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Recent Cases

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RECENT CASES

CONTRACTS — Right of Insured Minor to Change the Beneficiary. The insured, a minor, took out a $1,000.00 policy with the insurer. The policy was duly issued and the wife of insured was designated the beneficiary. The right to change the beneficiary was expressly reserved within the policy to the insured. The insured before obtaining his majority lost the policy and requested a duplicate thereof. The insured signed a release on original policy and requested that the beneficiary named in original policy be changed from his wife to his grandfather. The insurer issued a duplicate accordingly. The grandfather paid premiums from this date forward. The insured died while still in his minority. This action was thereupon commenced by the wife of insured against the insurer and insured's grandfather claiming that she is the legal beneficiary under the policy. The trial court sustained the plaintiff's contentions. On appeal, HELD, reversed. The change was duly made and insured minor was competent to effect the change of beneficiary. *Dryman v. Liberty Life Insurance Co.*, 216 S. C. 177, 57 S. E. 2d 163 (1950).

It has long been settled that a contract entered into by an infant is voidable by the infant, but is binding upon the party to the contract who is in his majority. *Hanks v. Deal*, 3 McCord 257 (1825); *Sarter v. Gordon*, 2 Hill Eq. 121 (1835). An infant who is a party to a contract may enforce it and is entitled to all rights that are stated therein. *Eubanks v. Peak*, 2 Bailey 497 (1831); and by inference in *Hammossopoulo v. Hammossopoulo*, 134 S. C. 54, 131 S. E. 319 (1923). It is universally held that an insurance policy taken out by a minor on his own life is a valid contract, voidable only at the will of the minor, and if not voided by him, is binding on the insurer. *Pippen v. Mutual Ben. Life Ins. Co.*, 130 N. C. 23, 40 S. E. 822; *Union Cent. Life Ins. Co. v. Hilliard*, 63 Ohio St. 478, 59 N. E. 230. It is the settled law of this jurisdiction, and in most others, that where the right to change the beneficiary has been reserved to the insured in the policy, the beneficiary has a mere expectancy and not a vested right or interest. *Antley v. Life Insurance Co.*, 139 S. C. 23, 137 S. E. 199 (1926), 6 A. L. R. 184; *Bost v. Volunteer State Life Insurance Co.*, 114 S. C. 405, 103 S. E. 771 (1920). The expectancy of the beneficiary of a life policy reserving to the insured the right to change the beneficiary may not be defeated except upon substantial compliance with the plan prescribed

by the policy for changing the beneficiary. *Shuler v. Equitable Life Assurance Society of U. S.*, 184 S. C. 485, 193 S. E. 46 (1937); *Wilkie v. Philadelphia Life Ins. Co.*, 187 S. C. 382, 197 S. E. 375 (1938). It has been held that even though voluntary payments of premiums have been made by a third party or by the beneficiary it will not deprive the insured of the right to change beneficiary in accordance with the reservations thereof in the policy, unless there is an agreement to the contrary. *Wintworth v. Equitable Life Assurance Society*, 65 Utah 581, 238 P. 648 (1925). As to the effect of the marriage of an infant, the courts hold that an instrument executed by married infant is voidable the same as that of an unmarried infant and may be affirmed or disaffirmed after attaining majority. *Losey v. Bond*, 94 Ind. 67 (1883). The custody of an insurance policy has absolutely no effect on an infants rights reserved therein. The parents or anyone else in possession of policy of an insured infant has no title to proceeds other than prescribed in the policy and possession is as a mere custodian. As to the general law see *Tuff v. Smith*, 114 S. C. 306, 103 S. E. 551 (1920); and as to infant see *Novosel et al v. Sun Life Assurance Co. of Canada*, 49 Wyo. 422, 55 P. 2d 302 (1936). Regardless of the above mentioned circumstances, when an infant takes out an insurance policy the infant has all rights that are reserved therein and if the right to change beneficiary has been reserved to the insured the infant may affect such change by compliance with stipulation within policy. *Novosel et al v. Sun Life Assurance Co. of Canada, supra; Novosel et al v. Sun Life Assurance Co. of Canada, et al*, 57 P. 2d 110 (1936).

