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Recent Case Comments

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AGENCY—ATTORNEYS—IMPLIED POWER OF ATTORNEY IN FORECLOSURE SUIT TO BID AT SALE—Does an attorney of record, especially in an equity case, have implied authority to purchase for his client property offered for sale in a suit to which such client is a party?

This is the question raised in the recent case of *Foxworth v. Bank*[1] and answered in the affirmative by the court, Cothran, J. entering a very able and vigorous dissent.

The pertinent facts are that P and M banks each held notes secured by a single mortgage. The P Bank, its note falling due first, instituted foreclosure proceedings and joined M Bank as defendant. M Bank employed an attorney to represent it in the foreclosure proceedings, the only issue between the two banks being whether they should take *pro rata.* The court having deferred decision upon this issue until after the sale, M's attorney bid the property in for a sum sufficient to cover the claims of both banks. M Bank denying the authority of its attorney to bid at the sale, a subsequent assignee of the P Bank procured a rule to show cause why the M Bank should not comply with the bid.

The circuit court in its written order held the M Bank accountable for the act of its attorney on the ground, (1) that he had implied power to bind the bank by reason of the relation of attorney and client, (2) that the preponderance of the evidence established express authority for the action of the attorney, and (3) that, irrespective of implied or express authority, the bank had ratified the bid of its attorney by unreasonable delay in disaffirming it.

This discussion must necessarily exclude the holding of the court upon its last two grounds of express power and ratification since the evidence upon which these holding were based is not available here; but as to the first ground, it seems that the better reasoning and clear weight of authority supports the dissenting opinion in denying that the attorney had implied authority to bid in the property for the bank by reason of the fact that he had been representing it as attorney in the foreclosure proceedings.[2]

[1] *Foxworth v. Murchison National Bank* (1926) 134 S. E. (S. C.) 428.

[2] *Savery v. Sypher* (1868) 73 U. S. (6 Wall.) 157, 18 L. Ed. 822; *Bauman v. Eschallier* (1911) 184 Fed. 710, 107 C. C. A. 44; *Beardsley v. Root* (1814) 11 Johns. (N. Y.) 464, 6 Am. Dec. 386; *Washington v. Johnson* (1846) 26

The majority opinion, in support of its propostiion that an attorney has implied power to purchase because of the relation of attorney and client in a foreclosure proceeding, draws a fine line of distinction between (1) the power of an attorney to purchase for his client property sold under execution upon a lien in favor of the client, which power, it is conceded, is clearly denied by the authorities,[3] and (2) the power of the attorney to purchase for his client property sold under foreclosure proceedings in a case to which such client is a party.

The court argues that the relation of attorney and client in an equity case involving the sale of real estate does not terminate until a sale and an order confirming the report of the sale;[4] and that, since the relation is not sooner terminated, therefore the attorney has authority to do whatever, in his judgment, is necessary to protect his client's interest,—even to the extent, without any further authorization, of bidding in the property for the client. In support of this position the court cites the Kansas case of *Smith v. Cunningham.*[5] It may be pointed out that there the plaintiff died after the decree of foreclosure and before the sale, and the court merely held that the general authority of the defendant's attorney continued until confirmation of sale, and that under such authority the attorney may waive notice of a motion, for revivor. It scarcely follows that the authority of the mortgagor's attorney to waive a procedural defense is a sound support for the doctrine, above enunciated, which would allow the attorney for the mortgagee, under his general authority, to purchase the property for his client at the foreclosure sale.

It seems that putting the authority of the attorney upon the basis of the duration or termination of the period of the relation of attorney and client is but a begging of the question. The real question involved here is not *how long* does the relationship continue, but, rather, *how broad* is the relationship while it does continue.

Tenn. (7 Humph.) 468; *Fisher v. McInerney* (1902) 137 Cal. 28, 69 Pac. 622, 2 R. C. L. 1011; *Averill v. Williams* (1847) 4 Denio (N. Y.) 295, 47 Am. Dec. 252; Note 132 Am. St. Rep. 179 (1909); *Mayer v. Blease* (1872) 4 S. C. 10; *Gilliland v. Gasque* (1875) 6 S. C. 406; *Ex parte Jones* (1896) 47 S. C. 393, 25 S. E. 285; 6 C. J. 156; *Dixon v. Floyd* (1906) 73 S. C. 202, 53 S. E. 167; *Le Conte v. Irwin* (1883) 19 S. C. 554; 3 A. & E. Ency. L. 329.

[3] See note 2 *supra,* all except first two cases cited are applicable here.

[4] 3 A. & E. Ency. L. 327; *McIver v. Thompson* (1921) 117 S. C. 195, 108 S. E. 411; *Cauthen v. Cauthen* (1907) 76 S. C. 226, 56 S. E. 978; *Smith v. Cunningham* (1898) 56 Kans. 552, 53 Pac. 760.

[5] *Smith v. Cunningham* (1898) 56 Kans. 552, 53 Pac. 760.

The better reasoning and the few authorities directly in point clearly support the rule that an attorney, in mortgage foreclosure proceedings, as well as in execution sales, *virtute officii,* has no authority to purchase property in the name of his client.[6]

P. H. RANSON.

BANKING—LIABILITY OF BANK FOR VIOLATION OF CUSTOMER'S INSTRUCTIONS—In *Beacon Chocolate Co. v. Bank of Montreal* (1926) 14 Fed. (2nd.) 599, the plaintiff, a Boston corporation, started a branch office in Chicago, and opened two accounts with the defendant bank. One account was to be in the name of the plaintiff. The defendant bank was notified that all checks from plaintiff's customers were to be endorsed by H., Manager, with a rubber stamp which contained the words, "For Deposit. The Bank of Montreal. Beacon Chocolate Co., Boston, Mass.," and deposited to the account of the plaintiff; and that no check could be drawn on this account except by one of three men, all of Boston, and their signatures were given to the defendant. The other account was in the name of H., Manager, and the weekly check from plaintiff to H. to pay the expense of the branch office was to be deposited to this account. Later H. deposited the checks he received from plaintiff's customers in his account as manager and misappropriated the money. This action is to recover the loss.

