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# Practice and Procedure

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# PRACTICE AND PROCEDURE

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## PRE-TRIAL

### *Change of Venue*

In two cases the Supreme Court considered the question of venue in civil actions. The case of *McMillan v. B. L. Montague Company*,[1] sets forth the basic principle that the right of a defendant in a civil action to a trial in the county of his residence is a substantial one, not to be lightly denied and which cannot be defeated by joinder of a sham or immaterial defendant. On these points, basic to our general law, the Court has set forth an extensive listing of the supporting South Carolina authorities. The original action had been brought against two defendants but the trial judge later granted a non-suit on behalf of the defendant upon the basis of whose residence previous motions for a change of venue had been denied. After the plaintiff had obtained judgment, the trial judge set aside the verdict of the jury and changed the place of trial to the county of residence of the other defendant. The plaintiff appealed this decision, but the Supreme Court unanimously affirmed the change of venue granted by the trial judge. The Court held that the defendant had not waived its rights by not appealing from the prior refusals of the trial judge to grant its motion for a change of venue. The Court noted that the motion had been renewed at every opportunity throughout the proceeding and cited several instances wherein a change of venue had been allowed at various stages of litigations. "Such motions may be made upon the call of calendar for the Term of Court for which the case is docketed for trial,[2] after a

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1. McMillan v. B. L. Montague Co., 238 S. C. 512, 121 S. E. 2d 13 (1961).
2. Witherspoon v. Spotts and Co., 227 S. C. 209, 87 S. E. 2d 477 (1955); Lee v. Neal, 233 S. C. 206, 104 S. E. 2d 291 (1958).

mistrial,[3] upon dismissal of a resident defendant,[4] or at successive Terms of Court,[5] and after appeal to the Supreme Court resulting in elimination of one of the de-defendants."[6] The Court held that no showing had been made to counter the defendant's first motion for a change of venue.

In the case of *Bryan v. Richardson*,[7] the Supreme Court again recognized that the South Carolina statutes and rules for the making of a motion for a change of venue do not prescribe any particular time limitation. The Court affirmed the granting of plaintiff's motion for a change of venue on the ground of convenience of witnesses and interest of justice although the motion had been made more than two years following the commencement of the action. The Court refused to hold that the plaintiff had been guilty of laches or that he had waived his statutory right to seek a change of venue.

*Discovery*

In the case of *John Deere Company v. Cone*,[8] the Juvenile and Domestic Relations Court of Richland County had ordered the company to show cause why it should not withhold from defendant's salary accrued alimony payable to his wife pursuant to a prior order of the court. The court further directed that the company show to it from the original records the amount of money advanced to the husband and the amount repaid by him. The Supreme Court felt that the rule to show cause issued by the court was in reality a subpoena duces tecum insofar as it was purported to require production of the company's original records. As such, the Court felt that it was faulty and ineffectual since it had not been directed to the custodian of the documents. The Court refused to sustain the procedure as valid under the discovery provisions of the law because the company was not a party to the action for back alimony payments and also held that the rule was ineffectual as a subpoena in that the records

3. Hunter v. D. W. Alderman and Sons Co., 79 S. C. 555, 6 S. E. 202 (1908).
4. Tate and Thompson v. Blakely, 3 Hill 297, 21 S. C. L. 297 (1837); City of Sumter v. U. S. Fid. and Guar. Co., 116 S. C. 29, 106 S. E. 778, 93 A. L. R. 949 (1921).
5. Blakely & Sopeland v. Frazier and Sanders, 11 S. C. 122 (1878).
6. Nehi-Royal Crown Bottling Co. v. Chandler, 228 S. C. 412, 90 S. E. 2d 489 (1955).
7. Bryan v. Richardson, 240 S. C. 92, 124 S. E. 2d 731, (1962).
8. John Deere Co. v. Cone, 239 S. C. 597, 124 S. E. 2d 50 (1962).

were located outside of the territory within the jurisdiction of the court. On the last grounds, the Court also held invalid a later section of the rule to show cause directing the President of the company in Illinois to answer interrogatories.

