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Comments

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COMMENTS

TRANSFERS OF SHARES OF CORPORATE STOCK—The recent case of *Castelloe* v. *Jenkins*[1] sheds interesting light on the problems arising out of the transfer of shares of corporate stock. This particular field of corporation law has long been the subject of various conflicting decisions on the part of courts throughout the United States. However, this apparent confusion among the authorities is perhaps due in a very large measure to the varying statutory provisions obtaining in different states, as well as to a growing tendency on the part of a great many courts to treat stock certificates after the manner of commercial paper, and to provide, in so far as possible, a facile means of effecting transfers. But before proceeding to a discussion of the problems contained in the case cited, it is perhaps not inappropriate to notice some of the more general principles underlying this subject.

Several fundamental propositions may be taken as clear. A corporation, being a creature of the state wherein it is created, must of necessity be controlled by the laws of that state. It follows that any machinery set up for the purpose of effecting transfers of corporate stock must derive its efficacy, either from the statutes of the state wherein the corporation was created, or from provisions contained in the charter or by-laws of the corporation itself. Otherwise the matter must be controlled by principles of common law. Moreover, all authority is apparently agreed on the proposition that shares of stock are intangible personal property; that the certificate is not the share itself but merely *prima facie* evidence of title; and that the real situs, if there is such a thing, is upon the books of the corporation. Thus the North Carolina statute provides:

"Shares of stock in a corporation are personal property, and are transferable on the books of the corporation in the manner and under the regulations provided in the by-laws. Whenever a transfer is made for collateral security, and not absolutely, it shall be so expressed in the entry of the transfer." C. S. 1164.

But the provision requiring transfer to be made on the books of the corporation has been construed almost uniformly not to apply to persons outside the corporation—the stockholder and his transferee—but to have been inserted solely for the protection of the corporation. Accordingly in North Carolina, and in perhaps a majority of American jurisdictions, it has been held that as between the shareholder and his transferee, at least an equitable title may be transferred simply by a proper endorsement and delivery of the certificate, subject only to any claims by way of assessment or otherwise which the corporation may assert against it.[2]

It is believed, however, that no court, in the absence of specific statutory authorization, has gone so far as to hold that certificates of stock are negotiable in the true sense as are bills of exchange and promissory notes. Thus where a

[1] (1923) 186 N. C. 166, 119 S. E. 202.

[2] *Cox* v. *Dowd* (1903) 133 N. C. 537, 45 S. E. 846; *Bleakley* v. *Candler* (1915) 169 N. C. 16, 84 S. E. 1039; *Bank* v. *Dew* (1917) 175 N. C. 79, 94 S. E. 708; *Meisenheimer* v. *Alexander* (1913) 162 N. C. 226, 78 S. E. 161.

certificate, properly endorsed in blank, is lost or stolen, and subsequently comes into the hands of a casual holder who pays value and who is not affected with notice of the original holder's rights, the latter's title remains unimpaired.[3] But this is not so where the owner intrusts his endorsed certificate to a broker or other person under circumstances sufficient to clothe the latter with the indicia of title or apparent authority to effect a transfer. Here the familiar principal of estoppel work in favor of the *bona fide* purchaser for value without notice.[4]

A further difficulty arises with respect to the rights of an attaching creditor who attaches the stock on the books of the corporation and of the transferee of the stock certificates who purchases without notice of the creditor's rights. Here again the matter depends entirely upn the statutory provision for attaching shares of stock. The North Carolina statute provides as follows:

"The rights or shares of the defendant in the stock of any association, or corporation, with the interest and profits thereon, and all other property in this state of the defendant are liable to be attached, levied on, and sold to satisfy the judgment and execution." C. S. 816.

"The execution of the attachment upon any such rights, shares, or any debts or other property incapable of manual delivery to the sheriff, shall be made by leaving a certified copy of attachment with the president or other head of the association or corporation, or with the debtor or other individual holding such property, with a notice showing the property levied on . . ." C. S. 817.

These two sections may be said to embody the usual statutory situation. Suppose that there is an attachment levied on the shares in accordance with the statutory provisions, and that thereafter the shareholder endorses and delivers over the certificates to a bona fide purchaser who is without notice of the prior attachment. There is apparently no holding among the North Carolina decisions on this precise point, but in *Clews* v. *Freidman*, a Massachusetts case, where the facts were in all respects similar to the case supposed, the Supreme Judicial Court of that state held that the transferee of the shares would prevail over the prior attachment on the books of the corporation.[5] It is believed, however, that this decision was made to rest almost entirely on the Massachusetts statute which provided that "delivery of a stock certificate of a corporation to a *bona fide* purchaser or pledgee for value, together with a written transfer . . . signed by the owner of the certificate, shall be a sufficient delivery to transfer the title as against all parties." Quere, what the law is in North Carolina under the present statutory situation? It would seem that such a decision as that reached by the Massachusetts court would hardly be justified under existing provisions.

