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# Comments

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# COMMENTS

POWER OF COURTS TO SUSPEND JUDGMENTS—In the case of *State* v. *Phillips*,[1] the defendant entered a plea of guilty to a charge of public drunkenness. The judge rendered judgment to the effect that the defendant should be sent to the public roads for a term of six months if he were again drunk in the county, and designated the clerk of court and the sheriff of the county to put the sentence into effect upon information that the defendant, in violation of the condition, was again drunk in said county. Subsequently the clerk had the defendant assigned to the roads. The defendant sued out a writ of habeas corpus, and he was recommitted upon a hearing before another judge. This was reversed by the Supreme Court.

The power of a court of general jurisdiction to suspend judgment for special purposes was recognized at common law,[2] if the suspension was for a reasonable time, as where the court desired time to inform itself in regard to a matter necessary to the decision of the case, or in dealing with various motions and appeals. This seemed to be allowed either before or after judgment rendered. In North Carolina, in addition to the conditional judgment, there are three distinct types of suspended judgment, which might be named (1) suspended judgment, (2) suspended execution of judgment and (3) conditional suspension of judgment.

A conditional judgment is one in which the judgment is rendered, but the force and validity of the judgment is made to depend upon a condition.[3] An illustration is the principal case, where the judgment was rendered but was to have no validity unless the defendant violated the condition.

Of the three types of so-called "suspended judgments" mentioned above, the first is a true "suspended judgment." It occurs, in North Carolina, in cases where the prayer for judgment is continued,[4] that is, no judgment is rendered at all, but it is suspended instead. This must be distinguished from the second type, the suspended execution of judgment, where judgment is rendered but its execution is suspended upon a condition, such as, a sentence of six months to jail, but no capias to issue if defendant leaves the county within fifteen days.[5] The third type, or conditional suspension of judgment, is a form of judgment peculiar to North Carolina, where judgment is suspended upon payment of costs or upon performance of other conditions, such as appearance of defendant at each term of court.[6] Instead of entering judgment in the usual form, the court suspends judgment, and the continuance of the suspension depends upon conditions. In effect, this is rendering judgment for the performance of the conditions, such as, payment of costs, etc. In the average case, the result is that the defendant pays the costs and thus avoids any further judgment.

[1] *State* v. *Phillips* (1923) 185 N. C. 614, 115 S. E. 893.
[2] *State* v. *Hilton* (1909) 151 N. C. 687, 691, 65 S. E. 1011; 4 Blackstone 394.
[3] *Simmons* v. *Jones* (1896) 118 N. C. 472, 24 S. E. 114.
[4] *State* v. *Hilton* (1909) 151 N. C. 687, 65 S. E. 1011.
[5] *In re Hinson* (1911) 156 N. C. 250, 72 S. E. 310.
[6] *State* v. *Whitt* (1895) 117 N. C. 804, 23 S. E. 452; *State* v. *Crook* (1894) 115 N. C. 760, 20 S. E. 513.

From the cases, it seems that the suspension must be for a definite and reasonable time in order to be valid in North Carolina.[7] The Supreme Court upholds all three types of suspended judgment, above discussed, but it is difficult to see wherein the third type might not result in an indefinite suspension. Suppose judgment is suspended upon payment of costs. If this is anything other than a judgment for the costs, it is certain that, upon payment of costs, the sentence is indefinitely suspended. This is also true in cases which require the defendant to appear at each successive term of court and prove his good behavior,[8] without limiting the time.

There are jurisdictions which come out absolutely against an indefinite suspension, and hold that it is possible only in case of good cause, such as, (1) to enable the court to inform itself as to the best course to take in disposing of the case, (2) to allow certain motions and (3) in case of appeal. But the suspension in these cases may only be for a reasonable time.[9]