While the decision is harmonious with the general trend of the South Carolina law, it points out the need for broadened discovery procedures within the framework of our practice. In cases such as this most South Carolina attorneys now recognize that the Federal Rules provide a better opportunity for the attorney to gather information within the control of other parties or witnesses. Because of the strict interpretation of our statutory provisions relative to pre-trial discovery, legislative action to attain freer examination and availability of pertinent facts for the parties to an action is desirable.

*Pleading*

1. Demurrers.

In several cases the Supreme Court considered questions raised by demurrers. In *Oxman v. Sherman*,[9] the Court repeated the well established rule that in ruling on demurrers, the allegations of the complaint must be taken as true and given a liberal construction. In *Wooten v. Standard Life and Casualty Insurance Co.*,[10] the Court applied the above rule to motions for judgment on the pleadings. The Court stated that such motions are in the nature of a demurrer and, therefore, that they admit the allegations of the complaint as true. The procedure was recognized as drastic but appropriate where the other party's pleading is fatally deficient in substance. If there are material fact issues tendered by the pleadings, the motion will be denied. The motion is allowable, not for lack of proof, but for lack of an issue. Finding that there were questions of fact present in the instant case, the Court affirmed the trial judge's denial of judgment on the pleadings. In one case[11] the defendant hit upon a new method of collecting open accounts. Plaintiff had purchased certain furniture from the defendant but was delinquent in the payments thereon in the amount of $105.00. The defendant ordered a diamond from the plaintiff worth in value approximately $1,500.00 which was delivered to the defendant to

9. Oxman v. Sherman, 239 S. C. 218, 122 S. E. 2d 559 (1961).
10. Wooten v. Standard Life and Cas. Ins. Co., 239 S. C. 243, 122 S. E. 2d 637 (1961).
11. Lorick v. Davis Furniture Co., 238 S. C. 229, 119 S. E. 2d 732 (1961).

show her husband for his approval. Thereafter, the defendant refused to even discuss the matter of the diamond until the plaintiff returned the furniture purchased from the defendant. Plaintiff brought this action alleging fraud and seeking to recover actual and punitive damages in the sum of $10,000.00. The defendant demurred on two grounds which the Court actually separated into three. The trial judge overruled the demurrer and the Court sustained his decision on the grounds that the demurrer did not raise the issue of the sufficiency of the complaint. The demurrer was addressed to the contract involved whereas the action had been based not upon the theory of the contract but rather for fraud and deceit.

In *Collins v. Collins*,[12] the Supreme Court held that it was error for the trial judge not to accord the defendant opportunity to appear generally or answer upon the merits following the denial of his demurrer by the trial judge. Under our procedure,[13] a party should be allowed to plead over after the denial of a demurrer unless it appears that the demurrer was interposed in bad faith or for purposes of delay. It was not suggested that the defendant had acted in bad faith or for purposes of delay in this particular case. The rule cited by the Court is well recognized, but in an earlier case, the Supreme Court had refused to overrule a decision of a lower court on this ground since in that case the defendant had failed to seek from the Court permission to answer.[14] However, the statements of the Court in this regard are merely dicta since the Court held that one of the co-trustees had not been served by summons within the jurisdiction. At the time of this case, the South Carolina statutes provided no method for service upon a non-resident trustee of a trust created by inter vivos gift. The statutes did provide for service upon non-resident trustees in cases of a testamentary trust by allowing service upon the probate judge for the county in which the will was probated.[15] Subsequent to this action, a statute was passed by the South Carolina Legislature which allowed certain methods of service upon non-resident

