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Case Notes

CASE NOTES

DAMAGES – Measure of Damages for Injury or Destruction to Growing Crops – By Breach of Contract. — Defendant failed to return a farm tractor in the agreed time which resulted in a decreased production of crops by the plaintiff. The alleged loss was three-fourths the normally produced amount of cotton for the land in controversy. When the contract was formed, there had been notice given stipulating the necessity for prompt return of the tractor in order to maintain and cultivate crops, however, the tractor was not returned for nearly two months. During this interim, the defendant had loaned the plaintiff a substitute tractor which he warranted as being in excellent condition. The tractor did not produce the necessary work, requiring the use of two mules, which in turn resulted in the loss. The trial court returned a verdict for $4,000 for plaintiff. Upon trial court overruling motions for nonsuit, directed verdict, judgment notwithstanding the verdict, and for new trial defendant appealed. HELD: Reversed. The admission of evidence by plaintiff and his neighbors as to what, in their opinions, the crop would have produced and its quality was too speculative upon which to base estimates of damages. *Amerson v. F. C. X. Cooperative Service, Inc.*, 227 S.C. 520, 88 S.E. 2d 605 (1955).

As laid down in *Hadley v. Baxendale*, 9 Exch. 341, 156 Eng. Reprint 145, 5 Eng. Rul. Cas. 502, 8 R.C.L. 455 (1854), the rule followed by the majority of courts for measure of damages to growing crops by breach of contract is that which arises naturally from the breach, or in such manner as may reasonably be supposed to have been in contemplation of the parties at the time the contract was entered into, as a probable result of the breach. *Spencer v. Hamilton*, 113 N.C. 50, 18 S.E. 167 (1893); *Stuart v. Burlington County Farmers' Exch.*, 90 N.J.L. 584, 101 Atl. 265, 69 A.L.R. 748 (1917). Even under the general rule, in order to recover damages, it must appear with reasonable certainty that the damage would not have occurred had the contract been fulfilled. *Lindsay v. Nichols & S. Threshing Machine Co.*, 59 N.D. 307, 229 N.W. 808, 69 A.L.R. 744 (1930); *Fairbanks, M. & Co. v. Austine*, 288 Fed. 1 (1923). In order to recover special damages, it is necessary to allege and prove that notice was given at the time of making the contract of the special circumstances from which damages might reasonably be expected to result. *Gadsden v. Fertilizer Co.*, 89 S.C. 483, 72 S.E. 15 (1911); *Stebbins v. Selig*, 257 Fed. 230, 250 U.S. 669, 63 L. Ed. 1199, 40

Sup. Ct. Rep. 15 (1919); *Klob v. Southern Ry.*, 81 S.C. 536, 62 S.E. 872 (1908). Where it is possible, the plaintiff must supply himself in open market with substitute goods which were contracted for "if he can do so with reasonable exertion, or at trifling expense, and he cannot recover from the delinquent party damages which he could with reasonable effort have avoided." *St. Louis Southwestern Ry. Co. v. Reagan,* 79 Ark. 484, 96 S.W. 168, 7 L.R.A. (N.S.) 997 (1906); 8 R.C.L. 442. Where the contractor knows, or should know by ordinary diligence, that by a delay damage will result which would be a natural and probable consequence of his delay, generally there can be a recovery. *Neal v. Pender-Hyman Hardware Co.,* 122 N.C. 104, 29 S.E. 96, 65 Am. St. Rep. 697 (1898); *Western Silo Co. v. Carter,* 98 Kan. 279, 158 Pac. 71, 69 A.L.R. 748 (1916); *Sutter v. International Harvester Co.,* 81 Kan. 452, 106 Pac. 29 (1910). The criterion for obtaining the exact measure of damages is diversified, but generally the rule followed is to show the kind of crops the land is capable of producing, the kind of crops destroyed, and the average yield of the land; *U. S. Smelting Co. v. Sisam,* 191 Fed. 293, 112 C.C.A. 37, 37 L.R.A. (N.S.) 976 (1911); *International Agr. Corp. v. Abercrombie,* 184 Ala. 244, 63 So. 549, 49 L.R.A. (N.S.) 415 (1913); also the average yield per acre of similar land in the immediate neighborhood cultivated in a like manner. *Smith v. Hicks,* 14 N.M. 560, 98 Pac. 138, 19 L.R.A. (N.S.) 938 (1908); *International Agr. Corp. v. Abercrombie,* 184 Ala. 244, 63 So. 549, 49 L.R.A. (N.S.) 415 (1913); *McCown-Clark Co. v. Muldrow,* 116 S.C. 54, 106 S.E. 771 (1921). Such evidence is to ascertain the value of the crop as it stood at time it was injured or destroyed and not its probable value when mature. *Thompson v. Chicago, B. & O. Ry. Co.,* 84 Neb. 482, 121 N.W. 447, 23 L.R.A. (N.S.) 310 (1909); *Sayers v. Missouri Pac. Ry. Co.,* 82 Kan. 123, 107 Pac. 641, 27 L.R.A. (N.S.) 168 (1910). However, the rule in South Carolina, and in some other jurisdictions, is that damages should be measured from the rental value of land, costs of fertilizers, and other expenses. *Horres v. Berkeley Chemical Co.,* 57 S.C. 189, 35 S.E. 500, 52 L.R.A. 36 (1900); *Lampley v. Atlantic Coast Line R. R. Co.,* 63 S.C. 462, 41 S.E. 517 (1901). Where it appears that crops have been entirely destroyed or nearly so, and where there appears to be a reasonable certainty that crops would have matured, the proper measure would be to allow for the probable yield when mature and ready for market, deducting the expense of raising the crop and also the value of the crop actually raised. *Smith v. Hicks,* 14 N.M. 560, 98 Pac. 138, 19 A.L.R. 938 (1908); *Board of Commissioners v. Richardson,* 122

