LIBERIAN OIL REFINERY COMPANY, Appellant, *v.* IBRAHAM MAHMOUD, Appellee.

APPEAL FROM THE CIRCUIT COURT, SIXTH JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Argued May 2, 3, 1972. Decided May 19, 1972.

1. A named officer of a corporation is not a party to the suit brought against the corporation, for it is the corporate entity which is being sued.
2. The appearance at the trial by the managing agent of a corporation being sued, such managing agent being a proper person to receive process in a suit against a corporation, is an act which by itself confers jurisdiction over the parties upon the court.
3. A person in the employ of another may be personally sued for his negligence occuring in the course of his employment.
4. A prior finding of a traffic court which is irregular upon its face need not be admitted by the trial judge before whom the issues are being tried.
5. When an essential allegation in a pleading is not denied in the subsequent pleading of the opposing party, the allegation is deemed admitted.
6. An issue of fact is to be determined solely by the jury on the greater weight and sufficiency of the evidence, and such preponderance of the evidence may be established by a single witness who may testify against a greater number of witnesses to the contrary.
7. And when the jury arrives at a verdict after having given consideration to evidence which is sufficient to support a verdict, the verdict should not be disturbed by a court.

As the result of a motor vehicle accident, appellee brought an action against the corporate owner of the vehicle and the company's driver for the value of the irreparably damaged car, which he alleged to be $3,500.00. In the corporation's answer it was alleged that the person named as resident manager was actually only a consultant to the company and, therefore, improper service had been made. It was also contended that the employee driver could not be sued since he was acting in the scope of his employment. No denial was made by defendant of the value of the car alleged by plaintiff nor was any testimony or evidence offered by it in refutation. The jury returned a verdict for plaintiff in the amount of damages he had claimed and an appeal was taken from the judg-

ment entered. In effect, besides raising the same points set forth in the answer, the appellant contended in its appeal that the verdict was contrary to the weight of evidence and that it had not been allowed to cross-examine witnesses on matters relating to the value of the plaintiff's car. Although agreeing that cross-examination should have been allowed, the Supreme Court held that the error was not substantial enough to warrant reversal; in all other respects the arguments of appellant were dismissed by the Court, principal among these being the allegedly improper service, for it was pointed out that an officer had been served, although there appeared to be misnomer. The Court emphasized that a corporation was being sued as an entity and officers are not proper parties in suits against corporations. *Judgment affirmed.*

Toye Bernard and *M. Kron Yangbe* for appellant. *J. Dossen Richards* for appellee.

MR. JUSTICE HORACE delivered the opinion of the Court.

This case was commenced in the March 1969 Term of the Civil Law Court for the Sixth Judicial Circuit, Montserrado County, by the filing of a complaint on February 3, 1969, in an action of damages to personal property by Ibraham K. Mahmoud against the Liberian Oil Refinery Company and Elijah Young, a driver of the Company. Pleadings progressed to the reply. The record in the case shows that on February 24, 1970, Hon. Daniel S. Draper, assigned Circuit Judge, disposed of the issues of law raised in the pleadings and ruled the case to trial by jury. The case came up for trial during the March 1970 Term, Hon. Macdonald J. Krakue, assigned Circuit Judge, presiding. Having heard evidence on both sides and having received the instructions of the court, the jury after due deliberation brought in a verdict

in favor of plaintiff, awarding him $3,500.00 for damage done to his car by the defendant Company. A motion for a new trial was filed and resisted. After hearing arguments on the motion it was denied by the trial judge who then rendered final judgment on May 8, 1970, affirming the verdict of the jury.

Appellant prayed for and was granted an appeal to this Court for a review of the entire proceedings in the court below on a five-count bill of exceptions.

From the record certified to us the history of the case may be briefly stated.

On December 7, 1968, there was a motor vehicle collision at the intersection of Newport Street and Sekou Toure Avenue. Appellee's car was moving straight down Sekou Toure Avenue, and appellant's car was entering thereon from Newport Street. Appellant's General Manager Mr. J. A. Fouche and his wife were in the car being driven by an employee of the Company. Appellee's driver was the only occupant of his car. After the collision, a police officer was called on the scene of the accident, who after making a preliminary on-the-spot investigation of the collision, took the two drivers to Police Headquarters for further investigation. Thereafter appellee's driver was released and appellant's driver charged for not yielding the right of way at the intersection. Subsequently appellee filed an action against appellant, the Liberian Oil Refinery Company, by and through Fred Ryan as its General Manager, who was served with process, and Elijah Young, the driver of the Company's vehicle.