As to the power of the courts in regard to the second type of "suspended judgment," where there is a stay of the sentence or judgment after it is rendered, the weight of authority seems to hold that there is no power vested in the courts to stay the execution either temporarily or indefinitely except in certain cases of emergency.[10] The reason usually given is that it would be giving to the courts some of the pardoning power which is vested only in the executive. In other words they hold there is a constitutional prohibition on the exercise of such power by the courts. The power of the courts to stay the execution during the good behavior of the defendant is denied by the weight of authority.[11] They say that the courts have no power to provide that the imprisonment of a defendant shall begin at some future indefinite time depending on the happening of a contingency.[12] It has been held that the legislature cannot confer upon the courts such power.[13] However, a few of the authorities hold that the courts can stay the execution of the sentence depending on the good behavior of the defendant since it is in favor of the prisoner.[14] In the case of *State* v. *Hatley*,[15] a North Carolina case, judgment was rendered that the defendants be imprisoned for 12 months but if the defendants leave the state in 30 days no capias to issue. The defendants left but returned and were imprisoned as per judgment. The Supreme Court in sustaining the judgment held that it was not conditional or alternative, that the clause stating "if the defendants leave the state, etc.," was only the suspension of the time when the judgment should go into execution, and that this was a valid judg-

[7] *State* v. *Tripp* (1914) 168 N. C. 150, 83 S. E. 630; *State* v. *Everitt* (1913) 164 N. C. 399, 79 S. E. 274; for cases upholding an indefinite suspension see: *State* v. *Addy* (N. J. 1877) 39 Am. R. 547; *People ex rel. Atty* v. *Court of Sessions* (N. Y. 1894) 36 N. E. 386.

[8] *State* v. *Everitt* (1913) 164 N. C. 399, 79 S. E. 274.

[9] *Gray* v. *State* (Ind. 1886) 8 N. E. 16; *Commonwealth* v. *Maloney* (Mass. 1887) 13 N. E. 482; *People ex rel Smith* v. *Allen* (Ill. 1895) 41 L. R. A. 473.

[10] *Tanner* v. *Wiggins* (Fla. 1907) 45 So. 459; *Neal* v. *State* (Ga. 1898) 30 S. E. 858.

[11] *Tanner* v. *Wiggins* (Fla. 1907) 45 So. 459; *State* v. *Sturgis* (Me. 1912) 85 Atl. 474.

[12] *Fuller* v. *State* (Miss. 1912) 57 So. 806; *State* v. *Abbott* (S. C. 1911) 70 S. E. 6.

[13] *Snodgrass* v. *State* (Tex. 1912) 150 S. W. 162.

[14] *State* v. *Everitt* (1913) 164 N. C. 399, 79 S. E. 274; *Weber* v. *State* (Ohio 1898) 51 N. E. 116.

[15] *State* v. *Hatley* (1892) 110 N. C. 522, 14 S. E. 751; *State* v. *Tripp* (1914) 168 N. C. 150, 83 S. E. 630.

ment. This seems to be an extension of the kind of judgment which courts can render. The judgment in this principal case; namely, that the defendant be sentenced to the roads, etc., if he is again drunk in the county, would seem to be valid, had not the judge directed the clerk to put it into effect and failed to provide a hearing for the defendant as to the breach of the condition. This was a judicial act involving discretion which the judge could not delegate to the clerk. North Carolina holds that the consent of the defendant must be had before the courts can exercise this power of suspending or staying the judgments.[16]

The Federal Courts have no power to suspend judgment or stay execution except for short periods pending the determination of other motions arising in the cause after verdict.[17] In the case of *Ex Parte United States,* the defendant was convicted and sentenced. Then the court issued an order staying its execution during the good behavior of the defendant. The court said this was clearly beyond the power of the courts, it being an infringement on the power of the executive, and that the result of such judgments by the courts is an equivalent of an absolute and permanent refusal on the part of the courts to impose any sentence at all.[18]

As to civil judgments, North Carolina, with other states, holds that if conditional, they are invalid; such as a judgment against A in favor of B for so much, to be stricken out or become void upon the payment of the amount within sixty days;[19] or "judgment for plaintiff for the possession of certain land to be stricken out or become void if the defendant files a certain bond within thirty days after adjournment."[20] Likewise conditional judgments in criminal cases are invalid.

The North Carolina rule as to criminal judgments is a sound and good one. It certainly is a more modern and progressive view to take of the enforcement of criminal law, and has proved very successful in practice. As for its being an infringement on the pardoning power of the executive, which is the main reason advanced against the rule, it really makes the pardoning power effectual in dealing with the great number of minor cases which do not come within the scope of the pardoning power. It is a means in the hands of the courts of helping those minor offenders who may become good citizens if given a fair opportunity. Such a power must be exercised with prudence.

