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SC Court of Appeals

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Robert M. Dudek, Chief Appellate Defender
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September 13, 2021

The Honorable Jenny Abbott Kitchings
Clerk, S.C. Court of Appeals
Post Office Box 11629
Columbia, S.C. 29211

Re: State v. Eric Emanuel English, Appellate Case No. 2018-000850
Oral argument on Tuesday, September 14, 2021 at 10:40 AM

Dear Ms. Kitchings:

The Court is scheduled to hold oral argument in the above case on Tuesday, September 14, 2021 at 10:40 AM. Please find enclosed the South Carolina Supreme Court decisions of *Currie v. Davis*, 130 S.C. 408, 126 S.E. 119 (1923) and *Thayer v. Deen*, 2 Hill (SC) 677, 20 S.C.L. 677 (1835). These decisions came to undersigned counsel's attention after the initial briefs had been served and filed. Pursuant to Rule 208(b)(7), SCACR, I am respectfully advising this Court that the *Currie* and *Thayer* cases represent pertinent and significant authority for the issue presented in the brief filed by undersigned counsel. By copy of this letter, I am notifying opposing counsel of the submission of this supplemental authority.

If you have any questions concerning this matter, please do not hesitate to contact me.

Sincerely,

Joanna K. Delany
Appellate Defender

JKD/kk

cc: Mark R. Farthing, Esquire (with enclosure)

Enclosures: as stated

130 S.C. 408
Supreme Court of South Carolina.

CURRIE
v.
DAVIS, AGENT, ETC.

No. 11144. [a1]
|
Feb. 26, 1923.

Synopsis

Appeal from Common Pleas Circuit Court of Sumter County; T. J. Mauldin, Judge.

Action by J. M. Currie against Jas. C. Davis, Agent, appointed by the President under the Transportation Act. Judgment for plaintiff, and defendant appeals. Affirmed subject to entry of remittitur otherwise reversed.

Attorneys and Law Firms

***120** Douglas McKay, of Columbia, and Reynolds & Reynolds, of Sumter, for appellant.

L. D. Jennings and M. M. Weinberg, both of Sumter, for respondent.

Opinion

MARION, J.

On August 31, 1919, at Florence, S. C., the plaintiff purchased a ticket entitling him to transportation as a passenger on a line of railroad then in charge of the Director General of Railroads of the United States government, from Florence, S. C., to Mayesville, S. C. He then presented himself at the gate through which passengers were required or invited to pass in order to board trains. The gate was in charge of a gatekeeper, a railroad employee, to whom the plaintiff showed his ticket. The gatekeeper refused him passage through the gateway, and then "shoved" him back, causing him to fall and bruise his arm, in the presence of a "crowd of people." Thereafter the plaintiff made four attempts, at separate times, to get through the gate to his train. Each time he was threatened with physical violence and cursed by the gatekeeper. He then went to the ticket agent, told him of important business plans and arrangements that made it necessary for him to get to Mayesville on the train for which he had bought his ticket. The ticket agent suggested that he try getting through another gate about 75 feet away, but which, as plaintiff claimed, "was not for passengers to go through." He told the ticket agent he did not care to steal through, as he had bought his ticket. He then met Captain Johnson, a conductor for the line of railroad upon which he had taken passage, who upon being apprised of the situation, advised him to try the gateman again. He then went back to the gate, again showed the gateman his ticket, and was again repulsed with rude, threatening, and insulting language. After that he made one or two more attempts to get through the gate, with the same result. The remarkable story, outlined by the foregoing statement, is the more remarkable in that it is corroborated rather than discredited in essential particulars by the testimony of Conductor Johnson and the ticket agent, defendant's witnesses at the trial. In an action for damages the plaintiff recovered a verdict for $10,000. From judgment thereon, the defendant appeals.