The complaint states that appellee is the owner of a chocolate-colored Jaguar car bearing license plate number 8585 which was negligently hit by appellant's car, irreparably damaging appellee's car; that the value of the car at the time of its complete and irreparable destruction amounted to $3,500.00. He prayed damages in this amount.

Appellant after being summoned filed both a special and formal appearance. We have not been able to find any authority in our Civil Procedure Law, L. 1963–64, ch. III, for filing special appearances. The only requirement in this regard is found in section 361 of the statute, which reads:

> "Appearance by defendant defined. Service of an answer or a notice of appearance or the making by defendant of a motion constitutes an appearance by him."

This, by the way, is only mentioned in passing.

In defendant's answer, filed February 13, 1969, the Company alleged improper service, in that Fred Ryan is only a consultant, J. A. Fouche being the general manager. The answer also alleged that the driver, named as defendant along with the Company, was an employee and thus not personally liable. It also stated the Traffic Court had absolved their driver and further raised a technicality of improper use of blank forms, affecting venue.

Plaintiff's reply claimed proper service on an officer other than Ryan and discounted the remainder of defendant's allegations.

Before proceeding further we would like to mention that although appellee stated in his complaint that the value of his car was $3,500.00 at the time it was irreparably damaged, no traversal was made of this important issue in appellant's answer.

The bill of exceptions submitted by appellant contains the same matter set forth in the answer and in addition raises objections to the manner in which the judge ruled on motions without passing on the issues of law raised, as well as denying the right to dispute the value of the demolished vehicle. Procedural errors were charged, too.

The point of jurisdiction raised in the bill of exceptions, as well as in appellant's brief, presents an interesting question, indeed. Appellant has contended that the

Corporation was never properly brought under the jurisdiction of the trial court because the wrong person had been named as General Manager. Appellee on his part has said that even though the wrong person was named, under our law that would only be a misnomer and the statutes provide for its correction; that the Corporation was properly and legally brought under the jurisdiction of the court because J. W. Milholand, an officer of the Corporation, acknowledged service of process by signing the writ of summons. This allegation of appellee is borne out by the record, that J. W. Milholand did sign the writ of summons. Appellant never denied this during the entire trial but only emphasized that Fred Ryan, not being the General Manager, but only a consultant to the Liberian Oil Refinery Company, was not authorized to receive process issued against the Corporation. From the emphasis laid on this point by appellant, one would think that liability lay against Mr. J. A. Fouche, General Manager, instead of against the Corporation.

An interesting feature of the trial is that although appellant contended that Mr. J. A. Fouche was not served with process as General Manager, yet the same appellant had Mr. Fouche subpoenaed as a witness who testified for appellant as General Manager of the Company, to whom were put preliminary questions.

"Q. What is your name and place of residence?

"A. My name is John A. Fouche, and I live in Monrovia, Mamba Point.

"Q. Are you employed and if so in what capacity?

"A. My name is John A. Fouche, and I live in the City of Monrovia. I am employed by the Liberian Oil Refinery Company as Managing Director."

Since Mr. Fouche was apparently subpoenaed as a witness who was an occupant of one of the cars in the accident, one wonders why appellant's counsel by his own mode of questioning brought out the fact of Mr. Fouche's

position in the Company. This also is simply stated in passing.

In arguing the point that the Corporation had not been properly brought under the jurisdiction of the Court, appellant cited the Civil Procedure Law, L. 1963–64, ch. III, §§ 338(6), 517, which we set forth in consecutive order.

> "Personal service shall be made upon a domestic or foreign corporation by reading and personally delivering the summons within Liberia to an officer, or managing or general agent, or to any other agent authorized by appointment or by statute to receive service of process, and, if the summons is delivered to a statutory agent, by, in addition, mailing a copy thereof to the defendant."
>
> "Any corporation, domestic or foreign, has the capacity to sue or be sued in Liberian courts, subject, however, to the provisions in Chapter 1 of the Associations Law; and any registered cooperative society has the capacity to sue or be sued in Liberian Courts, subject, however, to the provisions of Chapter 2 of the Associations Law."