12. Collins v. Collins, 239 S. C. 170, 122 S. E. 2d 1 (1961).
13. CODE OF LAWS OF SOUTH CAROLINA, § 10-644 (1952).
14. De Pas v. City of Spartanburg, 190 S. C. 22, 1 S. E. 2d 914 (1938).
15. CODE OF LAWS OF SOUTH CAROLINA, § 10-433 (1952) as amended by Act No. 456 (1955); CODE OF LAWS OF SOUTH CAROLINA, § 67-53 (1952), as amended by Act No. 1697 (1960). These sections were limited to applications for letters of appointment by a trustee to the probate court or court of common pleas and, therefore, not applicable to inter vivos trusts.

inter vivos trustees.[16] The new statute, while definitely filling a need in the law, may pose questions of jurisdiction that must be tested to determine their constitutionality. If the trust assets can be found, a safer procedure might be to acquire jurisdiction by attachment of the property or res of the trust.

2. Replies.

In the case of *Plummer v. Independent Life and Accident Insurance Company,*[17] the Supreme Court dealt with the matter of requiring plaintiff to reply to an answer. The trial judge had refused to require a reply and the Court recognized that such a decision was within the discretion of the judge and subject to reversal only where clearly erroneous. Ordinarily, a plaintiff is required to reply in cases where the defendant in his answer sets up a release but in this case plaintiff had referred to the release in the original complaint and alleged that it was fraudulently procured. In the light of this fact, the Court felt that the answer did not contain new matter requiring a reply.

### *Amendment of Pleadings*

In our cases and in practice, the amendment of pleadings has been liberally allowed. In the only case involving this point,[18] the Supreme Court held that power to allow amendment of pleadings in the furtherance of justice is so broad that its exercise by the trial court wil rarely "be disturbed, because it will seldom happen that the Court will exceed its power or abuse the discretion given it in such matters." In this case, however, the trial court refused to allow the defendant to amend its answer so as to allege the defense of fraud. The defendant had waited until only five days before the commencement of the term at which the case was being tried. The defendant was fully informed by the original complaint of the nature of the cause of action against it and the trial judge concluded that the defendant had not demonstrated the diligence required in proposing the amendment. The facts of this case are very strong and the case should

16. Act No. 810 (1962), see Acts and Joint Resolutions of the General Assembly of South Carolina, Regular Session of 1962, p. 1955 (1962).
17. Plummer v. Independent Life and Acc. Ins. Co., 238 S. C. 313, 120 S. E. 2d 108 (1961).
18. Alamance Indus. v. Chesterfield Hosiery Mill, 239 S. C. 287, 122 S. E. 2d 648 (1961).

not be taken as a sweeping limitation upon the right to amend a pleading.

*Set-Off and Counterclaim*

In *Ellison, et al v. Simmons,*[19] the Court pursuant to the Code, refused to allow the defendant to an action for wrongful death to set-off or counterclaim for his personal injuries or property damage arising from the accident on which suit had been brought. Since a wrongful death action is brought for the benefit of statutory beneficiaries and not for the estate of the decedent, the logic of this decision is inescapable. The remedy of the defendant was by separate suit against the estate of the decedent. The same case also contains a considerable discussion of charges to the jury, illustrating several clearly established principles, such as, the charge must be considered as a whole and will not be reversible error unless prejudice is shown.

*Parties*

In *Bridges, et al v. Wyondotte Worsted Company, et al,*[20] the Court refused to allow the joinder of an additional party on motion of the defendant where this would prejudice the rights of the plaintiff. The Court noted that the party was not necessary to the controversy.

TRIAL

*Evidence*

In *Harper v. Bolton*[21] plaintiff's attorney introduced into evidence the vial containing the enucleated eye of the plaintiff which was allegedly removed as a result of this accident. This evidence was allowed in over the objection of the defense counsel after the plaintiff's doctor witness had testified the eye had been removed as a result of injury received in the accident.

