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This idea has been incorporated in the last Federal Revenue Act.¹³

Reservation of income or beneficial interest in the property transferred. The general rule is that where the grantor reserves to himself income from the property transferred or any beneficial interest therein the transfer is subject to the inheritance tax.¹⁴ The rule applies where the deed is absolute on its face and there is a collateral agreement reserving the interest in the grantor.

G. M. SHAW.

RECENT CASE COMMENTS

BANKS AND BANKING—CRIMINAL LAW—RECEIVING DEPOSITS WITH KNOWLEDGE OF INSOLVENCY—CONSTRUCTION OF STATUTES—After defendant bank officers had knowledge that the bank was insolvent, they permitted a teller to continue accepting deposits. They were indicted, tried, and convicted under a statute which makes it a felony for any officer of a bank to receive deposits after he becomes aware of the bank's insolvency. The statute further renders such an officer *civilly* liable for any deposits received by him, "or with his knowledge or assent." Upon appeal it was held that the judgment for criminal conviction be reversed.¹

The court reaches this surprising result upon two distinct grounds, the first of which is rather doubtful. 1. That the word "receives," strictly construed, means personal reception, and since the defendant is being prosecuted under the penal section of the statute, it must be

¹³ 1926 Revenue Act, section 202 (d).

¹⁴ *In re Cornell's Estate*, 170 N. Y. 425, 63 N. E. 445 (1902). Where owner of securities gave them with condition that donor should have all or any part of the income, the gift was taxable; *Tipps v. Bass*, note 6 *supra*, *In re Leach's Estate*, 282 Pa. 545, 28 Atl. 497 (1925). Even though possession of joint estate was transferred, if the decedent reserved beneficial interest, the transfer was taxable; *People v. Tavenor*, 300 Ill. 373, 133 N. E. 211 (1921) conveyances of land, with reservation of life estate, were deeds granting future estates to take effect in possession after death of grantor, and the transfer was taxable; *McCaughn v. Girard Trust Co.* 11 Fed. (2nd.) 520 (1926). Instrument irrevocably granting property in trust, to pay income to grantor for life a post mortem disposition; *Reed v. Howbert*, 8 Fed. (2nd.) 641 (1925). Creation of trust not a complete transfer, where donor retained income from trust property; *Smith v. State*, 134 Md. 473, 107 Atl. 255 (1919); *American Bd. v. Bugbee* 98 N. J. L. 84, 118 Atl. 700; *In re Hanna*, 119 Misc. 159, 195 N. Y. Supp. 749; *Todd's Estate*, 237 Pa. 466, 85 Atl. 845; *contra*, *In re Harrevman* 98 N. J. E. 638, 129 Atl. 393; *In re Cornell's Estate*, *supra*, note 12; *Lewis v. Brown*, 182 Ia. 738, 166 N. W. 99; *In re Choate*, 195 Ia. 715, 192 N. W. 857 (1923); *In re Baird*, 219 App. Div. 418, 219 N. Y. Supp. 158 (1927); *Gifts Causa Mortis—In re Edwards*, 85 Hun. 436, 32 N. Y. Supp. 901 (1895).

¹ *State v. Lewis*, 139 S. E. 386 (S. C. 1927).

construed strictly in his favor.² 2. In the section of the statute providing for civil liability, the legislature specially treated the subject of the bank officer "receiving" deposits (the basis of criminal liability) by the addition of the words "or with his knowledge or assent," thereby leaving the inference that they intended differentiating between the type of reception necessary for civil, as distinguished from criminal liability.³ At any rate, this special provision in the section on civil liability, not having been used in the section on criminal liability, must be assumed to have been designedly omitted therefrom.⁴

The effect of this statute, as pointed out in the dissenting opinion, is to render the statute nugatory, for all that an officer need do to avoid criminal liability would be to have a clerk receive deposits, as was done here. In the absence of the specific language of the statute relative to civil liability, it is doubtful that the same result would have been reached, but it appears that the South Carolina court would have followed the better view that to render a bank officer criminally liable for *receiving* deposits after having had knowledge of insolvency, it is not necessary that he should have manually received the deposits.⁵

Such a point as the one raised in the instant case could not arise in North Carolina, since C. S. 224g imposes criminal liability on any bank officer who receives or "permits an employee to receive" deposits after the officer had knowledge of the bank's insolvency.

ALVIN S. KARTUS.

The deceased begged a ride with the defendant in his truck. After proceeding some distance the truck suddenly went down an embankment, turning over several times, which resulted in the death of the

² 25 R. C. L. 1081-1084, as cited by the court. But see *Mills v. So. Ry.* 82 S. C. 242, 64 S. E. 232 (1909), which holds that construction of a statute should not be so strict as to defeat its obvious purpose. On the same point see also *Littleton v. Harr*, 158 N. C. 566, 74 S. E. 12 (1912).

³ Where, in a legislative enactment, a special provision is made as to a subject which would otherwise be embraced in a general provision on the same subject the special provision is held to be an exception and not intended to be embraced in the general provision. Enlich on Statutes § 399; 2 Sutherland, Statutory Constr. (2d ed.) p. 666. Cf. *ibid.*, pp. 401, 420.

⁴ See *Hyde v. Johnson*, 2 Bing. N. C. 776 (C. P. Eng. 1836), interpreting several differently worded sections of the Statute of Frauds.

⁵ *Hudson v. State*, 258 Pac. 352 (Okla. 1927); *State v. Mitchell*, 96 Miss. 259, 51 So. 4, Ann. Cas. 1912 B, 309 and note, 26 L. R. A. (n. s.) 1072 and note (1910); *Carr v. State*, 104 Ala. 4, 16 So. 150 (1894); *State v. Cramer*, 20 Idaho 639, 119 Pac. 30 (1911); *State v. Cadwell*, 79 Ia. 432, 45 N. W. 700 (1890).

plaintiff's intestate. It was found that there was a latent defect in the steering apparatus of the truck. *Held*, that the defendant owed the deceased, as a gratuitous guest, the duty of exercising ordinary care to avoid personal injury to him. But the defendant owed him no duty to inspect and keep his truck in repair. The court indicates that had the defendant known of the defect he would have been under a duty to warn his guest. *Marple v. Haddad*, 138 S. E. 113 (W. Va. 1927). It is highly conjectural, however, that the driver of an automobile is under any duty to warn a gratuitous guest of the condition of the automobile.

BILLS AND NOTES—CERTIFICATE OF DEPOSIT—NEGOTIABILITY—ADVANCE NOTICE REQUIRED BEFORE PAYMENT—Action by an endorsee of a certificate of deposit against the issuing bank for the amount of the certificate. The bank claimed the right of set-off for the indebtedness of the depositor on the grounds that the certificate was not negotiable, and that the plaintiff was not a holder in due course. These contentions were based on the reasons, (1) that the certificate payable to "himself order" showed a conflict of terms, and as there was no word connecting or separating the words "himself" and "order," and as "himself" was in writing it would prevail, thus, the certificate was not payable to order; and (2) that although by its terms payable twelve months from date, the certificate contained a provision giving the bank the right to require thirty days notice of the time of payment, and in consequence the time was indefinite and the certificate was non-negotiable. The court held that the certificate of deposit was negotiable, that the plaintiff was a holder in due course and that the plaintiff's demurrer to the defendant's claim of set-off should be sustained.¹

The first question was disposed of by saying that the word "or" could be interpolated and thus the certificate of deposit would correspond to the requirements of the statute.² This seems to be a very

¹ *Coffey v. Day & Night Nat. Bank of Pikeville*, 21 Fed. (2nd.) 661 (Ky. 1926). The following is a copy of the instrument involved (italics indicating the written portion). "No 220. Pikeville, Ky., *January 5th, 1925*. This certifies that *W. P. T. Varney* has deposited in this bank *thirty-five hundred dollars (\$3,500.00)* payable to *himself order—twelve months* after date on return of this certificate properly endorsed. This bank may require thirty days notice of the time when payment will be required to meet the requirements of the Federal Reserve Board regarding time deposits. *With 6% interest if left 12 months*. No interest after 12 months unless renewed. Not subject to check. (Signed by the cashier).

² Ky. Statutes, § 3720-b-8.

safe basis for the decision considering the instrument as a whole.³ Were it not held good for that reason the decision could be sustained for other reasons. Granting that there is a conflict between the terms "himself," "order," as contended by the defendant, and that the term "himself," being in writing, would prevail,⁴ there is still no conflict between the term "himself" and the remainder of the instrument, and as the provision "on return of this certificate properly endorsed" which appeared further on in the instrument has been held to imply negotiability, the instrument may be held negotiable without the term "order."⁵ In all events the irregularity is not sufficient to put the plaintiff on notice so his taking would amount to bad faith, for a mere suspicion,⁶ or lack of care in making inquiry will not prevent him from being a holder in due course.⁷

With regard to the second question whether the uncertainty of the time of payment rendered the instrument non-negotiable, the defendant relied on cases which involved demand instruments and which required in addition to the thirty days notice the presentation of a savings fund passbook as a condition of payment.⁸ These cases were properly dismissed from consideration as such condition rendered the time of payment dependent on collateral matters and indefinite. The provision under consideration in the instant case seems to present a new question in negotiable instruments, and it remains to be determined what effect the privilege of the bank to require thirty days notice before becoming obligated to pay has on the time of payment in the commercial sense. The specified due date was stated to be "twelve months after the date issued."⁹ To give full force to this statement would be to restrict the bank's right to require thirty days notice so that such right could be exercised only in case payment should be required on or before the specified due date. Under such a construction the certificate would be in substance a

³ *Harding v. Cargo of Coal*, 147 Fed. 971, 973 (D. C. 1906).