Held, that the defendent was liable. The defendant knew that all checks to the plaintiff could be endorsed by H. only for deposit to the account of the plaintiff corporation. When the defendant bank permitted H. to deposit in his account as manager customer's checks which should have been deposited in the plaintiff's account, the defendant bank violated its understanding with the plaintiff and thereby became liable for any resulting loss.

M. P. MYERS.

CANCELLATION—GOVERNMENT CONTRACTS—FRAUD WITHOUT DAMAGE—CHANGE OF POSITION AS SUFFICIENT BASIS FOR EQUITABLE RELIEF—The contracting official, Albert B. Fall, then Secretary of the Interior, received financial favor from Harry F. Sinclair, president and owner of all the capital stock of the defending company, a bidder for leases on the Teapot Dome, to which company the

[6] *Savery V. Sypher* (1868) 73 U. S. (6 Wall.) 157, 18 L. Ed. 822; *Bauman v. Eschallier* (1911) 184 Fed. 711, 107 C. C. A. 44.

leases were subsequently granted. In a suit brought by the United States for the cancellation of these leases the Circuit Court of Appeals, in reversing a decree of the District Court for the defendant, and directing a decree for the government, held that fraud had been practiced on the government and said "it matters not that the government is subjected to no pecuniary loss, or that the contract might have been an advantageous one to it." *United States v. Mammoth Oil Co.* (1926) 14 F (2d) 705.

Fraud in this instance defeated the proper and lawful function of the government so that, whether or not pecuniary loss fell on the United States, the decree is justified by public policy. No doubt this exceptional basis exists for the decision, but nevertheless, the holding suggests a reëxamination of the soundness of the general rule that fraud without damage is not actionable in equity. Pomeroy's statement of this rule is supported by a great mass of authority; he says "In short, the representation must be so material that its falsity renders it unconscientious in the person making it to enforce the agreement or other transaction that it has caused. Fraud without resulting pecuniary damage is not a ground for the exercise of remedial jurisdiction, equitable or legal; courts of justice do not act as *mere* tribunals of conscience to enforce duties which are *purely* moral."[1]

Admitting that exceptions should be made for instances of infidelity in public officials again we find that extraordinary dispensations are made where between private parties, fiduciary relations have become tainted with fraud and corruption. "It may safely be stated that the cases are very few, if any, in which any abuse of such relations has been discovered that the complaining party has not been relieved, whether any actual damage has been established or not."[2]

Perhaps cases that involve fiduciary relations, whether public or private, can be called exceptional in which equity is seeking to preserve the sanctity of the relationship rather than to relieve against the result of the fraud. But in still another situation, equity refuses to regard the absence of pecuniary loss as decisive, for in cases of specific preformance the decree has been refused although the bargain was not disadvantageous to the defendant because the transac-

[1] 2 Pomeroy, Sec. 899 (1918) 4th ed.
[2] *Henninger v. Heald* (1894) 52 N. J. Eq. 431, 29 Atl. 190.

tion was tainted with fraud.[3] The convenient metaphor as to 'clean hands' rationalizes the refusal of the decree sought and allows equity to further the principles of morality and ethics.[4]

But where the ordinary mortal seeks to have cancelled a contract secured by fraud where no fiduciary relation is involved there is no relief unless he is able to prove some tangible pecuniary loss which has fallen directly upon himself.[5] "Courts are not *mere* tribunals of conscience to enforce duties which are *purely moral.*" This sentence, however weak in justifying the law, is said to be practical. It is submitted that most cases, in which the defrauded litigant elects to rescind and finds that he cannot prove pecuniary loss, are not instances in which mere tribunals of conscience are asked to enforce purely moral duties. Fraud was a material factor that induced the defrauded party to enter a bargain which otherwise he would not have entered. If the contract is still executory, the 'clean hands' rule offers a reason for denying specific performance and preventing the defrauder forcing the defrauded to go through with the bargain. But why does the defrauded party care whether he carries out the tainted contract or not when there is no pecuniary loss to himself? Is it not that he has to change his position and is not change of position detriment, intangibly or indirectly falling upon himself? If the courts, by denying specific performance, decline to force the defrauded person to change his position although he would not be damaged thereby and thus remit the defrauder to an inadequate remedy at law, why should they not also regard fraud without damage, but resulting in a change of position, as a ground for cancelling a contract? For example, an owner of residential property refuses to sell to a bidder who wishes to use the residence for a boarding house, because the owner desires to protect the interests of his friends and neighbors. The bidder secures an agent, personally acceptable to the owner, to represent that he wants the property for a home. The agent pays the actual value of the property and then conveys to the undesirable bidder.[6] Fraud was the

[3] *Kelly v. Ry.* (1888) 74 Cal. 557; 16 Pac. 386; *Fox v. Tabel* (1895) 66 Conn. 397; 34 Atl. 107.

[4] 2 Kent, Comm., Lect. 39, p. 490, 2d ed. Story 1 Eq. Jur., Sec. 206 (1839).