> Evidence is offered for the purpose of proving the existence or non-existence of some matter of fact. . . . . It would have been proper to admit into evidence the removed eye of the respondent if such had been made for

19. Ellison v. Simmons, 238 S. C. 364, 120 S. E. 2d 209 (1961).
20. Bridges v. Wyondotte Worsted Co., 239 S. C. 37, 121 S. E. 2d 300 (1961).
21. 239 S. C. 541, 124 S. E. 2d 54 (1962).

the purpose of proving some disputed or contraverted fact in issue. Here, there was no issue as to the removal of the respondent's eye.

Citing a New York case, *Rost v. Brooklyn Heights R. Co.*,[22] where a childs foot had been run over by an electric car and the amputated foot was displayed to show the size of the child at the time of the injury, the child being present at the trial and the defendant admitting the foot had been amputated:

> The Court conceded that it has the undoubted rule that the exhibition of an injury or an injured member of the body to the jury is proper where it is a subject of examination, if such examination is necessary to enable the jury to understand the circumstances surrounding the injury, or to obtain a more comprehensive and intelligent conception of the conditions which existed when the injury was received, or of the character of the injury itself, but stated where such exhibition is not essential or necessary to enable the jury to better understand the condition, or where the jury may be lead to an illegitimate consideration on account thereof then it becomes improper.

Our Court then said:

> The exhibition of injuries should not be permitted where such will not tend to throw any light on any issue in the case nor should such exhibition be permitted where it is apparently designed merely to excite pity and commiseration. . . .
>
> Exhibition of the enucleated eye of the respondent did not tend to throw any light on any issue in this case. We think the trial Judge committed error in permitting the introduction of the removed and preserved eye.

In the case of *Turner v. Pilot Life Insurance Company*[23] the insurance company accepted the insured's check and an application for reinstatement after default. It waived its rights to forfeiture within the time required to present the check at the drawee bank and was liable although the bank dishonored the check because of the insured's intervening death, even though the insured did not have sufficient funds in the account to pay the check.

22. 10 App. Div. 477, 41 N. Y. S. 1069 (1896).
23. 238 S. C. 387, 120 S. E. 2d 223 (1961).

The defendant insurance company, in addition, defended on the grounds of suicide of the plaintiff's decedent. The insurance company attempted to introduce into evidence proof of the defense of suicide. Appellant sought to show that just prior to the insured's death he was in bad financial condition, necessitating borrowing money to pay premiums; that he carried far more life insurance than his meager income warranted; that he was short in his accounts as treasurer of the local union; and that he was an experienced hunter, well versed in handling fire arms (the plaintiff's decedent was killed by a gun shot in the chest). The lower court did not rule the proffered testimony incompetent but merely held it would not be admitted until the appellant proved some circumstances surrounding the insured's death indicating the possibility of suicide. This the appellant could not do. The lower court, therefore, rejected this evidence.

In affirming the lower court Mr. Justice Oxner said:

> The trial Judge might well have concluded that it would be highly prejudicial to admit testimony of this character unless there was some other evidence supporting an inference of suicide. All that the proffered testimony intended to show was motive. Although motive is a circumstance to be considered in determining whether or not death is the result of suicide, proof of motive alone is insufficient to warrant submission of that issue to the jury.

An insurance company, in *Garrett v. Mutual Benefit Life Insurance Company*[24] being sued on a disability policy attempted to show, by cross examination of the plaintiff, he received almost as much from his disability, because of disability policies with other companies, as he would have received if he continued to work. The trial judge properly refused to allow such cross examination.

> It is well settled that the extent to which cross examination of a witness may go is a matter resting within the discretion of the trial Judge. This rule is thus stated in *State v. Maxey*, 218 S. C. 106, 62 S. E. 2d 100: The general range and extent of cross examination is within the discretion of the trial Judge, subject to the limitation that it must relate to matters pertinent to the issue, or to specific acts which tend to discredit the witness or

24. 239 S. C. 574, 124 S. E. 2d 36 (1962).

impeach his moral character. The discretion of the trial Court in allowing cross examination is not subject to review except in cases of manifest abuse or injustice.