⁴ Ky. Statutes, § 3720-b-17 (4).

⁵ *Forrest v. Safety Banking & Trust Co.*, 174 Fed. 345 (C. C. 1909). See *Kirkwood v. First Nat. Bank*, 40 Neb. 484, 58 N. W. 1016, 24 L. R. A. 444 (1894); *Pierce v. St. Nat. Bank of Boston*, 215 Mass. 18, 101 N. E. 1060 (1913).

⁶ *Smathers v. Hotel Co.*, 162 N. C. 346, 78 S. E. 224 (1913).

⁷ *Walden v. Dowing Co.*, 4 Ga. App. 534, 61 S. E. 1127 (1908); *Critcher v. Ballard*, 180 N. C. 111, 104 S. E. 134 (1920).

⁸ *First Nat. Bank v. Golden*, 19 Cal. App. 501, 126 Pac. 498 (1912); *White v. Cushing*, 88 Me. 339, 34 Atl. 164, 32 L. R. A. 590 (1896); *Fisher v. O'Hanlon*, 93 Neb. 529, 141 N. W. 157 (1913); *Wilson v. Campbell*, 110 Mich. 580, 64 N. W. 278.

⁹ See note 1, *supra*.

thirty days demand instrument with the ultimate maturity date fixed. If, however, the bank is to have the right to require notice of thirty days anytime up until the specified due date, the maturity date is virtually extended to thirteen months from the time of issue. In either case, however, it seems that the date of maturity is sufficiently certain to be a fixed and determinable future time within the meaning of the N. I. L.,¹⁰ since it is in the power of the holder by merely giving notice (or making demand) to establish a definite outside limit on the time for payment.

As the court held the certificate of deposit to be negotiable and the holder to be one in due course, the defendant's claim to right of set-off was denied.¹¹ The inference seemed to be that had the holder not been one in due course the set-off would have been allowed. There is a conflict of authority on this point.¹²

M. P. MYERS.

One Stanley was recently indicted in Georgia for the offense of "forgery of a fictitious check." He pleaded guilty and was sentenced. Now he files a petition for a writ of habeas corpus alleging that he is illegally held, since the name signed to the check was his own name. The court decided that he could not be discharged under habeas corpus on this contention, since that was a matter of defense which should have been pleaded at the trial. Two judges dissented. *Stanley v. Beavers*, 139 S. E. 344 (Ga. 1927).

BILLS AND NOTES—CONSIDERATION FOR ACCOMMODATION ENDORSEMENT—FORBEARANCE FOR INDEFINITE TIME—In a recent North Carolina case¹ the holder of a past due note agreed to extend the time of payment to the maker for "three or four years," in consideration of a third party's endorsement and agreement to be liable for the payment thereof. The interesting problem raised by the case is: what degree of certainty in time for payment is necessary for an extension on a negotiable instrument?

¹⁰ *Dorsey v. Wolff*, 142 Ill. 589, 32 N. E. 495, 18 L. R. A. 428 (1892); *Easley v. Tenn. Nat. Bank*, 130 Tenn. 366, 198 S. W. 66 (1917); *Shaw v. Camp*, 160 Ill. 425, 43 N. E. 608.

¹¹ *Deavenport v. Green River Deposit Bank*, 138 Ky. 352, 128 S. W. 88, 137 Am. St. Rep. 386 (1910); *Taylor v. Carmon*, 153 N. C. 101, 68 S. E. 1058 (1910); *Johnson Co. Saving Bank v. Renfro*, 57 Tex. Civ. App. 160, 122 S. W. 37 (1909).

¹² 8 C. J. 803, § 1062.

Definiteness, for the time of payment, is to be distinguished where it is a requisite for the negotiability of a note and where it is a requirement for contractual obligation. A note payable in three or four years, whether negotiable or not,² may be definite enough to constitute a good contract, enforceable between the parties thereto.³ So an agreement to extend the time of payment three or four years on a negotiable instrument, like any other contract must be certain as to time for performance, but this certainty of time requirement is not a requisite in the same degree or sense that it is for negotiability.

In a contemporaneous case⁴ the same question, of what degree of certainty in time for payment is required to extend, came before a Georgia court upon the following similar facts. The holder of a past due note, in consideration of a third party depositing collateral with the holder, agreed to extend the time for payment but the time for payment was left indefinite. The decision of the court, while showing that the case was properly considered and decided upon the principles of contract, said: "The promise to extend the time of payment is so indefinite as to be incapable of enforcement, and therefore constitutes no consideration for the act of the stranger in depositing the collateral." Bearing in mind that in both cases no question of negotiability was before the court this uncertainty of time of payment is pertinent only to the question of validity of the contract to extend. Therefore these two cases differ only in their degree of indefiniteness.

The holder's promise to extend is consideration for the third party's act or promise to become liable with the maker. If by the indefiniteness of the promise made, the promisor neither suffered detriment nor gave up any right which he had before the promise, then there was no consideration for the liability assumed by the third party, and no contract.⁵ The North Carolina court held that the

² N. I. L., Art. 1, sec. 3; C. S. 2982. *Duncan v. Louisville*, 13 Bush. 378, 26 Am. Rep. 201 (Ky. 1877). Note made payable in one or two years after date, held negotiable. This view is open to Dean Ames criticism that "nothing could be more inconsistent with the negotiability of a bill or note than that the holder should have to be continually on the alert to ascertain the precise day when they should become payable, in order to charge the drawer or indorser." 2 Ames Cases Bills and Notes p. 831; Norton, Bills and Notes (1914) 4th Ed. p. 51.

³ See *Bank v. Bynum*, 84 N. C. 25, 37 Am. Rep. 604 (1880), although this case is in part no longer good law on the point of negotiability. N. I. L. § 2, C. S. 2983.

⁴ *Abraham v. First Bank of Cook Co.*, 134 S. E. 583 (Ga. 1927).

⁵ Williston on Contracts No. 136, Vol. 1 (1920), "If an agreement to forbear is only for such time as the promisor shall choose, it is not sufficient consideration." *Strong v. Sheffield*, 144 N. Y. 342, 39 N. E. 330 (1895).

extension for three or four years "was definite at least for three years,"⁶ and this viewpoint brings the case within the general rule that an extension for a definite period is good consideration for the third party's promise to be liable.⁷ But the question still remains whether a promise to extend for an indefinite time is good consideration. The Georgia court was of the opinion that it was not.

Agreements to extend or forbear, however, when the specific period therefor is not stated, contemplate a reasonable time.⁸ So the promise given to extend, even though indefinite as to time, as in the Georgia case, has the natural implication that extension for a reasonable time is agreed upon. An extension or forbearance for a reasonable time being good consideration it follows that, if from the facts of that case, the indefinite extension is meant to be for a reasonable time, such an indefinite extension is not lacking consideration or incapable of enforcement.⁹

F. B. GUMMEY, II.

Plaintiff, wholesaler, entered into a contract with defendant, retailer, to sell goods to the latter for a certain period. It was stipulated in the contract that it might be terminated by either party by written notice and that credit would be extended to defendant until its termination. In pursuance of the contract, plaintiff sold certain goods to the defendant and not being paid therefor, brought suit for the price, though he did not give defendant any notice of the termination of the contract nor had the time for its expiration arrived. *Held*, that plaintiff, by refusing to sell except for cash, had breached the contract, and, consequently, a counterclaim set up by defendant should be allowed. *W. T. Raleigh Co. v. Wilson et al.*, (1927) 139 S. E. 395.

⁶ *Hamilton v. Prouty*, 50 Wis. 592, 7 N. W. 659, 36 Am. Rep. 866. Three possible views: (a) Three or four years at option of the maker, (b) three years and then demand up to four years, (c) three or four years to option of the holder.

⁷ 8 C. J. § 629, n. 33; 1 Joyce Defenses to Commercial Paper, (2nd Ed.) sec. 331; *Bank v. Oakes*, 184 Mo. App. 598, 170 S. W. 679 (1914); *Boyd v. Kelley*, 111 Miss. 629, 71 So. 897 (1916); *Reynolds v. Citizen's Bank of Moultrie*, 22 Ga. App. 164, 95 S. E. 763 (1918); *Burke v. Dillon*, 92 Ia. 557, 61 N. W. 371 (1894); 19 L. R. A. (N. S.) 842, note; *O'Gara, King and Co. v. Hansing*, 88 Minn. 401, 93 N. W. 307 (1903); *Rix v. Adams*, 9 Vt. 233, 31 Am. Dec. 619 (1837).

⁸ 1 Williston, Contracts, §§ 38, 136 (1920) and cases cited; 5 N. C. L. Rev. 78.

⁹ 2 Williston, Contracts, § 1226; *McMicken v. Safford*, 197 Ill. 540, 64 N. E. 540 (1902); *Traders Nat. Bank v. Parker*, 130 N. Y. 415, 29 N. E. 1094 (1892); *Drake v. Pueblo Nat. Bank*, 44 Colo. 49, 96 Pac. 999 (1903); *Nott v. State Nat. Bank*, 51 La. Ann. 871, 25 So. 475 (1899); *Glasscock v. Glasscock*, 66 Mo. 627 (1877); *King v. Upton*, 4 Greenl. 387 (Me. 1877); cf. N. I. L. § 25, C. S. 3005.

