moving for change of venue. The Supreme

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8. *Ibid.*

9. 213 S. C. 546, 50 S. E. 2d 688 (1948).

10. 232 S. C. 304, 101 S. E. 2d 848 (1958).

11. 228 S. C. 287, 89 S. E. 2d 755 (1955).

Court held that appellant had followed the proper procedure, citing, among others, the case of *Taylor v. Wall*, *supra*.

In *Perdue v. Southern Ry.*<sup>12</sup> decedent's administrator sued the railroad company and the resident driver of the automobile in which decedent was riding when it collided with a boxcar. The accident had occurred in Charlotte, North Carolina, and the defendant railroad, a non-resident of the County of Darlington where suit was brought, moved for a change of venue to York County, South Carolina on the grounds that the convenience of witnesses and ends of justice would be promoted thereby, contending that plaintiff had joined co-defendant Galloway, the driver of the automobile, and a resident of Darlington County, merely for the purpose of retaining venue in Darlington County. The trial judge denied the railroad's motion to change the venue and the Supreme Court adhered to its oft-recited rule that

Motions of this character are addressed to the discretion of the lower Court, and its ruling on such matters will not be disturbed unless it appears from the facts presented that the Court committed a manifest abuse of a sound judicial discretion. . . .

The right of the defendant in a civil action to trial in the county of his residence . . . is a substantial right [citing cases]; and this Court has repeatedly held that a jury of the vicinage passing upon the credibility of witnesses is in itself a promotion of justice.

The Supreme Court held that the evidence before the lower court supported his findings that it would be more convenient for most witnesses to try the case in Darlington County than in York County, and held further that it could not be contended that the defendant driver was not material since the defendant railroad had contended in its answer that the decedent's death arose solely from the negligence of the defendant driver.

Again in *Herndon v. Huckabee Transport Corp.*<sup>13</sup> the Supreme Court declined to disturb the order of the lower court denying defendant's motion for change of venue from Hampton County to Colleton County in which latter county the plaintiff resided and the accident occurred. The Supreme Court held that the record did not disclose any manifest abuse of discretion by the trial judge.

12. 232 S. C. 78, 101 S. E. 2d 47 (1957).

13. 231 S. C. 364, 98 S. E. 2d 833 (1957).

In *Doss v. Douglass Construction Co.*<sup>14</sup> suit was originally brought in Lexington County against the defendant construction company only for an automobile collision which occurred in Richland County. Before the twenty days for answering had expired, plaintiffs amended their complaints to include as co-defendant the truck driver Cook, who was himself a resident of Lexington County. Both Cook and the construction company moved for a change of venue to Richland County on grounds of convenience of witnesses, and the construction company included an additional ground that it was not a corporation but a trade name of an individual who was a resident and citizen of Richland County.

The circuit judge found that the convenience of witnesses and the ends of justice would be promoted by trial in Lexington County and overruled the motion of both defendants to transfer the case to Richland County, the place of accident, for trial. The Supreme Court on appeal adhered to its policy of affirming the lower court on the ground that there was no manifest abuse of discretion.

In *Belger v. Caldwell*<sup>15</sup> suit was brought for the death of a pedestrian in Hampton County against Caldwell, a resident of Colleton County and the driver of the car which struck the pedestrian, and against Smith, a resident of Hampton County, the driver of a car which allegedly failed to dim its lights so as to cause Caldwell's car to go out of control. Caldwell moved to change venue to Colleton County on the ground that that was the place of his residence and the joinder of Smith as a defendant was merely to confer venue upon Hampton County. The trial judge overruled the motion for change of venue and on appeal the Supreme Court sustained the trial judge on the ground that under conflicting affidavits his decision would not be disturbed in the absence of manifest error.

*King v. Moore*<sup>16</sup> is somewhat unusual in that it is a second appeal to the Supreme Court on the question of venue, the defendants having prevailed in the earlier case<sup>17</sup> by having service against a co-defendant determined invalid and mala fide and thereby causing the place of trial to be changed from Berkeley County where the accident occurred to Florence County where the defendant resided. The plaintiffs, how-

14. 232 S. C. 261, 101 S. E. 2d 661 (1958).

15. 231 S. C. 355, 98 S. E. 2d 758 (1957).

16. 231 S. C. 421, 98 S. E. 2d 849 (1957).

17. *King v. Moore*, 224 S. C. 400, 79 S. E. 2d 460 (1953).

ever, after the case was moved to Florence County, applied to the lower court for an order transferring it back to Berkeley County on the ground that the convenience of witnesses and ends of justice would be promoted thereby. The trial judge agreed with the plaintiffs and ordered that the venue be changed back to Berkeley County where the accident occurred and most witnesses resided. The Supreme Court, on appeal in this second case, declined to disturb the actions of the trial judge on the ground that there was no manifest error.

### III. DECLARATORY JUDGMENTS

In *Charleston and Western Carolina Ry. v. Joyce*<sup>18</sup> the railroad sought a declaration of its right to remove certain cross-ties pursuant to a contract and deed between the parties; in other words, an interpretation of these instruments. On motion the lower court struck certain counterclaims in the answer after an admission by defendant that an interpretation of the contract was absolutely necessary. Thereafter the defendant sought to amend her answer to allege facts which took place prior to the written documents which the court was asked to interpret. The Supreme Court upheld the action of the trial court in refusing the motion to amend, noting that no charge of abuse of discretion had been made. It also said that to permit the amendments would have been, in effect, to overrule the order striking the counterclaims, which order had not been appealed and had therefore become the law of the case.

The Court held there was no error in granting the declaratory judgment without taking testimony, where the sole question was the interpretation of a contract the language of which was free from ambiguity. It upheld the interpretation of the trial court as the only reasonable one. And finally, it concluded that the case was not tried piecemeal (see *Williams Furniture Co. v. Southern Coatings & Chemical Co.*)<sup>19</sup> but that it determined the only issue necessary to decide the dispute between the parties.

In *Taco Corporation v. Hudson*<sup>20</sup> an action was brought for declaratory judgments asking the court to determine the parties' rights and liabilities under a patent licensing contract. The Supreme Court sustained without comment the trial

18. 231 S. C. 493, 99 S. E. 2d 187 (1957).

19. 216 S. C. 1, 56 S. E. 2d 576 (1949).