S.C. 58 at page 60, 114 S.E. 632 (1921); *Clark Co. v. Muldrow,* 116 S.C. 54, 106 S.E. 771 (1921); *Cushman Motor Works Co. v. Kelley,* 70 Okla. 208, 173 Pac. 1042 (1918). Here contingent or speculative gain, with respect to which no means exist of ascertaining with any certainty whether they would have resulted or not, are rejected. *Horres v. Berkeley Chemical Co.,* 57 S.C. 189, 35 S.E. 500, 52 L.R.A. 36 (1900); *California Press Mfg. Co. v. Stafford Packing Co.,* 192 Cal. 479, 221 Pac. 345, 32 A.L.R. 114 (1907); *Fuller v. Edings,* 11 Rich. L. 239 at page 251 (1858).

When the delinquent party to a contract knows, or should know, that by his delay a serious loss will occur, he should be, and generally is held accountable for those losses. This general rule has a number of exceptions, making damages contingent on the injured party's good faith and reasonable effort to avert the loss by other means. Where damages are allowed, the principal problem the court must consider is what evidence should be allowed to ascertain a concrete figure for the amount of damages, and to what extent speculative or opinionative testimony may be allowed. The feeling seems to be fairly unanimous that courts will not allow recovery on a purely speculative basis. Nevertheless, courts have allowed recovery on what approaches speculation, in that testimony is sometimes allowed where it is based on a reasonable method of measurement. For example, a method of measurement might be to compare damaged crops with those grown under similar circumstances in the immediate neighborhood. Where a definite path is opened by the plaintiff which allows the court to measure damages, recovery can be obtained. However, where there is no such course the court in all fairness has no alternative except to reject the right to special damages.

LEONARD B. BURGESS.

FELONIOUS HOMICIDE — The Expanding Concept. — The present defendant and his co-felon perpetrated a robbery on a grocery store. While fleeing, the co-felon was killed in an exchange of shots between himself and the proprietor of the store. The defendant was indicted for first degree murder. The lower court sustained the defendant's demurrer to the commonwealth's evidence. On appeal, HELD: Reversed and new trial ordered. The killing of the co-felon was the natural foreseeable result of the initial act. The robbery was the proximate cause of the resulting death. *Commonwealth v. Thomas,* 382 Pa. 639, 117 A. 2d 204 (1955).