Plaintiff claimed that on account of missing his train in Florence he was prevented from getting certain gin machinery installed and erected in due course, as a result of which he was delayed four days in starting two ginneries, one at Mayesville and the other at Eutawville, and that such delay caused him to sustain a certain pecuniary loss which he was entitled to recover as an element of the damages proximately caused by defendant's misconduct. The defendant's first exception imputes error to the trial judge in permitting the plaintiff to testify over objection "what his average gross earnings were per day after his ginneries at Mayesville and at Eutawville began to operate." The contention is that the testimony was "purely speculative and incompetent, being no measure by which damages could be ascertained for a few days delay in the institution of said ginneries, and before they were established as going concerns." The exception on this point must be sustained. It is not entirely clear from the evidence printed in the record whether the ginneries in question could be classified as established plants, in the sense that they were old gin stands in which new machinery, in whole or in part, was to be installed for the current ginning season, or whether they were essentially new plants which were in process of establishment for the inauguration of what was for the plaintiff a new business enterprise. If the ginneries were of the character of established industrial or manufacturing plants, then the measure of damages for an interruption in operation, or for delay in starting operations for the cotton season, was the rental value, to be determined in accordance with the rule laid down by this court in the case of Standard Supply Co. v. Carter & Harris, 81 S. C. 181, 187, 62 S. E. 150, 19 L. R. A. (N. S.) 155, in which case the precise question was elaborately considered and clearly decided. In

the case at bar there was apparently no attempt to apply the measure of rental value. In any event, the data supplied by the evidence affords no adequate basis of fact for applying such measure. *121 Hence, since the evidence is susceptible of the inference, which is assumed as a fact by defendant's exception, that the ginneries were not established plants or going concerns, but were, at the time of the alleged delay, new business enterprises, not yet in active operation, the admissibility of the testimony as to subsequent gross earnings must be determined in accordance with that theory of the facts. In such case the correct measure of damages is thus stated by Mr. Justice Woods, who delivered the opinion of the court, in McMeekin v. Southern Railway, 82 S. C. 468, 473, 64 S. E. 413, 415:

> "The plaintiff's business had not been launched, and therefore he could not recover profits he expected to make. Tappan & Noble v. Harwood, 2 Speer, 536; Bird v. Tel. Co., 76 S. C. 345, 56 S. E. 973; Standard Supply Co. v. Carter & Harris, 81 S. C. 181. The mill was not erected, and it was impossible to anticipate the conditions which would exist at the time of completion. Indeed, it might be that the mill would never be completed. For these reasons there would be no reasonably certain basis upon which to compute the measure of damages for rental value, as in the case of the stoppage of a completed ginning plant like that in Standard Supply Co. v. Carter & Harris, supra. The true measure of damages, therefore, in this case, is the loss to the business of constructing a mill—not running a mill. The loss to the business of construction was the interest on the money invested in the work of construction, and the wages of the laborers employed for construction, reduced by the earnings which the plaintiff either received or by reasonable diligence could have received from the employment of such laborers in other work. Saluda Mfg. Co. v. Pennington, 2 Speer, 746."

No adequate consideration, founded upon the evidence, is suggested for not applying that measure of damages to the case at bar. Gross earnings or profits per day after the ginneries started, certainly in the absence of other material facts and circumstances, could afford no reliable or reasonably fair test by which to estimate loss of net profits from a delay of four days in starting the gins. Aside from the fact that profits cannot be ascertained from gross earnings alone, every bale of cotton available for ginning during the four days preceding the opening of the ginneries might actually have been ginned by the plaintiff at the same profit after his gins started. There is no evidence as to local or special conditions tending to establish that as a result of the delay in opening any business was actually diverted to other plants, or that plaintiff's output as a whole for the season was in any wise diminished. The amount of the verdict warrants the inference that the jury accepted the only measure of damage tendered them in that aspect of the case, which was plaintiff's estimate of his loss at $160 in gross profits per day for one plant, and $175 per day for the other, or a total loss of $1,340 for the delay of 4 days in starting the two ginneries. As the testimony objected to furnished a basis for the application of that improper measure of damages, its admission was prejudicially erroneous.