Few courts have passed upon the right of an infant to change a beneficiary, but the courts that have, used the basic rules concerning infants rights from which their conclusions have been drawn. All courts recognize that infants have the right to enforce all contracts entered into by them and such are voidable only at their will. An insurance policy is merely a contract to insure a risk. If the infant desired to change the beneficiary and the company refused the infant could simply void his contract and enter into another and thus affect the desired change. If the court had not reached the result that it did in the instant case a possible unnecessary hardship would have been worked upon the insurer and possibly a monetary loss upon the infant. It must be remembered that a different situation arises when an infant and his parents or guardian enter into such a contract.

MELVIN K. YOUNTS.

CONTRACTS – Whether a Sum is to be Considered as a Penalty or as Liquidated Damages.* In response to government advertising for construction of six disappearing gun carriages when war was imminent, the claimant submitted four distinct bids, the highest being for the shortest time of delivery. The Government accepted the highest bid, with a provision in the contract for a deduction of $35.00 for each day's delay in delivery. In prior negotiations the sum was referred to as a "penalty"; that word was also used in a portion of the contract, but not in the clause pertaining to the sum. Claimant was late, to an aggregate of 600 days, in delivering the carriages; whereupon the Government deducted the sum of $21,000.00 from the purchase price. In an action to recover this sum, thus rounding out the full purchase price stipulated in the contract, the lower court construed the sum to be a penalty and allowed the claimant to recover on the ground that the Government had suffered no damage. On appeal, HELD, reversed. Prior negotiations and the contract indicate that the parties regarded the sum as one for liquidated damages, that the transaction was of such a nature that determination of actual damages was virtually impossible, that the sum was not disproportionate to damages which might result from breach of a contract of such a nature through failure in timely delivery. *United States v. Bethlehem Steel Company,* 205 U. S. 105 (1907).

The distinction between a penalty and liquidated damages is that in essence the penalty provided in a contract is a stipulation operating as a warning or threat, while the essence of liquidated damages is a genuine covenanted pre-estimate of such damage. *Shields v. early,* 132 Miss. 282, 95 So. 289 (1923); *Dunlop Pneumatic Tyre Co. v. New Garage & Motor Co.,* A. C. (Eng.) 79 (1915); See Note, Ann. Cas. 1915C, 935. Liquidated damages are amounts settled upon in advance of a breach; they may exceed or fall short of the actual damages sustained, but the sum thus determined in advance binds both parties to the agreement. *Pacific Hardware & Steel Co. v. United States,* 48 Ct. Cl. (Fed.) 399 (1913); *Thompson v. Hudson,* 79 Ga. App. 807, 47 S. E. 2d 112 (1948). But it is uniformly held that under a provision construed to be a penalty, nothing can be recovered for a breach of contract unless actual damages are sustained. *Rispin v. Midnight Oil Co.,* 291 Fed. 481 (1923); See Note, 34 A. L. R. 1336 (1925); *Rubin v. John C.*

*(Editor's Note). – In publishing this case-note the South Carolina Law Quarterly is deviating from its policy of publishing only the most recent cases as topic covered by the above will be of great interest and value to all attorneys in South Carolina. This case-note was assigned with instructions to treat the case as though it had been decided in 1950, consequently the statements of law are up to date and include the latest cases.