"He whose act causes in any way, directly or indirectly, the death of another, kills him within the meaning of the law of felonious homicide. It is a rule of both reason and law that whenever one's will contributes to impel a physical force, whether anothers, his own, or a combined force, proceeding from whatever different sources, he is responsible for the results, the same as if his hand unaided had produced it." 2 *Bishop, New Criminal Law,* 636-637 (8th ed. 1892), cited in *Commonwealth v. Almeida,* 362 Pa. 596, 12 A.L.R. 2d 183 (1949). By statute, the majority rule today is that every homicide committed in the perpetration of a robbery is murder. *Garcia v. State,* 159 Neb. 571, 68 N.W. 2d 151 (1955); *People v. Watson,* 132 Cal. App. 2d 70, 281 P. 2d 564 (1955); *State v. Mabry,* 324 Mo. 239, 22 S.W. 2d 639 (1929). There are three states which include all felonies. North Dakota Revised Code, § 12-2708 (1943); South Dakota Revised Code § 13-2007 (1939); Oklahoma Statutes, § 21-1701 (1951). There are only three states today which have no statutory coverage of felonious homicide — Kentucky, South Carolina, and Maine. Moesel, *A Survey of Felony Murder,* 28 Temple Law Quarterly 453 (1955). In those states which have statutes, all who participate are equally guilty even though the act was done by only one. *People v. Miller,* 37 Cal. 2d 801, 236 P. 2d 137 (1951); *State v. Cannon,* 49 S.C. 550, 27 S.E. 526 (1896); *State v. Rainey,* 149 Me. 92, 99 A. 2d 78 (1953). The test is whether the homicide was committed in the furtherance of the plan and was a probable result of its execution. *State v. Darling,* 215 Mo. 450, 115 S.W. 1002 (1909); *State v. Williams,* 189 S.C. 19, 199 S.E. 906 (1938). It is immaterial whether the killing was done intentionally or not, *Lynch v. State,* 207 Ga. 325, 61 S.E. 2d 495 (1950); *People v. Coefield,* 37 Cal. 2d 865, 236 P. 2d 570 (1951); *State v. Ciesiellski,* 213 S.C. 513, 50 S.E. 2d 194 (1948), because the distinguishing criterion of murder is malice aforethought. *Bramlett v. State,* 202 Ark. 1165, 156 S.W. 2d 226 (1941); *Commonwealth v. Drum,* 58 Pa. 9 (1868); *State v. Chastain,* 85 S.C. 64, 67 S.E. 6 (1909). This malice, however, need not be proven because it is presumed from the doing of a felonious act, *Simpson v. Commonwealth,* 293 Ky. 831, 170 S.W. 2d 869 (1943); *State v. Mason,* 54 S.C. 240, 32 S.E. 357 (1899); *State v. Reagin,* 64 Mont. 481, 210 Pac. 86 (1922), and the malice of the initial offense attaches to whatever else the criminal may do therewith. *Commonwealth v. Guida,* 341 Pa. 305, 19 A. 2d 98 (1941); *Commonwealth v. Lessner,* 274 Pa. 108, 118 Atl. 24 (1922); *State v. Heyward,* 2 Nott & McCord 312 (S.C. 1820). Deliberation, wilfulness, and premediation are also implied. *Cochran v. State,* 48 Ariz. 124, 59 P. 2d 658 (1936); *Com-*

monwealth v. Gricus, 317 Mass. 403, 58 N.E. 2d 241 (1944); *People v. Lindley,* 26 Cal. 2d 780, 161 P. 2d 227 (1945). The killing of one felon by another has been held within the doctrine of felonious homicide, *People v. Caballero,* 31 Cal. App. 2d 52, 87 P. 2d 364 (1939); *People v. Udwin,* 254 N.Y. 255, 172 N.E. 489 (1930), likewise putting a person in a position of danger, death resulting therefrom, to aid the felons in their escape. *Keaton v. State,* 41 Tex. Crim. 621, 57 S.W. 1125 (1900); *Taylor v. State,* 41 Tex. Crim. 564, 55 S.W. 961 (1900); *Wilson v. State,* 188 Ark. 846, 68 S.W. 2d 100 (1934). It is immaterial whether the accused is armed, *People v. Jones,* 136 Cal. App. 722, 29 P. 2d 902 (1934), nor does the fatal shot have to be fired by one of the felons. *Hornbeck v. State,* 77 So. 2d 876 (Fla. 1955); *Commonwealth v. Moyer,* 358 Pa. 181, 57 A. 2d 736 (1947); *Wilson v. State, supra.* The person killed does not necessarily have to be the intended victim, nor a defending police officer. He may be an innocent third party, *Commonwealth v. Guida, supra; Marion v. Commonwealth,* 269 Ky. 729, 108 S.W. 2d 721 (1937); *State v. Barton,* 5 Wash. 2d 234, 105 P. 2d 63 (1940), or he may be one of the several felons, killed as a result of his own acts, *Commonwealth v. Bolish,* 381 Pa. 500, 113 A. 2d 464 (1953), or those acts of a police officer. *Commonwealth v. Thomas, supra.* The killing does not have to be coincidental with the act, *Commonwealth v. Doris,* 287 Pa. 547, 135 Atl. 313 (1926); *Gilmore v. United States,* 124 F. 2d 537 (10th Cir. 1942), affirmed, 316 U.S. 661; *State v. Hauptmann,* 115 N.J. Law 412, 180 Atl. 809 (1935), but there must be a causal connection between the killing and the felony, *Commonwealth v. Kelly,* 333 Pa. 280, 4 A. 2d 805 (1939); *People v. La Barbera,* 159 Misc. 177, 287 N.Y.S. 257 (Sup. Ct. 1936); *People v. Perry,* 14 Cal. 2d 387, 94 P. 2d 559, 124 A.L.R. 1123 (1939), and the death must be the proximate cause or the natural consequence of the act. *Commonwealth v. Almeida, supra; State v. Glover,* 330 Mo. 209, 50 S.W. 1049, 87 A.L.R. 400 (1932); *State v. Opher,* 28 Del. 93, 188 Atl. 257 (1936).