[5] Story 1 Eq. Jur., Sec. 187, 203 (1839). *Marsh v. Cook,* 32 N. J. Eq. 262. *Russell v. Transportation Co.* (1924) 25 S. W. 462. Bispham's Principles of Equity (1925), 10th Ed. Sec. 217. N. C. has not directly held on this point but inferences from other decisions indicate accord with the majority. See *Walsh v. Hall* (1871) 66 N. C. 233.

[6] *Brett v. Cooney,* 75 Conn., 341; 53 Atl. 729 (1902).

material factor which caused the owner to enter the contract and as a result make a fundamental change of position. It was held that redress could be secured by putting the parties back in their original position.[7]

It would seem, then, that the minority of cases reaches a more logical and just result in recognizing fraud as ground for rescission, even in the absence of damage, where such fraud is a material cause for entering a contract which would not otherwise have been consummated.[8]

F. B. GUMMEY, 2D.

CONSTITUTIONAL LAW—FUNCTION OF JUDICIARY IN CONSTRUING STATUTES—EFFECT OF DECISION OVERRULING FORMER DECISION—The legal effect of a decision of the Supreme Court overruling a former decision of that body in the construction of a legislative enactment is presented in a recent North Carolina case.[1] The situation presented by that case may be more easily understood by setting out the facts chronologically, as follows:

1876—Statute passed requiring the register of deeds to index and cross index the names of all parties to deeds and other instruments calling for registration.[2]

1887—Deed No. 1 by joint grantors to the plaintiff's predecessors in title. The name of one of the joint grantors did not appear on the register's index.

1894—Decision of Supreme Court in *Davis v. Whitaker*,[3] construing the statute to mean that the filing of a deed for registration was in itself constructive notice and that the register's failure to make a proper index of the names of the parties to a conveyance did not impair its efficacy.

1914—Deed No. 2. Conveyance to plaintiff.

1918—Decision of Supreme Court in *Fowle v. Ham*,[4] reversing its previous holding in 1894 and deciding that indexing of the names of parties to a deed is an essential part of registration.

1924—Deed No. 3. Conveyance to defendant from the joint grantor of Deed No. 1, whose name had not been indexed.

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[7] *Brett v. Cooney*, 75 Conn., 341; 53 Atl. 729 (1902).

[8] Williston, *Contracts*, Sec. 1525. Page on Contracts, Sec. 128, 146. 32 Yale Law Journal, 92. *Barnes v. Cen. Savings Bank* (1910), 149 Iowa 128, 128 N. W. 541. *Morrow v. Ursini* (1921) 96 Conn. 219, 113 Atl. 388.

[1] *Wilkinson et als v. Wallace* (1926) 192 N. C. 156, 134 S. E. 401.

[2] C. S. 3561.

[3] *Davis v. Whitaker* (1894) 114 N. C. 279, 19 S. E. 699.

[4] *Fowle v. Ham* (1918) 176 N. C. 12, 96 S. E. 639.

In an action to quiet title, the defendant contended that under the decision of *Fowle v. Ham,* in 1918, the plaintiff did not get a good title as against the defendant, because, under that decision, Deed No. 1, not being properly recorded, was not constructive notice to a subsequent purchaser and that therefore the defendant took as a purchaser for value without notice, and his title should prevail over the plaintiff's title.

The question presented was whether the decision of *Fowle v. Ham* was prospective or retrospective, and, if the latter, whether the plaintiff's title is protected under the decision of *Davis v. Whitaker* in 1894. The court held that "As a rule, a decision of a court of supreme jurisdiction, overruling a former decision is no doubt retrospective—'not that the overruled decision was bad law, *but that it never was the law.*' (Italics by author). To this rule there is a recognized exception. It is this: 'Where a constitutional or statute law has received a given construction by the courts of last resort, and contracts have been made and rights acquired under and in accordance with such construction, such contracts may not be invalidated, nor vested rights acquired under them impaired by a change of construction made by a subsequent decision.'"[5] Decision was

The above quotation from the court's opinion represents the weight of authority. The effect, however, is to make two classes of cases, the first including all cases not involving the construction of a statute and the second including those cases in which a constitutional provision or statute has received a given construction. As to the first, an overruling decision acts retrospectively. As to the second, an overruling decision acts prospectively only. Applied to the instant case, it means that the decision of *Fowle v. Ham* in 1918 did not act retrospectively but that the plaintiff's rights are determined by the overruled decision of *Davis v. Whitaker.*

Earlier N. C. decisions point to another approach to this question. In *State v. Bell,*[6] Connor J. said,

"While it is true that no man has a vested right in a decision of the court, it is equally settled that, where in the construction of a contract or in declaring the law respecting its validity, the court thereafter reverses its decision, contractual rights acquired *by virtue*

[5] *Wilkinson v. Wallace* (1926) 192 N. C. 156, 157, 134 S. E. 401. accordingly for the plaintiff.

[6] *State v. Bell* (1904) 136 N. C. 674, 677, 49 S. E. 163.

of the law as declared in the first opinion will not be disturbed." (Italics by author).

A few years later, Justice Walker advanced another theory when he said,

"The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to legislative amendment; that is to say, its operation must be prospective and not retrospective. . . . A change of decision is to all intents and purposes the same in effect on contracts as an amendment of the law by means of legislative enactment."[7]

In *State v. Fulton*,[8] Justice Brown said, "The judicial interpretation becomes, as it were, a part of the law itself," and Justice Walker, in a concurring opinion in the same case, said,

"As said in the opinion of the court, in the present case, the judicial interpretation of the statute becomes part of the statute, and if that interpretation is afterwards changed or modified, the defendant should be tried under the law as it had been declared to be at the time the alleged offense was committed, simply because it was the law at that time . . . a decision of this court is the law until it is overruled."