But suppose that the attachment does not take place until after the sale of the endorsed certificates to a *bona fide* purchaser, though at the time of the attachment the new holder has not yet effected a transfer on the books. Here the greater weight of authority holds that the transferee will prevail over the attaching creditor. The courts rely on the line of reasoning already referred to. It is said that the words appearing on the certificate, and in the statute, "transferable

[3] *East Birmingham Land Co.* v. *Dennis* (1889) 85 Ala. 565, 5 So. 317.
[4] *McNeill* v. *Tenth Nat. Bank* (1871) 46 N. Y. 325.
[5] (1903) 182 Mass. 555, 66 N. E. 201.

only on the books of the company" are inserted solely for the protection of the corporation; that this does not apply to outsiders; and that in any event the intended transferee took an equity which was superior to the rights of an attaching creditor.[6]

It is also fairly well settled that when the corporation accepts for transfer a certificate upon which the real owner's endorsement and signature has been forged, and issues new certificates which fall into the hands of a *bona fide* purchaser, the latter is entitled to damages.[7] Here the corporation is simply uttering false coinage, and the plainest principle of estoppel requires that it shall either allow the *bona fide* purchaser to keep the shares, or respond in damages, this depending upon whether the full amount of authorized capital stock has been issued. Obviously, however, the original holder's shares remain unaffected.

So much for those cases in which there has been an actual dealing with the stock certificates. What of the situation where no certificates have been issued, though the corporation is a going concern and all of the shares are fully paid up? In *Castelloe* v. *Jenkins, et als.,* A owned fully paid up shares of stock in the X corporation, but no certificates representing such shares had been issued. In February, A became indebted to B and sought by means of a paper writing to effect an assignment of the shares as security for the debt, and agreed also to deliver the certificates over to B just so soon as they were issued. B immediately notified the corporation of this transaction. In April, A purported to assign the shares to C for value. On May 15, certificates were issued in A's name, handed over to A by the corporation, and by him to C. The jury found that C had no notice of B's prior claim, and the corporation wrongfully issued the certificates to A and wrongfully effected a transfer to C. It appeared in evidence that B, though he did give notice to the corporation, did not effect a transfer on the books. B sued to recover the certificates or their value, joining A, the X corporation, C, and another. The court held that while B was entitled to a judgment as against A and the corporation, he was not entitled to recover of C or any one who took through him. Mr. Justice Adams, writing the opinion of the court, proceeds on the ground that C as a *bona fide* purchaser of the certificates for value without notice was entitled to prevail over B's pre-existing equity; that B is simply a pledgee out of possession, and that as such he has no standing as against a purchaser of the certificates in good faith. Here also the court is much influenced by the policy favoring the free circulation of commercial paper and instruments which may be likened thereto.

It is clear that A and the corporation are liable in any event, and the court so held, but what of the rights of B and C *inter se*? If the paper writing which B received from A was nothing more than an agreement on the part of the latter to deliver over the certificates when issued, then clearly the reasoning of the court is unassailable; for it is fundamental that a *bona fide* purchase will cut off the rights of a pledgee out of possession, such rights being only equitable. But the transaction purported to be, and was in terms, an assignment of the shares of

[6] *Bleakley* v. *Candler* (1915) 169 N. C. 16, 84 S. E. 1039; *Smith* v. *Coal Co.* 7 Lans. (N. Y.) 317.

[7] *In re Bahia and San Francisco R. R. Co.* (1868) L. R. 3 Q. B. 584; *Boston and Albany R. R. Co.* v. *Richardson* (1883) 135 Mass. 473.

stock. Thus the question arises as to whether or not it is possible to effect a transfer of shares of stock when no certificates representing such shares are in existence. The North Carolina statute already quoted does not, apparently, contemplate the existence of certificates as a prerequisite to a transfer, but it does expressly recognize the possibility of a transfer as collateral security. What, then, was the effect of the transaction between A and B and of B's subsequent notice to the corporation?

If it be assumed that shares of stock are merely intangible personal property, incapable of manual delivery, and that the stock certificate is merely *prima facie* evidence of title, as all courts are apparently agreed, then the share of stock is at most a chose in action, which, in the absence of specific statutory regulation, may be transferred by an assignment like any other chose in action.[8] In *Castelloe* v. *Jenkins,* there was not only a paper writing purporting to be an assignment, but B actually gave notice to the corporation. He has therefore satisfied the requirements for a common law assignment both as to priority and as to giving notice.[9] Thus on May 14, the day before the certificates were issued, it must be conceded that as between B and C, the former was entitled to prevail. What, then, was the effect of the issuance of the certificates to A and of his subsequent delivery of them to C? Is the case analogous to the situation where the corporation is simply uttering false coinage and must preserve inviolate the stock of the old holder while responding in damages to the *bona fide* purchaser of the new certificates; or is it more nearly akin to that class of cases where the certificates are intrusted to one having indicia of title under such circumstances as would give a *bona fide* purchaser a good title as against the original holder? Thus the question would seem to be, Who was the owner of the stock on May 15, the day the certificates were issued? The answer must depend upon whether the assignment to B gave him a legal title or merely an equitable one.