The proximate cause theory has been applied in numerous criminal cases. One of the earliest of these is *Commonwealth v. Hare,* 4 Pa. L. J. 257, 22 Clark 467 (1844), where an innocent bystander was killed as a result of a gun battle in a public street. In convicting the two groups of felonious homicide, it was declared that violators of the peace whose unlawful act had caused the death of an innocent third party, or an unoffending person, could not escape punishment merely because it could not be determined who fired the fatal shot. This same principle has been applied and upheld, see e. g., *Johnson v. State,*

142 Ala. 70, 38 So. 182 (1905); *People v. Ryan,* 263 N.Y. 298, 189 N.E. 225 (1934); *Spies v. People,* 122 Ill. 1, 17 N.E. 898 (1887); *State v. Glover, supra.* However, some states refuse to apply the proximate cause theory to criminal cases. *Butler v. People,* 125 Ill. 641, 18 N.E. 338 (1888); *Commonwealth v. Campbell,* 89 Mass. 541, 83 Am. Dec. 705 (1863); *Commonwealth v. Moore,* 121 Ky. 97, 87 S.W. 1085 (1905); *People v. Ferlin,* 203 Cal. 537, 265 Pac. 230 (1928); *People v. Garippo,* 292 Ill. 293, 127 N.E. 75 (1920); *People v. La Barbera,* 159 Misc. 177, 287 N.Y.S. 257 (Sup. Ct. 1936); *State v. Oxendine,* 187 N.C. 658, 122 S.E. 568 (1924).

It seems that the courts of Pennsylvania have set a precedent in the principal case above. One of the most closely related cases would be that of *People v. Garippo, supra,* in which one of the felons was killed during the course of a robbery by persons unknown. All the co-felons were convicted of manslaughter in the lower court on the proximate cause theory. On appeal, however, the courts refused to recognize the proximate cause theory and reversed the verdict. In *People v. La Barbera, supra,* and *People v. Ferlin, supra,* the facts are primarily the same in that one felon hired another to burn a building and the other felon was killed as a result of his own act. In both of these cases the defendant was acquitted on the basis of the wording of the penal code along with the reasoning that the deceased could not be guilty of his own murder, and therefore, neither could the defendant. However, in the *Bolish case, supra,* in which the facts were the same, the defendant was convicted of first degree murder. In the case under discussion, the killing, in the manner in which it took place, was, and has been for many years considered a justifiable homicide in the eyes of the law. It is conceded that the *Ferlin case, supra,* and the *La Barbera case, supra,* could have reached similar decisions by applying the proximate cause theory. So also could practically any result be reached in criminal cases by applying the proximate cause theory and eliminating its major defense, i. e., intervening cause, on the basis of having a duty to protect the rights of the public equally with those accused of crime as was apparently done here in the *Bolish case, supra,* and the *Thomas case, supra.*

Speaking in reference to the cases considering felonious homicide in South Carolina, it seems that the present law would be that while perpetrating or attempting to perpetrate a felony or unlawful act, the liability of each co-felon extends to any acts done by one or more of his confederates as a natural and probable consequence of the acts done in pursuance of their common design. Although this is an application of the proximate cause theory to some degree, it seems that

the intervening cause comes into effect when the acts are done by someone other than one of the felons. It is conceivable that the courts, in order to achieve justice, would extend this doctrine of felonious homicide to include liability for the death of innocent persons killed accidently by police officers or individuals while defending their life or property, but it is difficult to conceive them extending such liability to the extent that a killing that was heretofore considered a justifiable homicide, would now be considered murder. Regardless of whether Pennsylvania has extended the common law doctrine of felonious homicide, or have read a great deal more into their present day statute than was intended to be there, it will be interesting to see how many of her sister states concur in the results reached in the principal case just discussed.

ROBERT M. KENDRICK.

