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# Practice and Procedure

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# PRACTICE AND PROCEDURE

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## *Introduction*

This topic, unfortunately, embraces a great many subjects and overlaps many of the other topics covered in this review. Nearly every case involves some question of procedure and these questions, in turn, are interlocked with questions of pleadings, evidence, and the like.

The authors have attempted in this article to group together the cases involving particular procedural questions under specific headings. Some headings embrace only one topic, and others include numerous sub-divisions.

Under *Institution of Action* we have included cases where action is instituted by attachment of property, both of individuals and foreign corporations. Under *Injuction* we have reviewed a decision involving applicants failure to exhaust certain administrative remedies. Under *Courts* is reviewed a decision concerning the power of the State Court to require the United States to file its tax claim in a state proceeding.

Under *Demurrer* we have included cases involving misjoinder of an insurer and a case on the question of whether an affirmative defense may be raised by demurrer. Under *Setoff* there is cited a case involving a setoff which was allegedly premature.

Under *Venue* are cited cases which discuss the general proposition and also a case on the question of whether the right to contest venue is waived by the filing of a general answer, and a case on the venue of a suit against a foreign corporation.

Under the heading of *Judgment on the Pleadings* there is discussed a case wherein an insurance company brought suit against an insurance agency for its failure to cancel an insurance policy with the result that the insurance company was involved in certain liability under the policy.

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Under *Discovery* is discussed a case concerning the right of a former employee to examine certain officers of his former employer before trial in order to secure certain information needed to prove certain allegations of his complaint. Under *Evidence* are discussed two decisions, one relating to opinion evidence in condemnation proceedings, and the other relating to the question of violation of a statute giving rise to punitive damages.

Under *Trial-Discretion of Trial Judge* are discussed several decisions involving various discretionary powers of the trial judge during the course of the trial. The cases include decisions on qualification of jurors, ruling on whether or not a proper foundation has been laid for certain evidence, whether or not an expert's opinion is needed, whether or not a mistrial should have been granted because of conduct of attorneys, a new trial granted on after-discovered evidence, and finally on the right of the trial judge to deny a motion for voluntary non-suit.

Under *Right to Jury Trial in Equity Case* we review a decision wherein in a prior proceeding the Judge ruled the case to be in equity with no appeal from this ruling and the parties thereafter, at trial, sought leave to have certain issues framed for the jury. Under *Non-Suit* there is reviewed a case wherein the deficiency in plaintiff's evidence was supplied by defense testimony.

Under *New Trial* are cited cases differentiating new trial nisi from a new trial absolute, cases where a new trial was granted on damages only, and where a new trial was granted when continuance was improperly refused.

Under *Re-Opening Default Judgment* are reviewed two decisions, one involving a divorce and the other involving an automobile collision.

Under *Timely Preservation of Rights* there are numerous cases cited under various sub-heads. The first relates to timely objection in the court below on various matters, a case on timely objection to a juror and a case on timely application for appointment of a guardian ad litem.

Under *Waiver and Estoppel* several cases and subjects are reviewed. The first sub-heading relates to waiver of insurance policy requirements; the second to a rather unusual case involving estoppel by judgment; next there is a case on equit-

able estoppel and, finally, a case where estoppel was applied because of the failure of the party to require a reply to its affirmative defense.

*Res Judicata—Law of the Case* reviews a decision wherein an insurance company had secured a declaratory judgment against its insured that it owed him no obligation to appear and defend in his behalf but had neglected to make the third parties, injured in an automobile accident and who had sued the insured, parties to the declaratory judgment proceeding.

Finally, under *Appeals* we have reviewed numerous decisions involving various questions of appellate procedure. Under one sub-heading are discussed cases involving review of facts by the appellate court. There is another heading involving the appealability of a motion to strike, another heading involves additional sustaining grounds in an appeal, and finally there is a heading involving the abandonment of exceptions.

## I. INSTITUTION OF ACTION

### A. *By Attachment of Property*

In *Brewer v. Graydon*,[1] the plaintiff attached certain property of the non-resident defendant in a suit against the defendant for alienation of plaintiff's husband's affections and for criminal conversation with plaintiff's husband. Defendant appeared specially and moved to set aside the attachment. The lower court granted the motion and the Supreme Court affirmed on appeal. It was held that the provisions of the Code permitting attachment, to-wit; CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-901, providing in part:

> In any actions . . . (3) for the recovery of damages done to either person or property . . . (5) against a defendant who is not a resident of this state . . . .

did not contemplate the use of this remedy in actions for criminal conversation or alienation of affections. The Supreme Court said:

> Attachment is an extraordinary remedy and exists only by reason of statute providing same, and the Courts have held almost without exception that the provisions of such statutes must be strictly construed . . . .
>
> In 1932, the General Assembly, cognizant of the prior

1. 233 S. C. 124, 103 S. E. 2d 767 (1958).

> decisions of this Court heretofore referred to, adopted what is now Section 10-902 . . ., permitting attachment in liable and slander actions, thereby broadening the field in which attachments lie. Had it intended like treatment in actions for alienation of affections or criminal conversation, it would have been a simple matter to so provide, which it did not see fit to do.

The case of *Southeastern Equipment Co. v. One* 1954 *Autocar Diesel Tractor*,[2] involved an attachment against property of a foreign corporation and a so-called "special" appearance. A summons was issued and an attachment was instituted thereon. Thereafter Baumer Foods, Inc., owner of the attached property, appeared "specially" and moved for a substitution of security, posted bond and secured the release of the attached property. It then moved to dissolve the attachment on the ground that the affidavit was defective, and at the same time demanded a copy of the complaint, subject to its motion to dissolve the attachment. A day later it served another notice seeking to qualify the previous day's notice and demand as being subject to the special appearance.

Later a copy of the complaint was served on Baumer and it then moved to dismiss the complaint on the ground that more than thirty days had elapsed since the issuance of the summons but no personal service had been made and no publication commenced.

The Supreme Court held that the foreign corporation had submitted itself to the jurisdiction of the court by its motion to dissolve and its demand for the complaint, since it did not comply with the provisions of Code Section 10-648 in regard to giving notice that it intended to rely on the jurisdictional objection or reserving its rights thereunder. The Court also called attention to Code Section 10-406.1 that "a voluntary appearance of a defendant is equivalent to personal service of the summons upon him."

In regard to the sufficiency of the affidavit of attachment the Court found it unnecessary to reach this question, since the motion to dissolve was made after substitution of security, which was an implied acknowledgment of the validity of the attachment, and thereby came too late.

2. 234 S. S. 213, 107 S. E. 2d 340 (1959).

## II. INJUNCTION

### A. *Failure to Exhaust Administrative Remedies*

In *DePass v. City of Spartanburg*,[3] a landowner sought to enjoin the enforcement by the City of an ordinance respecting sub-standard housing and the City demurred to the complaint which was dismissed and the landowner appealed. The complaint alleged that the plaintiff had attempted to rehabilitate some of her property in accordance with the ordinance but that the City, on August 8, 1957, had ordered that she rehabilitate eleven of her houses by September 8th following, and notified her of her right to a hearing should she request the same within ten days. The plaintiff alleged that she had requested such a hearing but, apparently, brought this action for injunction before the hearing was had. The City's demurrer was apparently based on the grounds that the plaintiff had not exhausted her administrative remedies and was, therefore, not entitled to injunctive relief. The Supreme Court held:

> A party aggrieved by the application of an ordinance must invoke and exhaust the administrative remedies provided thereby before he may resort to the Courts for relief . . . . Courts are reluctant to interfere with the administrative action prior to its completion and in this sense not final.

## III. COURTS

### A. *Power of State Court to Require United States to File Its Tax Claim in State Proceeding*

The case of *Want v. Alfred M. Best Company*,[4] involved a proceeding to settle the insolvent estate of the late Samuel Want, wherein the federal government intervened, asserting a priority as to certain transferee and fiduciary liabilities to it of Want for income taxes due by the estate of his brother and asserting further that it was prohibiting from filing certain transferee gift tax and estate tax claims because those claims were pending in the Tax Court of the United States. The lower court issued an order barring any claims the U. S. might have against the Samuel Want estate unless it should assert the same in this cause by August 20, 1956.

3. 234 S. C. 198, 107 S. E. 2d 350 (1959).
4. 233 S. C. 460, 105 S. E. 2d 678 (1958).