It is a characteristic feature of the assignment of an ordinary chose in action that, though the assignee's right is now enforceable in courts of law, it is in its nature only an equitable right, since it was first recognized and enforced in courts of equity. Thus it is fundamental that an assignee takes subject to all existing equities in favor of the debtor, and that a prior assignment for value is subordinated to a subsequent assignment for value if the subsequent assignee in good faith actually collects the claim.[10] It is also well settled that the delivery of a tangible chose in action, such as a stock certificate or insurance policy or savings bank book, to a second assignee for value will cut off the rights of a prior assignee of the same claim or chose in action.[11] Applying these principles to the case under consideration, it would seem that C who actually received the certificates and effected a transfer on the books is entitled to prevail, his position being analogous to that of the subsequent assignee who collects, or to that of the subsequent assignee

[8] 7 R. C. L. s. 242.
[9] Williston on Contracts s. 435.
[10] Williston on Contracts s. 447.
[11] *Ibid* s. 438.

who in good faith purchases a tangible chose in action. B, despite the fact that he gave notice, may be said to have slept on his rights in that he failed to have his assignment transferred on the books of the corporation; he is thus in a position similar to that of a grantee in an unrecorded deed to land. At this point, however, it may be urged that it was unnecessary for B to have effected a transfer on the books, since under the uniform interpretation of this provision, the words are inserted merely for the protection of the corporation and do not apply to outsiders. And indeed the court in discussing the rights of C as transferee of the certificates, at page 205 (119 S. E.), does give this section (C. S. 1164) the conventional interpretation. What is sauce for the goose is sauce for the gander, but under the peculiar circumstances of this case it would seem that the statute does mean something more than a mere protection to the corporation. In view of the fact that no certificates were in existence, and that there was no means of dealing with the *res* itself, a strict compliance with the statute seems to have been the only means whereby B could have obtained a legal title as distinguished from an equitable one.

It follows that if B had caused the shares to be transferred on the books of the corporation, he would be in a position to assert his claim to the stock as against C, though logically his action should take the shape of a bill in equity against C and the corporation, praying for the delivery and cancellation of the certificates and a transfer upon the books to B as pledgee. In this event, C would none the less be entitled to damages from the corporation under the authority of the cases already discussed.

The Uniform Stock Transfer Act is now law in what is not an inconsiderable minority of our states. Under this act, stock certificates are made strictly negotiable, and other matters related to this general subject are specifically provided for. In view of the rather uncertain state of the North Carolina law governing stock transfers, it would seem that the act would commend itself favorably to the North Carolina legislature.

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MISTAKE IN INDORSEMENT OF NEGOTIABLE INSTRUMENT—In the case of *McRae* v. *Fox et al*,[1] the action was to recover on two notes for default in payment. There was judgment against both the maker and the indorser. The maker made no defense, but the indorser (defendant in the case) answered, alleging an agreement with the plaintiff, his immediate indorsee, that his indorsement was to be without recourse.

The notes had been indorsed by the payee to the defendant "without recourse" and he in turn transferred them to the plaintiff, believing that the words "without recourse" in the previous indorsement also covered his indorsement to the plaintiff. Since this was not enough to show mutual mistake, the defendant also

[1] *McRae* v. *Fox* (1923) 185 N. C. 343, 117 S. E. 396.

proved that independent of such an error, there was an agreement between him and the plaintiff whereby he would take in exchange for the two notes, calling for $3,000, a house belonging to the plaintiff valued at $2,500. But this exchange was upon the condition that the plaintiff was to take the notes with the understanding that there would be no recourse on the defendant in case of default by the maker. To this condition the plantiff agreed. The defendant omitted to indorse the notes "without recourse" thinking that the prior indorsement "without recourse" also covered his indorsement. The plaintiff argued that such omission was a mistake of law and parole testimony could not be admitted to vary the indorsement. But the defendant contended that under such circumstances there arose a case of mutual mistake evidenced by the agreement previous to his indorsement. The court agreed with defendant's contention and refused a motion of non-suit.

As a general rule parole evidence will not be admitted to explain a written instrument.[2] "It is against the policy of the law to allow parole testimony to add to or vary a written instrument."[3] As to the indorsements of negotiable instruments, the majority rule upon a regularly executed and transferred note, is, that where an instrument which has a valid inception in the hands of the payee or subsequent indorsee, is transferred by unqualified indorsement, the contract implied from such indorsement, whether in blank or in full, cannot, even as between immediate parties be explained or varied by parole testimony of a prior or contemporaneous agreement.[4] Twenty-eight states and the federal courts uphold the rule. The theory of the majority rule, is, "a contract by blank indorsement is fixed by law and should not be rendered uncertain by parole evidence any more than when written out in full, and there are no instruments concerning which it is more important that the rules should be clear, settled and conclusive than negotiable paper."[5]

There are four recognized exceptions to the majority rule as follows:

(1) That the indorsement was to an agent.

(2) That the note was indorsed to the holder for some special purpose.

(3) That the relation of principal and surety exists.

(4) That there is an equity arising from an antecedent transaction, and that the note was indorsed in order to transfer title in pursuance of such an agreement, and that the attempt to enforce it now is fraud.[6]

The principal case is clearly contrary to the majority rule, and comes within none of the exceptions.

"While there is much diversity in English as well as American decisions upon the subject of admitting parole evidence to rebut the legal presumption that every endorser in blank of a negotiable instrument intends to incur the liability which

[2] *Newton* v. *Clark* (1917) 174 N. C. 393, 93 S. E. 951.

[3] 1 Story, *Equity* 153.