Gabler Co., 127 App. Div. 275, 111 N. Y. Supp. 124 (1908). In the past some courts have preferred to regard a sum stated to be payable if the contract was not fulfilled as a penalty rather than as liquidated damages, e. g., *Shute v. Taylor*, 46 Mass. 61 (1842); *Wallis v. Carpenter*, 95 Mass. 19 (1866). The modern tendency, however, is to allow the parties to make their own contracts and carry out their own intentions, even where it will result in recovery of the amount stated as liquidated damages. *Kothe v. R. C. Taylor Trust*, 280 U. S. 224 (1930); *Wise v. United States*, 249 U. S. 361 (1919). The general rule in determining whether a stipulated sum is to be regarded as a penalty or as liquidated damages is held to depend upon the intent of the parties as gathered from a full view of the provisions of the contract, the terminology expressive of intent, and the subject matter of the agreement. *Gentry v. Recreation, Inc.*, 192 S. C. 429, 7 S. E. 2d 63 (1940); *Steeper v. Williams*, 48 Pa. St. 450 (1865); See Note, 48 A. L. R. 903 (1927). A minority view holds intent to be immaterial, the question being whether or not the sum is in fact in the nature of a penalty. *Central Trust Co. v. Wolf*, 225 Mich. 8, 237 N. W. 29 (1931), See Note, 78 A. L. R. 843 (1932). In arriving at intent the courts will look to the form and language of the contract. *Tuten v. Morgan*, 160 Ga. 90, 127 S. E. 143 (1925); *Mattes v. Baird*, 176 Okla. 282, 55 P. 2d 48 (1935). But the language of the instrument is not conclusive. *Tuten v. Morgan, supra; Bradshaw v. Millikin*, 173 N. C. 432, 92 S. E. 161 (1917). The name given to a stipulated sum will have no controlling effect if the parties' intentions appear otherwise. *Lindsay v. Anesley*, 28 N. C. 186 (1845); *Ward v. Hudson River Bridge Building Co.*, 125 N. Y. 230, 26 N. E. 256 (1891). If the contract appear ambiguous, recourse to prior negotiations may be had in order to determine intent. *Brawley v. United States*, 96 U. S. 168 (1878); *Simpson v. United States*, 199 U. S. 297 (1905). Upon full consideration of a contract the courts will generally hold a stipulated sum to be a penalty when actual damages are readily ascertainable. *Murray v. Faust*, 224 Iowa 50, 276 N. W. 95 (1937); *Weinstein & Sons v. City of New York*, 289 N. Y. 741, 46 N. E. 2d 351 (1942). A majority of the courts will also hold that, even in cases in which a stipulated sum is denominated a "penalty", the sum will be considered as a liquidated damages rather than as a penalty when it is apparent that the parties so intended, when actual damages are uncertain, and when the stated amount is not disproportionate to what the actual damages might have been. *Ward v. Hudson River Bridge Building Co.*, supra; *Grimsley v. Life Insurance Co. of Virginia*, 154 S. W. 2d 196

(Tex. Civ. App.) (1941); *Summit v. Morris City Traction Co.*, 85 N. J. L. 193, 88 Atl. 1048 (1913), See Note L. R. A. 1915E, 385, accord, *Widnes Foundry, Ltd. v. Cellulose Acetate Silk Co.*, (1931) 2 K. B. 393, 80 U. Pa. L. Rev. 451 (1931-1932).

The holding of the court, in the case under discussion, is in line with the weight of authority. To hold the provision to be a penalty would place upon the Government the burden of proving actual damage, a virtual impossibility. Upon consideration of the cost of the gun carriages ($36,000.00 each), the sum of $35.00 per day does not seem disproportionate to what actual damages might have been. The lower court undoubtedly arrived at its decision — that the Government suffered no damage — because the war was virtually at an end when the carriages were delivered. But this fact bears no weight as, in any action ex contractu, the damages must be ascertained by viewing the contract as of its inception so as to determine the natural and probable result of a breach. To allow the claimant to recover the full contract price would be to allow it to take advantage of its own wrong, in that it would receive the highest price for the longest period of delivery — a circumstance which neither of the parties intended.

M. A. SHULER, JR.

DAMAGES — Reversal by Appellate Court Because of Inadequacy of Damages for Wrongful Death. The defendant, while negligently driving his automobile, struck a child of five who, as a result of the injury, died after several hours of pain and suffering. Pursuant to the Mississippi wrongful death statute, the jury brought in a verdict for plaintiffs, parents of the deceased, for $2,000. On appeal, HELD, reversed, on the grounds of inadequate damages. In such an action the party or parties suing shall recover such damages as the jury may determine to be just, taking into consideration damages of every kind to the decedent and all damages of every kind to all parties interested in the suit. § 1453 MISS. CODE OF 1942. The court stated in reversing, "It may be the case that the jury considered that the proof was not conclusive to show that the death of the child in question was not the result of an unavoidable accident, and this view may have influenced the jury in assessing the damages at only $2,000. However, having found from a preponderance of evidence that the defendant was guilty of negligence and therefore liable, the jury would not have been warranted in mitigating the damages, since a five year old child is prima facie incapable of contributory negligence". *Gordon v. Lee*, 43 So. 2d 665 Miss. (1949).