Appellant's counsel also cited the Associations Law, 1956 Code 4:44.

> "Every corporation shall have a place of business in this Republic and shall have a qualified resident business agent. When a corporation does not have an operating office in the Republic the qualified resident business agent shall be any incorporated domestic bank or trust company with a paid in capital of not less than fifty thousand dollars which is authorized by the Legislature of the Republic to act as resident agent for corporations. Such resident business agent shall, within ten days after acceptance of an appointment as such, file a certificate showing the location of such office, in the office of the Department of State; and a certified copy of such certificate shall be suffi-

cient evidence that the corporation filing the same is the agent for the service of process upon the corporation until another certificate has been filed."

He also cited *Franco-Liberian Transport Company* v. *Republic,* 13 LLR 541 (1960), in which this Court held that parties may be added to an action by order of the court on its own initiative.

From the argument of appellant's counsel we gathered that it was not his contention that the Court could not change a party to the action, but that after it had done so, it should have had the party summoned. Let us examine the statutes on this point.

"Misnomer of a party shall not, unless it affects substantial rights of other parties, constitute grounds for dismissal of a claim for relief or of a defense; but the names of the parties may be corrected at any time, before or after judgment, on motion, upon such terms and proof as the court may require." Civil Procedure Law, L. 1963–64, ch. III, § 504(1).

"If the name or the capacity of a defendant is erroneously stated, the error shall similarly be considered one of misnomer only; provided, however, that the proper defendant, personally or by his attorney, defended in the name of the named defendant or that the proper defendant actually did learn or should have learned of the commencement of the action and, from all the facts within his knowledge, did know or reasonably should have known what claim or relief the plaintiff was suing for; and provided further that the service of summons or other jurisdictional act relied upon would have given the court jurisdiction of the proper defendant if he had been properly named in the complaint and summons." *Id.,* § 504(3).

Moreover, it has been held that if a defendant, though not served with process, takes such a step in an action, or seeks relief at the hands of the court as is consistent only with the proposition that the court has jurisdiction of the

cause and of his person, he thereby submits himself to the jurisdiction of the court and is bound by its action as fully as if he had been regularly served with process. *King* v. *Williams,* 2 LLR 523 (1925). Further, this Court has held in *Pennoh* v. *Pennoh,* 13 LLR 480 (1960), that misnomer cannot be pleaded as a defense after a general appearance or a plea to the merits.

In the instant case even though the writ was issued against the Corporation by and through Fred Ryan as General Manager when actually he was a consultant to the Corporation, the record shows that J. W. Milholand received the process, and appellee averred in his reply that this person is an officer of the Company. This averment of appellee was never denied nor was any effort made to counter it during the trial. But more than this, Mr. Fouche, who appellant alleged was the proper person to be served with process, took the stand during the trial and testified on behalf of appellant as its Managing Director. It should be remembered that a Corporation was being sued and not an individual.

The two other points of the first count of the bill of exceptions, that Elijah Young as driver for the Company was acting in the capacity of a servant and should not have been joined in the suit, are so unmeritorious that they warrant no special comment.

It is our opinion that the trial judge did not err in his ruling on these points. Count one of the bill of exceptions is not sustained.

Count two of the bill of exceptions relates to an exception to the trial judge's ruling on a question put to plaintiff on cross-examination as to the make of his car, which plaintiff's counsel objected to on the ground that the question was immaterial and irrelevant. The objection was sustained by the trial judge. Appellant contends that since the complaint had stated the value of the car as $3,500.00, when it was irreparably damaged, it was necessary to know what make of car it was in order to

determine if the amount stated was a fair appraisal of the damage, and the trial judge's sustaining the objections without indicating on which of the grounds the objections were sustained was erroneous.

It is true that the make of the car could not be dissociated from its value, but we see from the record before us that the complaint stated that the vehicle in question was a chocolate-colored Jaguar, and one of the witnesses for defendant at the trial, the company's driver, stated that the plaintiff's vehicle was a Jaguar. So while we may not agree with the judge's ruling on the objection, his error was neither prejudicial nor reversible. Count two of the bill of exceptions is, therefore, not sustained.