20. 231 S. C. 553, 99 S. E. 2d 419 (1957).



judge's ruling that the complaint stated a "justiciable controversy" and holding that it presented a proper subject for a declaratory judgment suit under Section 10-2003.<sup>21</sup>

#### IV. DISCOVERY

In *Peagler v. Atlantic Coast Line Railroad Company*<sup>22</sup> the defendant, being sued for injuries allegedly suffered by plaintiff in a railroad accident, applied to the circuit judge for an order permitting defendant to examine plaintiff before trial. Defendant sought information as to plaintiff's prior medical history, names of physicians who had treated him and of hospitals, including federal institutions where he had been confined, which information defendant contended was essential to the proper defense of the action.

In due course, first *ex parte* and later after due notice to plaintiff, defendant secured orders from the lower court permitting it to examine plaintiff before trial.

Plaintiff appealed therefrom to the Supreme Court contending the lower court had improperly ordered him to answer the questions, and that the information sought was absolutely privileged. The Supreme Court overruled both contentions, saying:

Determination of whether "good and sufficient cause" for examination under this statute has been shown is addressed to the discretion of the Circuit Judge . . . .

. . . . It is contended that the affidavit upon which the order was issued is defective in that some of the facts are stated on information and belief without disclosing the source of such information as required by *United States Tire Company v. Keystone Tire Sales Co.*<sup>23</sup> It may not be amiss to state that appellant made no showing contradictory to the facts contained in this affidavit. The Circuit Judge had before him not only this affidavit but the pleadings. After careful consideration, we think there was enough to justify the Court below in ordering this examination.

As to the contention of privilege the Court said:

There only remains the question of whether under the law of South Carolina communications between physician

21. CODE OF LAWS OF SOUTH CAROLINA, 1952.

22. 232 S. C. 274, 101 S. E. 2d 821 (1958).

23. 153 S. C. 56, 150 S. E. 347, 66 A. L. R. 1264 (1929).

and patient are privileged. There was no such privilege at common law . . . . Statutes have been enacted in most states making communications between physician and patient privileged from compulsory disclosure but as pointed out by Judge Whaley in his Handbook on Evidence, there is no such statute in South Carolina . . . . Therefore, the common-law rule prevails. (Omissions ours.)

*Mills Mill v. Hawkins*<sup>24</sup> was a proceeding to test the constitutionality of a water district act. The appellants had sought to require the respondents to produce the report of an engineering firm as to the lay-out, cost and other matters with respect to the proposed water and sewer systems in the district. It appeared that in 1946 a group of citizens had initiated a movement to obtain water and sewerage for the area and had engaged the engineering firm to draw plans and specifications and make cost estimates pertaining to the area. The data had been used several years previously in a proceeding before the Commissioner of Public Works wherein such facilities had been sought. The lower court declined to order the respondents to produce the engineering reports. The Supreme Court sustained the lower court, saying:

Respondents, who were not parties to that proceeding, testified that they had seen the plans made by the Beebe Company but did not have them and did not know where they were. *We agree with the trial Judge that appellants should have subpoenaed the members of this firm and required them to bring the plans into Court. We find no error.* (Emphasis added.)

#### V. CHOICE OF REMEDIES

In *Barnwell Production Credit Ass'n v. Hartzog*<sup>25</sup> the plaintiff contended its action was equitable, being to foreclose a chattel mortgage. Defendants said it was a law action of claim and delivery, and pleaded various defenses in the answer charging plaintiff with misrepresentations, fraud and deceit and other delicts. The lower court construed the actions as being equitable, and granted a general order of reference from which defendants appealed. The Supreme Court held:

It is elementary that a pleading is to be liberally construed in favor of the pleader . . . . An equally well settled

24. 232 S. C. 515, 103 S. E. 2d 14 (1958).

25. 231 S. C. 340, 98 S. E. 2d 835 (1957).

principle of law is that the character of the action is primarily determined by the allegations of the complaint. . . .

Where, as here, several remedies are available to the plaintiff, it is he, not the defendant, who may choose which of them he will pursue; and the Court, in construing a complaint in such a case suggestive of more than one theory, will sustain the theory intended by the pleader, if it be supported by the allegations, and will reject as surplusage allegations not in harmony with it.

Answering defendants' contention that the various law defenses raised in their return entitled them to a jury trial the Supreme Court said:

We have long held that in such case the issues thus raised are to be tried on the equity side of the Court and do not entitle the defendant to trial by jury as a matter of right.

The defendants' objection that the circuit judge erred in treating certain statements of plaintiff's counsel as being in the nature of an election was overruled. The Supreme Court said:

Election of remedies is the act of choosing one of two or more inconsistent remedies allowed by law in the state of facts . . . . The issue before the Circuit Judge did not, in reality, involve the principle of election; for neither the plaintiff nor the defendant contended that as to the chattel mortgage the complaint sought two or more inconsistent remedies . . . . The issue was not of election, but of construction of the complaint; and the statement in Judge Henderson's order to the effect that he took the statement of plaintiff's counsel as "in the nature of an election" must be viewed as meaning that he considered it as expressing counsel's construction of the complaint, rather than as an election in the strict sense of that word. (Omissions ours.)

In *White v. Livingston*<sup>26</sup> plaintiff brought an action in equity to set aside a deed on grounds of fraud. It was referred to a special referee, who found the deed valid because appellant had failed to prove the allegations of his complaint. The appellant on appeal contended *inter alia* that the referee should have held the deed to be an equitable mortgage given

26. 231 S. C. 301, 98 S. E. 2d 534 (1957).

for the purpose of securing the repayment of a loan. With reference to this the Supreme Court said:

Regardless of whether appellant may have had a meritorious cause of action to have the deed construed as a mortgage, which we do not consider, we agree with the trial judge that such relief is not available to him because he did not seek it by his complaint and did not offer his own or other testimony that such was the intention of the parties to the deed. The case was tried before the referee, consonant with the allegations of the complaint, as an action to set aside the deed for fraud, which it was. *It is well settled that one cannot present and try his case on one theory and thereafter advocate another theory on appeal....*

Just reason for the rule is very plain here. Relating it to the facts of the case, respondent was alerted by the complaint to defend against the charge of fraud in the procurement, execution and delivery of the deed, which she did successfully in the trial before the referee. She was not noticed to defend against a claim that it was intended as a mortgage. It would be unfair to her to require that she resist such claim after the trial before the referee and when his decision was before the court upon exceptions to it. The trial, with its opportunity to defend, was over. (Emphasis and omissions ours.)

