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RECENT CASES

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RECENT CASES

DIVORCE—Constructive Desertion. Plaintiff sued defendant, his wife, for divorce. The defendant counterclaimed for divorce on grounds of constructive desertion. The lower court found for the wife on her counterclaim and entered a decree granting divorce and awarding alimony, counsel fees, and custody of children. On appeal, HELD, reversed. The evidence did not sustain a finding of constructive desertion. *Machado v. Machado*, ___S. C.___, 66 S. E. 2d 629 (1951).

In South Carolina one of the grounds upon which a divorce can be granted is desertion. S. C. Const., art. 17, sec. 3; 46 St. at L. 138. The usual form of desertion is where one spouse abandons the marital home with the intent to terminate the marriage relationship. *Rose v. Rose*, 50 Mich. 92, 14 N. W. 711 (1883). In such a case the one leaving the home is the deserter. However, if one spouse, instead of leaving, so misconducts himself that the other in consideration of safety, health, and self-respect abandons the home, the offending spouse is, in the eyes of the law, the deserter and his actions render him guilty of constructive desertion allowing the offended spouse to sue for a divorce on that ground. *Lynch v. Lynch*, 33 Md. 328 (1870). It is well established that acts on the part of one spouse which justify the abandonment on the part of the other, and allow the other to sue for a divorce on the grounds of constructive desertion, must evince an intent on the part of the offender to permanently destroy the marital home. *Matthews v. Matthews*, 91 N. J. Eq. 149, 107 A 480, aff. 180 A 926 (1919). And it is not necessary that the offender entertain the fixed purpose to destroy the home at the time; it is sufficient if it is the natural consequence of his actions. *Czanyi v. Czanyi*, 93 N. J. Eq. 11, 115 A 76 (1921). It is likewise unanimously held that the disruption of the home must be against the will of the party forced out. *Masterson v. Masterson*, 20 Ky. Law Rep. 631, 46 S. W. 20 (1898). However, the degree of misconduct necessary to constitute one a deserter upon the other's leaving is by no means well defined. Generally, it is held that misconduct on the part of one which endangers the other's safety, health and self-respect is sufficient. *Lynch v. Lynch*, *supra*. Several jurisdictions restrict this rule

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somewhat, and hold that the misconduct must be such that the offended spouse could maintain an action for divorce independent of the misconduct. *Reynolds v. Reynolds*, 68 W. Va. 15, 69 S. E. 381 (1910). Drunkenness which leads to infliction of suffering amounting to cruelty is adequate misconduct, *Gray v. Gray*, 125 Cal. App. 203, 13 P. 2d 862 (1932), as are acts of cruelty alone. *Sweet v. Sweet*, 49 Nev. 254, 243 P. 817 (1926). Likewise the infliction of physical violence upon the other spouse, or even upon the child of the other, has been held sufficient to render the wrongdoer a deserter. *McGaughey v. McGaughey*, 231 Ky. 209, 21 S. W. 2d 245 (1929); *Rigsby v. Rigsby*, 82 Ark. 278, 101 S. W. 727 (1907). However, a single act of physical violence though coupled with nagging and occasional fits of temper is not sufficient misconduct. *Godfrey v. Godfrey*, 284 Ill. App. 297, 1 N. E. 2d 777 (1936). Drunkenness unaccompanied by further misconduct is likewise inadequate. *Martin v. Martin*, 159 Md. 46, 149 A 616 (1930). Even adultery on the part of the husband does not make the husband a deserter if his wife leaves the home as a result of such activity. *Stiles v. Stiles*, 52 N. J. Eq. (7 Dick) 466, 29 A 162 (1894). If the wrongdoer, after he has adequately provoked his spouse, and thus caused the spouse's departure from the home, makes overtures for a reconciliation, he is no longer a deserter. However, these overtures must be made in good faith and before the statutory period has run. *McGaughey v. McGaughey, supra.*