The plaintiff's claim that he was delayed four days in starting his ginneries was based primarily upon the assumption of fact that, if he had reached Mayesville Sunday night on the train he was prevented from boarding, he could have obtained certain papers and checks which would have enabled him to proceed to Eutawville the following morning and take up the bill of lading and secure delivery from the railroad carrier of his gin machinery which was there awaiting him. The defendant offered the train dispatcher and the train sheets kept by him to prove that the train in question which was due to arrive at Mayesville about 8 p. m., did not reach there until after midnight, too late for the plaintiff to have transacted his business. This evidence was excluded upon the ground that it violated the hearsay rule. Defendant's second exception imputes error to the trial judge in so ruling. The witness, Bellinger, was the official train dispatcher; the train sheets were the original records made by him in the discharge of his official duty in the ordinary course of business, based upon telegraphic reports transmitted to him from the various stations by agents whose duty it was personally to observe the facts and to transmit the reports as to the time of arrival and departure of trains. The point raised has not been expressly decided in this state, and is one as to which there is a conflict of authority in other jurisdictions. We think the evidence

was admissible. The fundamental reasons upon which the numerous well–established exceptions to the hearsay rule are based are "circumstantial guaranty of trustworthiness and necessity." 2 Wigmore on Evidence, § 1420; 1 Elliott on Ev. § 320.

Applying first the test of trustworthiness, we know of no class of records made in "the regular course of duties or business" which are more convincingly verified by the circumstances under which they are made, and the character of the entries themselves. It is a matter of common knowledge that the train dispatcher of a railroad is the field officer upon whose orders depend the movement of all trains upon a line, a division, or a system. In a figurative but apposite sense it may be said that, by day and by night, the train dispatcher rides as the superpilot upon every locomotive that pulls freight and passengers through cut and tunnel, over fill and bridge, from station to station, between distant termini. Grave public interests, dependent upon the prompt carriage of mails and the uninterrupted flow of commerce, the safety of property, and the lives of crews and passengers are staked upon the correctness ***122** and reliability of a train dispatcher's orders. These orders are based upon the information secured by personal observers transmitted by telegraph or telephone, entered upon the train sheets, and thereafter relied upon by the train dispatcher as "chart and compass" in guiding and controlling the movement of distant trains. In this connection the language of the Massachusetts court in the case of Donovan v. Boston, etc., R. R. Co., 158 Mass. 450, 33 N. E. 583, is pertinent:

> "It is clear that the sheet was worse than useless, if its statements, as seen by the dispatcher, were not accurate. Every interest of the defendant demanded that an entry when made should be true, and no reason can be conceived why the defendant should procure or permit a false or incorrect entry to be placed under the eye of the official who controlled the movement of its trains; nor is there any reason to presume that the operator who observed the passing of the trains at a station, and telegraphed the information to the dispatcher's office, or the person who there received the messages and made the entries on the sheet, had any interest to mistake the facts or to make false entries. The system was the established course of the defendant's business, so that the sheet was not an accidental memorandum, and every step by which the information spread upon it was gathered, transmitted, and entered, was an act performed by some person in the line of his duty and in the usual course of his employment, under a sanction tending to make his statements true, and these acts were so connected with and dependent upon each other as to form parts of one transaction."

In discussing the admissibility of entries of this general character, Professor Wigmore says:

"When it is a mere question of whether provisional confidence can be placed in a certain class of statements, there cannot profitably and sensibly be one rule for the business world, and another for the courtroom." Wigmore on Ev. § 1530.