The Supreme Court affirmed, finding that the pendency in the U. S. Tax Court of claims brought there by Want before he died, seeking redetermination of proposed estate and gift tax deficiency assessments against the brother Jacob Want's estate, did not prevent the assertion of those claims in this action; that the action of his executrix in seeking to have the government assert all its claims in this state court action amounted to a waiver of any right she might have had to insist upon a Tax Court determination of the deficiency assessments; and that the state court order did not violate the government's sovereign immunity from suit. The Court said:

> Assertion of the estate and gift tax claims in this action would have furthered the effective and orderly exercise by the state court of the jurisdiction exclusively vested in it, and would have accorded with that spirit of cooperation between the independent tribunals of the states and of the United States essential to the harmonious functioning of our dual judicial system.

## IV. DEMURRER

### A. *Misjoinder of Insurer*

The question of making the indemnity insurer a named party defendant was before the Court in *Watts v. Baker and Canal Ins. Co.*,[5] where a taxicab passenger sued the owner and the insurer for personal injuries, claiming a direct right of action by reason of a policy filed with the City of Columbia pursuant to City Ordinance Section 36-6. The insurer demurred for misjoinder and also moved to make the complaint more definite and certain by requiring the plaintiff to state whether the insurance policy was filed pursuant to any statute or ordinance and if so, to set forth the terms thereof.

The lower court overruled the demurrer but granted the motion to make more definite, and the plaintiff amended her complaint by setting forth the ordinance in full. The insurer again demurred in that it now appeared that it was being sued on a liability policy issued to its co-defendant and that no cause of action existed against it until recovery of judgment against Baker. Again the trial court overruled the demurrer.

The Supreme Court reversed, sustaining the demurrer and directing that all reference to insurance coverage in the com-

5. 233 S. C. 446, 105 S. E. 2d 605 (1958).

plaint be eliminated. The Court reviewed the cases permitting direct action against an insurer, and Sections 58-1481 and 10-702.[6] It also examined the Columbia ordinance in question, the pertinent portion of which was:

> The bond or policy shall stipulate that any person who may recover final judgment for damages, such judgment remaining unpaid for thirty days, shall have the right of action on such bond or policy in the event the owner of the taxicab is insolvent and does not pay the same within thirty days.

The Court concluded that under this language the plaintiff had no cause of action against the insurer until recovery of final judgment against the owner, his insolvency, and failure to pay the judgment within thirty days.

This case demonstrates the importance placed on the wording of the ordinance or statute in determining whether an insurance company is subject to direct action in this type of case.

B. *Raising Affirmative Defense by Demurrer*

In *Drakeford v. Dixie Home Stores,*[7] the lower court sustained a demurrer to a complaint seeking damages for slander, on the ground that the complaint did not state a cause of action for slander. In the order the court stated: "As a matter of law the question of the manager was as to a matter of concern to both plaintiff and himself and therefore privileged." On appeal the plaintiff raised the question that the trial court erred in sustaining the demurrer on the ground of privilege.

The Supreme Court agreed that this was error, and that in a slander action the issue of privilege is a matter of defense and is not ordinarily available on demurrer, citing *Rivers v. Florence Printing Co.,*[8] and the landmark case of *Bell v. Bank of Abbeville.*[9] However, the Supreme Court proceeded to affirm the lower court on the basis that the complaint was demurrable as not stating a cause of action for slander.

6. CODE OF LAWS OF SOUTH CAROLINA (1952).
7. 233 S. C. 519, 105 S. E. 2d 711 (1958).
8. 141 S. C. 364, 139 S. E. 781 (1927).
9. 208 S. C. 490, 38 S. E. 2d 641 (1946).

## V. SETOFF

A. *Premature Assertion*

In *Brock v. Mason and Holden,*[10] the Court held that before a state of facts can be made the basis of a counter-claim or set-off, there must be an independent cause of action therefor. In this case, a surety company sought to set-off against a sub-contractor's suit amounts allegedly due from the contractor on another project. But because the other project was incomplete and no claim against the surety had been made thereon, the Court held that the cause of action had not matured before the commencement of the primary suit and could not, therefore, be made the basis of a set-off.

## VI. VENUE

A. *In General*

In *Ernandez, as Administrator v. Miller,*[11] an action for wrongful death was brought in Chester County. The defendant moved for a change of venue to Sumter County, on the ground that at the time of commencement of the action he was a resident of that County. It was admitted that he originally resided in Chester, but his affidavit and others submitted on his behalf sought to show that he was in the Air Force stationed at Shaw Field and rented an apartment in Sumter County.

The plaintiff presented affidavits seeking to establish that the defendant was still a resident of Chester at the time the suit was commenced, and the court below agreed with him. The Supreme Court affirmed, holding that the issue of residence under the venue statute, CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-303, ("residence" here meaning domicile, as distinguished from temporary dwelling-place) is a factual one, and that its determination by the trial court is conclusive unless without evidentiary support.

The Court indicated in *Kelly v. Dangel*[12] that the burden of showing improper venue is on the defendant. Defendant was sued in Sumter County. He moved for a change of venue to Richland County on the grounds that two other persons really owned the business which plaintiff alleged he was con-

10. 233 S. C. 40, 103 S. E. 2d 423 (1958).
11. 232 S. C. 634, 103 S. E. 2d 263 (1958).
12. 233 S. C. 301, 104 S. E. 2d 383 (1958).

ducting and that one of them lived in Richland County. The judge's refusal was affirmed because, the Court said, no showing was made by defendant that he was sued in the wrong county or that he was a resident of Richland County.

The case of *H. F. Branham v. Boney Diesel Works Co., Inc. et al*[13] was an action in claim and delivery for possession of a tractor, bought in Kershaw County. The defendant moved for change of venue to Richland County on the ground that the proper venue for an action of this type is in the County where the property is situate, but offered no proof as to the location of the tractor, so the lower court promptly and properly denied the motion.

However, in the order denying change of venue the court below held that since one of the defendants was a resident of Kershaw County the Court of Common Pleas of that County had jurisdiction. The Supreme Court affirmed the result reached, pointing out that it was unnecessary and therefore improper to pass on the question of jurisdiction, which had not been raised in the motion, but that the order correctly disposed of the only issue before the Court.

B. *Rights Not Waived by Answer*

In *Lee v. Neal et al.*,[14] an action for personal injuries brought in Darlington County, one defendant was a Florence County resident, though served in Darlington County, and the other defendant was a North Carolina resident who was not served. An answer in the form of a general denial was filed and some five months later a motion for change of venue to Florence County and one to amend the answer by denying residency in Darlington County, supported by affidavit of counsel that he had just learned of the true residence of his client, was filed. At the hearing below the moving party produced affidavits in support of his position and the plaintiff produced nothing to the contrary. The trial court granted the motion to amend but denied the venue change, in the exercise of its discretion.

The Supreme Court reversed, holding that by answering generally the defendant did not waive his right to move for a change of venue, and that the court below abused its discretion in not granting the motion on the showing that the de-

13. 233 S. C. 226, 104 S. E. 2d 290 (1958).
14. 233 S. C. 206, 104 S. E. 2d 291 (1958).

fendant was a resident of Florence County. It quoted with approval from *Brown v. Palmetto Baking Co.*[15] to the effect that issues are not joined, necessitating trial, until answer or demurrer, and therefore a motion to change the place of trial cannot logically be required in advance of answer or demurrer.

C. *Suit Against Foreign Corporation*

In *Whitley, as Guardian v. Lineberger Brothers,*[16] a resident of Georgia brought action in Union County for personal injuries against a North Carolina corporation. The collision out of which the suit arose took place in Pickens County. The Court held that under Section 10-303 of the 1952 Code the plaintiff had a right to elect the county in which to bring the action, the defendant being a foreign corporation. It also upheld a refusal below to change the venue from Union to Pickens or Greenville counties, stating that there was no manifest abuse of the trial court's discretion.