That the instant case could not amount to one of constructive desertion is clear. While the acts of the husband made life quite tedious at times to his wife and can hardly be condoned, nevertheless, they were not by any standard adequate to drive his wife from the home and constitute him a deserter. In fact, after the initial separation, which was at the wife's suggestion, the husband made several requests for a reconciliation and his wife admitted at the trial that she was the one responsible for the continued separation. There is no doubt, therefore, as to the correctness of the decision and the propriety of the Supreme Court's recognition of constructive desertion as a ground for divorce in this state. However, it is unfortunate that the Supreme Court did not take this opportunity to define the degree of misconduct necessary in this state to justify one in leaving the home and subsequently suing the wrongdoer for a divorce on the grounds of construc-

tive desertion. Instead the court expressly declined to accept either the view requiring that the misconduct be of such a nature as to entitle the libellant to a divorce independent of the desertion, or the view requiring only that the misconduct be of such a nature as to endanger the other party's safety, health and self-respect. Now that the South Carolina Supreme Court has accepted constructive desertion in this state, it is to be hoped that it recognizes it as an independent ground for divorce and does not adopt a definition of misconduct whose only effect is to emasculate the doctrine it purports to subserve, and thereby deny the people of this state an independent and just ground for divorce.

T. B. GUERARD

ADVERSE POSSESSION—Effect of Possession Held Under a Parol Gift. In partition suit by plaintiff, defendant intervened, claiming title by adverse possession to a portion of the land involved. Defendant set forth a parol gift of the tract claimed by him; his open, continuous and exclusive possession thereof, under claim of ownership, for more than thirty years; and substantial improvements made by him upon the property. From jury's verdict for defendant, plaintiff appeals. HELD, Affirmed. Possession of land under a parol gift, with claim of ownership, will support a claim of title by adverse possession, and under such gift, the donee's possession is adverse from its inception. *Harrelson v. Reaves*, ----S. C.-----, 65 S. E. 2d 478 (1951).

As noted in the instant case, a parol gift of land confers no right, except as it may be enforced in equity. *Caldwell v. Williams*, Bailey Eq. 175 (1831); *Knight v. Stroud*, 214 S. C. 437, 53 S. E. 2d (1949). But where the donee enters into possession of the land, with the requisite indications of ownership, such possession is generally regarded as hostile from its inception. *M'Elwee v. Martin*, 2 Hill 496 (1834); *Golson v. Hook*, 4 Strob. 23 (1849); *Schafer v. Hauser*, 111 Mich. 622, 70 N. W. 136, 35 L. R. A. 835 (1897); *Bridwell v. McGrew*, 228 Ky. 334, 14 S. W. 2d 1085 (1929). The possession of the donee is considered hostile in the legal sense of the word, although it is in fact permissive, as such possession could be ended by the donor at any time before the running of the statutory period; or, as otherwise stated, such possession is

equivalent to a tenancy at will, capable of revocation by the donor before the completion of the statutory bar. *Sumner v. Murphy,* 2 Hill 486, 27 Am. Dec. 397 (1834). This permissive nature of the donee's holding is not considered sufficient to defeat its adverseness; the cases holding in effect that the donee's possession is an occupation as of right, that it indicates his intent to take as owner, or that the possession is hostile because it is an assertion of ownership in the occupant. *Davis v. Bowmar,* 55 Miss. 671 (1878); *Nulton v. Nulton,* 247 Pa. 572, 93 Atl. 630 (1915); *Nevells v. Carter,* 122 Me. 81, 119 Atl. 62 (1922). As summarily stated in the early South Carolina case noted above, mere occupation by permission, in such cases, will confer title under the statute. *Sumner v. Murphy, supra.* However, several courts have experienced difficulty in dealing with instances where nothing is shown other than bare possession by the donee. One such court held that, in addition to possession, some assertion of a hostile claim is essential. *Bumpus v. Ohio Cities Gas Co.,* 86 W. Va. 227, 103 S. E. 62 (1920). But this view is not generally followed. The South Carolina court early pointed out that it is not necessary, in such cases, that there should be some act or declaration of the occupant affirming an exclusive right in himself. *Sumner v. Murphy, supra.* Rather, "it is only necessary that the land should be held as 'one's own'." *Gray v. Bates,* 3 Strob. 498, 503 (1849); *Suddeth v. Sumeral,* 61 S. C. 276, 291, 39 S. E. 534, 85 Am. St. Rep. 883 (1901).