## VI. CONSOLIDATION OF ACTIONS

*McKinney v. Greenville Ice & Fuel Co.*<sup>27</sup> involved a collision between defendant's truck and an automobile occupied by the driver and a passenger. The passenger sued the driver and the truck owner jointly in one action, and the automobile driver sued the truck owner alone in another action. The truck owner moved to consolidate both actions which the trial judge refused to allow. The truck owner appealed and the Supreme Court sustained the lower court, saying:

In *Kennedy v. Empire State Underwriters of Watertown, N. Y.*,<sup>28</sup> we pointed out the distinction between true consolidation of cases and their trial together for convenience, to-wit: That in true consolidation the several actions are combined into one, losing their separate iden-

27. 232 S. C. 257, 101 S. E. 2d 659 (1958).

28. 202 S. C. 38, 24 S. E. 2d 78 (1943).

tity and becoming a single action in which a single judgment is rendered; whereas if they are simply tried together for convenience or, as it is sometimes said, "consolidated for trial", they do not merge into one, but each remains separate in all procedural matters other than the joint trial.

Only where the parties are identical and the causes of action such as may have been united in the same complaint under Section 10-701 of the 1952 Code may the Court, in its discretion, order consolidation over objection of either party . . . .

Where the parties are not the same, several cases may, by their consent, but not otherwise, be tried together for convenience . . . . (Omissions ours.)

The Court held that though the causes of action of the motor vehicle driver and passenger arose out of the same tortious acts, they were separate, and not joint, and could not have been joined in the same complaint under Section 10-701.<sup>29</sup> In disposing of the truck owner's contention that the motor vehicle driver could have set up her cause of action against it as a counterclaim or cross action in the action which had been brought against the driver and the truck owner by the passenger, the Court held that Code section 10-707<sup>30</sup> permitting cross claims did not give the defendant truck owner the right to require consolidation of the two cases. The Court, after quoting the Code section, held in effect that the statute conferred no right on the truck owner since it was not seeking to set up a cause of action against either plaintiff nor did it suggest that it had a cause of action against either.

## VII. PLEADINGS—AMENDMENT OR REPLEADING AFTER TIME

In several cases involving the filing or amendment of pleadings after time, the Supreme Court re-emphasized its policy of leaving the question to the discretion of the trial judge. Some of these are discussed elsewhere herein under "Reopening Default Judgment".

In *Simonds v. Simonds*<sup>31</sup> the Court affirmed the trial judge's refusal to permit defendant to serve and file a supplemental

29. CODE OF LAWS OF SOUTH CAROLINA, 1952. See also *Ryder v. Jefferson Hotel Co.*, 121 S. C. 72, 113 S. E. 474, 25 A. L. R. 739 (1922).

30. CODE OF LAWS OF SOUTH CAROLINA, 1952.

31. 232 S. C. 185, 101 S. E. 2d 494 (1957).

answer. In a prior appeal the Supreme Court had held the alleged grounds for divorce inadequate and had remanded the case to determine whether there should be separate maintenance. Although Section 10-610<sup>32</sup> allows a party "on motion" to make supplemental pleadings to include matters arising after the former pleading or of which the party was ignorant at the time of the former pleading the Court held that allowance of such a motion lay within the discretion of the trial judge and that it would not be allowed unless in the interests of justice. A prima facie case must be made that the supplemental pleading will raise new or previously unknown matter. Since in this case everything the defendant sought to raise had either been alleged by him in an earlier pleading or adduced as evidence at the hearings, the trial judge's refusal to permit a supplemental pleading was affirmed.

The trial judge's discretion was upheld in *Vasiliades v. Vasiliades*<sup>33</sup> where defendant was permitted to answer after time for answering had expired, because the intervening time had been consumed by several motions and hearings. In *Williams v. Ray*<sup>34</sup> the Supreme Court declined to disturb the trial judge's order denying the defendant the right to answer after the time expired.

#### VIII. POWER OF TRIAL COURT TO VACATE PRIOR ORDER

In *Peagler v. Atlantic Coast Line R. R.*<sup>35</sup> the Supreme Court said with reference to the power of the trial judge to vacate an earlier order made by him:

The first contention on this appeal is that Judge Grimball erred in vacating the order made by him on January 19, 1957. Appellant said that the fact that this order was procured by respondents precludes them from seeking to vacate it. It is generally held that Courts of General Jurisdiction have the inherent power to vacate or set aside their own judgments . . . . And the fact that the party who obtained such order is the one who is seeking to have it vacated does not necessarily preclude the Court from setting it aside . . . .

32. CODE OF LAWS OF SOUTH CAROLINA, 1952.

33. 231 S. C. 366, 98 S. E. 2d 810 (1957).

34. 232 S. C. 373, 102 S. E. 2d 368 (1958).

35. 232 S. C. 274, 101 S. E. 2d 821 (1958).

We think under the foregoing authority Judge Grimball was clearly empowered to vacate his order which had been issued without notice to appellant. No rights of third parties have intervened. Appellant argues that the vacation of the order of January 19, 1957, will prejudice him but this ordinarily is not sufficient ground for refusing to vacate . . . (Omissions ours.)

#### IX. POWER OF TRIAL COURT TO SUSTAIN DEMURRER ON GROUND NOT RAISED IN DEMURRER

In *Wallace v. Timmons*,<sup>36</sup> an action by a receiver of an insolvent insurance company against the widow of a former agent of the company for an accounting, the trial court sustained a demurrer for three reasons, one of which was that the claim was barred by laches. This was not one of the grounds of the demurrer, but the Supreme Court held that in proper cases it could be considered by the court on its own motion even though not pleaded, since it is not necessary to set up laches in a formal manner. The Court went on to say, however, that laches is usually a matter of defense, raised by the answer, and that in this particular case the question of whether there was in fact laches on the part of the plaintiff should not have been decided on demurrer, but should have awaited trial of the case and examination of the witnesses.