The approach taken by these earlier North Carolina decisions indicates that there are times when a court actually makes law, and when an overruling decision changes the law. This is contrary to the orthodox conception of the judicial function which is that a court can only find or declare the law. To conform to this orthodox conception, the court in the present case holds to the general rule that a decision acts retrospectively, except in cases involving statutory construction. The result in the principal case would be the same whether the court adopted this general rule with its exception or the view expressed in the earlier cases that an overruling decision changes the law. As a matter of policy, it might be sounder to admit that courts actually make law and that a decision is law until overruled. This would have the added advantage of giving a rule which would apply to all cases without exception.

J. Q. LeGrand.

[7] *Hill v. R. R.* (1906) 143 N. C. 539, 579, 55 S. E. 854.
[8] *State v. Fulton* (1908) 149 N. C. 485, 487, 63 S. E. 145.

CRIMINAL LAW—DOUBLE JEOPARDY—NATURE OF CRIMINAL ACT—FIRING OF TWO SHOTS AS ONE ACT—It is well established both at common law and by constitutional and statutory provision, that one cannot be prosecuted twice for the same "act" or "offense."[1] This is not true where one act constitutes more than one offense. When one act violates the law of two jurisdictions, the offender is amenable to both.[2] Thus a single act may be an offense against both North Carolina and the United States. In such a situation, the offender may be prosecuted under the law of either or both, and a conviction or an acquittal in either the state or the federal court is no bar to a prosecution in the other.[3]

What is an act? Is it the muscular contraction of the fingers, the physical act of pulling the trigger of a revolver; is it the consequences flowing from that physical movement; is it the physical force used plus the mental attitude, the volition? South Carolina holds that an act is determined by the consequences thereof, that there may be as many acts as there are results.[4] If A fire a gun at B and kills B and C, he may be prosecuted for two crimes in South Carolina. The New Jersey court, however, assumes an entirely different position, holding that it is the character of the act and not the results which flow from it which determine the question of guilt or innocence.[5] Georgia holds to the "same transaction" rule, i.e., the plea of former acquittal or conviction is sufficient whenever the proof shows the second case to be of the same transaction with the first.[6] Mr. Justice Holmes defines an act as "a muscular contraction, and something more."[7]

Most courts today recognize that there must be more than the mere physical movement to constitute an act or offense. A takes B's hand and strikes C. B, although a physical actor, would be relieved of all liability. It is A, the one with the volition, who is the wrongdoer. Again: A forcibly guides B's hand and forces his

[1] 3 Greenleaf, Evidence, sec. 35; 1 Bishop, Criminal Law, sec. 978; U. S. Const., Amdt. V.

[2] *State v. Cross* (1888) 101 N. C. 770, 7 S. E. 715; *United States v. Barnhart* (1884) 22 Federal 285.

[3] *Moore v. Illinois*, 12 How. (U. S.) 13; *Cross v. North Carolina* (1889) 132 N. C. 131.

[4] *State v. Corbitt* (1921) 117 S. C. 356, 109 S. E. 133.

[5] *State v. Rosa* (1905) 72 N. J. L. 462, 62 Atl. 695.

[6] *Roberts v. State* (1853) 14 Ga. 8; *Gully v. State* (1902) 116 Ga. 527, 42 S. E. 790.

[7] O. W. Holmes, Jr., "The Common Law," Chap. II, p. 54.

signature. There is no act chargeable to B because there was no will attendant. A points a gun at B and so induces him to sign a note. There is the physical act in such a case, but it produces few if any legal consequences because there is a lack of free volition.

In a recent case the defendant fired a revolver twice in rapid succession at A. The bullets missed A entirely but did strike B and C, bystanders, killing both. The defendant was acquitted in open court of the murder of B and now pleads that acquittal in defense of a prosecution for the killing of C. *Held,* the plea of former acquittal is a good defense. *State v. Houchins,* 134 S. E. 740 (W. Va. 1926).

This decision goes on the ground that because the two shots are impelled by the same impulse, the same emotion,—one volition, they are, in fact, one and the same act—one offense. Suppose these two situations: First, A shoots once but kills B and C. The authority is to the effect that there is but one offense,—one indictable act.[8] Second, A, under the stress of different impulses, shoots twice and kills B and C. Obviously in such a situation there are two separate offenses,—two indictable acts.[9] The present case involves the ground between these two situations. It has the one volition element of the first illustration and the two physical movements of the second, and the court holds that the determining factor in deciding how many offenses there are is the "single volition" involved rather than the two muscular movements used in pulling the trigger. To hold differently would be to base an offense upon the extent of the defendant's activity without regard to the character of the action, the impelling volition, or the result.[10]

C. R. JONAS.

EVIDENCE—RES IPSA LOQUITUR AS APPLIED TO ILLNESS FOLLOWING DRINKING OF BOTTLED PRODUCT—In *Lamb v. Boyles*[1] the plaintiff seeks to recover for injuries sustained from drinking a bottle of strawberry ale which defendant had manufactured and put on the market. Plaintiff was taken sick while drinking the ale,

[8] *Gunter v. State* (1895) 111 Ala. 23, 56 Am. S. Rep. 17; *Clem v. State* (1873) 42 Ind. 420, 13 Am. Rep. 369; *Seadberry v. State* (1898) 39 Tex. Crim. 466, 46 S. W. 639.

[9] *Kelly v. State* (Tex.-1901) 62 S. W. 915; *State v. Nash* (1881) 86 N. C. 650; *State v. Malpass* (1924) 189 N. C. 349, 127 S. E. 248.