As a characteristic of possession by a donee, it is interesting to note that even the donor's continued residence on the land with the donee has been held not to defeat the adverseness of the donee's possession. *Owsley v. Owsley,* 117 Ky. 47, 77 S. W. 397 (1903). Nor does the execution of a mortgage by the donor after entry by the donee change the character of the donee's holding or suspend the running of the statute. *Schafer v. Hauser, supra.* Only a subsequent recognition by the donee of the donor's superior title or a definite ouster and re-entry by the donor will dispell the adverseness of the donee's possession. *Parker v. Kelsey,* 82 Or. 334, 161 P. 694 (1916). Another interesting aspect of possession held under a parol gift is the possibility of the holder's taking advantage of the benefit of constructive possession or the doctrine of color of title. In those jurisdictions where a written instrument is not considered a requisite to color of title, it has been held that pos-

session under a parol gift is equivalent to possession under color of title. *Wilson v. Campbell,* 119 Ind. 286, 21 N. E. 893 (1889); *Davis v. Davis,* 68 Miss. 478, 10 So. 70 (1891). On the other hand, where the view prevails that a written instrument is essential to confer color of title, a distinction is made as to whether the claim of color of title is set up against the donor or persons in privity with him, or against persons not in privity with the donor. As against persons not in privity with the donor, the parol gift is considered insufficient to constitute color of title. *Golson v. Hook, supra; Lyles v. Fellers,* 138 S. C. 31, 136 S. E. 13 (1926); *Philbin v. Carr,* 75 Ind. App. 560, 129 N. E. 19 (1920). As between the donee and the donor or a person in privity with him, the oral gift is considered color of title. *Sumner v. Murphy, supra; Tennessee Coal, Iron & Ry. Co. v. Linn,* 123 Ala. 112, 26 So. 245, 82 Am. St. Rep. 108 (1898). Some doubt may arise, however, as to the present status of this view in South Carolina because of statutes, enacted subsequent to the *Sumner v. Murphy* decision, requiring any claim constituting color of title to be in writing. S. C. CODE OF LAWS §§ 378, 380 (1942). Regardless of whether the claimant has benefit of color of title, it seems settled that, after holding under a parol gift for the statutory period, a person acquires complete legal title, by adverse possession, to that land actually occupied, all other requisites of adverse possession being satisfied. *Harvey v. Harvey,* 26 S. C. 608, 2 S. E. 3 (1886); *Lyles v. Fellers, supra.*

The result in the instant case appears undoubtedly to be in accord with the practically uncontroverted weight of authority in this state and elsewhere. Perhaps the only point among these well settled principles about which some doubt could arise is the holding in *Sumner v. Murphy* that a parol gift constitutes color of title as between donee and donor. However, it is suggested that the statutes relating to color of title (as noted above) were declaratory of the common law rules of the state in regard thereto. Consequently, with this in mind, it appears that the court, should this question arise, would affirm the principle of the *Sumner* decision and the other competent authority in accord.

FRANCIS B. NICHOLSON

SURETYSHIP—Scope of Surety Bond For Contractor. The defendant entered into a contract with the South Carolina Highway System for the construction of a steel superstructure. The agent for the subcontractor of the defendant used four steel beams as outriggers for a derrick in the construction of the superstructure. The plaintiff now sues for the purchase price of these beams. The defendant Bonding Co. had entered into a bond with the South Carolina Highway Department wherein it was agreed that they would "pay when and as due all lawful claims for labor performed or materials furnished for use in and about the contruction of said highway or highway structures." It was agreed that there were no disputed facts to be submitted to the jury. The Presiding Judge directed a verdict for the defendant. HELD, affirmed. Permanent additions to a contractor's equipment, which by their nature are neither depreciated nor consumed on the contract, are not within the scope of a surety's bond. *Kline Iron & Metal Company v. McMeekin Construction Co., et al,* Westbrooks, ____S. C.____, ____ S. E.____ (1951).