LIBEL AND SLANDER – The Qualified Privilege of Mercantile Agencies. — Defendant, a mercantile agency, published a report to the effect that the plaintiff was heavily in debt both for the purchase price of his business and the business itself. The report was sent to two subscribers who had requested credit information concerning the plaintiff. It was conceded that part of the report was false. On the same day that the defendant was informed that the report was erroneous, it notified both subscribers of the error. The report was recovered unopened from one subscriber. In an action for libel plaintiff sought to prove the defendant guilty of gross negligence amounting to malice in employing its representative who supplied the erroneous information. It was shown that the representative had been convicted for drunkenness on numerous occasions more than one year previous to his employment with defendant. There was evidence that plaintiff and the representative had been and still were good friends. The trial judge directed a verdict in favor of defendant upon the ground that the evidence presented admitted of no reasonable inference than that it was a qualifiedly privileged occasion and there was no evidence of malice. On appeal, HELD: that the judgment be affirmed. *F. R. Cullum v. Dun & Bradstreet, Inc.*, 228 S.C. 384, 90 S.E. 2d 370 (1955).

The general rule appears to be that reports by mercantile agencies are qualifiedly or conditionally privileged if furnished in good faith to a subscriber having a legitimate interest in the information. *Erber & Stickler v. R. G. Dun & Co.*, 4 McCrary 160, 12 F. 526 (C.C.A.

Ark. 1882); *Sunderlin v. Bradstreet,* 46 N.Y. 188, 7 Am. Rep. 322 (1871); *Ormsby v. Douglass,* 37 N.Y. 477 (1868); *Bradstreet Co. v. Gill,* 72 Tex. 115, 9 S.W. 753, 2 L.R.A. 405 and note, 13 Am. St. Rep. 763 and note (1888). However, in some jurisdictions, a report of a mercantile agency has been held not to be privileged. *Johnson v. Bradstreet Co.,* 77 Ga. 172, 4 Am. St. Rep. 77 (1886); *Pacific Packing Co. v. Bradstreet Co.,* 25 Idaho 696, 139 Pac. 1007, 51 L.R.A. (N.S.) 893, Ann. Cas. 1916D 761 (1914); *MacIntosh v. Dun,* 18 A.C. 390, 2 B.R.C. 203, 12 Ann. Cas. 146 (1908). A communication sent to all subscribers without regard to their interest in the information destroys the privilege. *King v. Patterson,* 49 N.J.L. 417, 9 A. 705, 60 Am. Rep. 622 (1887); *Sunderland v. Bradstreet, supra.* A report of a mercantile agency in order to be privileged must have been furnished to persons having an interest in the subject matter. *Pollasky v. Minchener,* 81 Mich. 280, 46 N.W. 5, 9 L.R.A. 102, 21 Am. St. Rep. 516 (1890); *Taylor v. Church,* 8 N.Y. 452 (1853); *R. G. Dunn & Co. v. Shipp,* 60 S.W. 2d 502 (Tex. Civ. App. 1933), *partly reversed on other grounds* 127 Tex. 80, 91 S.W. 2d 330 (1936). The privilege will be lost if the communication containing defamatory statements goes beyond what the occasion requires even though there might be a common interest or duty of the parties. *Bell v. Bank of Abbeville,* 208 S.C. 490, 38 S.E. 2d 641 (1946); *Bohlinger v. Germanic Life Insurance Co.,* 100 Ark. 477, 140 S.W. 257, 36 L.R.A. (N.S.) 449, Ann. Cas. 1913C 613 (1911). In order for the communication to be privileged, it must have been furnished in good faith. *Bell v. Bank of Abbeville, supra; Fitchette v. Sumter Hardware Co.,* 145 S.C. 53, 142 S.E. 828 (1928); *Switzer v. American Railway Express Co.,* 119 S.C. 237, 112 S.E. 110, 26 A.L.R. 819 (1922); *Bradstreet Co. v. Gill, supra.* Ordinarily proof of a defamatory communication makes out a prima facie case of malice, but where there is a privileged communication the presumption of malice is rebutted and the plaintiff must show malice in fact. *Bell v. Bank of Abbeville, supra; Kenny v. Gurley,* 208 Ala. 623, 95 So. 34, 26 A.L.R. 813 (1923); *Southern Ice Co. v. Black,* 136 Tenn. 391, 189 S.W. 861, Ann. Cas. 1917E 695 (1916).