[4] *Martin* v. *Cole* (1881) 104 U. S. 30, 26 L. ed. 64; *Van Fleet* v. *Sledge* (1890) 45 Fed. 473; *Hodgins* v. *Jennings* (1912) 140 App. Div. 879; 133 N. Y. Supp. 584; *Lloyd and Co.* v. *Matthews* (1906) 223 Ill. App. 477, 79 N. E. 172, 7 L. R. A. N. S. 376.

[5] 4 A. L. R. 764.

[6] *Dale* v. *Gear* (1871) 33 Conn. 15, 9 Am. Rep. 355.

the law attaches to the act of indorsement, in this state it is a settled rule, that in an action by the first indorser against the payee, a special agreement between them, restricting payee's liability when the indorsement is in blank may be interposed as a defense to the action."[7]

The above rule placing North Carolina among the states holding in the minority applies only to the immediate parties to an indorsement and does not hold good in an action against an unqualified indorser by a subsequent holder in due course.

"When a payee or regular indorser of a negotiable note writes his name on the back of it, as between him and a subsequent *bona fide* holder for value, the law implies that he intended to assume the well known liabilities of an indorser and he will not be permitted to contradict the implication."[8]

The minority rule which holds that parole evidence is admissible as between immediate parties to show the actual contract involved in the transfer of notes without reference to the indorsement being in full or in blank, is supported on the theory that a blank indorsement is only *prima facie* evidence of the contract which the law implies therefrom, and as between the immediate parties the actual contract may be shown.[9]

"In an action against any indorser by his immediate indorsee it is a good defense that there was a verbal agreement at the time of the indorsement that the indorsee should not sue the indorser, and that the contract between the two consists partly in the written indorsement, partly in the delivery of the bill to the indorsee, and partly in the actual understanding and intention with which the delivery was made and that the intention of the parties may be gathered from their words, either spoken or written."[10]

The principal case was not decided on a question of mistake of law, as the strong dissent would have it,[11] but on the question of whether or not there existed mutual mistake of fact as between the immediate parties, and, the jury having found such to exist, the court rendered a decision separate and apart from any question of mistake as to the legal effect of defendant's indorsement.

North Carolina has always held with the minority and the principal case is no exception. By this line of authority if mutual mistake appears as in the principal case, such mistake may be rectified as between immediate parties through the admission of parol evidence, showing the true tenor of the agreement.[12] But for the sake of certainty in commercial transactions, the majority rule seems preferable.

R. K.

[7] *Davis* v. *Morgan* (1870) 64 N. C. 570; *Iredell Co.* v. *Wasson* (1880) 82 N. C. 309.
[8] *Mendenhall* v. *Davis* (1875) 72 N. C. 150.
[9] 4 A. L. R. 764.
[10] *Sykes* v. *Everett* (1914) 167 N. C. 600; 83 S. E. 585.
[11] *McRae* v. *Fox* (1923) 185 N. C. 343, 347, Walker, J., dissenting.
[12] *Day* v. *Day* (1881) 84 N. C. 408; *White* v. *Railroad* (1892) 110 N. C. 456, 15 S. E. 197; *Jones* v *Warren* (1904) 134 N. C. 390, 46 S. E. 740; *Ray* v. *Patterson* (1915) 170 N. C. 226, 87 S. E. 212.

CONTINGENT AND VESTED REMAINDERS—The action in this case was brought to remove a cloud from plaintiff's title. The land was devised as follows: "To my son, John H. Boylan, for life if he marries and has issue, or the issue of such, at his death, then to such child or children; but if he dies leaving no children or the issue of such then I give said plantation to my grandson, William, during his natural life, and at his death to his eldest son." At the time of the testator's death, John H. Boylan was living and succeeded to a life estate, but died without having married and left issue. Thereupon, the grandson, William, succeeded to the land as life tenant, and later married and had a son, who died before his father. The plantiffs hold under a conveyance from this son's heirs. The defendants claim as tenants in common with plaintiffs under the residuary clause in the will. There was a judgment for plaintiffs and defendants appealed.

The appellants claim that the devise created a contingent limitation, and when the life tenant died the land went back to the testator's heirs, the son being dead at that time.

The court held that a contingent remainder was created to the then unborn son of William, the life tenant, which became vested when he was born. Being a vested remainder when the son died, it went to his heirs, and they could convey a good title to the plaintiffs.[1]

This raises the question; What is the nature of an interest in a remainder? What does the remainder-man have?

A remainder is a future estate in lands which is preceded and supported by a particular estate and one which takes effect in possession immediately upon the determination of the particular estate, the remainder must be created at the same time and by the same conveyance as the preceding estate.[2]

Remainders are divided into two classes. They are (1) vested remainders, (2) contingent remainders.[3]

A vested remainder is a present vested right to the future enjoyment of the land.[4] If it is a vested remainder, only the possession is postponed.