Items going into the work or contributing to its execution and nothing else are such items that shall be within the scope of a surety bond for the contractor. Those items which improve and go into the general plant of the contractor and are available for other work will not be within the scope of such a bond. *City of Alpena v. Title Guaranty and Surety Co.,* 158 Mich. 678, 123 N. W. 536 (1909). To determine, then, whether a given article furnished the contractor is or is not within the purview of the bond, one must differentiate between materials and contractor's working equipment. *United States Rubber Co. v. Washington Engineering Co.,* 86 Wash. 180, 149 P. 706 (1915). A bond for materials and supplies does not cover material which is part of the permanent equipment of the contractor, *United States Fidelity & Guaranty Co. v. Yazoo County,* 145 Miss. 387, 110 So. 780 (1927), and there can be no recovery on a surety bond for major repairs or replacements which increase the value of the permanent equipment of a contractor in absence of proof that the new parts, by their nature, tended to be consumed in the work covered by the bond. *Western Casualty & Surety Co. v. Fulton Supply Co.,* 60 Ga. App. 710, 4 S. E. 2d 690 (1939). Repairs which add materially to the value of the equipment and render it available for other work are no more within the protection

of the bond than is equipment which adds materially to a contractor's plant and which, by its nature, is not consumed in a single job. *American Surety Co. v. Lawrenceville Cement Co.*, 110 F. 717 (C. C. D. Me. 1901). Therefore the surety's bond for "all labor performed and materials furnished" does not extend to major changes in equipment more or less permanent in character. *Maryland Casualty Co. v. Ohio River Gravel Co.*, 20 F. 2d 514 (4th Cir. 1927). The South Carolina court held in *Molony & Carter Co. v. Pennell & Harley, Inc.*, 169 S. C. 462, 169 S. E. 283 (1933), that material, to be within the purview of a surety bond, need not become a part of the project. And the supplies need not be totally consumed to come within the scope of the contractor's bond. *American Hardware & Equipment Co. v. Detroit Fidelity & Surety Co.*, 159 S. C. 263, 156 S. E. 770 (1930). The word consumed means the distinction rests on the effiect that the use has on the article and not upon the degree of use to which it was subjected. *United States Rubber Co. v. Washington Engineering Co.*, *supra.* Constructing does not mean simply the manual labor and mechanical work expended in the construction. It means such material as is necessary for the building of the project such as sand, carts, and other similar material. *Miller v. Cornell-Young Co.*, 171 S. C. 228, 171 S. E. 790 (1933). Small tools are supplies covered by the bond although they may outlast a particular job. Materials and supplies should not cover or include the major articles known as plant equipment provided by the contractor whether he performs a particular contract or not. They should be classified as materials and supplies on the one hand and equipment on the other according to their inherent nature, and not the circumstance that they do or do not outlast a certain job. *United States Fidelity & Guaranty Co. v. Benson Hardware Co.*, 222 Ala. 429, 132 So. 622 (1931).

The instant case listed *American Hardware & Equipment Co. v. Detroit Fidelity & Surety Co.*, *supra*, as apparently being in agreement with it. In that case the court attached special meaning to the words "in and about the construction" in holding that a surety bond for a contractor included a gasoline pump used on a construction project. There was no evidence as to the condition of the pump except that it was not consumed on the project. There was neither reference as to the inherent nature of the pump, nor any distinction made

as to supplies and equipment. The instant case is in accord with the most prevalent and logical view concerning a surety's scope of liability on a contractor's bond, but it is unfortunate that the court did not see fit to point out the distinguishing features between the instant case and the *American Hardware & Equipment* case. It is interesting to note that no South Carolina case was listed and none was found where the surety was relieved of liability for material or equipment purchased by a contractor when that equipment or material was used "in or about" the project covered by the bond. The decision reached in this case was most reasonable, but it will be interesting to observe the effect which it will have upon vendors selling goods to such contractors in the future in South Carolina.