## VII. JUDGMENT ON THE PLEADINGS

In *United States Casualty Company v. Hiers,*[17] an insurance company brought suit against an insurance agency to recover from the agency the amount of judgment against the insurer plus costs and attorneys' fees which the insurer had been required to pay in a prior action[18] because of the agents' failure to return a premium to an insured under a policy which the insurer had instructed the agents to cancel. The insurer based its action against the agents on the negligence of the agents. The defendants filed their answer thereto denying negligence, alleging that the insurer's loss was occasioned by its wrongful cancellation of the policy and not the defendants' failure to return premium, and that the defendants were not liable for the plaintiff's cost of appealing the earlier case to the Supreme Court, "which defendants neither participated in or authorized." The plaintiff had forwarded the policy to its insured on September 14, 1953, with notice to the insured and to the agents that the balance of the premium must be paid by September 28th. The insured paid the premium to the

15. 220 S. C. 38, 66 S. E. 2d 417, 419 (1951).
16. 233 S. C. 182, 104 S. E. 2d 70 (1958).
17. 233 S. C. 333, 104 S. E. 2d 561 (1958).
18. Taylor v. United States Casualty Co., 229 S. C. 230, 92 S. E. 2d 647 (1956).

agents in time but they neglected to forward it to the insurance company which, on October 7, cancelled the policy for non-payment of the premium. The agents then forwarded the premium to the insurer asking that the policy be continued but the insurer notified the agents and the insured that the cancellation would not be rescinded, and returned the remittance to the agents who failed to refund it to the insured and had not done so at the time of trial of the *Taylor* case, according to the testimony of one of the defendants in this case, Mr. Hiers, at the trial of that case.

The plaintiff moved for judgment on the pleadings and the motion was allowed by the lower court. The Supreme Court said:

> The second and third defenses referred to the 'wrongful' cancellation of the policy by respondent, but it was wrongful (as related to Taylor) only because of appellant's agents' negligent failure to remit the premium to respondent which they had collected from Taylor; as against all others the respondent was within its rights in cancelling the policy for non-payment of the premium. *One cannot set up the result of his own wrong as a defense to his liability for the natural and probable consequence of the latter, which appellants would do by this plea.*
>
> The foregoing anticipates the fate of (2) of the first defense. Appellants wrongful failure to remit the premium to respondent caused it to cancel the policy, with the resulting liability to Taylor. Again, appellants would shield themselves from liability for their wrong by hiding behind a direct and proximate result of it, which they should have foreseen. Such a position is patently illogical and no authority has been cited or found for it.

With reference to defendants' contention that they were not liable to the plaintiff for its cost in appealing the earlier case to the Supreme Court because they had not authorized nor participated in the appeal the Supreme Court adverted to the evidence in the record of a letter from plaintiff's attorney to the defendants advising of the tendency of motions to the trial court in the *Taylor* case for judgment n.o.v., and for a new trial and notified the defendants that the insurer would look to them for payment of the judgment and reimbursement of

expenses if judgment was entered against it, and appellants were invited to have their counsel assist in the argument of the motion. A further letter was written advising the defendants of the adverse ruling on the motion and asking defendants reaction as to what appellant should do with reference to perfecting the appeal, pointing out the costs of the appeal and other expenses which would be claimed against the defendant if the appeal should be lost. The defendants ignored the letters. The Supreme Court said:

> It was the duty of appellants to voice at that time their opposition to appeal if they were opposed. Under the circumstances, silence amounted to acquiescence. There is no contention that the appeal was frivolous; the wisdom of it cannot be judged by the result alone. Nor is there contention of impropriety in the amount of the costs, expenses and attorneys' fee. Like the others, this defense is without merit.
>
> It is well settled by general rule that the failure of an agent of an insurer to comply with the instructions of the latter, whereby loss to it results, is liable over to the insurer .... (authorities cited).
>
> 'If an insurance company which is entitled under the terms of a policy to cancel or reduce the risk directs its agent to cancel or reduce same, it is his duty to do so with reasonable promptness, and if he negligently or willfully fails to carry out peremptory instructions to cancel or reduce he is liable to the insurer for the amount which it is required to pay in settlement of the loss.'

The Supreme Court held that judgment on the pleadings was a drastic procedure but would be granted in proper cases. It cited Section 10-654,[19] providing "sham and irrelevant answers and defenses may be stricken out on motion . . .", and Section 10-1505,[20] providing in part "if a demurrer, answer or reply *be frivolous* the party prejudiced thereby, upon a previous notice of five days, may apply to a Judge of the Court either in or out of the Court for judgment thereon and judgment may be given acordingly." The Supreme Court said further:

> It was alleged that respondent did not 'vouch' appellants to defend Taylor's action. There was no duty upon re-

19. CODE OF LAWS OF SOUTH CAROLINA, 1952.
20. *Ibid.*

spondents to formally vouch appellants in the Taylor case. They had full knowledge of pendency of it, were consulted in reference to the defense and Hiers testified for respondent, who was the defendant in that case. He frankly admitted the failure of appellants, as agents, and they still held the premium money which they should have refunded to Taylor under the instructions of respondent upon its cancellation of Taylor's policy. . . .
We are convinced, as was the Trial Court, that the answer presented no issue for trial. (Emphasis and Ommissions Mine.)

## VIII. DISCOVERY

In *Barfield v. Dillon Motor Sales Inc.*,[21] the plaintiff sued his employer for injuries allegedly caused by negligence, et cetera, of the employer. The complaint alleged, *inter alia*, that the employer was subject to the Workmens Compensation Law because it had more than fifteen employees but had rejected that law and, therefore, could not be permitted to defend the action on the ground that the plaintiff was negligent, that he assumed the risk, or that his injuries were caused by the negligence of a fellow servant. The defendant denied that it had fifteen employees so as to be subject to the Workmens Compensation Law and deprived of its common law defenses. Before defendant served its answer plaintiff moved for an Order requiring defendant to produce its records showing the names of its employees and certain other records relating thereto for a period prior to respondent's injuries which motion was over-ruled by the Judge on the grounds that it was premature. After defendant had served its answer the plaintiff renewed his motion to require the defendants to produce its records which was likewise denied by the Circuit Judge on the grounds "the pleadings fail to show sufficient grounds for the granting of plaintiff's motion and it must be denied for failure to make the requisite showing by affidavit in conformity with the applicable rules." Later, the respondent moved for an Order before another Judge to allow him to examine before trial an officer of the defendant and also its bookkeeper with respect to their knowledge with relation to records of the defendant which would disclose information as

21. 233 S. C. 26, 103 S. E. 2d 416 (1958).

to the nature of the employment or contract of hire of all employees of the appellant in February, 1956, and for six months prior thereto. The motion was made pursuant to the provisions of CODE OF LAWS OF SOUTH CAROLINA, 1952 § 26-503, and was based upon the complaint and answer in the case, upon an affidavit of respondent and certificate of respondent's attorney. In his affidavit in support of the motion the plaintiff named seventeen persons whom he identified as employees of the defendant but averred that in order for him to safely go to trial it was necessary that he know prior to trial the contract of hire of the persons named and that such information was exclusively within the knowledge of the persons whose depositions he sought to take. The trial judge granted the motion and referred the matter to the Master in Equity for Dillon County to take the depositions of the witnesses named. The defendants appealed from that order. The Supreme Court affirmed the trial judge. In answer to the defendants' contention that since the plaintiff had named seventeen persons in his affidavit allegedly employed by the defendant the matter was already within his knowledge and precluded plaintiff's examining defendants before trial, the Supreme Court said:

> We do not agree with this contention. It is imperative that the respondent know whether any of the seventeen persons named in his affidavit would be excluded from the term 'employee' as such is used in Section 72-11, 1952 Code of Laws of South Carolina, which excludes persons whose employment is both casual and not in the course of the trade, business, profession, or occupation of the employer. There is also excluded persons who are independent contractors.

The defendant objected to the Order permitting discovery on the further ground that the plaintiff was seeking to discover matters upon which the defendant made its defense. The Supreme Court disposed of this contention by saying that the plaintiff had alleged in his complaint that the defendant employed more than fifteen persons and the answer denied the allegation and thereby affirmatively alleged that the appellant did not have in its employ a sufficient number of persons to require it to be subject to the provisions of the Workmens Compensation Law. The Supreme Court citing numerous authorities held:

> The pre-trial examination sought by the respondent is not for the purpose of discovering evidence in support of the allegations of appellants' answer. It is for the sole purpose of establishing whether or not the appellant was subject to and bound by the terms of the Workmens Compensation Act on the date of respondent's injury. What the respondent seeks by the pre-trial examination is material to his cause of action.