A contingent remainder is one in which both title and possession are postponed and the vesting of the title is made to depend on the happening of an uncertain event which may not happen at all, or which may happen at a time subsequent to the determination of the particular estate.[5] The North Carolina court laid down the test for distinguishing the two kinds of remainders to be, "a remainder is vested, if so long as it lasts, the only obstacle to the right of immediate possession by the remainder-man is the existence of the preceding estate. A remainder is vested, if it is subject to no condition precedent, save the determination of the

[1] *Carolina Power Co.* v. *Haywood* (1923) 186 N. C. 312.
[2] *Richardson* v. *Richardson* (1910) 152 N. C. 705, 68 S. E. 217.
[3] See note 2, *supra.*
[4] See note 2, *supra.*
[5] *Starns* v. *Hill* (1893) 112 N. C. 1, 16 S. E. 1011.

preceding estate."[6] A vested remainder is an inheritable interest and if the remainder-man dies without having disposed of it, the remainder will descend to his heirs in the same manner as an estate in possession.[7]

There are two classes of contingent remainders, (1) when the uncertainty is as to the person or persons who will take the remainder, (2) when the uncertainty is as to the time at which the remainder will vest. In either case the contingency must happen before or at the determination of the particular estate.[8]

Contingent remainders are no longer considered mere possibilities which cannot be transferred, but a remainder-man whose estate is contingent may convey it.[9] This is regulated by statute in North Carolina.[10]

A remainder may be contingent when created but be vested when the particular estate ends. For instance, if A be a tenant for life with remainder to B's eldest son, and the son is then unborn, it is uncertain whether B will have a son or not. If A dies before a son is born to B, then there being no person in being to take the estate, the remainder is gone, the particular estate having ended before the vesting of the remainder. If B has a son born before A's death, then the instant the son is born the remainder becomes vested.

In the principal case, the remainder was contingent when created, being dependent upon the life tenant having a son. When the son was born the remainder became vested in him *eo instante*. It was no longer contingent. The son died before he could have taken possession, but this did not affect his interest which was already vested. What makes a remainder contingent is not whether the remainder-man will enjoy the possession of the property, but whether, if the particular estate ends, the remainder-man could take possession. Upon the death of the remainder-man in the principal case the title went to his heirs and the court properly held that they could convey an unencumbered title.

C. C. H.

FORFEITURE OF PROPERTY USED IN TRANSPORTING LIQUOR IN VIOLATION OF THE PROHIBITION LAWS—A sheriff seized an automobile used in transporting forty gallons of liquor along the public highway. Two men were in the car, one of whom was captured while the other made his escape. The one arrested was tried and convicted of unlawfully transporting liquor. The T. & H. Motor Co. had sold the automobile in question to Smith, one of plaintiffs, had taken from him a chattel mortgage on the automobile to secure the purchase price, and the mortgage had not been paid. The plaintiff motor company made this known to the defendant, the sheriff who seized the automobile, but he declined to surrender the automobile. The plaintiff instituted claim and delivery proceedings to secure

[6] See note 5, *supra*.
[7] *King* v. *Scoggin* (1885) 92 N. C. 99, 53 A. R. 410.
[8] See note 2, *supra*.
[9] *Beacom* v. *Amos* (1913) 161 N. C. 357, 77 S. E. 407.
[10] C. S. s. 1744, Public Laws of N. C. 1923 ch. 69.

possession of the automobile, giving the undertaking for seizure, but the defendant replevied, giving bond as required by C. S. 836, and retained possession of the automobile, as he deemed it his duty to do under C. S. 3403.

It is admitted that the plaintiff was in no way connected with the liquor and had no knowledge of the illegal use of the automobile. Pending trial of this action the automobile was destroyed by fire without any fault of the defendant.

The court by a three to two decision held that the sheriff was liable for the loss of the automobile irrespective of any question of negligence on his part in keeping it.[1]

In discussing this case it is necessary to keep in mind sections 836, 3403 and 3404 of the Consolidated Statutes.

The defendant in the present case seized the automobile under the statute[2] which provides that the sheriff shall seize and take into his custody any automobile, etc., being used in violation of the Prohibition Laws, and shall safely keep the same until the guilt or innocence of the party is determined, and, upon conviction, such party loses all right, title and interest in the property seized. This means only the right, title and interest of the violator of the law and does not apply to the interest an innocent third party may have in the property.[3] Clearly the plaintiff motor company is an innocent third party, as it is admitted that it knew nothing whatever about the illegal use of the automobile.

Applying the statute mentioned above to the facts of the case before us, it would seem that the sheriff should not be liable for the loss of the automobile. The statute says that the sheriff is required "to seize and safely keep" the property until the guilt or innocence of the party has been ascertained; this the sheriff was attempting to do when the automobile was destroyed through no fault of his own. Hence it would seem that he was only doing his duty as an officer of the law, and the law should not punish a man for carrying out its mandates.