#### X. POWER OF TRIAL COURT TO BRING IN ADDITIONAL PARTIES

In *Singleton v. Singleton*<sup>37</sup> one heir of an intestate brought action against the administrator for an accounting. In addition to the parties there were nine other heirs at law of the deceased. The administrator moved for an order requiring that the other heirs be brought in as parties "necessary to a complete determination of the controversies" and to "avoid a multiplicity of actions." The trial judge granted the motion, ordering plaintiff to amend his pleadings so as to bring them in and to take such steps as necessary to make them either parties plaintiff or parties defendant.

The Supreme Court affirmed, referring to Sections 10-202, 10-203, and 10-204<sup>38</sup> as to who may be joined as parties, and Section 10-219<sup>39</sup> concerning the power of the court to cause

36. 232 S. C. 311, 101 S. E. 2d 844 (1958).

37. 232 S. C. 441, 102 S. E. 2d 747 (1958).

38. CODE OF LAWS OF SOUTH CAROLINA, 1952.

39. *Ibid.*

other parties to be brought in. It made short shrift of plaintiff's argument that the order placed an undue burden on him in trying to get the other heirs before the court, pointing out that they could be brought in as either plaintiffs or defendants, that Section 10-451<sup>40</sup> provided a method of service on non-residents, and in addition, that the record showed that counsel for the plaintiff was already representing six of the heirs.

#### XI. POWER OF TRIAL COURT TO CALL WITNESSES

In *Elletson v. Dixie Home Stores*,<sup>41</sup> an action for malicious prosecution, the question arose in the trial court as to the nature of the offense for which the present plaintiff was tried and acquitted in the Greenville Municipal Court. Of its own motion the court below called as a witness the Assistant City Attorney who had conducted the prosecution in Municipal Court; it also called the officer who signed the warrant.

The Supreme Court approved this procedure, pointing out that the Municipal Court was not a court of record and that the witnesses were testifying as to their own knowledge. The Court said: "The Court may of its own motion call a witness and examine same even out of order".

#### XII. POWER OF TRIAL COURT TO REOPEN CASE FOR MORE EVIDENCE

In the case of *Nash v. Gardner*<sup>42</sup> the Supreme Court upheld the refusal of the trial court to reopen the case to admit additional evidence proffered by the defendant. The additional evidence was cumulative, and the affidavit of the single proposed witness was not offered at the time of the motion but some three months thereafter. The granting or refusal of the motion was discretionary, and no abuse of discretion was found.

#### XIII. POWER OF TRIAL COURT TO EXTEND TIME FOR APPEAL

In *Ex parte Mutual Motors*<sup>43</sup> one Hobbs obtained a default judgment against Simms and a Chrysler auto, issued execution which was returned *nulla bona*, then brought action against Mutual Motors for alleged conversion of the auto with knowl-

40. *Ibid.*

41. 231 S. C. 565, 99 S. E. 2d 384 (1957).

42. 232 S. C. 215, 101 S. E. 2d 283 (1957).

43. 232 S. C. 18, 100 S. E. 2d 538 (1957).



edge of the lien. Mutual Motors moved to reopen the default judgment and, when this was denied, served timely notice of appeal. It then moved for an extension of time within which to perfect the appeal until thirty days after the conversion action could be decided, which motion was granted. Hobbs appealed, alleging error in granting "an indefinite time within which to perfect its appeal."

The Supreme Court noted that the appeal might be dismissed for irrelevancy of the exception, since the extension was not for an indefinite time, but proceeded to consider the merits, holding that the Richland County Court has the same jurisdiction as circuit courts to extend the time for perfecting appeals on motion timely made. This power should be exercised with reasonable discretion, which was abundantly present here in the possibility of avoiding a multiplicity of appeals.

#### XIV. POWER OF TRIAL COURT TO SETTLE RECORD ON APPEAL

In *Bank for Savings and Trusts v. Towe*<sup>44</sup> the appellant and respondent were unable to agree as to certain contents of transcript of record and applied to the trial judge for an order settling the record. The Supreme Court held:

Over the objection of the appellants, Judge Littlejohn, settling the case on appeal, allowed the respondents proposed amendment to the effect that Mr. Means "was still active in the pending case", and that the proceeding is "still pending in said Court".

*We agree that there should not be included in the statement a disputed fact where there is an objection made by one of the parties to the action . . . .* However, this holding does not require a reversal of the order of Judge Littlejohn. (Emphasis added.)

#### XV. INSTRUCTIONS TO JURY

Section 10-1210<sup>45</sup> which permits counsel to present objections to judge's charge or request for additional instructions, was construed in *Goodwin v. Harrison*.<sup>46</sup> There the Court held that the provision does not contemplate written objection or requests for additional instructions. And in *Tate v. Le-*

44. 231 S. C. 268, 98 S. E. 2d 539 (1957).

45. 1957 Cumulative Supplement to CODE OF LAWS OF SOUTH CAROLINA, 1952, adopted 1953 STATUTES AT LARGE, p. 28.

46. 231 S. C. 243, 98 S. E. 2d 255 (1957).

*Master*<sup>47</sup> the Court held that counsel are required to make their positions on the judge's charge absolutely clear or they will be held to have waived any objections.

In *Lundy v. Lititz Mutual Ins. Co.*<sup>48</sup> the trial judge apparently, in his main charge, charged on the facts in violation of Art. 5, Section 26 of the South Carolina Constitution. Thereafter, following the requirements of section 10-1210<sup>49</sup> of the Code, the jury was excused to give counsel an opportunity to request further instructions or make objections. Counsel for the insurer made an additional request but interposed no objection to what had already been charged. The jury was recalled, the additional request was charged, and the court then gave certain other instructions which the insurer contended amounted to a charge on the facts. The Supreme Court, though intimating that it agreed with the insurer, held that timely objection should have been made at the conclusion of the main charge, since substantially the same instructions had already been given there, and stated that "appellant cannot now complain of the Court's repeating substantially the same instructions to which counsel failed to object when given an opportunity to do so."

*Elletson v. Dixie Home Stores*<sup>50</sup> was an action for malicious prosecution in which the plaintiff here had been acquitted in the Greenville Municipal Court of a charge of taking a jar of coffee without paying for it, or "shoplifting." The defendant requested the following charge in the trial court:

... if a person takes an article of merchandise from its place on the counter of a store and places it in his pocket so that it is concealed and leaves the premises without paying for it, he is prima facie presumed to have so concealed such article with the intention of converting it to his own use without paying the purchase price therefor.