The defendant further contended that the trial judge was precluded from granting an Order to examine the two named employees of the defendant before trial by virtue of the earlier Orders by Judge Lewis denying the plaintiff the right to inspect certain records of the defendant. The Supreme Court in over-ruling this contention said:

> Reference to the two Motions, from which we have quoted, shows that the Motions before Judge Lewis were made pursuant to Section 26-502 of the 1952 Code of South Carolina, and Rule 43 of the Circuit Court, and was made for the purpose of seeking an inspection of certain books, papers, and documents in the possession of the appellant. The Motion before Judge Littlejohn was made pursuant to Section 26-503 of the 1952 Code of South Carolina, and was supported by an affidavit pursuant to Rule 45. It thus appears that the relief sought before Judge Littlejohn was entirely different and distinct from the relief sought before Judge Lewis. We conclude that the previous Order of Judge Lewis did not determine the issue made before Judge Littlejohn.

The defendant next contended that the trial judge committed error in permitting a pre-trial examination of a named officer and a named employee of the defendant, rather than of the defendant itself through its officers and employees. The Supreme Court over-ruled this objection also, citing an earlier decision of the Court (*United States Tire Company v. Keystone Tire Sales Company*),[22] in which it was said, *inter alia*:

> 'It seems to us, and we so hold, that, when it is proper for a corporation to be examined . . . it is also proper for the officers of the corporation to be so examined, for, as indicated before, a corporation must speak and act

22. 153 S. C. 56, 150 S. E. 347, 66 A. L. R. 1264 (1929).

through its officers . . . of course, the examination of these officers and agents is to be limited to the affairs of the corporation involved in the litigation, to which the corporation is a party.'

## IX. EVIDENCE

### A. *Opinion Evidence in Condemnation Proceeding*

In *S. C. State Highway Dept. v. Hines*,[23] a condemnee landowner who was a civil engineer and a general contractor attempted to testify that a strip of land adjoining his property on the rear had been offered for sale to him for five thousand dollars. The court below refused to permit the introduction of this evidence and limited counsel's inquiry to the question of what, in his client's opinion, the land at the rear of his property was worth. He then stated he thought it was worth five thousand dollars.

The Supreme Court affirmed both rulings, stating the general rule, as to the first question, that the price at which adjacent property has been offered for sale is inadmissible, especially where such offer has not been accepted. On the second question the Court held that "no peculiar ability or specialized training is required to enable a witness to testify as to his opinion of the value of property with which he is acquainted."

### B. *Violation of Statute for Punitive Damages*

In the case of *Smith, Administratrix v. Lynch, Administrator C.T.A.*,[24] an auto accident case in which the drivers of both cars were killed, the evidence was uncontradicted that the defendant's testatrix failed to stop before entering the intersection of a "through highway," in violation of Section 46-423 of the 1952 Code, and there was also evidence that she was driving at a speed in violation of Sections 46-361 et seq. The Court held that these statutory violations, if the proximate cause of the collision, would justify punitive as well as actual damages.

## X. TRIAL

### *Discretion of Trial Judge*

The trial judge has a wide discretion in many phases of the conduct of the trial. This was emphasized by several cases of

23. 234 S. C. 254, 107 S. E. 2d 643 (1959).
24. 232 S. C. 608, 103 S. E. 2d 54 (1958).

the Supreme Court this term. In *Elliott v. Black River Elec. Coop.*,[25] defendant's attorney sought to ask each prospective juror whether the case had been discussed in his presence. The trial judge, having already asked each juror if he had formed an opinion on the merits of the case, refused to permit the question. The Supreme Court held that Section 38-202 of the 1952 Code vests the trial judge with exclusive power to determine a juror's competence and that his decision would not be reviewed unless "wholly without evidence to support it."

Three cases dealt with the trial judge's discretion in the control of presentation of evidence. In *Elliott v. Black River Elec. Coop., supra,* the defense counsel warned a plaintiff's witness he would present witness A to impeach the plaintiff's witness' testimony. Witness A was alleged to have spoken with and taken a conflicting statement from the plaintiff's witness. Later, the defendant offered witness B. The judge refused to permit his testimony, ruling that no proper foundation had been laid. The trial judge, the Court said, has discretion to determine whether a proper foundation for impeachment has been laid and his decision will not be disturbed except where discretion is abused. In *Jenkins v. Long Motor Lines*,[26] the Court held that the trial judge likewise has discretion in deciding whether an expert's opinion is necessary to aid the jury in deciding the facts. And in *Hansson v. General Insulation & Acoustics*,[27] the Court said the judge's discretion with respect to the scope of cross-examination is not subject to review except in cases of "manifest abuse or injustice."

In *Rogers v. Florence Printing Co.*,[28] the plaintiff's attorney remarked in the jury argument that one of defendant's possible witnesses was not present because he (plaintiff's counsel) "had something on" him. Defendant's motion for mistrial was denied and the jury was simply instructed to disregard the remark. In affirming, the Court said that the question of declaring a mistrial under the circumstances was discretionary with the trial judge and his decision was not an abuse of that discretion.

25. 233 S. C. 233, 104 S. E. 2d 357 (1958).
26. 233 S. C. 87, 103 S. E. 2d 523 (1958).
27. 234 S. C. 177, 107 S. E. 2d 41 (1959).
28. 233 S. C. 567, 106 S. E. 2d 258 (1958).

In *Evatt v. Campbell*,[29] defendant moved for a new trial because of after-discovered evidence. The evidence was that plaintiff had (unsuccessfully) tried to bribe a witness. The Court held that refusal to grant a new trial was discretionary and would not be upset absent an abuse of discretion amounting to legal error. The Court also stated that, to justify a new trial because of new evidence, the evidence must be: (a) such as will probably change the result; (b) discovered since the trial; (c) unable to have been discovered before the trial by exercise of due diligence; (d) material to the issue; (e) not merely cumulative or impeaching. Here, the evidence would simply have tended to impeach the plaintiff.

In one case, *Fairy v. Gardner*,[30] the trial judge was held to have abused his discretion. In an automobile accident case, plaintiff moved for voluntary nonsuit because the defendant's insurance company's liability under the policy was the subject of a suit in federal court. Plaintiff admitted that he would probably file suit again, and the judge refused the non-suit. The Supreme Court held that both in equity and at law the voluntary non-suit was within the trial judge's discretion, but that it should be granted in the absence of "material or legal prejudice" to defendant. The discretion comes into play only upon a showing of prejudice to defendant. No legal prejudice may be deduced merely from the fact that plaintiff might file suit again, hence the judge abused his discretion in not granting the voluntary non-suit.

## XI. RIGHT TO JURY TRIAL IN EQUITY CASE

In *Allen Brothers Milling Company v. Adams*,[31] the plaintiff sought to enjoin the defendant from damming back water entering their property and defendant counterclaimed to restrain the plaintiff from maintaining a second pond at its present level. The plaintiff demurred to the counterclaim and the judge ruled that the case was one in equity and that decision on the demurrer must be deferred until after the evidence had been taken. Later, defendants gave notice to plaintiff's counsel of a motion for framing of issues under Code Section 10-1057[32] and Rule 28 of the Circuit Court and along

29. 234 S. C. 1, 106 S. E. 2d 447 (1959).
30. 233 S. C. 297, 104 S. E. 2d 374 (1958).
31. 233 S. C. 416, 105 S. E. 2d 257 (1958).
32. CODE OF LAWS OF SOUTH CAROLINA, 1952.

with the notice proposed thirteen issues of fact to be tried by a jury. Within the time required by the Circuit Court Rule the plaintiff's counsel proposed eight issues for submission to the jury. The motion to frame issues was heard by the trial judge and he denied the motion on the ground that submission of the proposed issues to the jury would cause confusion and "would result in no substantial aid to and enlightenment of the conscience of the Court". Accordingly, in the exercise of his discretion he declined to submit any issues to the jury and referred the case to the Master in Richland County to take and report the testimony together with his findings of law and fact. The defendants appealed from this order of reference. The Supreme Court said:

> We find it unnecessary to determine whether any issues of a legal nature are raised by the pleadings. The conduct of the parties require that this action be regarded solely as in equity. There was no appeal from the Order of Judge Griffith holding that the suit was in equity. The Motion by defendants to frame issue was made under Section 10-1057 of the Code and Rule 28 of the Circuit Court which apply only to cases in equity. So far as the record discloses, no contention was made in the Court below that the case involved legal issues upon which defendants were entitled to a jury trial as a matter of rights.
>
> Under the foregoing circumstances defendants cannot now claim that this is a law case entitling them to a jury trial as a matter of rights. . . .
>
> Regarding the instant case, as we must, as an action in equity, the parties were not entitled to a trial by jury as a matter of right. The framing of issues was addressed to the sound discretion of the Trial Judge. He was fully empowered to refuse to submit issues to the jury and either refer the case or determine the questions involved without a reference . . . .