J. JENNINGS

CORPORATIONS—Dealings Between a Director and the Corporation. The plaintiff, as a member of the board of trustees of the McLeod Infirmary, brought suit against the infirmary, an eleemosynary corporation, and members of its board of trustees, to have proposed conveyance of part of the property of the corporation held void. A judgment dismissing the complaint was entered in the lower court. On appeal, HELD, reversed. Although there was no showing of actual fraud or fraudulent intent on part of members of the board of trustees, in purchase of property from the corporation, the evidence showed that the member's conduct failed to measure up to the high standard required by the law of one in his fiduciary relation to the corporation, and hence, conveyance would be held void. *Gilbert, et al v. McLeod Infirmary, et al,* 219 S. C. 174, 64 S. E. 2d 524 (1951).

The directors of a corporation are regarded as occupying the position of trustees or at least quasi trustees, *Latimer v. R. R.,* 39 S. C. 44, 17 S. E. 258 (1892); and as officers of the corporation, they occupy a fiduciary relationship toward the corporation. *McKellar v. Stanton,* 104 S. C. 248, 88 S. E. 527 (1915); *Young v. Columbia Oil Co. of West Virginia,* 110 W. Va. 364, 168 S. E. 678 (1931). Their legal position is the same regardless of whether they are called directors or trustees. 1 Bogert on Trusts. At one time it seems to have been held in some jurisdictions, that a director could not, because

of his trust relationship, become the purchaser of corporate property. South Carolina in the case of *Anderson v. Butler*, 31 S. C. 183, 9 S. E. 797 (1898), followed this view in holding that it is a well established principle that a trustee cannot buy at his own sale. He cannot make a binding contract with himself in the purchase of trust property under his control. On the contrary, all such purchases are subject to be vacated and set aside by the cestui que trust at his option, and this too, without regard to the fact, whether such purchase was made in good faith, at full price, or was fraudulent and delusive. *Scottish-American Mortg. Co. v. Clowney*, 70 S. C. 229, 49 S. E. 569 (1904). In other jurisdictions and by the weight of authority, such purchases have been upheld, at least if the price has been fair and the officer has not been guilty of bad faith. *Union Trust Co. of Md. v. Carter*, 139 F. 717 (C. C. W. D. Va. 1905). This view was followed in the Circuit Court of Appeals sitting in the Eighth Circuit in the case of *Rhea v. Newton*, 262 F. 345 (1919), which held that while a contract between a corporation and a director will be closely scrutinized by the courts, it will be upheld if fair and made in good faith, and if no undue advantage was taken of the fiduciary relationship between the parties. *Cardin Bldg. Co. v. Smith*, 125 Okla. 300, 258 P. 910 (1927). It is a question for the jury whether the conveyance was properly authorized by the corporation and was made in good faith, for a fair consideration, free from the taint of undue advantage or fraud. *Green River Mfg. Co. v. Bell*, 193 N. C. 367, 137 S. E. 132 (1927). The general rule today is if the purchasing director abstains from participation in behalf of the corporation, and the corporation is properly represented by others who are personally disinterested, the transaction will stand under attack, if the purchasing director made full disclosure, paid full value, and the corporation has not been imposed upon. *Morris v. North Evanston Manor Bldg. Corp.*, 319 Ill. App. 298, 49 N. E. 2d 646 (1943). If the transaction is attacked, the burden is upon the director to establish these requisites by evidence. *Pepper v. Litton*, 308 U. S. 295, 84 L. Ed. 281 (1930). On the other hand, if the purchasing director participates in the representation of the corporation, the transaction is voidable at the option of the corporation, merely upon proof of the fact stated. *Schemmel v. Hill*, 91 Ind. App. 373, 169 N. E. 678 (1930). The difficulty in applying

this rule is the determination of whether the purchasing director was acting in his own behalf, or on behalf of the corporation. Several factors which have been used as an aid in determining this question are: 1. Was the purchasing director's vote necessary to constitute a quorum of the board. *Curtain v. Salmon River Co.*, 130 Cal. 345, 62 P. 552 (1900). 2. Was the purchasing director related to the other members of the board. *Crocker v. Cumberland Mining and Mill Co.*, 31 S. D. 137, 139 N. W. 783 (1913). 3. Were the other directors on the board employees of the purchasing director. *Bingham v. Belland Zoller Ice Co.*, 175 Ill. App. 469 (1912). 4. Did the purchasing director induce votes from his fellow members by friendship associations, or by knowledge that although he refrains from voting, he desires favorable action by others. *Rothenberg v. Franklin Washington Trust Co.*, 127 N. J. Eq. 406, 13 A 2d 667 (1940).