We think the entries upon a dispatcher's train sheets, recognized and relied upon as safe in the operation of a great and complicated business, very fully meet the test of the "circumstantial guaranty of trustworthiness." Likewise we are of the opinion that such entries satisfactorily meet the test of necessity. As is said by Mr. Justice Connor in an elaborate and well–considered opinion upon this precise question in the case of Fireman's Insurance Co. v. Seaboard Air Line Ry., 138 N. C. 42, 52, 50 S. E. 452, 107 Am. St. Rep. 517:

> "Prof. Wigmore suggests that when an entry is made in the usual course of business, based upon reports made by one whose duty it is to make such report, but who is not required to make and keep any record of the transaction, the entry so made is admissible upon the ground of necessity, growing out of the fact that it is not to be expected that the person making such report would remember the fact reported, and that he is therefore unavailable in a legal sense. It is not to be expected that an operator, who reports to the dispatcher the time of arrival and

> departure of a number of trains daily, could undertake to testify from memory the hour and minute of each arrival or departure. He has no duty imposed upon him to do so. If he did undertake to testify, as in this case, three years after the event, but little credence would be attached to his testimony. For practical purposes, he is as essentially unavailable as if dead or insane."

In the case at bar the trial was had more than two years after the date upon which the particular train in question arrived at Mayesville. The practical necessity for the admission of the train sheets, grounded upon the considerations above suggested, is apparent. As the evidence offered was more or less relevant to a material issue of fact, its exclusion was prejudicially erroneous, and the appellant's second exception must be sustained. See generally, Seaboard Air Line Ry. Co. v. Earle, 86 S. C. 91, 67 S. E. 1069, 138 Am. St. Rep. 1028; J. L. Mott Iron Works v. Kaiser (S. C.) 103 S. E. 783; State v. Stephenson, 69 Kan. 498, 77 P. 277, 66 L. R. A. 261, 105 Am. St. Rep. 171, 2 Ann. Cas. 873; Scott v. Astoria R. R. Co., 43 Or. 26, 72 P. 594, 62 L. R. A. 543, 99 Am. St. Rep. 710; Ferebee v. Berry, 168 N. C. 281, 84 S. E. 262; Erk v. Simpson, 137 Ga. 608, 73 S. E. 1065.

The appellant's third point (exceptions 3, 4, and 6) is directed to the contention that the trial court erred in holding that the plaintiff was entitled to recover damages for humiliation in the action at bar against the sovereign power. It is conceded that under the federal Control Act (U. S. Comp. St. 1918 [U. S. Comp. St. Ann. Supp. 1919, §§ 3115 3/4a–3115 3/4p]), and under the orders issued pursuant thereto by competent executive authority, all damages which may be properly classified as actual or compensatory are recoverable in an action against the Director General or other duly authorized agent of the government. But it is argued that the damages recovered in this action for alleged injury to feelings or for humiliation caused by the wrongful conduct of defendant's gateman were "nothing more nor less than an award of punitive damages" under the guise of compensation. That contention is rested primarily on the construction of the federal law adopted by the Supreme Court of the United States in Missouri Pacific R. Co. v. Ault, 256 U. S. 554, 41 S. Ct. 593, 65 L. Ed. 1087, 1092, and clearly expressed as follows:

> "Wherever the law permitted compensatory damages, they may be collected against the carrier while under federal control. * * * But double damages, penalties, and forfeitures, which do not merely compensate but punish, are not within the purview of the statute."

***123** There can be no doubt that under the settled law of this jurisdiction, prior to the passage of the federal Control Act, such breach of the carrier's duty to a passenger as proximately caused the infliction of injury to feelings, mental suffering, or humiliation, even in the absence of physical injury, afforded an adequate legal foundation for the award of actual or compensatory damages. Lipman v. A. C. L. R. Co., 108 S. C. 151, 93 S. E. 714, L. R. A. 1918A, 596; Cave v. Ry. Co., 94 S. C. 282, 77 S. E. 1017, L. R. A. 1915B, 915, Ann. Cas. 1915A, 1065; Adams v. Ry., 103 S. C. 327, 87 S. E. 1007, L. R. A. 1916D, 1183. That view, as pointed out by Mr. Justice Hydrick in Lipman v. R. Co., supra, is in accord with the overwhelming weight of reason and authority. In the case of Gillespie v. B. H. R. Co., 178 N. Y. 347, 70 N. E. 857, 66 L. R. A. 618, 102 Am. St. Rep. 503, the New York court considers the question, and very fully reviews the authorities, as to whether damages for humiliation suffered because of such breach of the carrier's duty are properly recoverable as compensatory damages, and arrives at a conclusion in accord with the following statement of the law quoted from Thompson on Negligence, § 3288:

> "Damages given on the footing of humiliation, mortification, mental suffering, etc., are compensatory, and not exemplary damages. They are given because of the suffering to which the passenger has been wrongfully subjected by the carrier. The quantum of this suffering may not and generally does not depend at all upon the mental condition of the carrier's servant, whether he acted honestly or dishonestly, with or without malice."