The trial judge charged this request, but added that this presumption is a rebuttable one, that if the person gives a reasonable explanation he is exonerated, and that it is the province of the jury to decide whether the presumption has been rebutted.

47. 231 S. C. 429, 99 S. E. 2d 39 (1957).

48. 232 S. C. 1, 100 S. E. 2d 544 (1957).

49. See note 45 *supra*.

50. 231 S. C. 565, 99 S. E. 2d 384 (1957).

The Supreme Court found no error in this modification of the requested charge. It agreed that the request was in conformity with section 16-359.1 *et seq.* of the 1956 Cumulative Supplement to the 1952 Code,<sup>51</sup> but pointed out that this criminal presumption statute was passed subsequent to the delicts complained of in this case and was therefore inapplicable.

#### XVI. REOPENING DEFAULT JUDGMENTS

*Simon v. Flowers*<sup>52</sup> was a tort action for personal injuries wherein the defendant failed to plead to the complaint within the twenty day period prescribed by the Code. Thereafter the plaintiff's counsel refused to accept service of a proffered answer and the defendant moved for permission to answer on the ground that his default had been occasioned by mistake and excusable neglect. The affidavit of defendant's counsel indicated that the default was the result of forgetfulness on his part due to the pressure of business in the trial of cases and in attending hearings before the Industrial Commission. The trial court refused leave to answer and granted a default judgment, and the reviewing court affirmed, pointing out that section 10-609 of the Code<sup>53</sup> vests discretionary power to allow an answer in the trial court, not the appellate court. The Court referred to the constitutional limitation of its appellate jurisdiction in law cases to "the correction of errors at law" and stated that it had no power to substitute its judgment for that of the circuit judge in cases of this nature. It found no "clear showing" of abuse of discretion on the part of the court below and permitted the default judgment to stand.

In *Williams v. Ray*<sup>54</sup> the trial judge's action in refusing to set aside a default judgment and to permit an answer after the time for answering had expired was also affirmed. Defendant in a tort action was properly served on June 11, 1957 with a summons and complaint bearing a 1956 date. Defendant promptly sent these to his liability insurance company whose claims department received them June 24, 1957. They were then forwarded to a Dillon lawyer for answering who received them June 27, but who returned them the same day because he could not represent the insurer. On July 8, they

51. Adopted, 1956 STATUTES AT LARGE, p. 1771.

52. 231 S. C. 545, 99 S. E. 2d 391 (1957).

53. CODE OF LAWS OF SOUTH CAROLINA, 1952.

54. 232 S. C. 373, 102 S. E. 2d 368 (1958).

were received by another lawyer, but he was immediately told by plaintiff's attorney that the defendant was in default. On the basis of this, plaintiff obtained a default judgment against defendant for \$5,000.00, and defendant's motion to be permitted to answer was denied because "excusable neglect" had not been shown. The result of this case seems very harsh. It appears that the defendant insurer did just about all it could do under the circumstances and that its failure to answer was virtually unavoidable. Surely in a case like this, where there is an insurance company which conducts the defense but which is not served with a complaint, the Court should be liberal in permitting late pleadings. It seems that this is a question which should be dealt with by the General Assembly if and when it revises South Carolina's code of civil procedure.

## XVII. FORM AND SUFFICIENCY OF OBJECTION

The general rule that assignments of error must be specific was applied to several cases.

*Concrete Mix, Inc. v. James*,<sup>55</sup> an action for goods sold and delivered, involved several questions affecting procedure. The Supreme Court held insufficient an exception that the lower court erred in failing to direct a verdict on the ground "that plaintiff failed to make out a case against said defendant." With reference to this exception the Supreme Court said:

The quoted language is that of the second exception. It is too general and indefinite for consideration. Supreme Court rule 4, Sec. 6; "each exception must contain a concise statement of one proposition of law or fact" etc. . . .

In answer to the appellant's charge that the lower court erred in ruling that the issue of an alleged partnership was not raised by the answer the Supreme Court said:

*The answer did not contain specific denial of partnership, which was necessary to make an issue thereabout; the general denial did not . . .* "In a number of jurisdictions, however, under statutes or rules of court, a plea of the general issue does not raise the issue of the existence of the partnership alleged . . ."

Nor was it error, certainly not an abuse of the Court's discretion, within which it lay, to deny the motion of appellant to amend his answer to belatedly deny the

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55. 231 S. C. 416, 98 S. E. 2d 841 (1957).

partnership. It came after the close of plaintiff's case and it would have been unfair to it to then inject an issue which was not made by the pleadings upon which the parties went to trial. If allowed it would have substantially changed the defense; indeed, it would have interposed a new defense. (Emphasis added.)

In *Large v. Large*,<sup>56</sup> the plaintiff unsuccessfully sought the specific performance of an alleged contract to devise, the defense being, among other things, that the plaintiff had been guilty of such unfilial conduct toward the deceased that whatsoever rights he might otherwise have had were destroyed. The plaintiff on appeal contended in his exception (which is quoted in part) that the trial judge erred in failing to grant plaintiff specific performance of the contract to devise "upon the grounds that the plaintiff is entitled to specific performance thereof as a matter of law, and further that the testimony and evidence failed to show that plaintiff was guilty of unfilial conduct toward the decedent . . ." The Supreme Court held that the exception did not comply with its rule 4, Sec. 6.<sup>57</sup> With reference to the question of whether or not the lower court correctly ruled that the plaintiff because of his unfilial conduct was not entitled to specific performance, the Court said:

Whether or not the premise thus stated is a sound principle of law, applicable generally to contracts of this nature, is a matter that we need not decide. Its correctness is not challenged by the exception here, and it is therefore the law of the case . . .

In *Saxon v. Saxon*<sup>58</sup> the Court said that the allegation by appellant that the jury's verdict was "contrary to the law and the evidence" was held to be too general to be considered. A like holding was made in *Tate v. LeMaster*.<sup>59</sup>

The Court stated in *Shayne of Miami, Inc. v. Greybow, Inc.*<sup>60</sup> that it is not the function of the Court to supply grounds for reversal of the lower court. But in *Reaves v. Stone*<sup>61</sup> the Court went further than the respondents' briefs and, in affirming partial disallowance of claim for improvements, held

56. 232 S. C. 70, 100 S. E. 2d 825 (1957).