Count three of the bill of exceptions deals with the trial court's ruling on a question put to a defense witness, Borbor Young, on cross-examination.

> "Then tell the court and jury upon what evidence Judge Thorpe alone rendered judgment in your favor since it is this questionable judgment that you are relying on for your defense?"

The question was objected to on the ground of the best evidence rule because, as appellant's counsel contended, the judgment itself would have been the best evidence. At first blush appellant's contention would appear to be quite plausible, but let us examine the record on this point. The record speaks for itself.

"Q. Are you also called Elijah Young?
"A. Yes.
"Q. Did you say that the police investigated the accident on the scene and brought you to the Traffic Court?
"A. No, we were brought to court and had the investigation.
"Q. Who investigated the matter?
"A. The judge, the Traffic Judge whose name I do not know.
"Q. I presume your boss man and his wife testified

on this investigation since they were besides yourself the only person on the scene of the accident? [Objections: On the grounds: (1) Irrelevant and immaterial and attempting to collaterally attack the trial in the traffic court which issue was not specifically raised in the written pleading neither ruled to trial. The Court: A witness is to testify to all facts touching the cause or likely to discredit him, and hence the objections are overruled. To which the defendant excepts.]

"A. No, they did not go to testify there.

"Q. Then tell the court and jury upon what evidence Judge Thorpe alone rendered judgment in your favor since it is this questionable judgment that you are relying on for your defense? [Objection: On the grounds: (1) Not the best evidence; Judge Thorpe would be the best evidence. The Court: Objection not sustained.]

"A. Counsellor Brumskine and the judge."

The record further reveals that the purported judgment of the Traffic Court which was made profert with defendant's answer was materially different from that which was testified to by the clerk of said court at the trial. The one made profert with the answer carried the name of Judge Thorpe, and the one testified to by one Mr. Gow, clerk of the traffic court, carried his name.

Taking all the surrounding circumstances into consideration as revealed in the record of the trial, we are convinced that the purported traffic court's final ruling is not only questionable but savors of collusion somewhere along the line. Count three of the bill of exceptions is overruled.

Count four of the bill of exceptions refers to the question of the value of the car owned by appellee. Appellant's counsel contends that the value of the car was not established by any witness except appellee himself during

the trial and, therefore, under the rule of the need to establish a case by the preponderance of evidence, since there was no corroboration of appellee's testimony, value was not established.

The record before us reveals that the plaintiff alleged in his complaint that the value of his car at the time it was irreparably damaged by appellant was $3,500.00. This point was not traversed at all in the answer. Even during the trial no effort was made to contradict appellee's claimed value. Yet, in appellant's brief and in argument before this Court they claim that appellee, not being a mechanic, should have brought the damaged car to a garage to have it appraised, obtained a statement from the garage with respect to the exact market value and the actual estimated value of the wrecked car in order to accurately determine the correctness of the value of $3,500.00 stated in the complaint. As mentioned before, the issue of the car's value, although specifically alleged in the complaint, was never traversed in the answer, and all we find in the record of the trial with respect to this particular point we have set forth following.

"Q. You have testified that the value of the car at the time of the accident is $3,500.00, would you mind telling the jury and court how you arrived at the value?

"A. I depreciated the value of the car to the third value.

"Q. What was the original value of the car before the accident?

"A. About $10,800.00.

"Q. Did you buy this car yourself originally or second hand? Will you please tell us the name of the seller? [Objection: On the grounds: (1) Irrelevant. The Court: Objection sustained. To which defendant excepts.]

"Q. How long was it before you bought and how long it remained with you before the accident?

"A. It was two months old before I bought it. I had it in Liberia for one year and eight months.

"Q. What is the make of your car? [Objection: On the grounds: (1) Irrelevant and immaterial. To which defendant excepts.]"