*Intervening Negligence*

In *Matthews v. Porter*,[25] our Court dealt with the question of whether an intervening negligent act of the third party exculpated the defendant from his original act of negligence. The Court said it was a question of proximate cause.

> To exculpate a negligent defendant, the intervening cause must be one that breaks the sequence of causal connection between the defendants negligence and the injury alleged. The superseding act must so intervene as to exclude negligence of the defendant as one of the proximate causes of the injury.

The defendant Porter had been involved in an accident with an automobile operated by Issac Singletary. Apparently this first accident was due to the negligence of the defendant, Porter. The plaintiff Matthews was a trained nurse who stopped to render aid to the defendant's wife who was injured in the initial accident. While standing next to the defendant's automobile, a third party, McKnight, skidded sideways down the highway and after striking another car crushed Matthews between the car of the defendant Porter and the one driven by McKnight resulting in personal injuries to the plaintiff. The case was tried and resulted in a verdict of actual damages in favor of the plaintiff respondent. The defendant appealed and among his grounds was the exception that the injuries received by the plaintiff were due to and caused by the intervening negligence of McKnight.

The Court said:

> Our decisions are to the effect that liability exists for the natural and probable consequences of negligent acts or admissions proximately flowing therefrom. The intervening negligence of the third party will not excuse the first wrongdoer, if such intervention ought to have been foreseen in the exercise of due care. In such a case, the original negligence remains active and a contributing cause to the injury. The test is to be found in the probable consequences reasonably to be anticipated, and not in the number or exact character of the events subsequently arising.

25. 239 S. C. 620, 124 S. E. 2d 321 (1962).

The defendant further alleged it was the duty of the police making the investigation of the initial accident to warn other persons travelling on the highway of the existence of wrecked automobiles blocking their road of travel.

The Court in answering this said:

> In an action for injury alleged to be due to the neglect of duty on the part of the defendant, it is no defense that a similar duty rested upon another person. One upon whom the law devolves a duty cannot shift it to another, so as to exonerate himself from the consequences of its non performance. Since the appellant's negligence had caused the highway at the scene of the collision to be blocked, it was his duty to warn others using the highway of the dangerous condition he created. He could not delegate this duty to another, even though he was a law enforcement officer, and escape the consequence for its non performance by such officer.

*Absent Witness*

The "absent witness" doctrine was raised in the case of *Matthews v. Porter*.[26]

In that case the defendant sought to explain why his wife was not present to testify at the trial. He testified she was asleep when the first collision took place and at the time of the second collision his wife was lying across the front seat of his car and due to her condition and position she did not see the second collision.

Upon cross examination of the appellant by counsel for the respondent he was asked if his wife had made claim against him for her injuries. The appellant's counsel objected but after deliberation the trial court allowed the question which was answered in the affirmative. The defendant asserted it was error for the trial judge to permit the counsel for the respondent to examine him in regard to a claim made against him by his wife, asserting that this examination inferred to the jury that the appellant had liability insurance and such testimony was prejudicial.

Again our Court stated the rule:

> It is well settled in this state if a party fails to produce the testimony of an available witness on a material issue

26. 239 S. C. 620, 124 S. E. 2d 321 (1962).

in the cause, it may be inferred that such testimony if presented would be adverse to the party who failed to call the witness. Generally the rule above stated is applied when the uncalled witness is a relative of the party failing to call such witness or within some degree of control of the said party. It was proper for the appellant to testify as to the reason for his wife's absence and to explain that she did not have any knowledge of the facts surrounding the collision. The respondent had the right to cross examine the appellant and rebut the explanation made by him of his wife's absence. The testimony elicited on cross examination tended to show another reason for the absence of the wife of the appellant and to disprove the explanation made by him. We do not think the cross examination of the appellant created the inference he had liability insurance.