C. C. H.

REVIEW OF COMPROMISE VERDICT—In the recent case of *Bartholomew* v. *Parrish,*[1] a civil action was brought by the plaintiff to recover the sum of $366.51 for goods and merchandise sold to A upon the credit of the defendant. From the evidence there appears to be a conflict as to the amount for which the defendant agreed to be liable, the defendant admitting that he agreed to be liable for $100, the plaintiff contending that he agreed to be liable for all goods and merchandise

[16] *State* v. *Everett* (1913) 164 N. C. 399, 79 S. E. 274.

[17] *United States* v. *Wilson* (1891) 46 Fed. 748; *Ex Parte United States* (1916) 242 U. S. 27.

[18] *Ex Parte United States* (1916) 242 U. S. 27.

[19] *Strickland* v. *Cox* (1889) 102 N. C. 411, 9 S. E. 414; *Simmons* v. *Jones* (1896) 118 N. C. 472, 24 S. E. 114.

[20] *Simmons* v. *Jones* (1896) 118 N. C. 472, 24 S. E. 114.

[1] *Bartholomew* v. *Parrish* (1923) 186 N. C. 81, 118 S. E. 899.

sold to A. As a matter of fact A purchased goods to the amount of $366.51. The judge below properly instructed the jury upon the merits of the case telling them to find either a verdict of $366.31, the amount purchased, or $100.00 the amount for which defendant admits himself to be liable. The jury then brought in a verdict "Compromise $283.25."

Upon a motion by defendant to set aside the verdict on the ground that it was contrary to the evidence, contrary to the charge of the judge, and a "compromise" verdict, the judge overruled the motion, struck out the word compromise and gave judgment for the defendant. The judge could have set aside the verdict in the exercise of his discretion, but, since it appears upon the record to have been rendered in the nature of compromise, it was probably his duty to do so as a matter of law.[2]

The Supreme Court granted a new trial on the ground that the verdict was a compromise verdict and therefore should be set aside. That the verdict is a compromise in one sense of the word, we do not deny, but the word compromise is likely to mislead us. It depends upon the construction that we place on the word. From a legal point of view, a "compromise verdict" is a verdict arrived at by the surrender of conscientious convictions upon a material question by some of the jurors for a like surrender by others and the result is one which does not command the approval of the whole panel.[3] There is no evidence as far as we can see to show that there was any surrender of conscientious scruples on the part of any juror, nor is there any evidence to show that the verdict was not reached by open-minded discussion and harmonizing of views, which it is proper for jurors to use. Consequently, we do not think that the jury used the word "compromise" in a strict legal sense, neither do we think this to be a compromise verdict.[4]

What the jury appears to have done was to disregard the evidence entirely, and, in disregard of the law and evidence, to arbitrate or compromise the differences of the litigants according to their own idea of justice and equity. This is without a basis in our system and when they reach a verdict which cannot be supported by any construction or justified by any hypothesis of the evidence, it is not a verdict upon the evidence, but a settlement according to individual opinions. Consequently the better ground on which to set aside the verdict, is that it is not supported by any construction of the evidence. That the court has the power to set aside the verdict on this ground cannot be denied since the decision in *Brown* v. *Power Co.*[5] where Connor, J., says, "There can be no controversy in respect to the power and duty of this court to set aside a verdict when there is no evidence to support it."[6]

S. M. W.

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[2] *Pee Dee Naval Stores Co.* v. *Hamer* (1912) 92 S. C. 423, 75 S. E. 695; *Harvey* v. *Atlantic Coast Line* (1910) 153 N. C. 567, 69 S. E. 627.

[3] *Simmons* v. *Fish* (1912) 210 Mass. 563, 97 N. E. 102; 27 R. C. L. 850.

[4] *Sawyer* v. *Railroad Co.* (1866) 37 Mo. 240, 90 Am. D. 382, assessing damages and dividing aggregate; *Stoule* v. *Allen* (1890) 126 Ind. 568, 25 N. E. 897, verdict arrived at by balloting and agreeing that the verdict should be determined by party receiving majority; also *Richardson* v. *Coleman* (1892) 131 Ind. 210, 29 N. E 909.

[5] *Brown* v. *Power Co.* 140 N. C. 333, 52 S. E. 954.

[6] *Foundry Co.* v. *Iron Co.* (1907) 62 W. Va. 288, 57 S. E. 826.