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—REGULATION OF BUSES—Plaintiff brought suit to restrain the Public Utilities Commission from interfering with the operation of his bus line between Providence and Woonsocket, both in Rhode Island, the route being diverted through a part of Attleboro, Massachusetts. Plaintiff claimed that he was engaged in interstate commerce and, therefore, needed no permit from the Rhode Island authorities as required by law. The Public Utilities Commission was of opinion that plaintiff had no bona fide intention of engaging in interstate transportation, that the number of interstate passengers would be negligible, and that he was diverting his route through this thinly settled portion of Massachusetts merely to escape regulation. *Held*, to constitute "interstate commerce" by a bus line, it is not sufficient that its busses cross a state line, but they must transport passengers or goods interstate or intended in good faith to do so. *Inter-City Coach Co. v. Atwood* (Dist. Ct. R. I., 1927), 21 Fed. (2nd.) 83.

Although Congress has the undoubted power under the commerce clause to regulate motor vehicles, it has not yet done so.¹ In the absence of such regulation, the states, in the exercise of their reserved police power, have the power to regulate them, provided the regulations concern local matters not demanding uniformity of regulation, and do not constitute a direct or material burden on interstate commerce.² It has been definitely settled that a bus line engaged exclusively in interstate commerce may not be prohibited from using the state highways,³ though they may be subjected to reasonable regulations.⁴ It has also been held that a bus line carrying passengers both intrastate and interstate may be regulated, and even prohibited from carrying intrastate passengers provided the prohibition does not unduly burden or prohibit the carriage of the interstate pas-

¹ The Interstate Commerce Act, U. S. Comp. Stat. Ann. 1916, sec. 8563, p. 9048 *et seq.*; Supp. 1923, sec. 8563, p. 2427 *et seq.*, which governs interstate commerce by railroads and other designated agencies, does not assume to regulate interstate commerce by motor vehicles. *Interstate Transit Co. v. Derr*, 71 Mont. 222, 228 Pac. 624 (1924).

² *Cooley v. Board of Wardens*, 12 How. 299, 318 (U. S. 1851); *Minnesota Rate Cases*, 230 U. S. 352, 399 (1912); *Hendrick v. State of Maryland* (1915), 235 U. S. 610, 622, 35 Sup. Ct. 140.

³ *Buck v. Kuykendall*, 267 U. S. 307 (1914); *Bush v. Maloy*, 267 U. S. 317 (1914). See 25 Columbia Law Rev. 670 (1925).

⁴ *Hendrick v. Maryland*, *supra*, where the court said that the operation of motor vehicles is attended with public danger and expense, and that a state may take measures necessary to minimize these disadvantages, even though some of the vehicles subject to regulation are engaged in interstate commerce. *Accord*, *Kane v. New Jersey* (1916), 242 U. S. 160, 37 Sup. Ct. 30.

sengers.⁵ In the instant case, under the decisions mentioned above, it seems certain, that if the plaintiff was engaged in interstate commerce exclusively, the state would have no power to refuse him the use of its highways. It seems, also, that though he was engaged in carrying both intrastate and interstate passengers, it could at most only prohibit his intrastate business. The problem is therefore reduced to the question of whether the plaintiff was engaged in interstate or only intrastate commerce and the decision of the case rested on this issue.

The Supreme Court has never defined the bounds of what constitutes interstate commerce.⁶ By the overwhelming weight of authority, commerce through two states, though the termini are in the same state, is interstate commerce as a matter of fact; the fact must be tested by the actual transaction.⁷ A few cases which have indicated that the motive was material and could change the character of the commerce, so as to preclude a fraudulent evasion of the state laws seem to proceed upon an erroneous theory.⁸ The transaction is interstate, factually. In determining whether a particular transaction is interstate the Supreme Court has laid down the definite and fixed rule that the physical facts shall govern, regardless of motives or animating influences.⁹ Cases like *Austin v. Tennessee*,¹⁰ relied on in the instant case, and *Cook v. Marshall County*,¹¹ where the tricks and devices of the defendants were not allowed to turn boxes into "original packages," according to the rule laid down in *Brown v. Maryland*,¹² are to be distinguished; in these cases the court held that the boxes were not *actually* "original packages" within the constitutional import of the term as interpreted by the

⁵ *Interstate Busses Corp. v. Holyoke Ct. Ry. Co.*, 47 S. Ct.

⁶ See Words and Phrases, Second Series, Vol. II, pp. 1157-1168.

⁷ *Hanley v. Kansas City So. Ry. Co.* (1903), 187 U. S. 617, 23 Sup. Ct. 214; *United States v. Delaware, etc. R. R.* (C. C. 1907), 152 Fed. 269; *United States v. Erie R. R.* (D. C. 1909), 166 Fed. 352; *St. Louis, etc. R. R. v. Hadley* (C. C. 1909), 168 Fed. 317, 340; *St. Louis, etc. R. R. v. State* (1908), 87 Ark. 562, 113 S. W. 203; *Mines v. St. Louis, etc. R. R.* (1908), 134 Mo. App. 379, 388, 114 S. W. 1052; *Western Union Tel. Co. v. Speight* (1920), 254 U. S. 17, 41 Sup. Ct. 11; *Missouri Pacific R. R. Co. v. Stroud* (1925), 267 U. S. 404.

⁸ *Western Union Tel. Co. v. Taylor* (1914), 57 Ind. App. 93, 104 N. E. 771; *Western Union Tel. Co. v. Sharp* (1915), 121 Ark. 135, 180 S. W. 504.

⁹ "We cannot conclude that a legal domicile in Kansas, coupled with a reprehensible past and a purpose to avoid the statutes of the state, suffice to change the nature of the transaction." Per McReynolds, J., in *Kirmeyer v. Kansas* (1915), 236 U. S. 568, 573, 35 Sup. Ct. 419.

¹⁰ (1900) 179 U. S. 343, 21 Sup. Ct. 132.

¹¹ (1905) 196 U. S. 261, 25 Sup. Ct. 233.

¹² (1827) 25 U. S. 419.

Supreme Court up to that time.¹³ The instant case may be distinguished on similar grounds, in that it was "not a bona fide commercial arrangement" and was not *actually* interstate commerce, but a mere fiction. On principle, the case is certainly justifiable as it is inconceivable that state control should be evaded by such methods.

R. T. GILES.

An employee of the A. C. L. R. R. Co. was murdered by another employee. In an action based upon the Federal Employer's Liability Act, the North Carolina court found actionable negligence of the railroad company in not preventing the murder. 191 N. C. 153. On *certiorari* to U. S. Supreme Court—reversed. The court said, "It would be straining the language of the act somewhat to say in any case that a willful homicide 'resulted' from the failure of some superior officer to foresee the danger and to prevent it." *Atlantic Coast Line R. Co. v. Southwell*, 48 S. Ct. 25 (1927).

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—STATE TAXATION—A South Carolina statute¹ placing a graduated sales tax on dealers in tobacco products received and sold within the state, to be collected by affixing stamps to the "package from which normally sold at retail" was held constitutional and not in conflict with the constitution of the United States,² since the packages when taxed had come to rest within the state and no longer formed a part of interstate commerce.³

A state tax upon an article as property after it has come to rest in the state is valid, and the fact that it was transported to the place where taxed in interstate commerce is no objection to validity.⁴ An immunity from taxation except for the purpose of inspection exists with respect to articles imported into a state from a foreign country by virtue of an express prohibition in the constitution of the United States.⁵ This immunity exists as long as the goods remain in the

¹³ *Kirmeyer v. Kansas*, *supra*, note 9, at p. 573.

¹ Tax Act, S. C., April 22, 1927 (35 St. at large, p. 121).

² U. S. Constitution, Art. I, Sec. 8, cl. 3.

³ *Doscher et al. v. Query et al.*, S. C. Tax Commission, 21 F. (2d) 521 (1927).

⁴ *Brown v. Houston*, 114 U. S. 622, 5 S. Ct. 109, 29 L. Ed. 257 (1885); *Hinson v. Lott*, 8 Wall. 148, 19 L. Ed. 387 (1868); *Woodruff v. Parham*, 8 Wall. 123, 19 L. Ed. 382 (1868); *Sonneborn Bros. v. Cureton*, 262 U. S. 506, 43 S. Ct. 643, 67 L. Ed. 1095 (1923).

⁵ Art. I, Sec. 10, Cl. 2.

original package in which imported, and until sale is made.⁶ The supposed analogy between imports and articles in original package in interstate commerce is no longer followed.⁷ The protection of interstate commerce is withdrawn when the article "comes to a state of rest and is held by the consignee as stock for purposes of sale."⁸ The protection does not extend to the final sale.⁹

A temporary delay or detention of the goods in course of transit for the convenience of the carrier or that of the consignee in making payment does not break the continuity of interstate shipment, and release the goods from the protection of interstate commerce.¹⁰ Accordingly, a tax upon the gross sales of oils shipped from other states and later sold from the storeroom in the original package has been held valid.¹¹

In the principal case an undetermined quantity of the goods required to be stamped was later shipped out of the state. By provision of the statute the amount of the tax was refunded for goods shipped out of the state. The work of affixing the stamp was not a burden on interstate commerce. Goods are not in interstate commerce until they are actually in transit or given to the carrier for that purpose.¹² The fact that goods are intended for export or shipment in interstate commerce will not protect them from taxation if the movement be not actually commenced.¹³

Complainants insisted that the tax denied due process of law under the Fourteenth Amendment since unpacking the boxes in order to affix stamp to the individual packages in hands of wholesalers necessitated a repacking, sometimes damaging the goods. The answer to

⁶ *Brown v. Maryland*, 12 Wheat. 419, 6 L. Ed. 678 (1827); *Leisy v. Hardin*, 135 U. S. 100, 10 S. Ct. 681, 34 L. Ed. 128, (1890).