*Jury Argument*

Our Supreme Court in the case of *Theresa Harper v. Pattie Bolton*,[27] put South Carolina among the states which opposed the demonstrative use of the blackboard by an attorney, over the objection of opposing counsel, to write his own opinion as to the per diem value which the jury should award for pain and suffering.

To permit plaintiff's counsel to suggest and argue to the jury an amount to be allowed for pain and suffering, mental anguish and disability calculated on a daily or other fixed basis allows him to invade the province of the jury and get before it what does not appear in the evidence. Since an expert witness would not be permitted to testify as to the market value of pain and suffering, which differs in individuals and the degree thereof may vary from day to day, certainly there is all the more reason for counsel not to do so. The estimates of counsel may tend to instill in the minds of the jury impressions not found in the evidence. Verdicts should be based on deductions drawn by the jury from the evidence presented and not the mere adoption of calculation submitted by counsel.

The Court said to allow counsel to endorse on a blackboard his own opinion as to the per diem value of pain and suffering

27. 239 S. C. 541, 124 S. E. 2d 54 (1962).

was to permit him to make an argument that had no foundation whatsoever in evidence.

> Though wide latitude and freedom of counsel in arguments to the jury are and ought to be allowed such arguments cannot be based on facts not on the record, or inferences based on or drawn from the facts which are not even admissible in evidence.

The Court was careful to reiterate however, there is no impropriety of counsels' use of the blackboard, during his argument to the jury, for the purpose of fairly illustrating points that are properly arguable or bringing to the attention of the jury, facts or figures properly revealed in the evidence. *Johnson v. C and WC Railway Company*:[28]

> Calculations made or diagrams drawn (on the blackboard) are, of course, not evidence. Like statements of counsel and oral argument they should have reasonable foundation and evidence on inference barely arguable from the evidence. Just as oral arguments may be abused so may such visual arguments; and its abuse may be so flagrant as to require a new trial. Control of the arguments of counsel, with regards to the use of such visual aids, as with regard to oral statements, rests in the sound discretion of the trial Judge.

The defendant at the conclusion of the jury arguments requested the trial judge to charge the following: *Garrett v. Mutual Benefit.*[29]

> I charge you that you are not to consider whether this plaintiff drew only $250 per month in disability payments as against a larger amount which he earned when actually working, because this is not an issue, it being solely whether the plaintiff is disabled under the terms of the policy.

This charge was requested by the defendant solely on the ground that the attorneys for the plaintiff had allegedly argued to the jury that the plaintiff would not quit a job making nearly Ten Thousand ($10,000.00) Dollars per year in order to draw Two Hundred Fifty ($250.00) Dollars per month disability insurance income if he was not in fact totally disabled. The defendant contends that the requested

28. 234 S. C. 448, 108 S. E. 777 (1959).
29. 239 S. C. 574, 124 S. E. 2d 36 (1962).

charge was proper in view of the foregoing argument since the Court had previously excluded testimony (which it attempted to elicit on cross examination) that showed the disability income of plaintiff from all companies to be $550.00 per month.

The Supreme Court said:

> No objection was interposed to the challenged argument at the time and the record fails to disclose the argument made . . . . The order of the trial Judge refusing the motion for a new trial indicates that there was doubt in his mind as to the nature of the argument made, since objection thereto was not made at the time so that it could be entered in the record.
>
> It is the duty of counsel to make timely objection to argument considered improper, so that the challenged argument can be entered in the record and a ruling then made by the trial Judge thereabout. Where this is not done, as here, and the alleged improper remarks are not set out in the record, exceptions to the refusal of the trial Judge to grant a new trial because of improper remarks by counsel will not be considered on appeal.

The Court again reaffirmed the rule: "Since only one reasonable inference can be properly deduced from the evidence it was a question of law for the Court and not a question of fact for the jury." *Moore v. Palmetto Bank and Textile Insurance Company.*[30] In *Mungo v. Bennett,*[31] the appellant contended a directed verdict should have been granted upon the grounds the only reasonable conclusion to be drawn from the evidence is the respondent was *contributorily negligent.* "Under our decision the affirmative defense of contributory negligence rarely becomes a question of law for the Court."