Modern business could hardly exist without the extensive use of credit. With the increasing growth of business and commerce, the need and worth of mercantile agencies is well recognized. However, the mere fact that mercantile agencies perform a beneficial service should not, in itself, cloak them with the privilege of issuing false reports to their subscribers. They enter into business and hold themselves out to the public to supply information for profit. It is not un-

just that they should assume the responsibility for their acts. Their entire motivation is profit and self-interest. Justification of the privilege to mercantile agencies has been based largely on the existence of a private duty of the mercantile agency to its subscribers who have an interest in the information. However, the very nature of that duty is that the information shall be accurate and not an erroneous or false report. If the privilege were removed from mercantile agencies, it would neither impose an undue burden upon them nor would it impede their business. Insurance is a preventive technique. Third party liability insurance is available to minimize risks. Fortunately in the instant case, the error in the report was discovered upon receipt by the subscriber. However, it is conceivable that a false report may be issued by a "credit" agency and acted upon by a subscriber and cause damage to an individual's business and reputation. If the communication was made in good faith and not actuated by malice, the injured party would be without redress. At least negligence should take the place of malice. It appears that an unjust burden is imposed upon an individual to require him to show express malice or malice in fact in order to destroy the qualified privilege of a mercantile agency.

WILLIAM LEIGHTON FILSON.

PROPERTY — Rights of Riparian Landowners on Navigable Streams to Compensation for Loss of Land as a Water Power Site in Eminent Domain Proceedings. — Condemnee (a South Carolina corporation) and a subsidiary Georgia corporation owned 4,519.15 acres of land in fee and had flowage rights over 188.50 additional acres. In 1944, Congress authorized the Clark Hill project. In 1947, the United States instituted its condemnation proceedings in South Carolina. At the same time, condemnation proceedings with regard to the property owned by the Georgia corporation were instituted in Georgia. Condemnee filed an answer claiming value based upon the potential use of their fast lands located above the high water mark of the river for water power development. Motions of the United States to strike these allegations were denied. *United States v. 1,532.63 Acres of Land,* 86 F. Supp. 467 (W.D. S.C. 1949). The question of just compensation was submitted to commissioners appointed by both district courts. After a joint proceeding, it was found that $60,293.60 was the value of the lands, considering only the agricultural and wild forest value. The commissioners also found

that the lands in question "were peculiarly adapted for use as a site or as an integral portion of a site for hydro-electric development," that this potential use had affected the market value of the land, and that the sound market value (including the value as a potential power site) totalled $1,257,033.00. This amount was allocated on an acreage basis. The award for the South Carolina lands was $471,904.45. The district court affirmed and gave judgment for the amount of the award. *United States v. 3,928.09 Acres of Land,* 114 F. Supp. 719 (W.D. S.C. 1953). Aff'd, *United States v. Twin City Power Co.,* 215 F. 2d 592 (4th Cir. 1954). Cert. granted, *United States v. Twin City Power Co.,* 348 U.S. 910 (1955). HELD, four judges dissenting: Reversed. There can be no vested private claims in the water of a navigable river that constitute "private property" within the meaning of the Fifth Amendment; consequently, the United States is not required to pay for any special value of the land in relation to the use of the water of the river. *United States v. Twin City Power Co.,* 76 S. Ct. 259 (1956).

The exercise by the Federal Government of the power of eminent domain is subject to the provision of the Fifth Amendment of the Constitution that private property shall not be taken for public use without just compensation. The fair market value of the property at the time of the taking is usually the measure of just compensation. *United States v. Commodities Trading Corp.,* 339 U.S. 121 (1950); *United States v. Felin & Co.,* 334 U.S. 624 (1948). But, uses of the property available only to the taker are not considered in the determination of the fair market value. *United States v. Miller,* 317 U.S. 369 (1943); *Union Exploration Co. v. Moffat Tunnel Improvement Dist.,* 104 Colo. 109, 89 P. 2d 257 (1939). This being the case, it must be noted that the interest of the Federal Government in the flow of a navigable stream is a dominant servitude. *United States v. Commodore Park, Inc.,* 324 U.S. 386, 391 (1945); *Federal Power Commission v. Niagara Mohawk Power Corp.,* 347 U.S. 239, 249 (1954). This interest has been called a superior navigation easement. *United States v. Gerlach Live Stock Co.,* 339 U.S. 725, 736 (1950). It must be noted further that the Government, at its discretion, can exclude riparian owners from the benefits of the power in a navigable stream. *United States v. Appalachian Electric Power Co.,* 311 U.S. 377, 424 (1940). Therefore, where the United States elects to exclude riparian owners from the benefits of the power in a navigable stream by the exercise of its servitude, or easement, no value contingent upon a utilization of the flow of the river can be attributed to the property.