See Joyce on Damages, § 354; 4 R. C. L. 1174, 1175. In the case at bar there was evidence tending to establish a breach of the contract of carriage by tortious conduct subjecting a passenger to the indignity of assault and battery, insult, and contumely. For the injury to his feelings, humiliation, and mental suffering thus inflicted upon the plaintiff by the servants of a carrier under the control of the Director General of Railroads, we are clearly of the opinion that compensatory damages were recoverable. The case at bar was properly tried upon that theory in the court below, and, while the amount of the verdict is unquestionably large, we are not prepared to hold that the award is so excessive as clearly to indictate a punitive purpose or primarily to entail a penal consequence. The assessment of unliquidated damages for an injury of this character cannot proceed by rule and must rest in the sound discretion of the jury, controlled by the discretionary power of the circuit judge, in the tribunal appointed by law to try the facts. There is no market value for injured feelings. The value of money in comparison with the value of the normally self–satisfied state of mind of which a man may be deprived by a wrongful invasion of his rights, a trampling upon the sensitive tentacles of his personal dignity, a public aspersion upon his manhood, or by abusive treatment of any character, is a matter as to which reasonable men may, and do, differ widely. The verdict was approved by the circuit judge as an award of compensatory damages. His conclusion cannot be held erroneous as a matter of law. See, generally, Bing v. R. Co., 86 S. C. 530, 68 S. E. 645; Huggins v. Railroad Co., 96 S. C. 267, 79 S. E. 406; Yarborough v. Electric Co., 100 S. C. 33, 84 S. E. 308; Southerland v. Davis, 122 S. C. 511, 115 S. E. 768; Southern Ry. v. Bennett, 233 U. S. 81, 34 S. Ct. 566, 58 L. Ed. 860.

In submitting the case upon the theory that actual damages for humiliation were recoverable the circuit judge approved as "good law" a request to charge, read by plaintiff's counsel, to the effect that "wounding a man's feelings is as much actual damage as breaking his limbs"; that "the difference is that one is internal and the other external, the one mental, the other physical"; that "in either case the damage is not measurable with exactness," but, since a closer approximation could be made in estimating damage to a limb, "the jury would have a wider discretion in dealing with feelings than with an external injury," etc. The only objections to that instruction urged by appellant are (1) that the "plaintiff was not entitled to recover against the United States administration for humiliation"; and (2) that "said charge was upon the facts and contrary to the Constitution of South Carolina." While the charge as framed may be open to criticism we do not think the objections suggested are valid. The first has already been disposed of. As to the second, we see no ground for appellant's contention that the court charged as a fact that the plaintiff's feelings had been wounded, and directed that the jury award the same amount of damages as if the plaintiff's body had been mutilated. Further, the record discloses that, while the trial judge approved the request as a proposition of law, he followed that comment by very clear directions to the jury that they "must look to the evidence to see whether that allegation of the complaint (as to humiliation) is established here," etc., and, "if it is true, then that would be the basis for a recovery of such actual damages" as they might "think the evidence in the case would warrant" them in awarding, etc. Certainly, as thus safeguarded, the instruction may not properly be condemned as a charge on the facts in violation of the constitutional inhibition in that regard. See State v. Hays, 121 S. C. 163, 113 S. E. 362.

The defendant requested the trial court to charge "that it is the duty of a passenger, who has, through mistake or misapprehension ***124** on the part of the agent of the defendant, been prevented from taking his train, on which he held a ticket to use all means known to him, or suggested by any agent of the defendant to minimize his damages." Error is assigned (exception 5), in that the circuit judge responded to the request as follows:

> "That is correct, Mr. Foreman and gentlemen, and you apply it with reference to that element of this case wherein plaintiff is seeking to recover damages by reason of loss to his property."