Appellant's counsel has contended before us that we are bound to uphold his contention because of the opinion of this Court in *Haid* v. *Ebric,* 17 LLR 662 (1966). The difference between that case and this is that in the reported case the issues raised in the complaint were thoroughly traversed in the answer, and the judge passing on the issues of law ignored the points raised in the answer that attacked the allegations in the complaint on the value of the vehicle and the documentary evidence referred to in the complaint not made profert with the said complaint. Besides, *Haid* clearly shows that the evidence preponderated against appellee by the testimony during the trial as to the cause of the accident. From what has already been stated in this opinion it can be seen that the facts and circumstances in *Haid* v. *Ebric* are not at all analoguous with those in this case. Moreover, this Court has held in *Cavalla River Company, Ltd.* v. *Pepple,* 3 LLR 436 (1933), confirmed in *Chenoweth* v. *Liberian Trading Corp.,* 16 LLR 3 (1964), that when an essential allegation in a pleading is not denied in the subsequent pleading of the opposing party, the allegation is deemed admitted.

When it comes to the question of preponderance of evidence we feel that the learned counsel for appellant confused the point of corroboration with preponderance. It is true that corroborated testimony can preponderate but not necessarily in all cases. It is an elementary principle that preponderance goes to the quality and not the quantum of evidence. In this case appelle alleged in his complaint that his car was worth $3,500.00 at the time it was irreparably damaged. This was not denied nor

questioned in the answer. At the trial he confirmed his allegation in his complaint by testifying to the value of his car. This testimony as to value was not contradicted or set off by appellant during the trial. As to what constitutes the preponderance of evidence in a case, legal writers are explicit.

> "A party is entitled to call as many witnesses as he deems necessary to the establishment of his claim or defense, subject to the power of the court reasonably to limit the number who may be heard upon any one issue, and frequently, testimony of several witnesses is offered in proof of a contested fact. An issue is not, however, to be determined merely by the number of witnesses testifying in support or in contradiction of it in comparison with the number of those giving opposing testimony, but by the greater weight and sufficiency of the evidence, of which the jury is the sole judge. Preponderance of the evidence, in other words, has no reference to the relative number of witnesses testifying for the opposing parties. The numerical strength of witnesses is not decisive of the weight of their testimony, and does not establish the truth of the matters as to which they may testify. The jury is free to believe the minority of the witnesses, and a verdict based upon the testimony of such minority will not be disturbed because opposed to the testimony of the majority. Witnesses may be of equal candor, fairness, intelligence, and truthfulness, and be equally well corroborated by all the other evidence, and may have no great interest in the result of the suit, yet the weight to be given their respective testimony may differ materially. The opportunity for knowledge, the information possessed, the manner of testifying, and many other things that go to convince the mind must be taken into consideration. The preponderance of the evidence may be established by a

single witness as against a greater number of witnesses who testify to the contrary." 20 AM. JUR., *Evidence,* § 1190.

What the appellant sought to establish in his pleadings, as well as at the trial, was not that the car was not valued at $3,500.00 but that the Company was not responsible for the accident. Count four of the bill of exceptions is not sustained.

Count five of the bill of exceptions avers that the trial judge erred in his ruling on appellant's motion for a new trial by not passing on the many issues of law raised in the motion, but merely ruling that the verdict was in accord with the evidence and therefore affirming it in his final judgment rendered. A careful examination of the motion for a new trial convinces us that the entire motion goes to challenging the jury for bringing in a verdict contrary to the weight of evidence and stating appellant's opinion of the law with respect to certain aspects of the evidence or lack of evidence.

"In the trial of civil cases, it is the province of the jury to consider the whole volume of testimony, estimate and weigh its value, accept, reject, reconcile, and adjust its conflicting parts, and be controlled in the result by that part of the testimony which it finds to be of greater weight. The jury is the exclusive judge of the evidence, and must in reason be the exclusive judge as to what constitutes the preponderance of the evidence. Accordingly, where the jury have reached a conclusion after having given consideration to evidence which is sufficient to support a verdict, the decision should not be disturbed by the court." 39 AM. JUR., *New Trial,* § 133.

Since we do not feel that the trial judge erred in denying the motion for a new trial, count five of the bill of exceptions is not sustained.

In view of what has been stated above, it is our opinion that the verdict of the trial jury in this case is in accord

with the evidence adduced at the trial and the final judgment of the court below affirming the verdict should not be disturbed. The judgment of the trial court in favor of appellee and against appellant is, therefore, hereby affirmed with costs against appellant, and the Clerk of this Court is hereby ordered to send a mandate to the court below to the effect of this opinion.

Affirmed.