However, upon examining the following section of the Consolidated Statutes,[4] we see that where the owner of the property is not captured and is not known, the sheriff shall advertise for him to come forward "and institute the proper proceeding to secure possession of the property." This section was not mentioned by the court in deciding the case, but it seems that this would be the basis for holding the sheriff liable for the loss of the automobile. It is quite true that the sheriff did not advertise for the owner to come in and institute the proper proceeding to get possession of the automobile, but without this notice the real owner did come in and institute the proper proceeding. The plaintiff brought an action for claim and delivery against the sheriff to get possession of the automobile as provided by the statute,[5] and the sheriff, instead of allowing the plaintiff to take the auto-

[1] *T. H. Motor Co.* v. *Sands* (1923) 186 N. C. 731, 120 S. E. 459.
[2] C. S., sec. 3403.
[3] *South Ga. Motor Co.* v. *Jackson* (1922) 184 N. C. 328, 114 S. E. 478. *Skinner* v. *Thomas* (1916) 171 N. C. 98, 87 S. E. 976.
[4] C. S., sec. 3404.
[5] C. S., sec. 836, providing for the ordinary action of replevin, known as claim and delivery.

mobile, gave the required bond, and kept the automobile in his possession as he deemed it his duty to do.[6] When the sheriff refused to let the plaintiff have the automobile and gave bond himself for it, his liability was changed from that of a custodian under the law to that of an insurer, and he became liable at all events for the loss of the automobile.[7] This is pointed out in the majority opinion and is clearly the correct view in the light of the sections of the Consolidated Statutes mentioned above. The fact that the sheriff thought that it was his duty to keep the automobile in his own possession can have no bearing on the case when the law is clearly against him. Ignorance of the law excuses no one, and it is clear from reading the sections of the statutes referred to herein that the sheriff should have turned the automobile over to the plaintiff; but since he elected to keep it, he did so at his own risk and is absolutely liable for its loss, however occasioned. This seems hard on the sheriff, as pointed out in the dissenting opinion, but the courts are to enforce the law as it actually exists. Because the defendant is a sheriff is no valid reason for exempting him from liability, when he has elected to change his position from that of a custodian to an insurer for the safe keeping on an automobile.

This case would be clearly covered by chapter 1, section 6 of the Public Laws of 1923,[8] as pointed out by one of the dissenting judges. This section provides that the vehicle shall be returned to the owner upon his giving a valid bond in a sum double the value of the property and is conditioned on the return of the property to the custody of the officer on the day of the trial and to abide the judgment of the court. This section is taken from the federal statute.[9] Under this section the sheriff would be required to return the property to the owner upon proper bond being given by said owner, but the present case arose before this section was passed, and therefore must be decided under the law existing at the time. The same result will be reached, however, in either case. Thus we see that in the light of the present law and as it existed when this case arose, the sheriff is liable for the loss of the automobile, since he retained it in his own possession after the plaintiff had brought proper proceedings to secure possession of it.

C. C. P.

EFFECT OF CONTRIBUTORY NEGLIGENCE—Negligence, as defined by Cooley, is "The failure to observe for the protection of the interests of another person, that degree of care, precaution and vigilance, which the circumstances justly demand whereby such other person suffers injury."[1] However all negligence is not action-

[6] C. S., sec. 3403.

[7] *Randolph* v. *McGowan* (1917) 174 N. C. 203, 93 S. E. 730.

[8] Public Laws 1923, ch. I, sec. 6—"When any officer shall discover any person in the act of transporting, in violation of the law, intoxicating liquor in any wagon, etc., or other vehicle, he shall seize all intoxicating liquor found therein being transported contrary to law, and he shall take possession of the vehicle or conveyance, and arrest the person in charge. Such officer shall at once proceed against the person arrested; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, conditioned upon the return of said property to the custody of the officer on the day of trial to abide the judgment of the court."

[9] To the same effect, see Fed. Statutes Annotated 1919 Supp. p. 214, Act of November 21, 1918, sec. 26.

[1] Cooley, *Torts*, vol. 2, p. 1324.

able. The elements involved in a cause of action for negligence are the existence of a legal duty to the plaintiff, failure to perform such duty, and a resulting injury.

In an action brought in a court of common law there could be no recovery for negligence by a plaintiff whose default contributed to the injury. The common law rule was that there could be no recovery for injuries where it appeared that the person injured was guilty of contributory negligence, or, in other words, where the injury was the result of the united, mutual, concurring and contemporaneous negligence of the parties to the transaction.[2] This principle of the common law is now changed by the Federal Employers' Liability Act,[3] and by statute in this state.[4] The North Carolina Statute provides that in all actions brought against a common carrier by railroad to recover damages for personal injury or death of an employee, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. This is technically the doctrine of comparative negligence.[5]

Comparative negligence is well defined in a Georgia case to be, "Where the negligence of both parties is concurrent and contributes to the injury, a recovery is not barred, but the damages are to be diminished by the amount proportioned to the fault attributable to the plaintiff, provided it be less than the defendant's and that the plaintiff by ordinary care could not have avoided the consequences of the defendant's negligence."[6] But the doctrine of comparative negligence is followed in Georgia because of a statute to that effect.[7]

Outside of the technical doctrine of comparative negligence, there are two classes of cases in which we find a comparison of the negligence of the plaintiff and the defendant: first, when it becomes necessary to compare the conduct of the plaintiff and defendant in order to ascertain the proximate cause of the injury, and second, when it becomes necessary to ascertain the nature or character of the negligence on both sides in order to fix liability. The first class of cases has developed the doctrine of the last clear chance, and the second class of cases concerns intentional conduct on the part of the defendant.

As illustrations of the first class, where there is a comparison of the negligence of the plaintiff and defendant in order to determine the proximate cause of the injury, the following cases are of interest. In the recent case of *Graham* v.