57. Supreme Court Rules, found in Vol. 7, CODE OF LAWS OF SOUTH CAROLINA, 1952.

58. 231 S. C. 378, 98 S. E. 2d 803 (1957).

59. 231 S. C. 429, 99 S. E. 2d 39 (1957).

60. 232 S. C. 161, 101 S. E. 2d 486 (1957).

61. 231 S. C. 628, 99 S. E. 2d 729 (1957).

that ejected trespassers were entitled to no allowance for improvements. The Court relied on Supreme Court Rule 4, Section 8,<sup>62</sup> which provides that the Court may affirm a decision for any reason appearing in the record.

However, the Court does not always insist on the Rule. The power of the Supreme Court to consider exceptions *which do not comply* with Rule 4, Section 6<sup>63</sup> was reaffirmed in *Wallace v. Timmons*.<sup>64</sup> The Court found that the exceptions did not comply with the rule in that they were general and indefinite, but proceeded to consider them anyway to reverse the court below, because they attempted to present meritorious assignments of error. Mr. Justice Oxner, concurring, agreed that the exceptions should be considered, because appellant was a receiver, an officer of the Court, and referred his colleagues to his dissenting opinion in *Shayne of Miami, Inc. v. Greybow, Inc.*, *supra*, where the majority had held that it was not the function of an appellate court to supply a ground for reversal where the exceptions fail to do so. In that case the dissent pointed out that the majority was affirming upon a ground not presented or passed upon in the lower court, and stated:

If this may be done for a respondent in an ordinary case, no good reason appears why we cannot *sua sponte* raise the proper grounds upon which this claim should be defended by an officer of this Court.

#### XVIII. REVIEW OF LAW QUESTIONS

*Metze v. Metze*<sup>65</sup> stated that a conclusion of law (as opposed to a conclusion in equity) will be supported if there is any evidence or inference therefrom which tends reasonably to support the conclusion. And in *Taylor v. Hardee*<sup>66</sup> the Court refused to reduce the amount of a verdict, saying it would do so only if the amount clearly indicates it was the result of passion, prejudice, caprice, or otherwise not founded on the evidence.

*Robinson v. Carolina Casualty Ins. Co.*<sup>67</sup> was a suit brought on a disability policy by an assured who had been shot by another tried before a judge without a jury. The judge found

62. Supreme Court Rules, Vol. 7, CODE OF LAWS OF SOUTH CAROLINA, 1952.

63. *Ibid.*

64. 232 S. C. 311, 101 S. E. 2d 844 (1958).

65. 231 S. C. 154, 97 S. E. 2d 514 (1957).

66. 232 S. C. 338, 102 S. E. 2d 218 (1958).

67. 232 S. C. 268, 101 S. E. 2d 664 (1958).

for the plaintiff. The Supreme Court affirmed the lower court, saying:

This is an action at law, tried by the Judge without a jury. His findings of fact have the same force and effect as the verdict of a jury; unless he has committed some error of law leading him to an erroneous conclusion, or unless the evidence is reasonably susceptible of the opposite conclusion only, his findings of fact must be accepted by this Court.

#### XIX. REVIEW WHERE OBJECTIONS NOT TIMELY MADE

The case of *Bailes v. Southern Ry.*<sup>68</sup> involves two points under this topic. Damages were sought for wrongful death as a result of being run over by a train. The plaintiff offered evidence that the deceased was a licensee, which evidence was excluded on the ground that this fact had not been pleaded. Later the trial court reversed itself and announced that such evidence could be admitted, but plaintiff did not choose to reopen and reoffer this evidence. The Supreme Court found no prejudicial error affecting the rights of defendant, since "such testimony as had been admitted relative to the status of the deceased prior to this was either without objection on the part of appellant, and cross-examined relative thereto, or through its own witness."

In its appeal the railroad contended that noise arising from construction adjacent to the courthouse had made it difficult to hear the witnesses and follow the proceedings, and that this was the cause of some of the testimony not being objected to. But the Court refused to consider this for the first time on appeal, stating that the record failed to disclose any complaint to the trial court at the time.

The time to object to evidence may begin with the pleadings. The right to object may be waived if the litigant has not previously objected to allegations of a pleading to which such evidence is responsive.

Thus, in *Lundy v. Lititz Mutual Ins. Co.*<sup>69</sup> the appellant insurance company charged error in the admission of certain testimony relating to admissions of liability allegedly made by its agent after the fire loss. The Court found that the testimony in controversy was responsive to certain allegations of the complaint, and said:

68. 231 S. C. 474, 99 S. E. 2d 195 (1957).

69. 232 S. C. 1, 100 S. E. 2d 544 (1957).

If appellant deemed this allegation irrelevant or prejudicial, motion should have been made to strike. Having failed to do so, complaint cannot now be made of the admission of testimony responsive to the allegation.

## XX. REVIEW OF POINTS NOT MADE BELOW

Few principles seem more certain than that the Supreme Court will refuse to consider any matter or assignment of error where a proper basis has not been laid in the lower court. It has already been pointed out that in *Tate v. Le-Master*<sup>70</sup> the Court held that if counsel failed to make his position on the judge's charge clear, he would be deemed to have waived any objections to defects. In *Howle v. McDaniel*<sup>71</sup> the Court, in reversing the direction of a verdict against the plaintiff and affirming the direction of a verdict against defendant on his counterclaim, stated that it could not pass on whether plaintiff should have judgment because he had failed to move for a directed verdict in his favor.

In *Surfside Development Co. v. Reynolds*<sup>72</sup> the Court ruled that in a case where plaintiff recovered actual damages against principal and agent and punitive damages against principal only and where defendant moved for judgment n. o. v. or new trial on general grounds, the Court would not consider whether punitive damages against the principal should be set aside, because this was not presented to the lower court.

In *Thomas v. Nationwide Mutual Automobile Ins. Co.*<sup>73</sup> the Court refused to consider a venue question not raised in the lower court.