*Judicial Discretion*

In case of *Lester C. Miller v. British America Assurance Company,*[32] plaintiff appellant instituted their cause of action as one at law. The defendant set up as an equitable defense an arbitration agreement and asked for an interlocutory injunction based on such special equitable defense.

30. 238 S. C. 341, 120 S. E. 2d 231 (1961).
31. 238 S. C. 79, 119 S. E. 2d 522 (1961).
32. 238 S. C. 94, 119 S. E. 2d 527 (1961).

Our Supreme Court said:

> It is within the discretion of the presiding Judge to try either the equity or law issue first but those issues should be tried first which are likely to result in a final judgment, and render unnecessary the consideration of the other issues.

It is discretionary with the trial judge, after the plaintiff has closed his case, to permit him to reopen and allow the introduction of additional evidence, after the motion for non suit has been made.

The respondent in the case of *Rakestraw v. Allstate Insurance Company*[33] produced a copy of an insurance policy and agreed it could be used in lieu of the original. It was distinctly understood the respondent was not introducing the policy in evidence but merely making it available to the plaintiff appellant for introduction. The appellant failed to introduce the copy of the evidence and at the conclusion of the plaintiff's case the trial judge granted a non suit on the grounds:

> (1) that the appellant had failed to prove that he came within the terms of the coverage provided in the contract of insurance between the respondent and Ann Hauser McKinney, for the reason that he had not introduced the policy of insurance in evidence; and (2) that the appellant failed to prove that he was occupying the insured automobile at the time he sustained bodily injury in the operation thereof with the permission of the insured.

When the trial judge indicated he was going to grant a non suit, the attorney for the appellant moved to reopen his case and to allow him to introduce into evidence the policy of insurance in question. The motion was denied. It appears from the record the plaintiff's counsel did not rely, for his failure to introduce the policy in question, upon accident, inadvertence, mistake or misapprehension as to the necessity for offering the policy.

The Supreme Court said:

> Since counsel for the appellant did not plead oversight, surprise, mistake or inadvertence, in the absence of which, and under all the circumstances here, we find no abuse of

33. 238 S. C. 217, 119 S. E. 2d 746 (1961).

discretion on the part of the trial Judge in refusing to permit the appellant to reopen his case and offer the policy of insurance as additional evidence.

Reiterated in the *Rakestraw* case is the rule a party is bound by the testimony of his own witnesses where the party did not prove facts to be otherwise than such witness testified them to be.

Citing *Brissie v. Southern Railway Company*[34] which was an action by an administrator against the railroad for the death of his intestate:

> The engineer of the train was placed upon the stand by the plaintiff, who testified to the circumstances of the death of the plaintiff's intestate. This court held that when the plaintiff placed the train engineer on the stand, he, thereby, became the plaintiff's witness and he was bound by the engineer's testimony.

Although it has been held where a party calls a witness in his behalf he may not impeach him or contradict him, he may prove facts to be other than his witness testified them to be. However in the *Rakestraw* case the appellant did not prove the facts to be other than his witness testified them to be. Hence he was bound by the testimony of his own witness.

## APPEAL AND ERROR

The Court's decisions in the area of Appeal and Error were largely a restatement of settled principles of the law.