⁷ *Woodruff v. Parham*, *supra*, note 4, at 123; *American Steel and Wire Co. v. Speed*, 192 U. S. 500, 24 S. Ct. 365, 48 L. Ed. 538 (1904); *Texas Co. v. Brown*, 258 U. S. 466, 476, 42 S. Ct. 375, 66 L. Ed. 721 (1922); *Sonneborn Bros. v. Cureton*, *supra*, note 4, at 506.

⁸ *Sonneborn Bros. v. Cureton*, *supra*, note 4, at 522.

⁹ *Banker Bros. v. Pennsylvania*, 222 U. S. 210, 32 S. Ct. 38, 56 L. Ed. 168 (1911).

¹⁰ *Coe v. Errol*, 116 U. S. 517, 6 S. Ct. 475, 29 L. Ed. 715 (1886); *La. R. R. Commission v. Texas and Pacific R. R.*, 229 U. S. 336, 33 S. Ct. 837, 57 L. Ed. 1215 (1912); *Adams Express Co. v. Kentucky*, 206 U. S. 129, 27 S. Ct. 606, 51 L. Ed. 987 (1907); *Champlain Realty Co. v. Battleboro*, 260 U. S. 366, 43 S. Ct. 146, 67 L. Ed. 309 (1922).

¹¹ *Sonneborn Bros. v. Cureton*, *supra*, note 4, at 506.

¹² *Coe v. Errol*, *supra*, note 10, at 547.

¹³ *Pace v. Burgess*, 92 U. S. 372, 23 L. Ed. 657 (1875); *Turpin v. Burgess*, 117 U. S. 504, 6 S. Ct. 835, 29 L. Ed. 988 (1886); *General Oil Co. v. Crain*, 209 U. S. 211, 28 S. Ct. 475, 52 L. Ed. 754 (1908).

this argument would seem to be found in the statute itself which allows a discount on the stamps purchased by those subjected to this loss.

H. H. GODWIN.

The city of Atlanta, Georgia, passed an ordinance, the first section of which prohibited colored barbers from serving as barbers of white women, white girls or children under the age of 14 years. The second section required that all barber shops in the city "shall thereafter be closed during week days at 7 o'clock p.m. except on Saturday when they shall close at 9 o'clock p.m. By an amendment to this section it is provided that the opening hour shall be 5:30 a.m. *Held*, Section 1 is void, being in violation of those sections of the state and federal constitutions which guarantee equal protection of the laws, inviolability of property rights, and due process of law. Section 2 is void as being unreasonable and discriminatory because it seeks to regulate "one particular lawful business that is in no wise noxious" but leaves unregulated various other businesses. *Chaires v. City of Atlanta*, 139 S. E. 559 (Ga., 1927).

CONTRIBUTORY NEGLIGENCE—STOP, LOOK, LISTEN, AND IF NECESSARY GET OUT—Plaintiff's intestate was killed in a crossing by a train running at sixty miles an hour. Intestate had no practical view of the track until he was twelve feet from danger and the engine was then obscured beyond two hundred and forty-three feet by a section house. He drove on the track at a rate of five or six miles an hour and was killed. It was not shown that he stopped or listened for the train. *Held*, recovery is denied. Failure of the traveller to stop and get out of his vehicle to see if a train is approaching is contributory negligence as a matter of law. *Baltimore & Ohio R. Co. v. Goodman*, 48 S. Ct. 24 (1927).

It has been held that failure to stop before attempting to cross a railroad track is negligence *per se*.¹ The majority view is that failure to stop, look, and listen must be considered under the circumstances.²

¹ *Hines v. Cooper*, 204 Ala. 519, 86 So. 396 (1920); *Benner v. Phil. & R. Ry. Co.*, 262 Pa. 307, 105 A. 283 (1918).

² *Flannelly v. Delaware & Hudson Co.*, 225 U. S. 597 (1912); *Perry v. R. R.*, 180 N. C. 290, 104 S. E. 673 (1920); N. C. Cons. Stat. 2621 (b) (1923), requires full stop at grade crossings but provides that no failure to stop shall be considered contributory negligence *per se* but shall be considered with the other circumstances; *Lake Erie & W. R. Co. v. Schneider*, 257 Fed. 675 (1919); *Judson v. Central Vermont R. Co.*, 158 N. Y. 597, 53 N. E. 514 (1899).

It may be evidence of negligence or if the facts are undisputed and if only one inference can reasonably be drawn therefrom, the question of negligence or contributory negligence is one of law for the court.³

Some courts say that if the traveller is otherwise unable to see an approaching train he is as a matter of law required to stop his vehicle, get out and look.⁴

In the principal case the court says, "If a driver cannot be *sure* otherwise whether a train is *dangerously near*, he must stop and get out of his vehicle. It is true that the question of due care very generally is left to the jury. But we are dealing with a standard of conduct, and when the standard is clear it should be laid down *once for all*, by the courts."

The standard of conduct which the court says is clear is the duty to stop, look, and listen before going on a railroad track. If the view is unobstructed there is no reason for stopping; if reasonable men might differ as to the necessity of stopping, it is a question for the jury; if the necessity is plain, it is a question of law for the court.

It is submitted that the opinion must be construed with reference to the facts and that the standard of conduct may be modified by due care under the circumstances. Any other interpretation would be an unwarranted encroachment upon the province of the jury.⁵

S. SHARP.

In the recent case of *A. L. Pridgen v. M. R. Gibson*, 194 N. C. 289, 139 S. E. 443 (1927), the trial court refused to allow a general practitioner of medicine to testify as an expert witness in regard to eye trouble, for the reason he failed to qualify as a specialist in that field of practice. The Supreme Court found error and sent the case back for a new trial, holding that the question whether only a specialist in a narrow field of medicine can testify as an expert in that field is a question of law subject to review by the Appellate Court and not a mere preliminary question in respect to skill and experience,

³ *Heitman v. Pac. Electric R. R. Co.*, 10 Cal. A. 397, 102 P. 15 (1909); *Morrison v. Lee*, 16 N. D. 377, 113 N. W. 1025 (1907); *Hagglund v. Erie R. Co.*, 210 N. Y. 46, 103 N. E. 770 (1913).

⁴ *Thompson v. So. Pac. Co.*, 31 Cal. App. 567, 161 P. 21 (1916); *Benner v. Phil. & R. Ry. Co.*, 262 Pa. 307, 105 A. 283 (1918). *Contra*: *St. Louis I. M. & S. R. Co. v. Kimbrell*, 117 Ark. 457, 174 S. W. 1183 (1915); *Mitchell v. St. Louis & S. F. R. Co.*, 97 S. W. 552 (1906); *Chicago R. I. & G. Ry. Co.*, 226 S. W. 1080 (Tex. 1921); *Louisville & I. R. Co. v. Clore*, 183 Ky. 261, 209 S. W. 55 (1919).

⁵ (1900) 13 Harv. L. Rev.; (1923) 23 Col. L. Rev. 303.

which questions are matters of judicial discretion. To hold that a witness is precluded from testifying as an expert simply because he is not a "technical" expert in a narrow field or branch of medicine is prejudicial error and does not represent a case of "irreviewable discretion."

COVENANTS RESTRICTING THE USE OF LAND—PUBLIC POLICY—RESTRAINT OF TRADE—INJUNCTIONS—One Posey, the purchaser of a certain lot, covenanted to use the Standard Oil Company's gas and oil as long as Smith, his grantor, acted as agent for the company and prices of their products should be in accord with those of rival companies. The Gulf Refining Company purchased the property of Posey, and in an action by Smith to enjoin them from a breach of the covenant, contended that the covenant was contrary to public policy as being in restraint of trade and tending to defeat competition.¹

At early common law all contracts in restraint of trade were void,² but this was gradually qualified by a distinction between general and partial restraints.³ Most jurisdictions now consider the reasonableness of the restraint as the true test in determining the enforceability of the contract.⁴ Public policy is the test of reasonableness; if the restriction unduly burdens the covenantor or the public interest, or if it transcends the limits of utility to the covenantee; then it is unreasonable.⁵ "No precise boundary can be laid down within which the restraint would be reasonable and beyond which is excessive."⁶ The reasonableness of the restriction is a question of law for the court.⁷

Agreements by the covenantor not to use his land in competition with the covenantee or in a manner obnoxious to him are generally

¹ *The Gulf Refining Co. v. Smith*, 139 S. E. 716 (Ga. 1927).

² Pollock, *Principles of Contracts*, pp. 427, 428.

³ *Broad v. Jollyfe*, 3 Cro. Jac. 596 (1620); *Mitchell v. Reynolds*, 1 P. Wms. 181 (1711).

⁴ *Nordenfelt v. The Maxim Co.* [1894], App. Cases 573; *Cowan v. Fairbrother*, 118 N. C. 406, 24 S. E. 212 (1896); *Swigert v. Tilden*, 121 Iowa 650, 97 N. W. 82 (1903). But some courts retain the general and partial restraint distinction. See, *Bonner v. Bailey* 152 Ga. 629, 110 S. E. 875 (1922).

⁵ *Hood v. Legg*, 160 Ga. 620, 128 S. E. 895 (1925); *Cowan v. Fairbrother*, *supra*, note 4.

⁶ *Horner v. Graves*, 7 Bing. 735 (1831).