See also *White v. Livingston*<sup>74</sup> reviewed elsewhere herein, wherein the Supreme Court held that after the case had been tried as an action to set aside a deed for fraud, the appellant could not be heard to complain on appeal that the deed should have been construed to be an equitable mortgage.

In *Barnwell Production Credit Ass'n v. Hartzog*<sup>75</sup> the defendant-appellant contended that the lower court had erred in treating a certain statement of the plaintiff's counsel as

70. 231 S. C. 429, 99 S. E. 2d 39 (1957), discussed *supra* under "Instructions to Jury".

71. 232 S. C. 125, 101 S. E. 2d 255 (1957).

72. 231 S. C. 508, 99 S. E. 2d 49 (1957).

73. 232 S. C. 358, 102 S. E. 2d 266 (1958).

74. 231 S. C. 301, 98 S. E. 2d 534 (1957).

75. 231 S. C. 340, 98 S. E. 2d 835 (1957).



being in the nature of an election of remedies when no notice of election had been served upon the defendant. The Supreme Court took the view that the counsel's statement was not accepted by the lower court as an election of remedies but merely as an expression of the plaintiff's opinion as to the nature of its case. The Supreme Court held, however:

But even if counsel's statement had amounted to an election of remedies, appellant's exception cannot be considered because the issue proposed by it was not presented to the Circuit Judge.

Again in *Concrete Mix, Inc. v. James*<sup>76</sup> there was a suit on account wherein the appellant sought a new trial and included an objection to the admission in evidence of certain ledger sheets affecting the account in suit. The Supreme Court dismissed the objection, saying: "However, his counsel's cross-examination of the witness concerning them, without reservation of the objection, makes it unavailable on appeal and we need not consider the merits of the question . . ."

In *Lawlor v. Scheper*<sup>77</sup> a purchaser of real estate obtained a verdict for actual damages against the vendor and his agents because of the agents' misrepresentation as to the amount owing on the mortgages covering the property. On appeal the agents argued the defense that a notation on the contract of sale recommended that "your attorney examine this title". The court refused to consider this point, since *negligence on the part of the purchaser was not made a ground of appeal in the exceptions*. The court did point out, however, that examination of title would not have disclosed the balances due on the mortgages being assumed.

Other cases wherein the Supreme Court declined to consider points which it held were not made below are listed in the footnote.<sup>78</sup>

## XXI. REVIEW OF DAMAGES

The question of excessiveness of a verdict was before the Court in *Benton v. Pellum*,<sup>79</sup> where an infant guest recovered

76. 231 S. C. 416, 98 S. E. 2d 841 (1957).

77. 232 S. C. 94, 101 S. E. 2d 269 (1957).

78. See also *Goodwin v. Harrison*, 231 S. C. 243, 98 S. E. 2d 255 (1957), reviewed under "Instructions to Jury" *supra*; *Kerr v. City of Columbia*, 232 S. C. 405, 102 S. E. 2d 364 (1958); *Wise v. Picow*, 232 S. C. 237, 101 S. E. 2d 651 (1958); *Metze v. Meetze*, 231 S. C. 154, 97 S. E. 2d 514 (1957).

79. 232 S. C. 26, 100 S. E. 2d 534 (1957).

a verdict of \$4,500.00 actual and \$4,500.00 punitive damages against her driver. The trial court granted a new trial unless she remitted \$2,000.00 of the verdict for punitive damages, which was done and judgment entered for \$7,000.00. Defendant alleged error in refusing a new trial absolute on the ground that the "verdict was so excessive that it was clearly the result of caprice, passion or prejudice." The Court affirmed, referring to the fact that the child had sustained headaches, nervousness, frequent blackouts and a concussion as a result of the accident.

In *Jeffers v. Hardeman*<sup>80</sup> the trial jury awarded the plaintiff truck operator actual damages of \$750 and punitive damages of a like amount. His minor passenger, suing the same defendant in an action which by agreement was tried with the trucker's case, was awarded \$100 actual damages and \$2000 punitive damages. The trial judge refused the defendant's motion for judgment n.o.v. but did grant a new trial in the minor's action unless she remitted on the record \$1,250 of the verdict for punitive damages. In this new trial order the lower court compared the two verdicts and referred to the fact that in the minor's case the punitive damages amounted to twenty times the verdict for actual damages.

The Supreme Court affirmed, stating that the new trial nisi was granted in the exercise of the trial court's discretion, which discretion the reviewing court felt was properly exercised.

In *Parnell v. Carolina Coca Cola Bottling Co.*<sup>81</sup> the Supreme Court held with reference to appellant's contention that the verdict was excessive:

This was included in appellant's motion for a new trial, and over-ruled by the Lower Court *which alone had jurisdiction* to reduce the verdict by means of an order for a new trial *nisi*. We agree with the Trial Court and we cannot reverse on this ground in view of the sickness and suffering of respondent. Certainly it cannot be said that the amount of the verdict indicates passion, prejudice, caprice or other considerations not founded upon the evidence, which would be necessary for reversal.

However, see *Nelson v. Charleston & W. C. Ry.*<sup>82</sup> where the Supreme Court granted a new trial to the appellant railroad

80. 231 S. C. 578, 99 S. E. 2d 402 (1957).

81. 231 S. C. 426, 98 S. E. 2d 834 (1957).

82. 231 S. C. 351, 98 S. E. 2d 798 (1957).

sued for wrongful death on the grounds that the verdict given by the jury was excessive. The verdict of \$35,000 actual damages plus \$17,500 punitive damages for the benefit of two brothers of a 58 year old woman was reduced by the trial judge by \$6,000. The Supreme Court said:

Even after giving due consideration to the diminished purchasing power of the dollar, we are convinced that upon the scant evidence presented, a verdict for \$35,000 actual damages (reduced by the trial Judge to \$29,000) is not supported by the evidence and cannot be explained on any rational basis. Whether it was the result of sympathy, passion or prejudice or whether it was due to mistake or misapprehension of the charge and issues involved, the result is the same. In the discharge of our duty we cannot escape the responsibility of setting it aside.