[10] See: *Moss v. State* (Ala.-1917) 75 So. 179; *Cook v. State* (Tex.-1901) 63 S. W. 873; *Woodford v. People* (N. Y.-1875) 20 Am. Rep. 464; *Ruffin v. State* (Ga.-1922) 114 S. E. 581.

[1] *Lamb v. Boyles* (1926) 192 N. C. 542, 135 S. E. 464.

vomited, was carried home, suffered from impaired eyesight, and was confined to his bed for several days. There was no direct evidence of foreign matter in the ale, no specific indication of poison, and no evidence of a defect either actually or constructively known to the defendant. *Held,* that the plaintiff could not recover by resorting to the doctrine of *res ipsa loquitur,* and that the circumstances of the injury were not such as would justify a jury in inferring negligence on the part of the defendant as a cause of the condition.

Res ipsa loquitur[2] means that the thing speaks for itself, i.e., that the circumstances themselves are of such a character as to amount to evidence of negligence. In North Carolina the phrase is used synonymously with prima facie case,[3] and the effect is merely to give the plaintiff the advantage of a footing in the case, the jury being authorized, but not required, to infer negligence from the facts proved.[4] This view seems to represent the better weight of authority.[5] However, some jurisdictions hold that the effect of the doctrine, where it applies, is to raise a presumption which requires a verdict unless rebutted,[6] and other jurisdictions go so far as to say that the defendant is required to show freedom of negligence by a preponderance of the evidence.[7]

Hoke, J., states the rule for the application of the doctrine as follows: "When a thing which causes injury is shown to be under the management of the defendant and the accident is such as in the ordinary course of things does not happen, if those who have the management use the proper care, it affords reasonable evidence in the absence of explanation by the defendant, that the accident arose from a want of care."[8] This statement is in accord with well considered cases of other jurisdictions,[9] and seems to be the general conception of the doctrine.[10]

[2] Discussed in 12 Cal. L. Rev. 138.

[3] *White v. Hines* (1921) 182 N. C. 275, 109 S. E. 31.

[4] *Stewart v. Carpet Co.* (1905) 138 N. C. 60, 50 S. E. 562; *Austin v. R. R.* (1924) 187 N. C. 7, 121 S. E. 1; *Hunt v. Eure* (1925) 189 N. C. 482, 127 S. E. 593.

[5] *Sweeney v. Erving* (1912) 228 U. S. 233; *Plumb v. Richmond Light Co. et al.* (1922) 233 N. Y. 285, 135 N. E. 504; see 5 Wigmore on Evidence (2d ed.) sec. 2509 and cases cited.

[6] 5 Wigmore on Evidence (2d ed.) secs. 2487 to 2490 incl.

[7] See note L. R. A. 1916A 930 and 935.

[8] *Fitzgerald v. R. R.* (1906) 141 N. C. 530, 54 S. E. 391.

[9] *Griffin v. Maurice* (1901) 163 N. Y. 188, 59 N. E. 925; *Howser v. R. R. Co.* (1894) 80 Md. 146, 30 Atl. 906.

[10] 5 Wigmore on Evidence (2d ed.) sec. 2509.

So the doctrine has been held to apply to cases where passengers are injured by machinery or appliances wholly under the carrier's control,[11] to cases of injuries from falling electric wires,[12] and other falling objects,[13] to derailments[14] and head-on collisions,[15] to communications of fire by locomotives,[16] to cases of bursting boilers,[17] etc. In the cases of bottled beverages the doctrine has been held to apply where the consumer is injured as a result of the presence of a decomposed mouse or rat,[18] the presence of a cigar stub,[19] the presence of broken glass,[20] and other deleterious substances in the contents of the bottle where the presence of the foreign matter is directly proved.

It is generally held, however, that the doctrine does not apply to a mere bursting of a bottle containing a carbonated drink,[21] and has been held not to apply to a case where a tack was found in a piece of blueberry pie made and sold on defendant's premises, the tack being so small that it might have been imbedded in a berry and not discovered by the use of reasonable diligence.[22]

It seems that in practically all cases where the doctrine has been held to apply the physical cause or source of the injury is obvious and undisputed, the effect of the doctrine being to establish defendant's negligence and not to establish the physical facts of the injury. In such cases the doctrine is relied on merely to support the plaintiff's claim as to the quality of the defendant's conduct, i.e., negligence, the physical cause or source of the injury having been directly proved.

But in the principal case of *Lamb v. Boyles* there is only circumstantial evidence of the physical cause of the injury, and the plaintiff

[11] *McCord v. Atl. & C. Air Line R. Co.* (1903) 134 N. C. 53, 45, S. E. 1031.

[12] *Haynes v. Gas Co.* (1894) 114 N. C. 203, 19 S. E. 344, 26 L. R. A. 810.

[13] 20 R. C. L. 157 et seq.; 15 L. R. A. 33 and note.

[14] *Craig v. Lumber Co.* (1923) 185 N. C. 560, 118 S. E. 8.

[15] *Hinnant v. Power Co.* (1924) 187 N. C. 288, 121 S. E. 540.

[16] *Currie v. R. R.* (1911) 156 N. C. 419, 72 S. E. 488.

[17] *Harris v. Mangum* (1922) 183 N. C. 235, 111 S. E. 177.

[18] *Crigger v. Coca-Cola Bottling Co.* (1915) 132 Tenn. 545, 179 S. W. 155, L. R. A. 1916B 877; *Coca-Cola Bottling Co. v. Barksdale* (1920) 17 Ala. App. 606, 88 So. 36.

[19] *Boyd v. Bottling Works* (1915) 132 Tenn. 23, 177 S. W. 80.

[20] *Watson v. Augusta Brewing Co.* (1905) 124 Ga. 121, 52 S. E. 152, 1 L. R. A. (N. S.) 1778, 110 Am. St. Rep. 157.