[2] *Butterfield* v. *Forrester* (1809) 11 East 60; *Meredith* v. *Coal Co.* (1888) 99 N. C. 576, 5 S. E. 659; *R. R.* v. *Jones* (1877) 95 U. S. 439.

[3] U. S. Compiled Stat., secs. 8657-65.

[4] In North Carolina, as relating to railroad employees, C. S., sec. 3467.

[5] In *Hinnant* v. *Power Co.* (1924) 187 N. C. 287, the North Carolina Supreme Court held that, under the statute, the plaintiff's conributory negligence is not a complete bar to his right of recovery for the defendant's negligence, but is considered by the jury only in diminution of damages. See also *Lamm* v. *Railroad* (1922) 183 N. C. 74; 110 S. E. 659.

[6] *City of Ocilla* v. *Luke* (1922) 28 Ga. App. 234, 110 S. E. 757. See also *Electric Co.* v. *Latham* (1921) 26 Ga. App. 698, 107 S. E. 88, where the court lays down the rule as follows: "If both parties were at fault, but the default of the deceased was in some degree less than that of the defendant's and he could not have avoided the consequences of defendant's negligence by the use of ordinary care, then the rule of comparative negligence and apportionment of damages would apply."

[7] Ga. Code of Civ. Procedure, 1910, sec. 2781, 4426. In common law jurisdictions, the doctrine of comparative negligence exists only by virtue of statute. The Illinois court adopted the doctrine in *Galena R. R.* v. *Jacobs*, 20 Ill. 478, but it has since become an obsolete doctrine even in that state.

The City of Charlotte[8] there was an action against the defendant for injuries sustained by the plaintiff. Evidence showed that the city was negligent in constructing pilasters at the approach of its street to a bridge, insufficiently lighted at the place at night to be observed by one traveling over the bridge in an automobile as a passenger. The plaintiff was riding on a truck, and at the time was allowing his legs to hang over the side in violation of a city ordinance. There was a verdict for the plaintiff and the defendant appealed. The question decided was whether the fact that the plaintiff was violating a statute at the time of the injury was such contributory negligence as to bar a recovery. The court held that it was not a matter of law, but left to the jury to determine under the evidence, as an issue of fact, whether the defendant's negligence was notwithstanding, the proximate cause of the injury.

In the case of *Hinton* v. *Railroad*,[9] plaintiff sued to recover for alleged negligent injury to plaintiff and her automobile. The railroad company provided at a street crossing gates to be let down for the protection of vehicles from passenger trains. It was shown that an employee negligently let down the gates in front of plaintiff's car too quickly for her to stop and thereby caused her to deflect her course to the damage of automobile and herself, without negligence on the part of the plaintiff. The court held that the fact that the driver was at the time exceeding the statutory speed limit and was therefore guilty of a misdemeanor does not alone bar recovery, such being dependent on the question whether plaintiff's act was the proximate cause of the injury. The court stated that where the violation of a statute is, in itself, made the basis of an action, such a suit cannot be maintained, but where it only affects or presents the conditions existent at the time of occurrence, the injured person, though himself violating the law at the time, is not prevented from recovering for a wilful or negligent wrong or injury inflicted upon him unless his own misconduct is the proximate cause of the injury.

In the case of *Zagier v. Southern Express Co.*[10] the plaintiff drove her car without having been examined as to her qualifications and without a license authorizing her to drive, in violation of a city ordinance. An express truck was negligently backed out of an alley way and collided with her car to its injury. Plaintiff brought suit against the Express Company, and the court held that she did not lose her right of action since her violation of law was not the proximate cause of the injury.

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[8] *Graham* v. *Charlotte* (1924) 186 N. C. 648, 120 S. E. 466.

[9] *Hinton* v. *Railroad* (1916) 172 N. C. 587, 90 S. E. 756.

[10] *Zagier* v. *Express Co.* (1916) 171 N. C. 692, 89 S. E. 43. In *Taylor* v. *Stewart* (1916) 172 N. C. 204, 90 S. E. 134, the court held, that, although it was negligence *per se* for the defendant to have driven in violation of the statute, it does not follow that the defendant is liable in damages, for the plaintiff must go further and satisfy the jury by a preponderance of evidence of the fact that such negligence was the proximate cause of the injury

The North Carolina "Stop Law," Public Laws, 1923, ch. 255, makes it a misdemeanor for any person operating a motor vehicle on a public road to fail to stop within fifty feet of every railroad before crossing, unless there is a gate or watchman. Sec. 1 of the "Stop Law" bears on the subject under discussion, as follows: "No failure to stop, however, shall be considered contributory negligence *per se* in any action against the railroad for injury to person or property; but the fact relating to such failure to stop may be considered with the other facts in the case in determining whether the plaintiff was guilty of contributory negligence."

For the effect of the violation of a statute in civil actions to recover damages, see *Public Wrong and Private Action in North Carolina*, 1 N. C. L. Rev. 192.