⁷ 1 Wharton, *Contracts*, sec. 433; *Hood v. Legg*, *supra*, note 5; *Wiley v. Baumgardner*, 97 Ind. 66, 49 Am. Rep. 427 (1884); *Rakestray v. Lanier*, 104 Ga. 188, 30 S. E. 735 (1898).

held valid.⁸ In a conveyance of land a restriction was upheld providing that rock taken therefrom should only be for railway purposes and not for any use in such business as the grantor is engaged.⁹ Probably the same result would follow if the restriction had been not to use any rock for any purpose.¹⁰ Supposing the rock however, to have been of a particular sort which the public could not obtain on the market, then no doubt a total restriction upon its use would not be upheld.¹¹ The courts have held valid covenants in deeds providing that no liquors be sold on the purchased premises.¹² Suppose that at a date when dealing in liquors is lawful, A owns extensive town lots and makes sales therefrom covenanting in the deeds not to sell whiskey in a certain block of the land retained by him. This restriction would probably be enforced,¹³ but suppose A has been a dealer in whiskey and when he sold his lots his grantees promised not to sell whiskey on the purchased premises. This would confine the control of the town's supply of whiskey in the grantor and would be void since it creates a monopoly.¹⁴ As to most commodities such a restraint would not be allowed, but since it is better for the public to restrain instead of encourage the sale of whiskey, the monopoly might be upheld.¹⁵

The case in question appears reasonable in fact. There was only a partial restraint and there was no substantial injury to the public interest; nor would there have been even had Posey covenanted not to sell any gasoline on the premises.¹⁶ The restriction did not have the effect of defeating competition because other gas could be pur-

⁸ *University Club of Chicago v. Deakin*, 265 Ill. 257, 106 N. E. 790 (1914); *Williston, Contracts*, sec. 1642, citing *Pavlovich v. So. Pac. Ry.* 150 Cal. 39, 87 Pac. 1097 (1906); *Hodge v. Sloan*, 107 N. Y. 244, 17 N. E. 335 (1887); *Watrous v. Allen*, 57 Mich. 362; 24 N. W. 104 (1885).

⁹ *Pavlovich v. So. Pac. Ry.*, *supra*, note 8.

¹⁰ *Hodge v. Sloan*, *supra*, note 8, wherein a restriction that the grantee should sell no sand from the premises was held valid. But see *Brewer v. Marshall*, 19 N. J. Eq. 537, 97 Am. Dec. 679 (1868); *Norcross v. James*, 140 Mass. 188, 2 N. E. 946 (1885).

¹¹ *Equitable Servitudes*, 16 Mich. L. R. 103 (1917), a criticism of *Norcross v. James*, *supra*, note 10.

¹² *Cowell v. Spring Co.*, 100 U. S. 55 (1879); *Ferris v. Am. Brewing Co.*, 155 Ind. 539, 58 N. E. 701 (1900); *Watrous v. Allen*, *supra*, note 8.

¹³ *Anderson v. Rowland*, 44 S. W. 911 (Tex. Civ. App., 1898). Here an agreement was upheld whereby the grantor promised not to sell whiskey in any building owned by him in the same block for five years.

¹⁴ *Burdell v. Grandi*, 152 Cal. 376, 93 Pac. 1022 (1907).

¹⁵ *Restrictive Agreements as to the use of property*, 21 Harv. L. R. 450 (1908); *Watrous v. Allen*, *supra*, note 8.

¹⁶ *Hodge v. Sloan*, *supra*, note 8.

chased if the Standard Oil Company's prices became higher. Thus the injunction was properly granted.

This is the second appearance of this case. The Gulf Refining Company in an earlier action tried to avoid this covenant by claiming that it was only binding upon Posey. But the court there held it to be a covenant running with the land and thus binding upon those who owned the premises.¹⁷ This holding warrants comment.

"It is in many cases a matter of much doubt whether a covenant with respect to the use and occupation of land runs with the land, so as to bind at law an assignee, although assigns be expressly named in the covenant,"¹⁸ but "Equity will restrain a breach of an agreement between grantor and grantee restricting the use of the land, both by the grantee himself and by all subsequent purchasers of the land with notice, whether or not an equitable restriction or a covenant running with the land is created."¹⁹ The covenant in the deed from Smith to Posey served as notice to the Gulf Refining Company. Where a party promises to use the land only in a certain manner the presumption is that the intention is to bind the land²⁰ and clearly no contrary intent appears here. Usually equitable servitudes and covenants running with the land are restrictions placed upon one piece of land for the benefit of other land, however they may be for the benefit of a business and if so intended the benefit will be enforceable by the assignee of the business.²¹ Therefore, since this covenant is impersonal and is a restriction upon the use of the land, the court was correct in enjoining any violation thereof by the grantee's assignee, regardless of whether or not it was a covenant running with the land or an equitable servitude.

CHARLES W. McANALLY.

Lehigh Valley R. Co. v. State of Russia, 21 Fed. (2d) 396 (C. C. A. 2nd. 1927). In 1917 our state department recognized Kerensky's provisional government, successor to the Imperial Russian govern-

¹⁷ *Smith v. Gulf Refining Co.*, 162 Ga. 191, 134 S. E. 446 (1926).

¹⁸ Kerr, *Injunctions*, 474.

¹⁹ *The theory of Restrictive agreements as to a business* (1911), 24 Harv. L. R. 574, citing *Tulk v. Moxhay*, 2 Ph. 774 (1848); *Parker v. Nightingale*, 6 Allen 341 (Mass. 1863).

²⁰ 2 Tiffany, *Real Property* (2 ed.) sec. 397.

²¹ Clark, *Equity*, sec. 100; *Abergare Brewery Co. v. Holmes*, 1 Ch. 288 (1900); *Francisco v. Smith*, 143 N. Y. 488, 38 N. E. 946 (1894); *Hodge v. Sloan*, *supra*, note 8. But see, *Norcross v. James*, *supra*, note 10. Judge Holmes' argument seems untenable. Case does not represent the modern tendency. Only way decision can be upheld is on theory that the agreement tends to create a monopoly.

ment, and received her ambassador. In 1918 under his authority, suit was brought against the defendant in a federal court for loss in 1916 of munitions consigned to the Russian government. Since the ambassador's retirement in 1922 the state department has recognized the custody of the property of the Russian government to be in a financial attache of the Russian embassy, who has continued the suit in the name of the state of Russia. Our state department has never recognized the Soviet government which came into power in the fall of 1917. The court affirmed a judgment for the plaintiff. It held that the plaintiff had power to sue on the ground that the cause of action was the property of the state of Russia and that it was bound to recognize the condition of things in Russia which was last recognized by the political department. *Quaere*: The short-lived provisional Russian government being no longer existant what becomes of the proceeds of the judgment?

CRIMINAL LAW—BILLS AND NOTES—IS ONE WHO WITHOUT AUTHORITY SIGNS FIRM CHECK AS AGENT OR PARTNER A "DRAWER" UNDER THE BAD CHECK LAWS—Defendant was convicted of obtaining property with intent to defraud by means of a worthless check.¹ The check was signed "A. & W. Cotton Co., by E. O. Anderson." He appeals, assigning as error that the trial court instructed the jury in such a manner that defendant's guilt would depend on a question of fact whether or not he was a partner of the firm A. & W. Cotton Co. A new trial was granted. The opinion is undoubtedly correct but it leaves several questions undecided which may arise on the new trial. These may be divided into three main headings. 1. Even though the defendant is not a partner, he may be an agent with authority to draw checks for the firm.² 2. His authority to draw checks for the firm may have been revoked but uncommunicated to him at the time of drawing the present check, in which event he could not be presumed to have an intent to defraud. 3. The statute being aimed at the *drawer* of the check it becomes material to determine who is the drawer of a check signed in a firm name by an agent, (a.) one who is authorized and, (b.) one without authority.

¹ *State v. Anderson*, 194 N. C. 377, 139 S. E. (1927). C. S. 4283 makes the giving of a worthless check, with the intent to defraud another by obtaining property in return, a misdemeanor. "By means of a check . . . upon a bank . . . not indebted to the drawer."

² *First Nat. Bank of Salem v. Jacobs*, 85 W. Va. 653, 102 S. E. 491 (1920).

The instructions were insufficient in that Anderson's membership in the firm is not necessarily determinant of his guilt. It is very possible and probable that he might be acting as an agent for the A. & W. Cotton Co.³ His guilt depends on whether he had no authority to write checks for the company and knew it.

The making of an untruthful representation is not of itself fraudulent. It becomes so only by being accompanied with a fraudulent intent.⁴ Even though the defendant's authority has been revoked the burden is still on the state to show that he knew he acted without authority in signing the check. The unpaid check is of itself evidence of non-payment. As evidence of lack of authority, it and the slip attached by the bank to show the reason for non-payment are clearly hearsay, and none the less so because written.⁵ It is furthermore unlikely that the paper would be admitted under the business entry exception because of the entrant's lack of first hand knowledge.⁶

Section 20 of the Negotiable Instruments Law⁷ provides that "Where the instrument contains or a person adds to his signature words indicating that he signs on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized." Under this section it seems that he is liable as a drawer rather than on his warranty.⁸ Dean Ames says: "This new rule involves a flat contradiction of the instrument, and the fiction works not justice but injustice."⁹ He adds that the agent is liable only on an implied warranty and should not be liable to the payee for the face of the note.¹⁰ This section is defended however by Lyman D. Brewster¹¹ and Charles L. McKeehan.¹²

Who is the drawer of a check signed "A. & W. Cotton Co., by E. O. Anderson," first, if Anderson has authority to sign checks; secondly, if his authority to sign has been revoked? The above-

³ *Somers v. Hanson*, 78 Oreg. 429, 153 Pac. 43 (1915).

⁴ 11 R. C. L. 241.

⁵ 3 Wigmore, Evidence (1923) sec. 1363.

⁶ 3 Wigmore, Evidence (1923) sec. 1530; *Firemen's Ins. Co. v. Seaboard Air Line Ry.*, 138 N. C. 42, 50 S. E. 452 (1905); document admitted where knowledge of entrant was made on the basis of a report of another employee with first hand knowledge.