### *Contentions not raised below not subject to consideration by Supreme Court*

Several cases demonstrated the importance of raising, either in the pleadings, at the trial, or on appropriate motions after trial, the contentions the appellant intends to make on appeal. Although the Court may, in order to clear up possible confusion in an area of law, pass on such contentions which were not raised below, *(e.g., McElveen v. Stokes,)*[35] the Court usually will not pass upon them.[36]

34. 209 S. C. 503, 41 S. E. 2d 97 (1947).
35. 240 S. C. 1, 124 S. E. 2d 592 (1962).
36. Ulmers v. Willingham, 238 S. C. 503, 120 S. E. 2d 859 (1961); Stanley v. Reserve Ins. Co., 238 S. C. 533, 121 S. E. 2d 10 (1961); Florence v. Turbeville, 239 S. C. 126, 121 S. E. 2d 437 (1961); Frederick v. Standard Warehouse Co., 239 S. C. 216, 122 S. E. 2d 425 (1961); Atlantic Discount Corp. v. Driskell, 239 S. C. 500, 123 S. E. 2d 832 (1962).

For the practitioner, *Ulmers v. Willingham*[37] showed the danger of a frequent practice. At the conclusion of the trial, defendant moved for a new trial without stating any grounds or argument. By agreement, the motion was marked argued, and the trial judge denied the motion. On appeal, the Court held that since no grounds were presented to the lower court, there was nothing for the Supreme Court, to pass on.

*Supreme Court Practice*

The Court stated in *McElveen v. Stokes*,[38] that an exception taken but not argued in the Supreme Court will be deemed abandoned. And in *Aaron v. Hampton Motors, Inc.*,[39] the Court pointed out the necessity of putting all matters to be considered by the Court in the transcript. In that case, the appellant quoted from the trial record in one of his exceptions, which was deemed improper and was not subject to the Court's consideration.

*Consideration of Evidence on Motions for Nonsuit, Directed Verdict, Judgment N.O.V., or New Trial*

The Court reaffirmed its well-settled rule that in reviewing the trial judge's ruling on motions for nonsuit, directed verdict, judgment n.o.v., or new trial, the Court will review the evidence and all reasonable inferences therefrom in the light most favorable to the plaintiff.[40]

*Damages*

The Court held, in two cases, that it would not set aside a jury verdict for excessiveness unless the verdict was so shockingly high that it indicates the jury acted from passion, prejudice, corruption, or a disregard of the facts or the instructions of the Court.[41] However, the Court itself may order a new trial *nisi*, if the damages awarded can be separated and some element thereof is improper.[42] The Court also held that

37. Ulmers v. Willingham, 238 S. C. 503, 120 S. E. 2d 859 (1961).
38. 240 S. C. 1, 124 S. E. 2d 592 (1962).
39. 240 S. C. 26, 124 S. E. 2d 585 (1962).
40. King v. J. C. Penney Co., 238 S. C. 336, 120 S. E. 2d 229 (1961); Margolis v. Telech, 239 S. C. 232, 122 S. E. 2d 417 (1961); Jumper v. Goodwin, 239 S. C. 508, 123 S. E. 2d 857 (1962).
41. Bruno v. Pendleton Realty Co., Inc., 240 S. C. 46, 124 S. E. 2d 580 (1962); Aaron v. Hampton Motors, Inc., 240 S. C. 26, 124 S. E. 2d 858 (1962).
42. Fuller v. Eastern Fire & Casualty Ins. Co., 240 S. C. 75, 124 S. E. 2d 602 (1962); Jumper v. Goodwin, 239 S. C. 508, 123 S. E. 2d 857 (1962).

it could not consider a jury's failure to award punitive damages as conclusive that the jury found the defendant not guilty of wilfulness, because the question of punitive damages was discretionary with the jury, if it found wilfulness.[43]

*Miscellaneous*

The Court held in *Donkle v. Forster*,[44] that an order for a new trial, based on a consideration of the facts, is not reviewable by the Supreme Court. And the Court reaffirmed a well known rule that a conflict in evidence even as to the application of an insurance policy exclusion clause, is for the jury.[45]

43. Jumper v. Goodwin, 239 S. C. 508, 123 S. E. 2d 857 (1962).
44. 238 S. C. 90, 119 S. E. 2d 231 (1961).
45. Outlaw v. Calhoun Life Ins. Co., 238 S. C. 199, 119 S. E. 2d 685 (1961).