## XII. NONSUIT

### A. *Where Deficiency Supplied by Defense Testimony*

The rule that where a deficiency of evidence at the nonsuit stage is supplied on either direct or cross-examination of defense witnesses the error in failing to grant the nonsuit is

cured, was reiterated in *Padgett v. Colonial Wholesale Distributing Company.*[33] There, on cross-examination, a witness for the defendant, after the court had overruled the nonsuit motion, admitted that the truck of defendant was traveling 55 miles per hour in a 45 miles per hour zone. The Supreme Court held that this supplied any deficiency that may have existed at the close of the plaintiff's case and repeated the familiar rule that violation of an applicable statute is negligence per se, and whether such breach contributed as a proximate cause to the plaintiff's injury is ordinarily a question for the jury.

## XIII. NEW TRIAL

### A. *New Trial Nisi*

The difference between a new trial *nisi* and a new trial absolute was discussed in *Elliott v. Black River Elec. Coop.*[34] If it is thought that a verdict is unduly liberal, but not so excessive as to raise the presumption of passion or other illegality, defendant should move for a new trial *nisi*—a new trial "unless" the plaintiff should remit part of his verdict. But if the verdict is so excessive as to raise a presumption of passion or prejudice, defendant should move for new trial absolute. In the former case, the verdict is legal, but excessive. In the latter case, it is illegal and therefore no part of it can stand.

### B. *On Damages Only*

An interesting procedural point was before the Supreme Court in *S. C. Electric & Gas Co., et al. v. Aetna Insurance Co., et al.,*[35] where, after a jury verdict in favor of the plaintiffs the trial judge granted a new trial limited to the issue of damages, having found the verdict excessive but declining to reduce it by order for new trial *nisi.*

The Supreme Court reversed on this ground, stating that in the absence of statute or rule authorizing this procedure it was not proper to grant a new trial as to damages only. The Court pointed out that such is the federal practice, by rule 59 (a) of the Federal Rules of Civil Procedure, and that the practice prevails in many other jurisdictions, but "in the absence of authorizing statute or rule we do not feel war-

33. 232 S. C. 593, 103 S. E. 2d 265 (1958).
34. 233 S. C. 233, 104 S. E. 2d 357 (1958).
35. 233 S. C. 557, 106 S. E. 2d 276 (1958).

ranted in making such an important innovation in our procedure."

C. *Where Continuance Improperly Refused*

In *Graham v. Greenville City Coach Lines*,[36] the plaintiff sued his former employer for a wrongful discharge from his job. When the case was reached for trial defendant moved for a continuance on the ground that its general superintendent who allegedly had wrongfully discharged the plaintiff was ill and unable to attend court, this motion being supported by a physician's affidavit. Upon the agreement of plaintiff's counsel that defendant's counsel's statement of what the witness would testify to if present would be admitted in evidence so far as competent, the motion for continuance was overruled and the trial proceeded in the absence of the witness under Circuit Court Rule 27. However, at the trial of the case plaintiff testified to certain matters which had not been pleaded in the complaint and which could only be rebutted by the testimony of defendant's general superintendent who was ill. Defendant contended that this testimony took it by surprise and that the motion for continuance should have been granted. The Supreme Court held:

> It is elementary that the granting or refusal of a motion for continuance is within the discretion of the Trial Court .... However, there are exceptions to almost all rules; indeed, there is an adage that exceptions prove the rule. We have concluded that this case ought to be an exception to the rule against reversal of orders on motion for continuance, rare though such is. We think that it was an erroneous exercise of discretion to refuse appellant's motion under the unusual circumstances of this case, and it will be reversed.

The Supreme Court held that since the matter brought out by the plaintiff at the trial had not been pleaded and defendant could not controvert because of the absence of the only witness who could testify thereabout there was sufficient ground for granting of a new trial. While this case apparently involved the question of whether or not the trial judge abused his discretion in refusing to grant defendant's motion for a continuance made before trial, actually it appears to the writer that it instead involved the point that the defendant

36. 233 S. C. 175, 104 S. E. 2d 72 (1958).

was in fact taken by surprise at the testimony which developed from the plaintiff during the trial which defendant could not in the exercise of due care have foreseen.

## XIV. REOPENING DEFAULT JUDGMENT

In *Grant v. Grant*,[37] our Supreme Court stated the principle that default judgments in divorce cases are not favored and will be set aside more readily than in other actions, because of the public interest involved in this type of action. However, it went on to affirm the court below in refusing to reopen the judgment, where counsel for the defendant wife waited six months after learning of the default decree before moving to reopen and in the meantime the plaintiff husband had remarried. The Court held that laches can be invoked to bar relief under Section 10-1213 of the 1952 Code even if the motion is made within one year as prescribed, where there is inexcusable and prejudicial delay in making it.

*Strickland v. Rabon*,[38] involved an action for personal injuries arising out of an automobile collision. The appellant failed to answer the complaint within twenty days after service, the case was tried and judgment secured in favor of the plaintiff on June 17, 1958. Thereafter, on June 19, 1958, the defendant attempted to serve an answer to the complaint but plaintiff's counsel refused to accept service of the answer on the grounds that the defendants were in default. On July 9, 1958, the defendants served notice on plaintiff's attorney of a notice of motion to vacate the judgment on the ground that judgment had been obtained due to mistake, inadvertence, surprise and excusable neglect, alleging that the defendants had a meritorious defense to the action. The judge of the lower court denied the motion. The defendants appealed to the Supreme Court, contending that the trial judge erred and abused his discretion in refusing to set aside the default judgment and allow the defendants to answer. The record discloses that summons was served on May 22, 1958, and on May 30th defendants' personal attorney requested an extension of time from the plaintiff's attorney and the latter on June 2, 1958, refused to grant an extension of time. Judgment by default was taken on June 17, 1958. The Supreme Court denying the motion to re-open, held:

37. 233 S. C. 433, 105 S. E. 2d 523 (1958).
38. 234 S. C. 218, 107 S. E. 2d 344 (1959).

> We have repeatedly held that a motion to vacate or set aside a default judgment under the above section[39] of the Code is addressed to the sound discretion of the Judge who hears it, and his conclusion will not be disturbed by this Court in the absence of a clear showing of abuse of discretion . . . .
>
> In the case of *Simon v. Flowers*,[40] . . . we said: 'Discretionary power under this section is vested in the trial, not the appellate, Court. In an appeal from such an order of the Circuit Court it is not our function, nor is it within our power, to substitute our judgment for that of the Circuit Judge simply because we might have reached a different conclusion had we been in his place . . . .

The Court considered the numerous affidavits filed in the case and held that inasmuch as plaintiff's counsel had refused to extend the time for answering to defendant and defendant had not moved before the Court to secure additional time, that the record revealed no excusable neglect that would justify the re-opening of the default judgment.

## XV. TIMELY PRESERVATION OF RIGHTS

### A. *Timely Objection*

One of the most firmly settled rules of appellate practice is that a question which has not been presented to the lower court for consideration will not be considered by the Supreme Court on the appeal. Undoubtedly this doctrine rests on the grounds that an appellate court exists primarily for the correction of lower court errors. If the lower court has not had the opportunity to decide the question presented, there is no error for the Supreme Court to correct. Involved also must be some idea that the appellant has waived his objection to something which was not objected to below. Regardless of the rationale, the Supreme Court reaffirmed this settled principle in the following cases during the 1958-1959 term: *Rushton v. Smith*;[41] *Waltz v. The Equitable Life Assur. Soc.*[42]; *Elliott v. Black River Elec. Coop.*;[43] *Rogers v. Florence Printing*

39. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-1213.
40. 231 S. C. 545, 99 S. E. 2d 391 (1957). See discussion this case at 11 S. C. L. Q. 96 (1958).
41. 233 S. C. 292, 104 S. E. 2d 376 (1958).
42. 233 S. C. 210, 104 S. E. 2d 384 (1958).
43. 233 S. C. 233, 104 S. E. 2d 357 (1958).

*Co.;*[44] *Laughlin v. Livingston;*[45] *Lisenby v. Newson;*[46] *G.A.C. Finance Corp. v. Citizens & Southern Nat. Bank of South Carolina.*[47]

*Laughlin v. Livingston, supra,* presents this point in a slightly unusual way. After losing a trial in a magistrate's court action for ejectment, the defendant appealed to the Circuit Court. By correspondence, plaintiff's attorney and the circuit judge set the date for the hearing. Copies of all letters were sent to defendant's attorney and he appeared at the trial. The circuit judge affirmed the magistrate.