RESTRAINING UNFAIR COMPETITION—From the facts in a recent case,[1] it appears that prior to the summer of 1922, the public service auto business in Asheville was in a very unsatisfactory state, brought about by over-charging and other discriminations on the part of the existing public cab service. In order that this condition might to some extent be allayed, and the public given a square deal, the Secretary of the Asheville Chamber of Commerce, at the instance of the Chamber and the *Asheville Daily Citizen,* asked the Yellow Cab Manufacturing Company, of Chicago, to establish a branch of its service in Asheville, and in this manner the Yellow Cab Company came into existence in Asheville. Eleven cabs were ordered from the Yellow Cab Manufacturing Company and put into use on the city streets. These cabs were distinguished by a combination black and yellow color; yellow body predominating, with black fenders, hood and top. These cabs were also of a distinct design and shape. The Yellow Cab Company, by means of extensive advertising and efficient service soon built a large and satisfied patronage.

Some two months after the Yellow Cab Company thus became established in the Asheville taxicab business, the defendant, J. H. Creasman, who had previously done business on a similar scale in Asheville for ten or twelve years, using automobiles of a black color, bought two cabs of the same design and color as those used by the Yellow Cab Company. There were differences in the cabs of the respective companies, but the general apparance of the cabs of both was that of a yellow taxicab.

The Yellow Cab Company immediately obtained a temporary injunction, which was later dissolved, but, on appeal, the injunction was continued, restraining defendant from using taxicabs painted yellow and resembling in form and color those of plaintiff.

This case is not based upon any question of the infringement of a technical trade mark, where an exclusive right to use is gained by prior registration, but rather upon the broader principles of unfair trade or unfair competition.[2] Unfair competition has been more particularly defined as "the passing off, or attempting to pass off on the public, the goods and business of one as being the goods and business of another."[3] It is sufficient if the plaintiff have an established business including custom and good will and that this business is injured by the fraud of another.[4]

Unfair trade cases differ from technical trade mark cases in two respects. In the first instance, as soon as a technical trade mark is infringed, a presumption of fraud arises. In the second instance an exclusive right to a certain symbol or mark, based upon prior registration is essential to trade mark infringement, while an unfair trade case depends upon an exclusive right by virtue of prior use.[5]

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[1] *Yellow Cab Co.* v. *Creasman* (1923) 185 N. C. 551, 117 S. E. 787.

[2] Pomeroy, *Equity,* sec. 578.

[3] *Scupe* v. *McGill Ticket Co.* (1920) 144 Ky. 7, 137 S. W. 784, 34 L. R. A. (N. S.) 1040; *Westminister Laundry* v. *Hesse Envelope Co.* (1913) 174 Mo. App. 238, 156 S. W. 767.

[4] Pomeroy, *Equity,* sec. 578-9.

[5] *Lawrence Manufacturing Co. v. Tenn. Mfg. Co.* (1891) 138 U. S. 537, 11 Sup. Ct. 396, 34 L. Ed. 997.

Unfair competition is the basis of the principal case. The essential elements to sustain a case of unfair competition are, injury to the established trade of another, deception of the public, and the promotion of unethical business methods.[6]

First of all, the plaintiff must have an established business which another interferes with by the use of articles similar to those used by the plaintiff. As it is essential to trade mark cases that the plaintiff show priority of registration, so in cases of unfair competition, the plaintiff's business must be a prior established business. "The right to use a particular trade mark belongs to him who first appropriates it and uses it in connection with a particular business."[7] In the principal case the plaintiff had established the use of yellow cabs prior to the use of similar cabs on the part of the defendant.

Injury to an established business through the fraud of another is the gravamen of a case involving unfair trade. "Fraud is the basis of unfair competition."[8] In the principal case not only was probable injury to plaintiff's business inferable from the circumstances in evidence, but it was actually shown that patrons of the plaintiff were deceived into using defendant's cabs, believing them to be the cabs of the plaintiff. The use by the defendant of cabs similar in general appearance to those of the plaintiff, as an inevitable result, would seem to deceive the public, and, as a result, injure the plaintiff.