The result reached in the instant case is in accord with the overwhelming weight of authority. South Carolina follows the view that a director of a corporation is a trustee for the corporation. Any dealings by a director with the subject matter of his trust is viewed with jealousy by the courts. This is a wise doctrine founded on the soundest morality, for it removes temptation from the path of the director or trustee, and guarantees the faithful execution of his trust in the sale of the property of his cestui que trust.

CLARENCE C. BROWN, JR.

CRIMINAL LAW—Necessity of Requests. Defendant was convicted of the murder of his wife. In telling of the homicide, he contended that his wife "jumped on me", and "me and her got into it". Officers testified that he stated to them afterwards that he had killed his wife and "was ready to be electrocuted." Defendant's confession, signed four hours after the homicide, stated that he and his wife got into an argument and he stabbed her; that he had previously made up his mind to kill her if she did not withdraw a pending suit. State hospital observation disclosed that the defendant had the "mental age" of a ten or eleven year old, though not insane. The principal question on appeal was whether the lower court erred in holding that there was no evidence of manslaughter, and in failing to submit to the jury the defense

of insanity. On appeal, HELD, reversed. Although the court was not requested to charge the law of manslaughter, insanity, or to instruct on the subject of confession, such omission would not be held to waive defendant's right to attack conviction on these grounds when the death penalty was involved. *State v. Gardner,* 219 S. C. 97, 64 S. E. 2d 130 (1951).

The duty of the court in criminal cases, on its own motion, is to give instructions on *general principals of law,* but without requests it need not give instructions upon specific matters. *People v. Dozier,* 35 Cal. App. 2d 49, 94 P. 2d 598 (1939). It is well settled that to raise any question as to defects in the court's charge, a special charge must be requested to correct the defect. *State v. Gibson,* 83 S. C. 34, 64 S. E. 607, 64 S. E. 916 (1909). Thus the refusal or failure to give an instruction cannot be assigned as error unless a request for such instruction was made. *State v. Melton,* 186 S. C. 478, 196 S. E. 181 (1938); *Cason v. State,* 86 Fla., 276, 97 So. 720 (1923). It follows that where there is no request to charge, there is no error unless the omission is clearly prejudicial to the defendant. *State v. Haddon,* 49 S. C. 308, 27 S. E. 194 (1897); *State v. Walker,* 79 S. C. 107, 60 S. E. 309 (1908). In a murder case the New Mexico Supreme Court held that a defense could not be taken advantage of unless seasonably raised. *State v. Smith,* 51 N. M. 328, 184 P. 2d 301 (1947). However, an Iowa case, by *dicta* stated that if such omission, even without request, deprives the defendant of a fair trial, it constitutes reversible error. *State v. Hathaway,* 100 Iowa 225, 69 N. W. 449 (1896). Requiring the accused to call the attention of the judge to the charges must be tempered by the recognition of the Constitutional rights of the defendant. *State v. Orr,* 128 S. C. 279, 122 S. E. 771 (1924). If the entire record of the trial discloses that the defendant did not have the kind of trial contemplated by law, the supreme court will take congnizance of errors though waived by the defendant in taking exceptions and requesting instructions. *State v. Pace,* 187 Or. 498, 212 P. 2d 755 (1950). In *Gentry v. State,* 86 Okla. Cr. 92, 189 P. 2d 626 (1948), the court held that the upper court may examine the instructions to see if the defendant has been deprived of a fundamental right by reason of the instructions given. The opposite has been applied in Mississippi where defendant's failure to request instructions denied him the right to complain on appeal. *Carter v.*