Then, apparently for the first time, defendant questioned the circuit court's jurisdiction because no "return" of the record was made from the magistrate's court to the Circuit Court as required by § 7-306 of the 1952 Code. The Supreme Court held, however, that defendant's attorney had as much to do with bringing the appeal to hearing as plaintiff's attorney and, having participated without objection, could not now complain about possible irregularities.

Another of these cases, *Rogers v. Florence Printing Company,*[48] in *dicta* reminded the bar that when requested instructions are refused by the trial judge, they must be insisted on to preserve the exception on appeal. A related case which also underlines the necessity of adequately preparing the record in the lower court if an appeal is anticipated is *G.A.C. Finance Corp. v. Citizens & S. Nat. Bk.*[49] At the conclusion of the judge's instructions, he must excuse the jury to give the lawyers an opportunity to object to or make suggestions on the charge. Section 10-1210.[50] If no objection or suggestion is made, counsel may not later complain of errors or omissions in the charge to the jury.

*Furbeck v. Crest Manufacturing Company,*[51] the plaintiff sued for breach of a contract of employment and defendants demurred to the complaint and the demurrer was over-ruled. The defendants did not appeal from the order over-ruling the demurrer but after the case had been tried and resulted

44. 233 S. C. 567, 106 S. E. 2d 258 (1958).
45. 233 S. C. 81, 103 S. E. 2d 741 (1958).
46. 234 S. C. 237, 107 S. E. 2d 449 (1959).
47. 234 S. C. 205, 107 S. E. 2d 315 (1959).
48. 233 S. C. 567, 106 S. E. 2d 258 (1958) (*Supra* Notes 30 & 46).
49. 234 S. C. 205, 107 S. E. 2d 315 (1959).
50. CODE OF LAWS OF SOUTH CAROLINA, 1952, Amendment 1956.
51. 233 S. C. 169, 103 S. E. 2d 920 (1958).

in a verdict for the plaintiff the defendants contended that the trial judge erred in construing the earlier order over-ruling the defendants' demurrer as establishing the law of the case concerning the nature of the contract. The Supreme Court held:

> There was no appeal from Judge Henderson's Order (over-ruling the Demurrer) which renders appellants' position at this time untenable.

The Supreme Court went on to say that it felt that in any event the trial judge's ruling was correct. The holding of the Court with reference to this point is somewhat confusing, since, from the opinion, it appears that the appellants were not questioning the correctness of the order over-ruling the demurrer but, rather, were questioning the correctness of the trial judge's construction of such order. However, counsel may be well advised to take an appeal from any order over-ruling a demurrer if this case be followed on this particular point, otherwise they may take the risk that another judge's interpretation of this earlier order may be non-appealable.

In *Sanders v. Jasper County Board of Education*,[52] the plaintiff sued the County for damages for alleged breach of a contract to transport children to school. On appeal the defendant argued that it was not liable to the plaintiff because the State Educational Finance Commission, under certain Code Sections, had taken over school bus operations. The Supreme Court declined to consider this ground, saying:

> . . . search of the record discloses that this position was not taken in the answer or at any stage of the trial or in Motions for Judgment n.o.v., and the new trial, hence it is unavailable upon Appeal.

In *Turbeville v. Gordon*,[53] the plaintiff sued to recover a balance due for construction of a house and for the reasonable value of the use of property and one of the defendants demurred to the complaint. The demurrer was over-ruled and defendant appealed. The Supreme Court affirmed the order over-ruling the demurrer and said with reference to one point:

> There is some reference in appellants' brief to the Statute of Frauds but this question was not presented to the Court below and cannot be raised here for the first time.

52. 233 S. C. 414, 105 S. E. 2d 201 (1958).
53. 233 S. C. 75, 103 S. E. 2d 521 (1958).

B. *Timely Objection to Juror*

In *Spencer, as Administratrix v. Kirby*,[54] an auto accident case, the court below granted the defendant's motion for a new trial after a verdict for the plaintiff. The ground for the new trial was that the foreman of the petit jury had been a member of the grand jury when a "No Bill" was returned on an indictment charging the defendant with murder for the death of plaintiff's intestate arising out of the same collision.

The Supreme Court reversed the new trial order and reinstated the verdict, adverting to the familiar rule that one will not be permitted to take his chances on a favorable verdict and upon disappointment have the verdict set aside on a technicality. The Court held that Section 38-103 of the 1952 Code, providing that "No member of the grand jury which has found an indictment shall be put upon the jury for the trial thereof," was not applicable in that it has reference only to the trial of one charged with the commission of a crime, an obviously correct conclusion.

The Court pointed out that there was no objection interposed to any juror's qualifications prior to the empanelling or the return of the verdict, nor was there any showing of lack of negligence in failing to make discovery of the disqualification before the verdict, or that injury had been suffered thereby.

C. *Timely Application for Appointment of Guardian-ad-Litem*

In *Green v. Boney*,[55] the summons and complaint were served on defendant while he was in the custody of the Fairfield County Sheriff after being sentenced to a term of imprisonment on a plea of guilty of involuntary manslaughter. A month later, through counsel, he filed an answer and counterclaim, and later amended his pleadings. One week prior to trial he served notice of a motion for a continuance "until such time as a guardian ad litem is appointed to appear for him" on the ground that he was confined to the State Penitentiary. This motion was refused on the day of the trial.

The Supreme Court affirmed, holding that the defendant had ample opportunity to apply for the appointment of a guardian, and that his able counsel, with full knowledge of the

54. 234 S. C. 59, 106 S. E. 2d 883 (1959).
55. 233 S. C. 49, 103 S. E. 2d 732 (1958).

Statute,[56] waited until the eve of the trial to raise the question. The right to the appointment, said the Court, had been waived.

## XVI. WAIVER AND ESTOPPEL

### A. *Waiver of Policy Provisions*

The question of whether an insurer can rely on technical non-compliance as to filing proof of loss while at the same time denying liability on grounds not related to proof of loss was before the court in *American Mutual Fire Insurance Company v. Green.*[57] On the day after the fire and at the scene thereof, an adjuster for the company told the insured not to remove any of the salvage, that he would hear from him soon. More than two months later the insurer's claims manager denied liability on the ground that the property was unoccupied at the time of the fire. Not until suit was brought did the insured find out that the company also took the position that no written proof of loss within sixty days had been filed. The lower court held that by denying liability on a ground not related to proof of loss, i.e., that the property was vacant or unoccupied, it had waived the proof of loss provision.

The Supreme Court affirmed, stating that the conduct of the adjuster immediately after the fire was reasonably calculated to lull the insured into inaction and to cause him to assume that his claim would be considered on the merits without requiring formal proof of loss.

The Court also held that although the question of waiver or estoppel is normally one of fact for a jury, yet when the facts are undisputed and warrant only one reasonable inference, waiver or estoppel becomes a matter of law for the court.

*Brown v. State Farm Mutual Automobile Liability Insurance Company*[58] involved among other things whether or not an insurance company had waived its right to require that the insured give it written notice of an automobile accident where along with the policy the insurance company had supplied its insured with a card directing that in the case of personal injuries the accident should be reported by telephone to the nearest claim office. The Supreme Court held that it was

56. CODE OF LAWS OF SOUTH CAROLINA, 1952 §§ 10-232, 237.
57. 233 S. C. 588, 106 S. E. 2d 265 (1958).
58. 233 S. C. 376, 104 S. E. 2d 673 (1958).

for the jury to decide whether or not the provisions of the membership card requiring telephone notice be considered a waiver of the policy's provisions requiring written notice.