## XXII. REVIEW OF CONCURRENT FINDINGS

The scope of the Court's review in equity cases was the subject of several cases. In *Wise v. Picow*<sup>83</sup> the Court reaffirmed the "two judge rule" that findings of a master concurred in by the circuit court would not be disturbed unless without any evidence to support them or against the clear preponderance of the evidence. In *Metze v. Meetze*<sup>84</sup> the rule in equity appeals was stated to be that the Court will affirm if the "clear preponderance" of the evidence supports the finding. In *Simonds v. Simonds*<sup>85</sup> the court reversed the master and trial judge's award of lump sum alimony, support, and attorneys' fees on the grounds that the decision was contrary to the preponderance of the evidence.

In *Holling v. Margiotta*,<sup>86</sup> an action in equity to enjoin the alleged violation of residentially restricted property by business usage, it was held that the findings of the master, concurred in by the trial court, that a limited amount of business activity nearby had not changed the residential character of the subdivision, were conclusive on appeal because they were not without evidence to support them and were not against the clear preponderance of the evidence.

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83. 232 S. C. 237, 101 S. E. 2d 651 (1958).

84. 231 S. C. 154, 97 S. E. 2d 514 (1957).

85. 232 S. C. 185, 101 S. E. 2d 494 (1957).

86. 231 S. C. 676, 100 S. E. 2d 397 (1957).

In *Dobson v. Atkinson*<sup>87</sup> the father sought to restrain the mother, from whom he had been divorced on the ground of her desertion, from removing their daughter from the jurisdiction of the Richland County Court. The Supreme Court affirmed the findings of fact by the master, concurred in by the trial court, that the mother was a fit person to have custody and that she should be permitted to take the child with her to Formosa. It referred to the fact that an action for divorce is within the equity jurisdiction of the Court, that concurrent findings will not be disturbed unless they are without evidentiary support or against the clear preponderance of the evidence, and further that the recommendation of the master here is entitled to considerable weight because of his opportunity to observe the witnesses.

### XXIII. LAW OF THE CASE

This familiar phrase occurs in several of last term's decisions. In *Kerr v. City of Columbia*<sup>88</sup> the Court said that the conclusions of a master, if not challenged by exceptions to his report, become the "law of the case" and will not be reversed or even considered on appeal. This in effect is an application of the rule that the Court will not consider matters not properly presented below. A more far-reaching decision is *Nelson v. Charleston & W. C. Ry.*<sup>89</sup> In a prior appeal of the same case, the Court had held that evidence of negligence was sufficient to go to the jury. In the second trial, the evidence was substantially the same. On appeal from the second trial, the Court refused to consider whether a nonsuit or verdict should have been directed, holding that the Court's ruling in the first appeal on the sufficiency of the evidence was the "law of the case" and controlling.

Disposing of the railroad's contention in the *Nelson* case that the lower court should have directed a verdict, the Supreme Court said:

The same contention was raised on the first appeal. In overruling same, we said: "As the case must be remanded for a new trial, we shall not discuss in detail the evidence, which was conflicting. In our opinion, it was sufficient to carry to the jury the issues of both actual and punitive damages." *There was no petition for a rehearing by appellant.*

87. 232 S. C. 12, 100 S. E. 2d 531 (1957).

88. 232 S. C. 405, 102 S. E. 2d 364 (1958).

89. 231 S. C. 351, 98 S. E. 2d 798 (1958).

We think our conclusion on the first appeal that the evidence was sufficient to warrant submission of the case to the jury as to both actual and punitive damages is the "law of the case" . . . .

On the first appeal it was fully argued and carefully considered by this Court. After the decision was rendered, *appellant again had the opportunity of raising the question by petition for a rehearing but failed to do so* . . . .

Of course, the doctrine of "the law of the case" has no application where the facts relating to the question decided are substantially different on a second appeal. In order to escape the application of the doctrine, however, there must be a material change in the evidence. (Omissions ours and emphasis added.)

In *Large v. Large*,<sup>90</sup> a proceeding involving an alleged contract to devise, the Circuit Court had held that because of the unfilial conduct on the part of the plaintiff warranted the refusal by the court of equity to exercise in plaintiff's behalf its power to compel specific performance of the alleged contract to devise. The Supreme Court said:

Whether or not the premise thus stated is a sound principle of law, applicable generally to contracts of this nature, is a matter that we need not decide. Its correctness is not challenged by the exception here, and it is therefore the law of the case.

In *White v. Livingston*<sup>91</sup> plaintiff proceeded in equity to set aside a deed for fraud. The referee found against plaintiff, who, on appeal contended that the referee should have found the deed to be an equitable mortgage. The Supreme Court said:

However, there was no exception to the finding of the referee that, quoting from the report, "[the action] is for the purpose of setting aside a deed on the grounds of fraud." It thereby became the law of the case.

In *Watkins v. Hodge*<sup>92</sup> the plaintiff brought claim and delivery against the defendant to recover an automobile which the defendant acquired at a County Fair lottery with plaintiff's tickets. Before answering, the defendant demurred to

90. 232 S. C. 70, 100 S. E. 2d 825 (1957).

91. 231 S. C. 301, 98 S. E. 2d 534 (1957).

92. 232 S. C. 245, 101 S. E. 2d 657 (1958).

the complaint upon the ground that it showed upon its face that the subject matter of the action was a lottery prize and the Court would not enforce an agreement relating to such. The demurrer was overruled by formal order from which there was no appeal. After trial and judgment for the plaintiff the defendant appealed on the lottery question. The Supreme Court held:

This contention was concluded adversely to appellant, insofar as this case is concerned, by the unappealed order overruling the demurrer which was upon that ground, and the order became the law of the case.

In *Charleston & W. C. Ry. v. Joyce*,<sup>93</sup> a declaratory judgment proceeding, the lower court had stricken certain counterclaims from the answer, and the defendant had not appealed therefrom. Later, when defendant sought to amend the answer in other respects, the Supreme Court affirmed the lower court's refusal to permit the amendments on the grounds *inter alia* that to have allowed them would have overruled the order striking the counterclaims which, not having been appealed, became "law of the case".

See also, *Bank for Savings and Trusts v. Towe*<sup>94</sup> where the Court applied the "law of the case" doctrine to a class action, when there was no appeal from an order holding that certain persons had an interest in a trust fund, and the order had left the case open for other persons similarly situated to intervene.

93. 231 S. C. 493, 99 S. E. 2d 187 (1957).

94. 231 S. C. 268, 98 S. E. 2d 539 (1957).