Judges have the power and are clearly charged with the duty of setting aside verdicts where damages are either so excessive or so small as to shock the conscience and to create the impression that the jury has been influenced by bias or prejudice or has in some way misconceived or misinterpreted the facts or the law which should guide them to a just conclusion. *Chesapeake & O. Ry. Co. v. Arrington,* 126 Va. 194, 101 S. E. 815 (1919). The verdict of a jury, awarding $100 for the wrongful death of a 16 year old industrious and energetic high school boy, was set aside because there was evidence of improper motives guiding the jury in the fixing of the inadequate amount. *Legg v. Jones,* 126 W. Va. 757, 30 S. E. 2d 76 (1944). The general rule auhorizing a review and reversal on grounds of inadequacy of damages assessed in the jury's verdict applies in instances of wrongful death where the damages are inadequate. The verdict, however, will not be set aside by the appellate court unless the evidence shows a mistaken conclusion was drawn by the jury due to inadequate presentation of evidence or an incorrect charge. *Clark v. Iowa C. R. Co.,* 162 Iowa 630, 144 N. W. 332 (1913); *Louisville & N. R. Co. v. Street,* 164 Ala. 155, 51 So. 306 (1909). Some appellate courts, however, have reversed the trial courts, not because of a possible misconception of the evidence by the jury, but merely because the damages awarded the plaintiff were inadequate. *Wallace v. City of Rock Island,* 323 Ill. App. 639, 56 N. E. 2d 636 (1944); *Belzoni Hardwood Co. v. Cinquimani,* 102 So. 470 (1928). Where the damages granted to the plaintiff by the jury in the trial court were inadequate, the appellate court was not abusing its authority by reversing the decision solely upon the inadequacy of the damages. *Danielson v. Carstens Packing Co.,* 115 Wash. 516, 197 P. 617 (1921). A verdict of insufficient damages constitutes in itself a valid case for reversal. *McCarty v. St. Louis Transit Co.,* 192 Mo. 396, 91 S. W. 132 (1905). The rule in some jurisdictions is that the appellate court should vacate the trial jury's verdict, and acting as a super-jury award the damages. *Wood v. State,* 258 A D 1026, 17 N. Y. S. 2d 69 (1940); *Skidmore v. City of Seattle,* 138 Wash. 340, 244 P. 545 (1936). Louisiana for example is a jurisdiction where this rule has been closely followed and often applied. The Court is averse to increasing the verdicts of juries, who rarely underestimate damages; but when the jury has failed to do justice, the court in exercise of its jurisdiction must do it. *Sullivan v. Vicksburg, S. & P. R. R. Co.,* 39 La. Ann. 800, 2 So. 586 (1887); *Williams v. Missouri Pac. R. R. Co.,* La. App. 6 So. 2d 79 (1943).

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The result reached in the principal case is in accord with the weight of authority in this country. No case has been found where the authority to reverse because of inadequate damages has not been recognized. This is easily understandable, as the rule of reversal for excessive damages has long been established. Therefore, it is the duty of the courts to reverse because of inadequacy of damages and afford the same protection to the plaintiff, who has fared ill because of a jury's bias or prejudice or because of the jury's innocent misinterpretation of the pertinent facts, as has long been given to the defendant in similar circumstances.

MORTIMER M. WEINBERG, JR.

TORTS — Right of Privacy — Publication of Indebtedness. The defendant finance company sent to the plaintiff a telegram which read: "Must have March payment immediately or legal action." Several days later a second telegram was sent to the plaintiff demanding payment and repeating the threat of legal action. The plaintiff brought suit claiming that the telegrams in question damaged his business standing and held him up to redicule in his community. The lower court sustained the defendant's demurrer that the complaint did not state a cause of action. On appeal, HELD, affirmed. The plaintiff's complaint did not state a cause of action for damages for violation of the right of privacy, regardless of whether or not the plaintiff was indebted to the defendant at the time or whether or not the defendant acted in good faith. *Davis v. General Finance and Thrift Corporation,* 57 S. E. 2d 225 (Ga. 1950).