[21] 20 R. C. L. 157 footnote 1; *Dail v. Taylor* (1909) 151 N. C. 824, 66 S. E. 135.

[22] *Ashe v. Dining Hall* (1918) 231 Mass. 86, 120 N. E. 396, 4 A. L. R. 1556.

is relying on circumstantial evidence not only as to negligence, but also as to whether in fact there was any injurious substance in the bottle, and, if so, whether his illness resulted from that source. Here the plaintiff is asking for two inferences, i.e., he is trying to use the doctrine as a bridge across two gaps rather than one. So the facts of the instant case seems to be distinguishable from the facts of those cases where the doctrine has generally been held to apply.

Nevertheless the doctrine has been so used as to establish two inferences. In *Lawrence v. Power Co.*,[23] circumstantial evidence was relied on to show that a fire was caused by defendant and it was held that such fact, so established, was of itself evidence of negligence. Obviously the greater the number of inferences allowed the weaker each subsequent inference in the chain becomes, and the most difficult it will be to establish the results desired.

Perhaps the phrase "res ipsa loquitur" may sometimes obscure the realities. It simply represents instances where the courts by repeated decisions have standardized certain rulings as to the sufficiency of often occurring types of circumstantial evidence cases. But no such standardization should override the court's exercise of judgment in each particular case as to the question: could a reasonable man from the evidence draw the inferences desired? The court seems on this basis to have reached the correct result in the instant case.

Whether the defendant in the principal case would have been liable on an implied warranty of the quality of the ale was not considered since the basis of the plaintiff's action was the alleged negligence of the defendant in putting the ale in a bottle containing a deleterious substance. The general rule is that warranties run only in favor of an immediate purchaser,[24] but several recent cases impose the absolute liability of a warrantor on a manufacturer in favor of the ultimate consumer.[25] Had the plaintiff brought his action on an implied warranty, the result of the instant case might not have been the same.

C. W. HALL.

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[23] *Lawrence v. Power Co.* (1925) 190 N. C. 664, 130 S. E. 735.

[24] I Williston on Sales (2d ed.) sec. 244.

[25] *Ward v. M. City Sea Food Co.* (1916) 171 N. C. 33, 87 S. E. 958; *Davis v. Packing Co.* (1920) 189 Iowa 775, 176 N. W. 382; I Williston on Sales (2d ed.) sec. 244, footnote 47.

LIENS AND PLEDGES—ASSIGNMENT OF BOOK ACCOUNTS TO CREDITOR—EFFECT OF ALLOWING DEBTOR TO RETAIN POSSESSION—In *Sneeden et al. v. Nurnberger's Market* (1926) 192 N. C. 439, 135 S. E. 328, the plaintiff brought suit on behalf of the creditors for collection of their accounts and the appointment of a receiver of the defendant's business. The defendant had assigned to Swift & Co., one of its creditors, all of his book accounts, debts due from customers, etc., to serve as a continuing security for the defendant's present and prospective indebtedness to the assignee. Swift & Co. thereupon reassigned same to defendant in trust for itself and for collection. Neither assignment was registered.

The court held that Swift & Co. has no lien or preference upon the assigned accounts by virtue of this assignment, and that the proceeds from the collection of the accounts are general assets in the hands of the receiver. The reasons assigned are: (1) If the contract between the defendant and Swift & Co. be construed as a mortgage, it was voidable as to defendant's creditors because it was not registered. C. S. 3311. (2) If it be construed merely as a pledge to secure a pre-existing debt, it was not enforceable because the lien was not maintained. To make a valid pledge, the pledgee's actual or constructive possession of the article is essential and the restoration of possession to the pledgor, as a rule, is inconsistent with the pledge. (3) There are cases which hold that the pledgee may redeliver the property to the pledgor for the purpose of having it sold for the benefit of the pledgee. This exception is limited to those cases in which the pledgor is acting as agent of the pledgee, who remains in constructive possession. It does not apply to this case where the defendant mingled pledged and unpledged funds with the consent of Swift and Co.

C. R. JONAS.

NEGLIGENCE—PROXIMATE CAUSE—FORESEEABILITY AS A TEST—A city allowed a street bordering a municipal aviation field to fall into such disrepair as to be impassable. To permit passage a detour was maintained across the corner of such field. An aeroplane struck the car of a motorist while he was driving on this detour, causing his death. In a suit against the city, alleging negligent failure to repair the street as the cause of the death, it was held: "The alleged acts of negligence were not the proximate cause of the injuries."[1]

[1] *Doss v. Town of Big Stone Gap et al.* (1926) 134 S. E. 563 (Va.).

In another case,[2] fire in a small factory belonging to plaintiff's intestate spread to his garage, thence to a pole of the defendant electric company, causing a high-power wire to fall. The insulation on this wire was worn off. The arm of the pole projected over the premises of the plaintiff so that when the wire fell it came into contact with a wire fence along plaintiff's property line. Ignorant of the danger, the plaintiff's intestate touched the wire fence and was instantly killed. The alleged negligence was in maintaining the wire over the premises in uninsulated condition, and failure to repair after notice. Held: "The alleged negligence was not the effective and proximate cause of the homicide."

The field of proximate cause in negligence cases is, at the present, one of almost hopeless confusion. That there is a simple and logical method for use in dealing with this question is shown in articles by several text writers[3] whose views are here followed.

In dealing with negligence cases, there are two problems presented:

1. Was there actionable negligence toward the plaintiff; and
2. If so, was such negligence the cause of the injury?

To the first the courts apply the usual test for determining negligence: would a reasonably prudent person under the circumstances have foreseen the injury. After this question is decided, the same test is again repeated by most courts in deciding the question of causal connection. Often negligence is assumed, and the above test then used in determining whether the negligence caused the injury. The fault lies in applying the "foreseeability" test to the second question.