State, 147 Miss. 171, 113 So. 177 (1927). The question of including the lesser charge in the greater has been considered by the South Carolina Supreme Court in *State v. Jones*, 133 S. C. 167, 130 S. E. 747 (1925), and *State v. Edwards*, 194 S. C. 410, 10 S. E. 2d 587 (1940), both murder trials, where they held that where there is no evidence of manslaughter, the law regarding it need not be charged. However, in such a case every doubt should be resolved in favor of the defendant, *State v. Martin*, 216 S. C. 129, 57 S. E. 2d 55 (1949), and especially in favor of a defendant condemned to die. *State v. Elliot*, 169 S. C. 208, 168 S. E. 546 (1933). In South Carolina the accused is entitled to any error appearing on the record without regard to technicalities. *State v. Dawson*, 203 S. C. 167, 26 S. E. 2d 506 (1943); *State v. McDonald*, 184 S. C. 290, 192 S. E. 365 (1937). Thus, to warrant the elimination of manslaughter, it is well settled that it should very clearly appear that there is no evidence whatsoever tending to reduce the crime from murder. *State v. Norton*, 28 S. C. 572, 6 S. E. 820 (1888); *State v. Hughes*, 107 S. C. 429, 93 S. E. 5 (1917).

Any criticism of the above decision must be tempered by the realization that a man's life is at stake. In case of the death penalty, human omission should not deprive a man of all of his available defenses no matter how heinous the crime. The revulsion for the crime should not displace reason in such a manner as to blind our courts to fair play which is the very essence of ordered liberty and justice. In the instant case, the court resolved the slightest possibilities in favor of the defendant. Such a decision is sound and guarantees a just and fair trial despite the human element involved. A jury must have the requisite legal guide in fundamental matters concerning a case in order to render a just and proper verdict. To condemn a man to death and allow no review of questions unless seasonably raised, is to stake his life on the frailty of human judgment. The decision in the instant case is heartening in its watchfulness of the delicate balance of justice.

GEORGE THOMY

JUDGMENTS—Power of Equity to Set Aside a Judgment at Law Based on Fraud. Plaintiff brought this action in equity

to have a judgment at law vacated on the ground that it was obtained by false and perjured testimony, and sought injunctive relief to prevent the enforcement of the judgment. The trial court overruled the defendant's demurrer to the complaint. On appeal, HELD, reversed. Where a judgment results from a trial in which there was false testimony, an independent action in equity will not lie between the parties or their privies to set aside such judgment on the ground of fraud. *Bryan v. Bryan*, ----S. C.-----, 66 S. E. 2d 609 (1951).

While the general doctrine is that fraud vitiates the most solemn contracts, documents, and even judgments, there is a split of authority as to whether a court of equity will set aside a judgment at law because it was founded on a fraudulent instrument or prejured testimony. The leading case against such action appears to be *United States v. Throckmorton*, 98 U. S. 61, 25 L. Ed. 93 (1878), holding that in order to set aside a judgment based on fraud, such fraud must be extrinsic or collateral to the matter in issue, and that intrinsic fraud is not sufficient for equitable relief. Cases of extrinsic fraud are presented in instances where one party is prevented by the fraudulent contrivance of his adversary from having a trial, *Pico v. Cohn*, 91 Cal. 129, 25 P. 970, 27 P. 537, 13 L. R. A. 336, 25 Am. St. Rep 159 (1891), or where a litigant by fraudulent means keeps his opponent from court. *Dodge v. Williams*, 107 Ga. 410, 33 S. E. 468 (1899). Perjured testimony and fraudulent instruments, however, are not generally considered grounds on which a court can disregard a prior judgment or deny its enforcement in an independent proceeding. *Aetna Casualty & Surety Co. v. Abbott*, 130 F. 2d 40 (4th Cir., 1942); *Steele v. Culver*, 157 Mich. 344, 122 N. W. 95 (1909); *Blankenship v. Montgomery*, ----Ark.-----, 239 S. W. 2d 272 (1951); *Thomas v. Marvins Credit, Inc.*, --- D. C. Mun. App.-----, 81 A 2d 340 (1951). The opportunity for one so injured to make the truth appear is at the trial, for it is there that he is put on notice that perjury has taken place. If he fails, overborne by perjured testimony, and fails again to show the injustice done on motion for a new trial, should the judgment be affirmed on appeal he is without remedy. *Pico v. Cohn*, *supra.*