In the instant case, the Supreme Court relied on *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913). On the strength of a supposed similarity between *Chandler-Dunbar* and the instant case, the majority of the Court rendered a decision denying to condemnee the power-site value of its riparian lands. It would appear that *Chandler-Dunbar* is distinguishable from the present case in one aspect. Another aspect of *Chandler-Dunbar* tends to support the conclusion reached by the District Court of South Carolina, as affirmed by the court of appeals. First, as to the distinction between *Chandler-Dunbar* and the instant case: In *Chandler-Dunbar* the United States exercised its navigation servitude to the exclusion of all other interests and eliminated without compensation a hydro-electric development constructed on *submerged land within the bed of the St. Marys River.* This property had *no value* independent of an appropriation of the flow of the river to a commercial use, whereas the land involved in the present case is *fast land lying above the high water mark* (condemnee with particularity did not claim any compensation for land within the bed of the river). Furthermore, the land in the present case has at least *some value* independent of an utilization of the flow of the stream. Now, as to the other aspect of the *Chandler-Dunbar* case: in fixing compensation for two strips of fast land, the Supreme Court allowed the inclusion as an element of value the availability of the parcels of land for lock and canal purposes. In the words of Mr. Justice Burton, who wrote the dissent in the case under study: "The *Chandler* case thus supplies specific authority for the decision of the lower courts in the instant case." The majority of the Court dismissed from mind this second aspect of the *Chandler-Dunbar* case by saying that the Court perhaps has been influenced in deciding *Chandler-Dunbar* by the fact that the use to be made of the land by the Government "was wholly consistent with the dominant navigation servitude of the United States and indeed aided navigation." The majority of the Court is faced with a dilemma if it chooses to justify in this way the holding of the *Chandler* case as to the compensation paid for condemned fast lands. On the one hand, in the instant case, if the dam *and its incidents* are not for the purpose of aiding navigation, then the contention of the respondent that this development did not constitute an exercise of the Government's superior navigation easement seems correct. On the other hand, if this development was in the interest of navigation, then it must be said in this case (just as the majority suggested was said in *Chandler-Dunbar*) that the use to be made of the land by the Government was "wholly consistent with the dominant navigation servitude of the

United States and indeed aided navigation," for the land was to be utilized concomitant to the construction, maintenance, and operation of the dam, which, according to the Government, was built in the interest of navigation. The brief submitted by the Government stated at page 28, commenting on the last mentioned feature of the *Chandler* case: "the award based on the land's utility for canal purposes was in no sense predicated upon the notion that the riparian owner or any private person can have a property interest in the flow of the stream . . . ." Condemnee in the present case did not rely upon any interest in the flow of the stream — instead condemnee relied upon the "land's utility" for a power site. If land which was deemed particularly adaptable to use as a site for a canal (through which the water of the river must actually flow) does not depend upon an interest in the flow of the stream which would be adverse to the Government's dominant servitude, then land which is deemed particularly adaptable to use as a site for a hydro-electric power plant should be at least equally independent of the necessity for relying upon an interest in the flow of the stream in order to have compensable special value. Therefore, it appears that the dissent in this case is more nearly in line with the earlier decisions.

KERMIT S. KING.

STATUTES — Liability of Public Officers Under Unconstitutional Statute. — This was an action against a public officer for killing plaintiff's dog under a subsequently declared unconstitutional state statute. Defendant, a public conservation officer, alleged immunity from liability as the act was committed before the statute was declared unconstitutional. The trial court rendered judgment for the plaintiff. On appeal, HELD: Affirmed. An unconstitutional act is not law and, subject to certain exceptions, confers no rights and affords no protection. *B. M. Smith v. John S. Costello,* 77 Idaho 205, 290 P. 2d 742 (1955).

In an action brought against a public officer it has been stated that everyone is presumed to know the law, and therefore, if an officer acts under an unconstitutional enactment of the legislature, he does so at his peril and must suffer the consequences. *Sumner v. Bealer,* 50 Ind. 341, 19 Am. Rep. 718 (1875); *Bonnet v. Vallier et al.,* 136 Wis. 193, 116 N.W. 885 (1908). However, it has been held that an officer who has acted in good faith in enforcing an unconstitutional statute is not liable. *Henke v. McCord,* 55 Iowa 378, 7 N.W. 623 (1880); *State v. Goodwin,* 123 N.C. 697, 31 S.E. 222 (1898); *O'Shields et al.*