A negligence case should be dealt with first, by applying the foreseeability test to determine the existence of negligence, then if the defendant was negligent, he is liable for the consequences of his act. Whether the injury was the consequence of his act is purely a question of fact for the jury.[4] It is argued that if courts follow such a method, that, once negligence is established, liability extends to every injury which flows therefrom, regardless of whether rea-

[2] *Rome Railway & Light Co. v. Robinson* (1926) 134 S. E. 132 (Ga.).

[3] Green, *Negligence and Proximate Cause,* 1 Texas L. Rev. 243 and 423; Beale, *Proximate Consequences of an Act,* 33 Harv. L. Rev. 633; Edgerton, *Legal Cause,* 72 U. of Pa. L. Rev. 211, 343; McLaughlin, *Proximate Cause,* 39 Harv. L. Rev. 149.

[4] *Collins v. Pecos & Northern Texas Ry. Co.,* 110 Texas 577; 212 S. W. 477.

sonable foresight might anticipate it. But the answer to this argument is that when the jury finds negligence in the first issue, it has already decided the question of whether reasonable foresight might have anticipated the injury. Proper words in charging juries will make this clear to them.

When an independant agency intervenes, it does not change the application of the rule. If it should have been foreseen that an intervening agency would appear so as to cause the injury, there is negligence. If not, there is no negligence, and the question of causation is completely eliminated. Foreseeability is an element of negligence and not of causation.[5] Failure to so distinguish is the root of all confusion on the subject.

In the case first quoted, a reasonably prudent person would not have foreseen that failure to repair the street would cause a person to drive over the detour and there be killed by an aeroplane. Therefore there was no negligence. The question of proximate cause need not have been mentioned.

As to the second case, the defendant maintained high tension wires on poles above the premises of others, and allowed the insulation to become worn off. If a reasonably prudent man under such circumstances might foresee that the uninsulated wire might fall because of a fire burning down the pole or because of some other intervening force, and thus come into contact with a wire fence underneath, the defendant would be negligent. After determining negligence the death can be directly traced to the uninsulated wire as the cause. If a reasonably prudent man would not have foreseen such injury, there would be no negligence. In such case, even though the injury can be directly traced to the original act, there can be no recovery because of failure to find negligence. So again there was no problem of proximate cause, but only a question of negligence.

J. L. CANTWELL, JR.

PERSONS—MARRIAGE—EFFECT OF STATUTE ON VOIDABILITY OF MARRIAGE OF INFANT UNDER TWELVE—In the recent South Carolina case of *State v. Sellers*,[1] A, a girl 11 years old, married B. She lived with B for four weeks, and then, before she was twelve years

[5] *Collins v. Ry. Co., supra.*

[1] *State v. Sellers* (1926) 134 S. E. 873.

old, left him and has not lived with him since. (Except for this act on her part there has been nothing done to indicate annulment of the marriage). Thereafter A went through a marriage ceremony with defendant, with whom she lived for a short while. She was then 23 years of age. Defendant later left A without having obtained a decree of annulment, and married C. Defendant was indicted for bigamy on account of his marriage with C, the indictment being based on the fact that his marriage to A was valid and subsisting. Defense: that defendant's marriage to A was void for that A was at that time married to B.

If the marriage of A to B was void—or if it was voidable and has been annulled and the bond broken by the act of A in leaving B at the end of four weeks of married life—then defendant's marriage to A was valid, and his subsequent marriage to C was bigamous. Otherwise, his attempted marriage to A was void and his subsequent marriage to C was valid and lawful.

The court held, Cochran, J., dissenting, that it was error for the trial court to charge that if A was under 12 years of age at the time she attempted to contract matrimony with B that such marriage was void and that a subsequent marriage of A with defendant was consequently valid. The appellate court ordered a verdict of not guilty entered in the case.

The substance of the statutory provisions brought to the attention of the court as applicable are:

1. When the validity of a marriage is doubted or disputed by either of the parties, the other may institute a suit to affirm its validity; and the decree of the court shall be binding on all concerned.

2. The court of common pleas shall have authority to determine the validity of any marriage and to declare such contracts void for want of consent of either party, or for other cause; provided, that such contract was not consummated by cohabitation of the parties.[2]

Before the above acts no court in South Carolina had power to annul a marriage for any cause.[3] But now the court of common pleas has power to declare a mariage void for any cause which shows that the marriage at the time entered into was not a contract, this power being subject to the proviso therein contained as to cohabita-

[2] Secs. 5531 and 5532, vol. 3, Code of 1922.

[3] *Mattison v. Mattison* (1846) 1 Strob. Eq. (20 S. C. Eq.) 387, 47 Am. Dec. 541; *Bowers v. Bowers* (1858) 10 Rich. Eq. (30 S. C. Eq.) 555, 73 Am. Dec. 99.

tion. This point was brought out in *Davis v. Whitlock*.[4] This holding is in accord with the express language of the statute. But the court in the instant case, after citing with approval *Davis v. Whitlock,* said, "We are inclined to think that we may go another step or two in the matter of protecting young womanhood and saving little children the stigma of being pronounced illegitimate; and it is clear in our minds that the Legislature intended this to be done." The court then construed the statute referred to to mean that no marriage could be annulled except by the court of common pleas. It seems that this construction is, in the light of previous decisions in South Carolina and of the well-established rules of statutory construction, debatable, to say the least. It is admitted that the common law prevails in South Carolina as to the age of consent to marry. At the common law the action of A in leaving her husband before arriving at the age of consent and refusing to live with him afterwards would have avoided the marriage.[5]