Appellant contends that under the facts of this case the law imposed upon the plaintiff the duty to minimize his damages, in so far as they were due to humiliation resulting from the gatekeeper's first rejection, by not thereafter subjecting himself to affront by repeatedly approaching the Cerberus at the gate, or by accepting the ticket agent's kindly suggestion that he try a flanking movement. We think the law applicable in that aspect of the case was the rule of contributory negligence or willfulness rather than the principle as to mitigation or reduction of damages. But, if the latter principle were applicable, the avoidable consequential damages which the defendant was entitled to have eliminated from the consideration of the jury were only such as could have been

avoided by the injured party in the exercise of proper care. 17 C. J. p. 926, § 224. In any view, the requested instruction was faulty in imposing the duty to use all known or suggested means to minimize damages irrespective of the applicable standard of reasonableness or due care, and appellant is not in position to complain of the modification as prejudicial error.

From the foregoing consideration of appellant's points it appears that the only reversible errors of law disclosed by the record relate wholly to the measure and assessment of the pecuniary damages alleged to have been sustained by the plaintiff from the delay in starting his ginneries caused by his failure to reach Mayesville on the train he was prevented from boarding. If the extent to which those errors affected the verdict were indeterminate, the defendant would unquestionably be entitled to a new trial generally. But the portion of the whole damages attributable to the plaintiff's alleged business loss is sharply segregated by the evidence, and may be definitely computed upon a mathematical basis. According to the plaintiff's own testimony, the only evidence adduced, his business loss could not have exceeded the sum of $1,340, the aggregate of the estimated profits from four days' operation of his ginneries. In that state of the record the disposition of the appeal presents a question essentially similar to that involved in an appeal from judgment upon a verdict separately assessing actual and punitive damages or specially finding definite amounts for distinct items of a claim. In such case it is within the discretionary power of this court to affirm or reverse in part or upon conditions that will effectually serve to correct the errors of law disclosed. 4 C. J. p. 1137, §§ 3135, 3148; Gray & Shealy v. Railway Co., 81 S. C. 370, 62 S. E. 442; Riley v. Railway, 81 S. C. 387, 62 S. E. 509; Blowers v. Railway, 74 S. C. 221, 231, 54 S. E. 368; Vance v. Ferguson, 101 S. C. 125, 134, 85 S. E. 241; Ellison v. Railway Co., 94 S. C. 425, 433, 77 S. E. 723, 78 S. E. 231; Calhoun v. So. Ry. Co., 115 S. C. 489, 106 S. E. 780; Massey v. Hines, 117 S. C. 1, 108 S. E. 180; Hansen v. Boyd, 161 U. S. 397, 16 S. Ct. 571, 40 L. Ed. 746. There can be no doubt that a remission in full by the appellee of such portion of the verdict as could have been affected by the erroneous rulings of the trial judge would correct or cure the errors involved in the judgment here appealed from. Since it is in the public interest, as well as to the interest of parties to actions, that litigation should be shortened, and that appeals should not delay the accomplishment of substantial justice, we are of the opinion that the appropriate judgment upon this appeal is the award of a new trial nisi.

It is accordingly ordered that the judgment of the circuit court be reversed and a new trial granted, unless the plaintiff shall withing 10 days after the filing of the remittitur in the circuit court remit on the judgment record, as of the date of the verdict, the sum of $1,340, and that upon the entry of such remission the judgment of the circuit court stand affirmed.

Reversed, nisi.

GARY, C. J., and WATTS and FRASER, JJ., concur.

COTHRAN, J., did not participate.

All Citations

130 S.C. 408, 126 S.E. 119

Footnotes

a1 Petition for certiorari dismissed 45 S. Ct. 88, 69 L. Ed. ___.

2 Hill (SC) 677
Court of Appeals of Law and Equity of South Carolina.

J. & O. THAYER
v.
JOHN DEEN.

June, 1835.