In the case of *City of Ocilla* v. *Luke*,[11] the facts were as follows: Plaintiff, the owner of an automobile, while driving it at night, ran it against an obstruction in one of the public streets of the city. He brought suit against the city for alleged damages to the automobile. Evidence was presented which authorized the jury to find that the city was negligent in allowing an obstruction to remain in the street for two or three weeks. Evidence further showed that the plaintiff was negligent *per se* in failing to have upon his automobile, which was being operated at night, the lights required by law. It was a question for the jury, the court held, whether the negligence of the plaintiff was the sole cause of the injury, or whether it was only contributory negligence thereto; also for the jury to say whether negligence of both parties was concurrent and contributed to the injury, whether the fault of the plaintiff was less than the fault of the defendant, and whether the plaintiff by the exercise of ordinary care, could have avoided the consequences of the defendant's negligence. This is not the doctrine of comparative negligence at all, but is a comparison of the negligence of the parties in order to ascertain the proximate cause of the injury, and is really the doctrine of the last clear chance.

The following cases illustrate the second class of cases above-mentioned, where the nature of the negligence of the parties is compared in determining liability. In a recent North Carolina case,[12] the defendant company operated an electric railroad, of which the co-defendant, Howland, was the superintendent. The plaintiff's intestate was a motorman subject to the superintendent's orders, who operated one of the cars which collided with one operated by Howland, and who suffered injuries resulting in his death. The jury found that the defendant, Howland was willful and reckless in conduct and his negligence was gross. They also found that the plaintiff contributed to his injury by his own negligence. There was a verdict for the plaintiff against both defendants, and defendant Howland appealed. The statute in North Carolina prevented the railroad from setting up the contributory negligence of the plaintiff as a bar to the action. The only question which the court decided was in connection with the liability of defendant Howland, and it was held that the plaintiff's contributory negligence will not bar his recovery of damages when the defendant had inflicted the injury with actual or constructive intent, but it is otherwise if it is admitted that he had not this intent, and plaintiff's contributory negligence will bar his recovery. The court held that the contributory negligence of the plaintiff was a bar in this case because the defendant is not shown to have committed the act intentionally, although his conduct was willful and he was guilty of gross negligence. From this case, it is clear that the plaintiff's contributory negligence will not bar his recovery of damages when the defendant has intended to inflict the injury with either actual or constructive intent. But it is otherwise if it is admitted that he had not this constructive intent, and contributory negligence will bar his recovery. "The substance of the rule as established by the cases to which we have referred is that, to entitle one to

[11] *City of Ocilla* v. *Luke* (1922) 28 Ga. App. 234, 110 S. E. 757.
[12] *Ballew* v. *Railroad* (1924) 186 N. C. 703, 120 S. E. 334.

recover for an injury without showing his own freedom from contributory fault, the injurious act or omission must have been purposely and intentionally committed, with a design to produce injury, or it must have been committed under such circumstances that its natural and reasonable consequence would be to produce injury to others, the actor having knowledge of the situation of those others. . . . There must have been an actual or constructive intent to commit the injury."[13]

The meaning of "constructive intention" may be well illustrated by a case[14] in which a boy between eleven and twelve years of age was riding on the rear step of an ice wagon which was moving up the street. The street railway track was undergoing repairs, and a pile of concrete extended up the street, with the exception of about thirty feet. The driver of the truck knew that the boy was on the rear step and without warning turned the horses on the car track at the space open just in front of an approaching car. A collision occurred and the boy was killed. The jury found that his death was caused by the negligence of the ice company and assessed the damages. The court granting a new trial for error in the charge as to contributory negligence, said: "There can be no doubt as to the conclusion of the jury, which is that the driver of the wagon, regardless of any contributory negligence of the boy, acted not only negligently when he had a chance to save him, but wilfully, recklessly, and wantonly, and, against such conduct as the finding implies, the contributory negligence of the boy is no protection or bar to the plaintiff's recovery. If the party injured is himself ever so negligent, the one who caused the injury is liable to him for the ensuing damages if he was aware of the dangerous situation and caused the damage willfully, wantonly, or even recklessly, that is, if he did so without regard to the consequences of his act and being indifferent to the rights of others." If the defendant knows that the plaintiff is in a perilous situation and willfully and wantonly does an act which naturally and reasonably will result in the plaintiff's injury, the willful and wanton act imparts a constructive intent to injure, which is imputed to the defendant. Therefore, where the defendant intentionally injures the plaintiff, whether the intention be actual or constructive, the plaintiff's contributory negligence is not a bar to his recovery of damages.[15]

With the exception of these two classes of cases, contributory negligence on the part of the plaintiff will bar his recovery. The statute in regard to railroad employees brings in a rule for diminishing damages if the plaintiff's negligence is less than that of the defendant, and this is the only true case of comparative negligence in North Carolina. But the other cases are interesting because there is a comparison of the negligence of the plaintiff and defendant.

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[13] *Connor* v. *Railroad* (1896) 146 Ind. 430, 45 N. E. 662.

[14] *Fry* v. *Utilities Co.* (1922) 183 N. C. 281, 111 S. E. 354.

[15] In *Davis* v. *Smitherman* (Ala. 1923) 96 So. 208, it was held that the plaintiff's contributory negligence was no answer to a count alleging the wanton negligence of the defendant, nor could the wanton contributory negligence of the plaintiff justify the defendant in wantonly injuring him, and such a plea is no bar. See also *Cargall* v. *Riley* (Ala. 1923) 95 So. 821.