"The right of privacy has been defined as the right to live one's life in seclusion without being subject to unwarranted and undesired publicity, or the right to be let alone." *Rhodes v. Graham,* 238 Ky. 225, 37 S. W. 2d 46 (1931). This concept of the right of privacy has been recognized, by way of dicta, in South Carolina. *Holloman v. Life Insurance Company of Virginia,* 192 S. E. 454, 7 S. E. 2d 169 (1940). The attempted collection of a debt by publication to the world that another has not paid his debt has been held to be an invasion of the right of privacy. *Brents v. Morgan,* 221 Ky. 765, 299 S. W. 967 (1927). In a number of cases recovery was allowed on the theory of an invasion of privacy, for the mental anguish created by continual threats to bring legal action. *Barnett v. Collection Service Company,* 214 Iowa 1313, 242 N. W. 25 (1932). However, an invasion of the right of privacy must be restricted to "ordinary

sensibility and not to supersensitiveness", and furthermore, it must be considered in relation to the rights of free speech and free assimilation of news. *Cason v. Baskin,* 155 Fla. 198, 20 So. 2d 243 (1940). Many jurisdictions have granted relief only where the plaintiff has been discredited in the minds of a considerable class in his community, the criteria being that of libel and slander. *Wright v. R. K. O. Radio Pictures,* 55 F. Supp. 639 (1944). Truth is not a defense to an action for an invasion of the right of privacy, and neither will malice nor good faith on part of the defendant be considered. *Barber v. Time, Inc.,* 38 Mo. 1199, 159 S. W. 2d 291 (1942); *Cason v. Baskin, supra.* The earlier suits for invasion of the right of privacy usually concerned the use of a person's name or picture in advertisements without their consent, and later this cause of action became the best and most used legal weapon against the "yellow journalism" of the early 1920's. The advantage of bringing such a suit instead of libel is that truth is no defense. The modern trend seems to be to restrict in scope the right of privacy, and a very small minority of jurisdictions still refuse to recognize the doctrine at all. *Judevine v. Benzies-Montanye Fuel and Warehouse Company,* 222 Wis. 512, 269 N. W. 295 (1936). Two states have by statute recognized the existence of a cause of action for the invasion of the right of privacy. N. Y. CIVIL RIGHTS LAW, §§ 50, 51 (1921); UTAH REV. SATUTES, §§ 104, 105 (1933). Those cases holding a publication of indebtedness as an invasion of the right of privacy have usually involved situations where the defendant was guilty of flagrant, abusive, and wide spread publication, i. e. radio and newspaper; placards in the windows of homes, automobiles, and places of business. In those cases which have allowed recovery for mental anguish, using an invasion of the right of privacy as a cause of action, the collector repeatedly used harsh and abusive threats of legal action to bring about payment.

It would appear that the decision in the instant case is sound, due to the fact that there was not such a wide publication of the indebtedness as to embarrass a reasonable man, and only the supersensitive person would have suffered the mental anxiety necessary to sustain this cause of action because of the sending of the two telegrams.

W. J. FEDDER.

RAILROADS — Injuries to Animals on or Near Tracks — Presumptions and Burden of Proof. The plaintiff alleges that the defendant's train, due to it's negligent operations, struck and killed two calves belonging to plaintiff. The case was tried before a magistrate with

a jury, and at the conclusion of the evidence, a verdict was directed in favor of the defendant on the grounds that the evidence offered by the employees of the defendant completely rebutted the presumption of negligence relied upon by the plaintiff. On appeal, the Circuit Court held that there was error in not permitting the question of whether the presumption of negligence had been rebutted, by a showing of due care, to be submitted to the jury. The Supreme Court, on appeal by the defendant from the order granting a new trial, HELD, reversed. Where the evidence is clear and undisputed, the effect of the presumption of negligence is overcome and need not be weighed by the jury against unimpeached positive testimony of the railroad employees showing due care and that the accident was unavoidable.