On the other hand, the principal case sanctioning use of equity's remedial powers in cases of this nature finds the United States Supreme Court saying that any fact clearly

proving it to be against conscience to execute a judgment, and of which the injured party might have availed himself at law, or of which he might have availed himself at law, but was prevented by fraud or accident, without fault or negligence on his part, justifies an application to a court of chancery. *Marshall v. Holmes,* 141 U. S. 589, 12 S. Ct. 62, 35 L. Ed. 870 (1891). There the court gave relief against a judgment obtained on a forged letter. In *Klaes v. Klaes,* 103 Iowa 689, 72 N. W. 777 (1897), such a decree was obtained to vacate an alimony judgment in a divorce action, in which the injured party did not appear, where the judgment was based on perjury. It has also been held that equity will grant relief where, on perjured testimony, a judgment that the defendant was the father of plaintiff's illegitimate child was obtained. *Munro v. Callahan,* 55 Neb. 75, 75 N. W. 151 (1898). Apparently the only case, prior to the instant case, in South Carolina on this point is *Crawford v. Crawford,* 4 DeSaus. Eq. 176 (S. C. 1811), in which the court enjoined the defendant from availing himself of a judgment at law granted on a fraudulently obtained bill of sale. Wells, in his work *Res Adjudicata,* § 499 (1878), in referring to the *Crawford* case, writes that he believed it stood "almost or quite alone, and has no weight as a precedence. (*sic.*)"

The confusion attendant upon the two leading Federal Cases, was apparent as early as 1894, when the Circuit Court Judge in *Graver v. Faurot,* 64 F. 241 (N. D. Ill. 1894), said he "might have recourse to the maxim that the greater regard should be given to the latter decision," i. e. the *Marshall* case, "were it not for the fact that in the latter case, the former decision is approvingly referred to, and apparently sought to be followed." When requested to clarify the rule, the Supreme Court denied *certiorari,* stating that to answer the question would be to practically pass on the whole case. *Graver v. Faurot,* 162 U. S. 435, 16 S. Ct. 799, 40 L. Ed. 1030 (1896). Finally, the Circuit Court of Appeals held that the making of false answers was a positive and actual fraud, which vitiates a decree based thereon. *Graver v. Faurot,* 76 F. 257 (7th Cir., 1896). Two years later, another Circuit Court of Appeals held that, as to *Marshall v. Holmes,* the *Throckmorton* case was *stare decisis. United States v. Gleeson,* 90 F. 778, 33 C. C. A. 272 (2nd Cir., 1898). Later more doubt was cast on the question by *Publicker v. Shallcross,* 106

F. 2d 949, 126 A. L. R. 386 (3rd Cir., 1939), in which the court doubted whether the *Throckmorton* case was still the law of the Supreme Court, and expressed the belief that its "harsh rule" would be modified in accordance with the more salutary doctrine of *Marshall v. Holmes*.

A survey of the multitude of cases on the Federal level concerning equity's power to set aside a judgment based on perjured evidence tends to hopelessly confound the reader. The United States Supreme Court has produced two apparently incompatible rules, overruled neither, and refused to make a choice between them. The sounder of the two, and the one supported by the greater weight of authority, seems to be the rule set forth in the *Throckmorton* case. Underlying the doctrine is the maxim *"Interest reipublicae ut sit finis litium,"* ("It concerns the state that there should be an end of lawsuits"). For should equity exercise this power, litigation of intrinsic matter might continue *ad infinitum*. The instant case, itself, presents a problem within South Carolina. *Crawford v. Crawford,* cited in the *Throckmorton* case, holds that equity will relieve a judgment at law founded on intrinsic fraud. It has never been overruled. In the instant case, the court, believing the problem to be unique within the State, has held that equity will set aside a judgment at law based on fraud only if such fraud is extrinsic to the matter in issue. Therefore, unless we apply the maxim that the greater regard should be given the latter decision, South Carolina finds itself in the same dilemma in which the Federal courts find themselves, with two conflicting and seemingly irreconcilable rules.

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