The Court then said:

> We will now consider the question of whether the respondent had the right to introduce evidence of the waiver of this provision of the policy when such was not pleaded in the complaint.
>
> This Court, in numerous cases, has defined waiver as being the intentional relinquishment of a known right.
>
> In 29 Am. Jur., Insurance, Para. 1422, at page 1065, it is said: ' . . . Where the complaint in an action on an insurance policy contains no allegation of waiver of a provision of the policy, *but the affirmative answer tenders that issue, evidence is properly admissible thereunder in behalf of the plaintiff as a rebuttal matter to meet a defense attempted to be raised by the defendant.* It has also been held that while the fact of a waiver of a condition as to proof of loss must be specially pleaded and will not be admitted in evidence under allegations of performance, the evidence of waiver of mode or manner of making, or sufficiency thereof, may be received in proof under general allegations of performance of conditions.'
>
> In this case, under the particular facts herein recited, and the conflicting conditions stated in the policy as to the giving of notice of the accident or loss, we are of the opinion that the Circuit Judge was correct in permitting the respondent to show that the insurer had waived the provision of the giving of written notice by attaching to said policy a provision permitting the giving of oral notice, *even though the complaint did not allege waiver.* . . .
>
> We think that under a general allegation of compliance with all the conditions of the contract, the plaintiff may show waiver under the particular facts in this case.

B. *Estoppel by Judgement*

In *Mackey v. Frazier*,[59] the owner of a truck driven by his servant had previously sued a motorist for damages resulting from an automobile-truck collision and the motorist counterclaimed against the truck owner for damages allegedly resulting from the negligent operation of the truck by the owner's

59. 234 S. C. 81, 106 S. E. 2d 895 (1959).

servant. In that case there was a judgment for the plaintiff. Thereafter, the motorist, Mackey, brought an independent action against the truck driver, Frazier. In the instant case the plaintiff's complaint contained the same allegations of negligence as he had set up in his earlier counterclaim to the action by the truck owner. The defendant in this case moved for judgment on the pleadings on the grounds that the former adjudication was a bar to the action brought by the present plaintiff. The lower court denied the motion for judgment on the pleadings and the defendant appealed. The Supreme Court said:

> The sole issue to be determined is whether when one sues the master for personal injury, caused by the sole negligence of the servant, and, failing in such action, can he then bring another action against the servant, alleging the same acts of negligence as the proximate cause of his injury and damage? . . . . .
>
> When the respondent in this action filed a counterclaim in the first action above mentioned, he was in the same position of a plaintiff bringing an action against the defendant . . . . The respondent asserted the master's liability to him by reason of the negligence of the servant because the servant was acting within the scope of his employment in the operation of the truck in question. It is true that a servant who is guilty of a negligent breach of a duty toward a third person, resulting in injury to him is liable therefor, whether the principal is or not . . . .

The Supreme Court went on to hold that the plaintiff in this case was estopped to maintain the action, saying:

> The doctrine of estoppel by judgment proceeds upon the principle that one person shall not a second time litigate, with the same person or with another so identified in interest with such person that he represents the same legal right, precisely the same question, particular controversy, or issue which has been necessarily tried and finally determined, upon its merits, by a Court of competent jurisdiction, in a judgment in personam in a formal suit . . . .

The Court distinguished between estoppel by judgment and res adjudicata, saying:

> However, we do not hold that the judgment in favor of Sloan Williams, who was the master, operates as res

judicata in a subsequent action against his servant or agent for the reason that the parties are not the same and there is no such privity between them as is necessary for the application of that doctrine. In order to make out a defense of res judicata, the following elements must be shown: (1) the parties must be the same or their privies; (2) the subject matter must be the same; and (3) while generally the precise point must be ruled on, yet where the parties are the same or are in privity, the judgment is an absolute bar not only of what was decided but what might have been decided . . . .

The true ground upon which a formal judgment, in a case like this, should be allowed to operate as a bar to a second action, is not res judicata, or technical estoppel, because the parties are not the same, and there is no such privity between them as is necessary for the application of that doctrine; but that in such cases, on grounds of public policy, the principle of estoppel should be expanded, so as to embrace within the estoppel of a judgment persons who are not, strictly speaking, either parties or privvies. It is rested upon the wholesome principle which allows every litigant one opportunity to try his case on the merits, but limits him, in the interest of the public, to one such opportunity . . . .

C. *Equitable Estoppel*

In *Fochman v. Clanton's Auto Auction Sales*,[60] the plaintiff, an automobile dealer, sued the defendant, an automobile wholesaler, for breach of contract arising out of the defendant's having stopped payment on two checks given to the plaintiff as a price for two automobiles sold by the plaintiff on the defendant's wholesale auction market. The defendant asserted by way of justification that prior thereto an alleged agent of the plaintiff dealer had purchased an automobile from the defendant and had given a worthless check therefor. The plaintiff recovered a verdict in the lower court and the defendant appealed. One of the main issues in the case involved the question of whether or not one Barker, who had previously given the bad check to the defendant, was an agent of the plaintiff. The Supreme Court held that the defendant having alleged agency must show that the agent had real or

60. 233 S. C. 581, 106 S. E. 2d 272 (1958).

apparent authority to act for the plaintiff. Since the plaintiff denied the agency the defendant was forced to rely upon the apparent authority of the agent and the principle of equitable estoppel. Citing authority, the Court said:

> Accordingly it is a general rule that, when a principal by any such acts or conduct has knowingly caused or permitted another to appear to be his agent, either generally or for a particular purpose, he will be estopped to deny such agency to the injury of the third persons who having good faith and in the exercise of reasonable prudence dealt with the agent on the faith of such appearances . . . on the principle that where one of two innocent persons must suffer loss, the loss will fall on him whose conduct brought about the situation . . . .
>
> The general rule, it will be observed, embraces three primary elements. These are (1) a representation by the principal, (2) a reliance upon such representation by a third person; and (3) a change of position by such third person in reliance upon such representation. All three elements must be present to bring a case within the rule. The person sought to be bound must, by his word or conduct, have represented that the person assuming to act for him had authority so to do. Accordingly an estoppel does not arise from the mere fact that the agent has acted for the principal on one or more previous occasions, but not under the appearance of a general authority so to act, nor does the rule in the question applied to acts of the agent outside the scope of the authority which the principal has caused him to seem to possess . . . .
>
> It is indicated by the cases in South Carolina that one may not assert estoppel on the theory that he was misled by circumstances when he knew nothing about those circumstances . . . .

The Court then held that because of conflicting evidence as to whether or not Barker was the plaintiff's agent the question was for the jury.

D. *Failure to Require Reply to Affirmative Defense*

In *Brown v. State Farm Mutual Automobile Liability Insurance Company*,[61] the plaintiff sued for certain benefits under an automobile liability insurance policy. The defendant

61. 233 S. C. 376, 104 S. E. 2d 673 (1958).

pleaded affirmatively in its answer the non-performance by plaintiff of certain policy conditions. The plaintiff did not file a reply to the defendant's affirmative defense. The Supreme Court said:

> The complaint of the respondent has complied with the requirements . . . of the Code. The answer of the appellant, following proper practice, sets up affirmatively, in its second defense, that there was no liability under the contract of insurance for the reason that no written notice of the accident or loss was given by the insured. If the appellant desired a reply to this new matter set forth in its answer, then it should have made a Motion, pursuant to Section 10-61 of the 1952 Code of Laws of South Carolina, to require the respondent to reply thereto . . . . The appellant did not avail itself of this remedy. The respondent had no right to reply to this defense, and under Section 10-608, the 1952 Code of Laws of South Carolina, this new matter in the answer would deem to be controverted or denied by the respondent.

## XVII. RES JUDICATA AND LAW OF THE CASE

In *Pharr v. Canal Insurance Company*,[62] several plaintiffs brought suit against the defendant insurance company to collect certain judgments which they had secured against one Bush arising out of an automobile accident. The defendant insurance company had previously issued an automobile liability policy to Bush as insured. When these actions by the injured parties had originally been brought against Bush the attorneys for the plaintiffs had sent direct to the defendant insurance company copies of the pleadings and the insurance company by its attorneys had secured an indefinite extension of time in which to answer. Thereafter, because of Bush's failure to cooperate with the company in any way, the insurer proceeded in court against Bush and secured a declaratory judgment that it was not obligated to defend any of the actions or pay any judgments which might be secured against Bush because of his violation of the provisions of the policy. When this judgment was secured the insurer notified the plaintiffs that it was withdrawing from the cases. The plaintiffs then proceeded to secure default judgments against

62. 233 S. C. 266, 104 S. E. 2d 394 (1958).