The court points out that under the loose system of the common law allowing persons to annul their own marriages it would be difficult to determine in many cases whether persons were married or not, thus throwing grave doubt on titles to property in some instances, involving sale of real estate, dower rights, etc. These are the proper reasons to advance, no doubt, to justify the legislature in changing this law, once the intention of the lawmakers to make the change is established. It is a familiar rule that it is to be presumed that the Legislature did not intend to change the common law unless the statute plainly indicates such an intention.[6]

Before these statutes the anomolous situation existed in South Carolina that the parties to a voidable marriage could themselves annul it in proper time, but that the courts had no power to declare

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[4] *Davis v. Whitlock* (1911) 90 S. C. 233, 73 S. E. 171, Anno. Cas. 1913D, 538.

[5] At the common law a marriage under the age of seven is absolutely void; persons marrying between the ages of seven and twelve in case of females or between seven and fourteen in case of males, may, in effect, annul their own marriages by doing such acts after arriving at the age of consent as will show that they disaffirm the contract. 1 *Black. Com.* 436; 18 R. C. L. p. 441, par. 70.

The case of *Koonce v. Wallace* (1859) 52 N. C. 194 states the rule as to affirmance, holding that cohabitation after arriving at the age of consent will affirm the marriage. As to disaffirmance, it seems that the parties should be able to avoid the marriage by acts showing such intent before as well as after arriving at the age of consent.

[6] 25 R. C. L. p. 1054, par. 280.

a marriage void for any reason.[7] In the light of this situation it is reasonable to believe that the intent of the Legislature was to give this power to the court without taking away the existing power of the parties themselves. That such was the intent has previously been intimated by the South Carolina court: "We shall first endeavor to show that changes in the constitutional and statute law have destroyed the force of these cases[8] and that jurisdiction to declare marriages void *ab initio* has been conferred upon the courts of common pleas."[9]

Granting that it was the intention of the Legislature that the statute be construed as in this case, it seems that the purpose of the law-making body would have been better accomplished and the social welfare better subserved if the parties had been allowed to retain the common law right of disaffirmance, and provision had been made that issue resulting from intercourse before such disaffirmance sould be legitimate.

S. E. VEST.

SLANDER—DISTINCTION BETWEEN WORDS ACTIONABLE PER SE AND WORDS REQUIRING PROOF OF SPECIAL DAMAGE—In the recent case of *Deese v. Collins*[1] plaintiff brought action to recover damages for slander. Defendant falsely stated that plaintiff, a white man, had negro blood in his veins. Held that the words by defendant were not actionable *per se,* and plaintiff could not recover without showing special damages. The words do not impute a crime or misdemeanor punishable by an infamous penalty, they do not charge the plaintiff with having an infectious or loathsome disease, and do not relate to plaintiff's trade or profession. This case shows that the North Carolina Court adheres to the common law distinction between words actionable *per se* and those actionable only by proof of special damages.[2]

C. W. HALL.

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[7] Cases in note 3 *supra.*

[8] These cases, the force of which are held to be destroyed, are *Mattison v. Mattison* (1846) 1 Strob. Eq. 387, 47 Am. Dec. 541, in which it was held that a court of equity in South Carolina has no power to annul a marriage contracted while the plaintiff was in a fit of *delirium tremens;* and *Bowers v. Bowers* (1858) 10 Rich. Eq. 555, 73 Am. Dec. 99, holding that a court of equity could not annul a marriage because of relationship (in this case a marriage between uncle and niece).

[9] *Davis v. Whitlock* (1911) 90 S. C. 233, 73 S. E. 171, Anno. Cas. 1913D, 538.

[1] *Deese v. Collins* (1926) 191 N. C. 749; 133 S. E. 92.

[2] See Chapin on Torts (Hornbook series) page 304.

TRIALS—POWER OF FEDERAL JUDGES TO COMMENT ON EVIDENCE —IMPROPER COMMENT—In *Cook v. United States* (1926) 14 Fed. (2d) 833, the defendant, a constable, was indicted for conspiring to violate the National Prohibition Act by agreeing to furnish immunity from arrest to a moonshiner. The consideration was $40 a month. The receipt of money by defendant was proved. The government contended and the evidence tended to show that it was for a bribe. The defendant admitted receiving the money but contended that it was in payment for gasoline tickets. The court in commenting on the evidence said that he gave no credence to defendant's statement and that he believed it was an afterthought. The court repeated this, and later said again that the defendant's statement did not look reasonable to him. Subsequently, the court returned to the subject again saying that he did not believe the defendant's contention. Defendant assigned these remarks as error.

Held: The comment is reversible error.

It is intimated that any of the remarks taken separately would have been proper, for the right of the judge to comment on the evidence "is one of the most valuable features of the practice in the courts of the United States."[1] But the remarks, taken together, were prejudicial, for by their reiteration the remarks were taken out of the catagory of fair comment and became partisan argument, leading the jury to a conclusion based on the judge's comments rather than on their impartial weighing of the evidence. The defendant had the right to have the jury consider the case unweakened by argument from the bench. The distinction seems to lie between dispassionate and judicial comment on the evidence and comment that is argumentative and partial.[2]

S. E. VEST.

[1] *Rudd v. United States* (1909) 173 Fed. 912.

[2] *Lewis v. United States* (1925) 8 Fed. (2nd) 849. For examples of the abuse of solicitor in state court of his right to comment on the evidence, the defendant's appearance, etc., see *Improper Comment Before Jury*, 3 N. C. Law Rev. 132.