⁷ The corresponding section in the North Carolina Statutes is C. S. 3001.

⁸ *Rudolph Wurlitzer Co. v. Rossman*, 196 Mo. App. 78, 190 S. W. 636 (1916).

⁹ 14 Harv. L. Rev. 241.

¹⁰ *Bryson v. Lucas*, 84 N. C. 680 (1881).

¹¹ Brewster, *The Negotiable Instruments Law* (1901), 15 Har. L. Rev. 26.

¹² McKeehan, *The Negotiable Instruments Law* (1902), 50 Am. L. Rev. (old Series) 437.

quoted section of the N. I. L. says that Anderson is *liable* on the instrument if he has no authority, and since the worthless check statute¹³ says that if the bank upon which the check is drawn is not indebted to the *drawer*, is or is not the defendant guilty under the latter statute? Is being *liable* on a check where there is no principal to be bound by the agent the same as being the *drawer* of a check?

The rule in civil cases is that an unauthorized agent who signs in a representative capacity becomes liable on the instrument.¹⁴ It has been suggested that this interpretation be limited to cases in which the unauthorized agent would be liable on his implied warranty.¹⁵ If this view be extended to a criminal prosecution the person obtaining property by giving a worthless check may be considered guilty by virtue of the willful misrepresentation. If the principal for whom the agent purports to sign is fictitious then it seems quite proper to consider the writer of the check the *drawer*. He is, in the definition of Bouvier, "the party who makes the bill of exchange." The *authorized* agent of a company or corporation binds his principal as drawer of a check under section 20,¹⁶ and if there are insufficient funds it is submitted that under C. S. 4283 the agent would not be liable as the drawer.

JON WIIG.

Village of University Heights et al v. Cleveland Jewish Orphan's Home, 20 F (2nd) 743 (C. C. A. 6th. 1927). Plaintiff had a zoning ordinance designating the kind of buildings which were to be erected on the lots in the town and also stating that the town was essentially a residential district. The orphanage which defendant sought to erect would in no wise conflict with the requirements as to the kind of buildings since it was to consist of separate houses, but permission was refused on ground that public convenience and welfare would not be served. The court declared, however, that such a construction of the law was unreasonable and that there was discrimination against the defendant.

¹³ C. S. 4283.

¹⁴ *Eisinger v. E. J. Murphy Co.*, 52 App. Cases, D. C. 197, 285 Fed. 931 (1922).

¹⁵ 23 Colum. L. Rev. 392, note.

¹⁶ *Chatham Nat. Bank v. Gardner*, 31 Pa. Super. Ct. 135, citing sec. 20, N. I. L.

CRIMINAL LAW—INSTRUCTIONS—PRESUMPTION OF INNOCENCE—The judge charged the jury in a murder case on the principle of reasonable doubt, but failed to say anything about the presumption of innocence, the defendant not having requested any such charge. Defendant excepted but on appeal the judgment of the lower court was upheld.¹

Whether the presumption of innocence should be charged along with reasonable doubt turns upon whether the presumption is to be regarded as evidence. If it is evidence then it should be included in the charge but if not it would not be error to omit it. The North Carolina court in the case of *Stewart v. R. R.*² adopted the view as expressed in *Coffin v. U. S.*:³ "A presumption of law is evidence. In all systems of law presumptions are treated as evidence. The presumption is one of the instruments of proof." The application was to the presumption of negligence but the court intimates that the same applies to all presumptions. Taking that to be the law, the present case⁴ establishes a new position.

If the presumption is to be regarded as evidence then the parties do not stand equal at the beginning as in a civil case. The defendant has the presumption in his favor to start with and the state must produce evidence to overcome it. Not only must the state overcome it, for in that event the parties would stand equal, but it must establish the guilt of the defendant beyond a reasonable doubt. Under this consideration the jury should have the presumption before them as something in favor of the defendant. Thus a charge as to reasonable doubt but omitting the presumption of innocence would deprive the defendant of something to which he was entitled. This is the view taken by the court up to the present time and is one followed in other jurisdictions⁵ and is sponsored by Greenleaf.⁶

The view which appears more sound and reasonable is the one taken by our court now and one sponsored by Wigmore⁷ and Thayer⁸

¹ *State v. Boswell*, 194 N. C. 260, 139 S. E. 374 (1927).

² *Stewart v. R. R.*, 137 N. C. 687, 50 S. E. 312 (1905).

³ *Coffin v. U. S.*, 156 U. S. 432, 39 L. Ed. 481 (1894).

⁴ *State v. Boswell*, 194 N. C. 260, 139 S. E. 374 (1927).

⁵ Alabama, Nebraska, and Vermont.

⁶ 1 Greenleaf, Evidence, Part I, ch. 4, sect. 34. "This legal presumption is to be regarded in every case, as a matter of evidence, to the benefit of which the party is entitled."

⁷ 5 Wigmore, Evidence, Sect. 2511. "No presumption can be evidence, it is a rule about the duty of producing evidence."

⁸ Thayer, Preliminary Treatise on Evidence at the Common Law, Appendix B, p. 551; 16 C. J. 535 Section 1007; *Culpepper v. State*, 4 Okla. Cr. 103, 111 Pac. 679, 31 L. R. A. N. S. 1166 (1910).

and which has been adopted in many jurisdictions.⁹ Under this consideration the presumption need not be charged for it is not considered as evidence. The presumption takes the fact of innocence as established rather than being evidence in and of itself and throws the burden of proof upon the state. There is no weighing of the evidence of the state on the one side and the presumption on the other. The presumption merely gives the court a rule to keep in mind as to the production of evidence. Coupled with the principle of reasonable doubt it makes it necessary that the state produce enough evidence to show the guilt of the defendant beyond a reasonable doubt. This presumption does away with any reflection which might be cast upon the defendant by the fact of his being charged with a crime and is not evidence to be weighed in his favor.

The view of the court in this case¹⁰ establishes a new position, one which conforms to reason more than the former view and one which is being backed by an ever increasing number of jurisdictions.

ANDREW C. McINTOSH.

In *Raven v. Laurens*, 139 S. E. 546 (Ga., 1927), an injunction was granted restraining defendant from erecting a filling station in a residential subdivision in violation of a building restriction not contained in deed, but of which defendant had notice. Such restrictive covenants are enforceable in equity.

CRIMINAL LAW — JURISDICTION — OFFENSE COMMITTED ON AMERICAN VESSEL IN FOREIGN PORT—The relator was indicted under sec. 272 of the Federal Criminal Code defining and prescribing punishments for homicides committed on American vessels "upon the high seas or on any other waters within the admiralty and maritime jurisdiction of the United States." The act was committed upon an American vessel moored to the wharf in an Italian port. *Held*, the federal courts are without jurisdiction under the statute because the offense was not committed on the high seas. *United States ex rel. Maro v. Matthews*, 21 F. (2d) 533 (E. D. Pa., 1927).

The inferior federal courts have no criminal jurisdiction except as provided by express enactment.¹ Congress is empowered by the constitution to define and prescribe punishment for crimes committed on the high seas.² In the principal case, as pointed out by the court,

⁹ Iowa, Oklahoma, Kansas, and Connecticut.

¹⁰ *State v. Boswell*, 194 N. C. 260, 139 S. E. 374 (1927).

¹ *United States v. Wilson*, 3 Blatchford 435, 28 Fed. Cas. 718.

² Fed. Const. Art. I, Sec. 8, Cl. 10.

jurisdiction was wanting unless the act was committed on the high seas within the meaning of the statute. The courts construe "high seas" as used by Congress in criminal legislation in the popular sense as distinguished from land-locked territorial waters.³ "The high seas are the unenclosed waters of the ocean outside the projecting capes."⁴ In our case the court would not concede that a vessel lying at anchor in a harbor would not be on the high seas. In the strictly natural sense that would depend upon the physical characteristics of the harbor. Certainly it would be within the limits of territorial waters, which in the purview of international law extend a marine league out into the sea from shore.⁵ For purposes of jurisdiction it would be confusing to conceive of the high seas and territorial waters as overlapping.

The common law theory of jurisdiction over crimes is territorial. The civil law theory is personal.⁶ The assumption of extra-territorial jurisdiction by a sovereign over its citizens is recognized by treaties giving such jurisdiction to consular courts and by the law of nations in the punishment of piracy.

Jurisdiction of vessels on the high seas cannot properly be based on the territorial theory, though it is a common practice to apply it to them⁷ on the theory that they are floating parts of the territory of the sovereign whose flag they fly.⁸ The jurisdiction is, as a matter of fact, personal jurisdiction, or tantamount thereto, and no fiction is needed to support it.⁹

Unquestionably the local sovereign has exclusive territorial jurisdiction over ports and unless exempt by treaty vessels entering are subject to the local law.¹⁰ It is none the less conceivable that the same act might be an offense against the laws of several sovereigns,¹¹ all upon different theories of jurisdiction.

J. B. FORDHAM.

³ *United States v. Wilson*, *supra*, note 2.

⁴ *Miller's Case*, 17 Fed. Cas. 300.

⁵ Moore, Digest of International Law (1904), 885; Hershey, Essentials of International Public Law (1912), 195.

⁶ For an extreme assertion of jurisdiction see *Cutting's Case* treated in I Moore, Digest of International Law (1904), 228-242, where the Mexican government claimed criminal jurisdiction over a United States citizen for a libel published in Texas, copies of which were circulated in Mexico.

⁷ 27 Harv. L. Rev. 269.

⁸ 17 C. J. 170.

⁹ Hershey, Essentials of International Public Law (1912) 220.