Tried before Mr. Justice Gantt, at Newberry, Spring Term, 1835.

**1 *677 *Sum. pro.* on a pedlar's account. The plaintiffs had employed one Benedict to peddle their goods; and while thus engaged, he made his original entries in a small memorandum book, for the most part in pencil, which he carried in his pocket. The presiding judge rejected this book as evidence on *678 proof of Benedict's hand-writing, who was then out of the State, and ordered a non-suit, which the plaintiff's now moved to set aside.

Opinion

JOHNSON, J.

In actions on accounts for goods sold and delivered, the plaintiff is necessarily bound to prove the delivery of the goods, and according to the ancient English common law, he was obliged to make the proof by disinterested witnesses. Book entries were only admissible like other memoranda, made at the time of the transaction, to refresh the memory of the witness. It was utterly impossible however, that any man could heap in his memory, even with the aid of memoranda, the minute, varied and complicated transactions of even an ordinary mercantile or other trading concern, and hence the necessity of substituting the book entries for the memory of the witnesses, which has been allowed in this State as far back as we can trace our judicial history. The same sort of necessity induced the Courts to allow the plaintiff to prove his own book entries, as evidence of the delivery of goods. It was not always possible to procure suitable clerks, and very frequently, amongst the small dealers, the profits would not justify the expense of a clerk; and thus the necessity of departing from the common law rule and admitting this secondary evidence, was forced upon the Courts and the country, and the same indulgence has been gradually extended, by judicial determinations, to all classes of regular traders, mechanics and professional men, when, from the nature of their business, and the general usage, they were obliged to sell on credit, and when it was customary to keep books of account. That the introduction of this rule has subjected the community to frauds and impositions, no one who has any experience in the ordinary concerns of life will for a moment doubt, and independent of a sense of justice which is very often impotent when opposed to interest, the community have no security against these frauds but the interest which the parties find in conciliating public favor by a fair and honest course of dealing; and these considerations appear to me to furnish abundant reason for not extending the rule beyond the actual necessity.

The account on which this action is brought is that of a pedlar or itinerant merchant. It is the first of the sort that has fallen within my observation, and the question is whether the rule shall be extended to these also. From the nature of their employment, and the manner of their doing business, although, it is possible, it is not to be expected, that they will keep their books with the regularity and system of the stationary regular merchant. They are mere birds of passage who *679 sweep over the country, having no other tie to it than as the means of acquiring wealth. It is known too, that they are not in the habit of dealing on credit. Their itinerant mode of life renders it in general impracticable to do it with convenience. They do not therefore fall within that class of persons in whose pursuit or employment the necessity and convenience, or the usage of the country has imposed on them the necessity, of keeping books of account. They do not therefore fall within the principle of the rule, and believing that it has already been extended too far, I am not disposed to superadd this item to the long list of suspicious evidence.

**2 In this case there is another reason for excluding the evidence which is equally satisfactory. The books of original entries was produced on the argument, and upon examination they are found to have been made for the most part in pencil, in small memorandum books, of a convenient size for the pocket; and on turning over the pages, I observed that many of the entries made in them were so obliterated as to be illegible, and exhibiting altogether such irregularity and want of system as would shock a regularly bred clerk. The order and regularity with which the merchants' books of accounts are usually kept, and the necessity of their producing the original entries at the trial, is a security against frauds from erasures and interlineations which an after thought might suggest; and the Courts have always refused to suffer them to be given in evidence, if on inspection the entries were found not to have been made in the regular course of business, as in the case of Lynch v. M'Hugo, 1 Bay, 33, where entries made in the front page and before the regular paging, in a book otherwise

regular, were rejected, because they were out of the regular course of entries.

Motion dismissed.

HARPER and EVANS, JS. (sitting for O'NEALL, J.) concurred.

Attorneys and Law Firms

Hammond, for the motion.

All Citations

2 Hill (SC) 677, 20 S.C.L. 677, 1835 WL 1369