Bush, after which the instant suits were instituted directly against the insurance company. The insurer contended as one of its defenses that the declaratory judgment exonerated it from any obligation to Bush and relieved it of any obligation to these plaintiffs. It further contended that there was no privity of contract between it and these plaintiffs to permit them to sue it directly. Finally, it contended that it was in no event liable to the plaintiffs because of the insured, Bush's, failure to cooperate with the insurance company in defense of any of the actions. The lower court over-ruled all contentions of the defendant insurance company and directed a verdict in favor of the plaintiffs for judgment against the defendant to the extent of its policy coverage. Its action was affirmed on appeal to the Supreme Court. Concerning the asserted bar of the declaratory judgment the Supreme Court said:

> We conclude that the declaratory judgment obtained by the appellant was not res adjudicata in this case for the reason that the declaratory judgment act specifically provides that 'no declaration shall prejudice the rights of persons not parties to the proceedings.' The identity of parties necessary to res adjudicata is missing. If the respondents had been parties to the declaratory action proceeding, they, of course, would have been bound by the judgment there obtained. Since they were not parties thereto nor were they in privity with any party thereto, they are not bound by the judgment there obtained.

With reference to the insurers' contention that there was no privity of contract between it and the plaintiffs the Supreme Court said, after quoting certain policy provisions:

> It appears from the foregoing provisions of the liability policy that no action can be brought against the insurer until the amount of the insured's obligation shall have been finally determined by a judgment against the insured, and then, that any person securing such judgment shall be entitled to recover under the policy to the extent of the insurance afforded thereby. This provision of the contract is for the benefit of the injured party who can exercise the right therein given by compliance with the conditions stated in this paragraph of the contract. This Court has held in numerous cases that a contract between two persons for the benefit of a third, even though such

third party be not named therein, can be enforced by such third party.

## XVIII. APPEALS

### A. *Review of Facts*

There were several cases during the term which re-stated certain basic principles of trials and review of findings of facts. Fundamental is the proposition, stated by a federal court, that when evidence conflicts, the jury is the judge of the facts, including the credibility of witnesses.[63] Furthermore, when a judge is the trier of fact in a law case, his decision is as unassailable as the finding of a jury.[64] Before the Supreme Court will upset the findings of fact by judge or jury in a case at law, appellant must show that no reasonable man would have found the same way that the judge or jury found.

The standard for review in equity cases is different. Under the Constitution, the Supreme Court may review the findings of fact.[65] However, if two judges concur in findings of fact, the Court will not set aside the findings unless without evidentiary support or against the clear preponderance of the evidence.[66] It seems to this writer that this statement is confusing. If a finding has no evidentiary support, then *a fortiori* it is against the clear preponderance of the evidence. Stating that the finding will be reversed if against the clear preponderance of the evidence sounds like saying that the Court will review the evidence *de novo*. Yet in practice, the Court is very reluctant to upset findings concurred in by two lower court judges. This reluctance seems grounded primarily in the fact that the trial judge, having seen the witnesses, is the best judge of their credibility.[67]

Related to the above cases dealing with standards of review of findings of fact are two other cases. In *Williams v. Ford*,[68] plaintiff presented only circumstantial evidence, i. e., skid marks and position of accident, to prove defendant

63. Meek v. Harris, 256 F. 2d 579 (4th Cir. 1958).
64. St. Paul Mercury Indemnity Co. v. Palmetto Quarries Co., 234 S. C. 246, 107 S. E. 2d 453 (1959), *see also* Evatt v. Campbell, 234 S. C. 1, 106 S. E. 2d 447 (1959) (dictum).
65. S. C. CONST. art. V, § 4 (1895).
66. Lisenby v. Newsom, 234 S. C. 237, 107 S. E. 2d 449 (1959); Evatt v. Campbell (*ibid*); Caine v. Griffin, 232 S. C. 562, 103 S. E. 2d 37 (1958).
67. Lisenby v. Newsom, (*ibid*).
68. 233 S. C. 304, 104 S. E. 2d 378 (1958).

driver's negligence. Defendant's evidence included three eyewitnesses whose testimony was consistent with plaintiff's circumstantial evidence. The jury found for the plaintiff, but the trial judge granted judgment n.o.v. In affirming, the Court held that a verdict based on circumstantial evidence must be such that, "considered in the light of ordinary experience, (the evidence) would lead with reasonable certainty to such conclusion and not leave it to mere speculation or conjecture."

In *American Mutual Fire Insurance Company v. Green*,[69] the trial judge was faced with deciding whether, on certain undisputed facts, an insurer was estopped to assert failure to file proof of loss within the required period. The judge held the insurer to be estopped. The Supreme Court, reviewing this decision, said that ordinarily waiver or estoppel is for the jury's determination, but where the facts are undisputed and warrant only one reasonable inference, it is a matter of law. It is not clear whether the Court is here merely applying the usual standard of review on findings of fact or granting the trial judge greater freedom because the facts are undisputed. If the Court is simply applying the usual standard, it seems irrelevant that the facts are undisputed. If the Court is applying a different rule because the facts are undisputed, the greater freedom given the trial judge in one breath is withdrawn in the next breath by requiring that there be "only one reasonable inference."

B. *Appealability of Motion to Strike*

In *Blackmon v. United Insurance Co.*,[70] the beneficiary of a life insurance policy of a face value of $200.00 sued the company for $3,000.00 actual and punitive damages. The Supreme Court agreed with the lower court that the cause of action set out in the complaint was one for fraudulent breach of contract accompanied by a fraudulent act. It held, therefore, that the motion to strike the allegations appropriate to punitive damages was properly refused, and added that the refusal of such a motion is not appealable.

C. *Additional Sustaining Grounds*

A full exposition of the provisions of Section 7 of Rule 4 of the State Supreme Court relating to the serving by a re-

69. 233 S. C. 588, 106 S. E. 2d 265 (1958).
70. 233 S. C. 424, 105 S. E. 2d 521 (1958).

spondent of additional sustaining grounds is contained in the opinion of Mr. Justice Legge, speaking for a unanimous Court, in *Colonial Life & Accident Ins. Co. v. S. C. Tax Commission.*[71] In an action to recover taxes paid under protest the plaintiff domestic insurance company challenged the act imposing the tax on three grounds. The court below agreed with it on the first ground, rejected the other two grounds, and decreed the relief prayed for. The Tax Commission appealed and, when it served the proposed case on respondent, the latter proposed the two rejected grounds as "additional sustaining grounds." The appellant rejected these amendments, the matter went to trial court for settlement, and that court excluded the additional sustaining grounds as "an attempt by plaintiff-respondent to raise questions on appeal which were presented in the court below and specifically ruled upon adverse to the plaintiff-respondent. No objection was made to these rulings . . . no appeal taken therefrom, and time therefor has long since expired." The respondent served notice of appeal from this order, printed as an appendix to its brief the additional grounds, the order settling the case, and its exceptions to that order, and served notice on the appellant that it would apply to the Supreme Court on the day of oral argument for leave to file the appendix to its brief as "an appendix to the case for appeal as settled."

The Supreme Court reversed the lower court on this point, pointing out that the purpose of the additional sustaining grounds provision of Rule 4, Section 7 was to relieve a respondent who has obtained the relief sought in the trial court, from the necessity of appealing from adverse rulings that did not affect the result reached below. To be entitled to consideration as an "additional ground" two factors must be present: it must relate to a matter that was presented to the trial court, and it must be such that its acceptance would lead to the same result that the trial court reached. The Court pointed out that although the rule refers to these as "amendments" to the proposed case, they are in fact "addenda." To require respondent here to appeal from the adverse rulings as to two of its grounds, when the favorable ruling on its other ground gave all the relief sought, would defeat the very purpose of the rule.

In passing, the Court noted that although a respondent might be restricted in argument to those additional sustaining

71. 233 S. C. 129, 103 S. E. 2d 908 (1958).

grounds of which it had given notice under the rule, the Supreme Court has the power under Section 8 of the same rule to affirm upon any grounds appearing in the record. It also pointed out that the respondent here should have printed the additional grounds and the order settling the appeal as an appendix to the case as settled and not as an appendix to its brief. However, the Court proceeded to consider the additional grounds on their merits.

D. *Abandonment of Exception*

In *G. F. Sanders v. Jasper County Board of Education*,[72] the Supreme Court said:

> Substituted counsel have presented the appeal upon printed brief, without oral argument. It is said in it with respect to the exception taken by the predecessor counsel, 'it will therefore be seen that an examination of the testimony and exhibits will be necessary in the light of the exceptions in the consideration of the appeal, and we therefore respectfully submit the same to the Court.' *This is not argument of the exceptions as they must be deemed to have been abandoned.* (Emphasis ours.)

72. 233 S. C. 414, 105 S. E. 2d 201 (1958).