¹⁰ *Wildenhuis's Case*, 120 U. S. 1.

¹¹ As where a citizen of one state commits an offense on board a vessel of another sovereign in a port of a third. Jurisdiction in the first case would be personal, in the second personal as of the vessel, and in the third territorial.

Georgia is evidently "fundamentalistic" in law as well as in religion, for in a recent case a sales manager is held not to be an officer, at least, an acceptance by the sales manager is not sufficient, where a contract of sales required an acceptance by an officer. *Ralston Purina Co. v. Arthur*, 139 S. E. 366 (Ga., 1927).

EVIDENCE—PRESUMPTIONS ON PRESUMPTIONS—The plaintiff alleged his barn was destroyed by sparks which were communicated to it from defendant's engines, parked within fifty feet of the barn on the night of the fire. There was proof that whenever the fires were "chunked up" sparks would be freely emitted from the engines. It was also proved that 11 o'clock p.m. was the regular hour to "chunk up" the fires. The barn was discovered burning shortly after 11 p.m. From these facts the plaintiff asked the jury to infer that the fires were "chunked up" on this night at the regular hour, that the fires emitted sparks, and upon that basis to further infer that the sparks from these engines caused the destruction of his barn. The jury so found and the defendant asks that the verdict be set aside for the reason the verdict was founded upon inference based on other inferences and so invalid. *Held*, an inference may be based upon another inference or presumption if the primary inference has the standing of a proved fact. *Virginia Ry. Co. v. London*, 139 S. E. 328 (Va., 1927).

A great number of American courts pay dogmatic "lip service" to a "rule" that "presumptions may not be based upon presumptions, nor inferences upon inferences."¹ The reason usually advanced for this rule is that the primary inference is uncertain itself² and the evidence from which it is drawn too remote to be admissible on the secondary inference,³ changing the nature of the jury function from the process of arriving at a conclusion to mere speculation.⁴ Dean

¹ *United States v. Mammoth Oil Co.*, 14 F. (2nd.) 705, 717 (C. C. A. 8th., 1926); *J. W. Ringrose v. W. & J. Sloane*, 266 F. 402 (E. D. Pa. 1920); *Looney v. Metropolitan R. R. Co.*, 200 U. S. 480, 488 (C. A. D. C. 1906); *United States v. Ross*, 92 U. S. 281, 23 L. Ed. 707 (1875); *Harris v. Missouri-Kansas-Texas Ry.* (Tex. Civ. App.) 283 S. W. 895 (1926); *Johnson v. Western Express Co.*, 107 Wash. 339, 181 P. 693 (1919); *Globe Acc. Ins. Co. v. Gerish*, 163 Ill. 625, 45 N. E. 563 (1896); *Rimmer v. N. W. Ry. Co.*, 116 S. C. 190, 107 S. E. 479, 480 (1921).

² *United States v. Ross*, 92 U. S. 281, 23 L. Ed. 707 (1875); *Ohio Bldg. Safety Valve Co. v. Industrial Board*, 277 Ill. 96, 115 N. E. 149 (1917).

³ *Baggess v. Kansas City Ry. Co.*, 207 Mo. App. 1, 229 S. W. 404 (1921).

⁴ *Stumpf v. Montgomery*, 101 Okl. 257, 226 p. 65 (1924); *Hays v. Hogan*, 273 Mo. 1, 200 S. W. 286 (1917).

Wigmore contends that "there is no such rule, nor can be," advancing as his reason for that position the fear that the rule that "an inference can never be based upon an inference," if strictly enforced, would never permit an action to be adequately prosecuted.⁵ It is submitted that both positions are misleading and contribute to the confusion surrounding the subject by their failure to appreciate the true significance of the distinction between "presumptions" or "inferences" which are allowed for lack of more positive proof and "presumptions" or "inferences" which have passed beyond that stage and have assumed the dignity of established facts.⁶

This "rule" has been traced in origin to a quotation from Starkie on Evidence.⁷ The Virginia court has lucidly pointed out that much of the confusion and misapplication of this theory is caused by a misconception of what Starkie meant by "direct evidence," contending that he meant by that term any evidence of logical, probative force, either direct, testimonial, or circumstantial; and that whenever evidence is established in the case "as a fact," whether established by testimonial evidence or adduced by inference from circumstantial evidence, "such fact may itself be taken as the basis for a new inference of fact."⁸ Whenever the terms of the rule are understood there is no difficulty in a proper application of it, and it is a safe and valuable principle. It is submitted that the application of this rule by the Virginia court in the instant case is the correct one: Whenever there is a technical presumption, created only because of some procedural

⁵ I Wigmore, Evidence (1923) 41: "It was once suggested that an 'inference upon an inference' will not be permitted . . . and this suggestion has been repeated by a few courts, and sometimes actually enforced. There is no such rule, nor can be. If there were, hardly a single trial could be adequately prosecuted." *Welch v. Chas. Frusch L. & P. Co.*, 197 Iowa 1012, 193 N. W. 427 (1923).

⁶ *Indian Creek Co. v. Calvert*, 68 Ind. App. 474, 120 N. E. 709 (1918); *Rasport Water Co. v. Holmes Packing Co.*, 121 Me. 345, 117 A. 311 (1922); *Stock v. Genl. Baking Co.*, 283 Mo. 396, 223 S. W. 89 (1920); *Sliwowski v. N. Y. etc. Ry. Co.*, 94 Conn. 303, 108 A. 805 (1920); *Indianapolis & Cinci. Traction Co. v. Monfort*, 80 Ind. App. 639, 139 N. C. 677 (1923).

⁷ 1 Starkie, Evidence (1824) 57: "In the first place, as the very foundation of indirect proof is the establishment of one or more facts from which the influence is sought to be made, the law requires that the latter should be established by *direct evidence*, in the same manner as if they were the very facts in issue."

⁸ *Chesapeake & Ohio Ry. Co. v. Ware*, 122 Va. 246, 95 S. E. 183 (1918); *Hinshaw v. State*, 147 Ind. 334, 363, 47 N. E. 157, 166 (1897): "There is important exception to no 'inference upon inference' rule, however. A fact in the nature of an inference may itself be taken as the basis of a new inference, whether intermediate or final, provided the first inference has the required basis of a *proved fact*"; 1 Greenleaf, Evidence, 34.

convenience and not because of any inherent probability of its truth,⁹ such a presumption is not a legitimate foundation for another presumption; but where there is a presumption, in the true meaning of the word, which accords with the natural inferences from the facts proved, then the facts giving rise to such presumption are as probative as direct or testimonial evidence and should constitute a legitimate foundation for another inference or presumption.

C. R. JONAS.

An automobile, driven by a chauffeur in an unlawful manner, ran into another car and killed one of its occupants. The owner, who was merely present in the car, was held guilty of involuntary manslaughter. *Moreland v. State*, 139 S. E. 77 (Ga., 1927). Whether a master should be held criminally liable for the acts of his servant in the scope of employment, thus extending the principles of agency applicable in civil suits for damages, presents some interesting questions.

GROUP INSURANCE—RIGHTS OF BENEFICIARY UNDER GROUP POLICY—Group life insurance is of comparatively recent origin, the first policy having been issued in 1912, but it is steadily gaining favor. This branch of insurance, simply defined, is the coverage of a number of individuals—not less than fifty—by a single or blanket policy. A more complete definition was embodied in the New York Laws in 1918.¹ This type of insurance is apparently intended for the insurance of employees or certain groups of employees. Medical examination is not required, because the indiscriminate insuring of all the employees in a given employment or in a given class eliminates or reduces to a minimum the individual selection against the company. Medical examination is nothing more than an expedient

⁹ This distinction is pointed out by Prof. Chafee in his article "Progress of the Law,—Evidence" 35 Harv. Law Rev. 302, 310.

¹ New York Laws 1918, c. 192 (N. Y. Ins. Laws, § 101a). "Group insurance is that form of life insurance, covering not less than fifty employees with or without medical examination, written under a policy issued to the employer, the premium on which is to be paid by the employer, or by the employer and employees jointly, and insuring only all of his employees or all of any class or classes thereof determined by conditions pertaining to the employment for amounts of insurance based upon some plan which will preclude individual selection, for the benefit of persons other than the employer; provided, however, that when the premium is to be paid by the employer and employees jointly and the benefits of the policy are offered to all eligible employees, not less than 75 per centum of such employees may be so insured."

adopted to counteract the adverse selection which would result if all applications were indiscriminately accepted by the companies. There must be a group of at least fifty individuals to permit the law of averages to work smoothly so that there may not be too large a percentage of impaired lives within the group. Massachusetts in 1921,² and North Carolina in 1925³ followed New York in defining "group insurance." The North Carolina statute incorporates standard provisions for policies of group insurance, the most important of which are the requirements that individual certificates be issued to the employees and a new individual policy if he leaves the employment, and a provision for adding new employees who are eligible. The employer is the policyholder during the employment and the certificate is merely informative. The proceeds of the policy are exempt from execution. The employee usually names a beneficiary but if he omits to do so the proceeds of the policy go to his dependents. The insurance money will not be paid to his estate if he has any dependents or any relatives as close as brother or sister.

The recent case of *Thompson v. Pacific Mills et al*,⁴ which seems to be the only decision concerning group insurance, decides that the right of a beneficiary under group policy ended after the expiration of one month temporary continuance after date for payment of annual premium, in view of the terms of the policy placing no restriction on the original contracting parties from entering into any contract for insurance. Nor did employer's failure to notify the beneficiary of the cancellation of the group policy create liability on the theory that by paying the premiums beneficiary might have taken advantage of certain provisions, since employee covered by the policy could obtain an individual policy only on termination of the employment for any reason. The premiums were paid by the employer, and in the certificate issued to the employee it was specifically stated that the taking out of the policy did not establish a precedent to continue the insurance. If as in some policies the insured has been required to pay part of the premium, the beneficiary might justly have complained of the failure of the employer to notify him of the cancellation; but under the circumstances of this case it was rightfully held that the beneficiary had no cause of action against either the employer or the insurance company.