v. Caldwell et al., 207 S.C. 194, 35 S.E. 2d 184 (1935). There is also the presumption that all legislative enactments are constitutional and are to be regarded as law until declared void by the courts. *Birdrell v. Smith*, 158 Mich. 390, 122 N.W. 626 (1909); *State v. Goodwin*, 123 N.C. 697, 31 S.E. 221 (1898); *Rexter v. Alfred*, 64 Hun. 636, 19 N.Y.S. 770 (1892). Some courts hold that imposing liability on judicial officers impedes the enforcement of the laws and weakens the whole structure of government, and that the interest of the public overrides the interest of the individual. *Tillman v. Beard*, 121 Mich. 475, 80 N.W. 248 (1899); *Brooks v. Mangen*, 86 Mich. 576, 49 N.W. 633, 24 Am. St. Rep. 137 (1891). In regard to an unconstitutional statute, when an officer is acting in a judicial capacity he is not liable for mere errors of judgment, when exercising improper judicial functions. *Trammell v. Russelville*, 34 Ark. 105, 36 Am. Rep. 1 (1879); *Goodwin v. Guild*, 94 Tenn. 486, 29 S.W. 721 (1895). Further, it has been held that a judicial officer will be protected in relation to all acts done under or pursuant to public law, before it is judicially determined to be unconstitutional. *The State v. Anthony Carroll*, 38 Conn. 449 (1871); *Archibald Taylor v. Thomas Skrine*, 3 Brev. L. 516 (S.C. 1815).

Some courts have held public officers liable by stating that there is no duty on anyone to obey an unconstitutional statute and no duty on the officer to enforce it. *County Commissioners of Wyandotte County v. Kansas City Ft. & S. & M. R. Co.*, 5 Kan. App. 43, 47 Pac. 326 (1896); *Campbell v. Bryant*, 104 Va. 509, 52 S.E. 638 (1905). By the same reasoning, public officers have been allowed to recover what they have been denied under an unconstitutional statute. *Ridgill v. Clarendon County*, 192 S.C. 321, 6 S.E. 2d 766 (1939); *Gamble v. Clarendon County et al., County Board of Commissioners*, 188 S.C. 250, 198 S.E. 857 (1937); *Dean v. Spartanburg County*, 59 S.C. 110, 37 S.E. 226 (1900). At the same time, no protection is afforded them in retaining taxes collected under unconstitutional statutes, *Board of Highway Com'rs., Bloomington T. P. v. City of Bloomington*, 253 Ill. 164, 97 N.E. 280 (1911); *Valentine v. Robinson*, 188 S.C. 194, 198 S.E. 197 (1938); nor are they protected in collecting an unconstitutional tax. *Cannon v. Montgomery*, 184 Ga. 588, 192 S.E. 206 (1937); *Dennison Mfg. Co. et al. v. Wright*, 156 Ga. 789, 120 S.E. 120 (1923). Some jurisdictions have resorted to fiction by regarding a public officer as a private wrongdoer who has acted without the authority of law. *Saratoga State Waters Corp. v. Pratt*, 227 N.Y. 429, 125 N.E. 834 (1920); *Poindexter v. Greenhow*, 114 U.S. 270, 5 Sup. Ct. 903, 29 L. Ed. 185 (1885). While

others treat unconstitutional enactments as void, in whatever proceedings they may be encountered, an unconstitutional statute, though having the form and name of law, is in reality no law. *State ex rel. McInvaille v. Rouse,* 86 S.C. 344, 68 S.E. 629 (1910); *Ex Parte Hollman,* 79 S.C. 9, 60 S.E. 19 (1908). Therefore, rights cannot be built up under it, contracts which depend upon it for their consideration are void, it constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made. *Norwood v. Goldsmith, Treasurer, et al.,* 168 Ala. 224, 53 So. 84 (1910); *Chenango Bridge Company v. Paige,* 83 N.Y. 178, 38 Am. Rep. 407 (1869); *Atkinson v. Southern Express Co.,* 94 S.C. 444, 78 S.E. 516 (1913). The doctrine that an unconstitutional statute gives no immunity is expressed by the interpretation of the statute being void "ab initio" and totally without effect. It is inoperative as though it had never been passed and anyone acting under it is liable because he acted without the authority of law. *Herrington v. State,* 103 Ga. 318, 29 S.E. 931 (1898); *Norton v. Shelby County,* 118 U.S. 425, 6 Sup. Ct. 1121, 30 L. Ed. 178 (W.D. Tenn. 1886).

The courts of this country have expressed their views on the liability of public officers acting under a subsequently declared unconstitutional statute in no hard and steadfast rule. The majority of the courts, including South Carolina, agree with the holding that an unconstitutional statute affords no protection to a public officer, but due to public policy this rule has been qualified when it is deemed to be for the common good, particularly, in regard to judicial public officers. The reasonable conclusion is that the court will not commit itself to any iron-clad rule, but will work an equitable result as each case arises, depending upon the facts and circumstances of each case and which interpretation would best serve the public interest.

In the instant case, it seems to appear that due to the particular circumstance of this case, the court reached the conclusion that the only equitable result would be to refuse immunity to the public officers by indorsing the view that an unconstitutional act is no bar at all, and affords no protection to anyone.

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