It has been held that, where a plaintiff proves that his cattle were killed by a train, he has made out *prima facie* case of negligence with the burden of proof to make a satisfactory explanation resting upon the railroad, *Danner v. S. C. R. R. Co.*, 4 Rich. 329 (1851). The courts further provided that, in the running of trains, a railroad company must exercise ordinary care and it is the absence of this degree of care which makes the company liable for the killing of stock by a running train. *Molair v. Port Royal & Augusta R. R. Co.*, 29 S. C. 152, 7 S. E. 60 (1888). In a later case, the court sustained this rule upon the principle of *stare decisis* by stating that negligence is to be presumed from the killing of cattle by a railroad train and that proof of the fact of killing throws the burden upon the company. *Roof v. Railroad*, 4 S.C. 61 (1872). This *prima facie* evidence of negligence must stand until overthrown by counter-proof. *Fuller v. Port Royal & Augusta R. R. Co.*, 24 S. C. 132 (1885). This rule was enlarged upon when the courts held, that where the plaintiff proves that his stock was killed by a train, he raises a legal disputable presumption of negligence on the part of the railroad company and this presumption is not affected by the mere introduction of evidence on the part of the company unless such evidence is sufficient to rebut this presumption by making out affirmatively a case of accident. *Joyner v. R. R. Co.*, 26 S.C. 49, 1 S.E. 52 (1886). This rule of law remains unchanged by the inactment of statutes requiring stock to be kept enclosed. *Jones v. Columbia & Greenville R. R. Co.*, 20 S.C. 249 (1883). However, where the general stock law is applicable, a railroad company is not required to use the same degree of care and caution as in localities where the law is not in force. *Harley v. R. R. Co.*, 31 S.C. 151, 9 S.E. 782 (1888). Such a stock law is a circumstance which the jury can take into consideration in passing on the question of negligence. *Davis v. Florida Central & Penn. R. R.*, 47 S.C. 390, 25 S.E. 224

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(1896). It is a question for the jury to decide as to whether there was sufficient evidence on the part of the defendant railroad company to rebut the presumption of negligence. *Ervin v. A. C. L. R. R. Co.*, 106 S.C. 354, 91 S.E. 317 (1916). The jury may, if it sees fit, disregard all the evidence instructed by the defendant and find that it was negligent by the mere fact that stock was killed by its train. *Perryman v. Charleston & W. C: Ry. Co.*, 105 S.C. 34, 91 S.E. 317 (1916). Evidence of the employees of the defendant does not rebut the presumption of negligence but tends to do so and leaves it as a question for the jury. *McLeod v. A. C. L. R. R. Co.*, 93 S.C. 71, 76 S.E. 19 (1912). The South Carolina rule on the evidentiary value of presumptions is, to the effect, that when any fact raises a presumption of negligence such fact alone, stands as evidence of negligence throughout the trial to be weighed by the jury with the rebutting evidence of the defendant. *Baker v. Western Union Telegraph Co.*, 87 S.C. 174, 69 S.E. 151 (1910). The general rule followed in the majority of jurisdictions in the United States is that, in the absence of a statute, the mere fact that an animal was killed on the track raises no presumption of negligence on the part of the railroad and the burden is upon the plaintiff to show such negligence. 52 C.J. 107.

The rule in *Danner's Case,* as developed by the later cases, is an exception to this general rule in that a presumption was created by killing stock on the railroad. This presumption did not go out upon the introduction of substantial contradicting evidence of the defendant but remained a question for the jury as to whether the presumption was rebutted by the railroad's evidence. The reason for this rule was the difficulty in obtaining evidence other than that supplied by the railroad's employees, which may be biased, thereby putting an undue hardship upon the plaintiff. This continued as law for nearly one hundred years during which time the railroad companies never ceased their attempts to have this rule changed. Other jurisdictions have adopted statutes which provided that a *prima facie* case of negligence is made out against the railroad when stock is injured on the tracks. Courts in these jurisdictions hold that the presumption goes out when evidence is introduced to contradict it. The present case changed the rule in *Danner's Case* and held that a verdict would be directed for the defendant where it introduced *clear and undisputed* testimony. It is submitted that this decision reduced the status of such a presumption to a rule of evidence subject to the rules on presumptions of fact.

WILLIAM H. DUNCAN.