J. C. RODMAN, JR.

² Mass. Gen. Laws 1921, Ins. § 133.

³ N. C. Pub. Laws 1925, c. 58.

⁴ 139 S. E. 619 (1927).

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACTS—IGNORANCE OF THE EXISTENCE OF A STATUTE AFFECTING COMPENSATION—The Supreme Court of Appeals of Virginia in the case of *King v. Empire Collieries*,¹ certified to it, held that where an employee was injured by an accident arising out of and in the course of his employment, the fact that he was doing at the time an act prohibited and penalized by statute would not bar recovery "unless the employer could show that the employee had knowledge of the statute, or that reasonable steps had been taken to bring the statute to his attention."

Decisions as to the effect of ignorance of the existence of a statute upon compensation² under Workmen's Compensation Acts fall into three groups: (1) those holding that such ignorance is no excuse, (2) those holding that such ignorance is an excuse, and (3) those holding that such ignorance is immaterial. This conflict in decisions results from the different interpretations by the several courts of the word "wilful"³ as used in the Workmen's Compensation Acts.

In keeping with the remedial and economically beneficent character of the acts,⁴ all courts agree that knowledge is an essential element of wilfulness.⁵ The first group, however, unable to break the shackles of precedent, declare that in cases of a violation of a statute this knowledge is presumed as a matter of law.⁶ The second group, realizing that the real basis of this presumption lies in its

¹ 139 S. E. 478 (Va. 1927).

² Penna. holds that by violation of a statute the employee takes himself out of the scope of his employment, thus defeating compensation. *Mizzer v. Philadelphia etc. Coal Co.*, 289 Pa. 735, 137 Atl. 126 (1927).

³ Many courts confuse the word "wilful" with the phrase "in course of employment." An amusing illustration is found in *Kinsman v. Hartford Courant Co.*, 108 Atl. 562 (Conn.), where the court declared that if a reporter sticks his head out of the street-car window carelessly or for his own purpose and is injured, his conduct is wilful; but if he does so to see an airplane in order to get a story for his paper, his conduct is not wilful.

⁴ *State v. Kindelberger*, 91 W. Va. 603, 114 S. E. 151; *Austin Bros. Co. v. Whitmire*, 31 Ga. App. 560, 121 S. E. 345.

⁵ *E. Clemens Horst Co. v. Indus. Accident Commission*, 193 Pac. 105 (Cal. 1920).

⁶ In *Bay Shore Land Co. v. Indus. Acc. Com.*, 172 Pac. 1128, (Cal. 1918), the court says "There are two classes of cases the first where the provision breached by the employee is a . . . private rule . . . of the employer. In this class the employee must have actual knowledge of the rule's existence. . . . The second class is where the provision breached . . . is a public statute. In this class the employee is charged with knowledge . . . and breach thereof is wilful misconduct as a matter of law." See also *Fidelity etc. Co. v. Indus. Acc. Com.*, 154 Pac. 834, L. R. A. 1916D 903, (Cal. 1916); *Great Western Power Co. v. Indus. Acc. Com.* 170 Cal. 180, 149 Pac. 35; *Dobson v. United Collieries* 8 Sc. Sess. Cas. 5th series (Scot.) 241, (1905).

necessity in the administration of justice,⁷ and realizing that it should not be applied to defeat the benefits given by the acts, yet seemingly unwilling to give full sanction to the economic hypothesis underlying the acts, hold that this knowledge must be actual, or the lack of knowledge the result of gross carelessness.⁸ The third group hold that the knowledge required to defeat compensation is not a knowledge of the existence or non-existence of a statute, but a knowledge of the surrounding circumstances—an understanding on the part of the workman that the act will probably result in injury to himself,⁹ and a deliberate persistence in spite of this understanding.¹⁰

It is submitted that this last group more fully appreciates the economic bases¹¹ of the acts, and is to be commended. The rule is, the industry must bear its own loss. The exception is, the wilful act of the workman whereby he brings the loss upon himself. This exception is necessary solely because the workman is able to bring about an injury purposefully (in its commonly accepted meaning), whereas a machine is not. Therefore, the true question is not, Did the workman know that he was violating a statute, but rather, did the workman know that his act, if persisted in, would probably result in injury? If the answer be affirmative, statute or no statute,

⁷ "Everyone capable to act for himself is presumed to know the law"—an utterly impossible and, *per se*, untrue presumption, but one which in the interest of the public is necessary. "It is at the foundation of the administration of justice. . . . To allow ignorance as a defense would be to offer a reward to the ignorant."—Pearson, J., in *State v. Boyett*, 32 N. C. 336. This presumption should be restricted in its application rather than enlarged; and certainly has no application to cases coming under the Compensation Acts.

⁸ *McNicol v. Spiers*, 1 Sc. Sess. Cas. 5th Series 604 (1899); *King v. Empire Collieries*, note 1, *supra*. See also *In re Burns* 105 N. E. 601, (Mass.); *Nickerson's Case*, 218 Mass. 158, 105 N. E. 604; *Baltimore Foundry Co. v. Ruzicka*, 132 Md. 491, 104 Atl. 167 (1918).

⁹ See *Harlan Gas Coal Co. v. Trail*, 213 Ky. 226, 280 S. W. 954 (1926).

¹⁰ *Wick v. Gunn*, 169 Pac. 1087 (Okla. 1918). See also *Indemnity Ins. Co. v. Scott*, 278 S. W. 347 (Texas); *Gornier v. Chase Companies*, 97 Conn. 46, 115 Atl. 677.

¹¹ These Acts rest mainly upon the economic hypothesis that the losses incurred by an industry should be borne by that industry. Accidents wherein workmen are disabled or killed result in losses analogous to those incurred by the breakage or destruction of machines. The industry must bear the latter; it should bear the former. It is not a question of whether the employer is at fault, but whether the loss grew out of the industry. The legal objection has been twofold. (1) The Acts impose a liability without fault upon the employer. [*Ives v. South Buffalo Rwy.*, 201 N. Y. 271, 91 N. E. 431 (1911)]. This objection has been anticipated. (2) The employer-employee relationship is one of contract and the parties are free to introduce any terms therein they wish. But this freedom is the economic *negative* freedom, which is freedom only in name. Economic necessity places the workman upon a decidedly unequal basis to compete with his employer and compels him to contract to his detriment.

the workman should not recover; if negative, statute or no statute, he should.

S. E. ROGERS.

WILLS—SPECIFIC LEGACIES—GIFT OF MERCANTILE BUSINESS NOT SUBJECT TO DEBTS—Testator made a gift of “. . . my mercantile business including stock of merchandise, note accounts, and fixtures, located at Metter, Ga.” subject to conditions, one of which was that the business be continued ten years after testator’s death by his executors unless sooner terminated. *Held*, that this was a specific legacy which would not be diminished to pay debts contracted prior to testator’s death for goods purchased for resale in the business, but such debts should be paid out of the residuum and general legacies. *Bank of Statesboro et al v. Simmons*, 139 S. E. 661 (Ga., 1927).

The decision in this case was not unanimous, but seems to be logically sound. There can be little doubt that the gift was a specific legacy.¹ The gift is capable of being designated and identified, and is sufficiently designated by the testator.² The courts, however, will not construe legacies as specific unless clearly so intended by the testator.³ The business, though unincorporated and having no legal existence, might well be the subject of a specific bequest even if the testator had not so fully enumerated its physical constituents.⁴

If the gift was a specific legacy, there can be little doubt that the debts contracted by the testator for goods for resale in the business should be paid out of the residuary estate and general legacies, and not out of the specific legacy.⁵ The debt was the testator’s personal

¹ See 10 Har. L. Rev. 454 (1896); Legacy of specific amounts in named banks is specific legacy, *Hart v. Brown*, 145 Ga. 140, 88 S. E. 670 (1916). Bequest of all horses, cows, hogs, wagons, farming implements, household and kitchen furniture, on plantation where testator resides is specific legacy, *McFadden v. Hefley*, 28 S. C. 317, 5 S. E. 12, 13 A. S. R. 675 (1888). Bequest of fund itself or a clear intention that the fund alone shall be the basis of payment of the legacy is specific, *Hobbs v. Brennman*, 94 W. Va. 320, 118 S. E. 546 (1923).

² Note 1, *supra*.

³ *May v. Serrard's Legatees*, 115 Va. 617, 79 S. E. 1026 (1913); *Hills Adm'rs. v. Hill*, 127 Va. 341, 103 S. E. 605 (1920).

⁴ Where testator authorized his executor in case his nephew and clerk “should elect to carry on his business to permit them to do so without payment for good will,” it was held a specific legacy to the nephew and clerk, *Fryer v. Ward*, 31 Beav. 602, 54 Eng. Rep. 1272 (1862). See note 1, *supra*.

⁵ *Gordon v. Jones*, 86 Miss. 719, 39 So. 18 (1905); *Dunn's Executors v. Renick*, 40 W. Va. 349, 22 S. E. 66 (1895); *Heath v. McLaughlin*, 115 N. C. 398, 20 S. E. 519 (1894); *In re Will of Perry Wiggins*, 179 N. C. 326, 102 S. E. 499 (1920). See 28 R. C. L. 300.