In the principal and similar cases, the inquiry first raised is whether the public are deceived to the injury of the plaintiff.[9] Cases of unfair competition do not necessarily involve any exclusive right to the use of a word, mark, or symbol, as they may be cases of the use of marks, symbols, etc., which everybody may use. The test is whether what has been done tends to deceive the public and injure the business of another.[10]

Actual confusion need not be shown where the necessary and probable tendency of conduct is to deceive the public.[11] But in the principal case actual confusion was shown to have existed among plaintiff's patrons. "A close imitation of one's trade name or means and style of transacting business, deceiving the public into a belief that the imitation is the original, is fraud, and where it appears an injunction will be granted."[12] Equity will generally grant an injunction if the similarity is such as to deceive the public and cause confusion among ordinary customers.[13] "A nice discrimination is not expected of the ordinary purchaser."[14]

It is not necessary that the imitation complained of be exact if the public are deceived. Comparisons in all cases would probably disclose differences. It is not

[6] Nims, *Unfair Competition*, p. 28; *Shaver* v. *Heller and Merz Co.* (1901) 108 Fed. 821, 48 C. C. A. 48.

[7] *Rosenbery* v. *Frement* (1911) 114 Pac. 886; *Kayser Co.* v. *Italian Silk Unwear Co.* (1914) 146 N. Y. 22, 160 App. Div. 607.

[8] *Lerchen and Sons Rope Co.* v. *Fuller* (1914) 218 Fed. 786, 137 C. C. A. 570.

[9] *Blackwell* v. *Wright* (1875) 73 N. C. 310; *Bates Mfg. Co.* v. *Bates Machine Co.* (1910) 72 Fed. 892, 102 C. C. A. 181.

[10] *Rosenthal* v. *Blott* (1910) 83 Atl. 387, 80 N. J. Eq. 90; *Columbia Engineering Works* v. *Mallory* (1915) 147 Pac. 542, 75 Oregon 542.

[11] *Silver Co.* v. *Rogers* (1904) 66 N. J. Eq. 140, 57 Atl. 725.

[12] *McLean* v. *Fleming* (1872) 96 U. S. 245, 24 L. Ed. 828.

[13] *Cauffman* v. *Schuler* (1903) 123 Fed. 205, *Wrisley Co.* v. *Iowa Soap Co.* (1903) 122 Fed. 796.

[14] *Silver Co.* v. *Rogers Corp.* (1905) 67 N. J. Eq. 646, 60 Atl. 187.

the differences, but the similarities that count. In the principal case there were many differences, yet the similarity in general appearance was enough to deceive.[15]

The defendant in the principal case insisted that yellow, being a primary color, could not be "monopolized." It is true that color, geographical sites, names, etc., cannot become the exclusive right of any one.[16] "Color except in connection with some arbitrary design or some definite association of characteristics which serve to distinguish an article as property of a certain person, is not a subject of trademark."[17] But it is also true that the law will protect the use of articles in the elements of which there can be no exclusive right of use, as shape, color, etc., and yet if the ensemble has come to mean a certain origin or quality to the public, an injunction will be granted.[18] In the principal case, while the cabs of the plaintiff were painted yellow, yet there was a combination of yellow and black on cabs of a particular structural design. The ensemble is the yellow cab.

The defendant, in the principal case contended that yellow was used because more durable, also because such color is bold, attractive, and can be seen at a great distance. Although this is true, nevertheless, the public is deceived and the plaintiff's established business is injured. Such conduct by the defendant is unethical and unsound, and is regarded by the law as against public policy.

No previous cases in North Carolina are found bearing directly on the question at issue, and there are only a few cases of infringement of trade mark. In other jurisdictions there are cases identically in point, involving the enjoining of public taxis on grounds of unfair competition.[19] These cases bear out the correctness of the decision rendered in the principal case.

R. K.

JOINDER OF HUSBAND IN WIFE'S ACTIONS—In a recent case[1] the wife sued for the value of services rendered. The husband joined in the suit setting up an independent claim for services rendered by him. The defendant demurred stating as grounds for demurrer both misjoinder of parties and causes of action. It was held that there was a misjoinder of causes of action, but that it was not error to join the husband in the wife's action. The case was remanded with instructions. The court, among other things, said the husband was a proper party, but not a necessary party.

At early common law the wife could not sue or be sued alone. The wife had no capacity to contract,[2] so she could not be held liable for her contracts. If she committed a tort the husband was liable,[3] and in some cases, he was liable for

[15] *Yellow Cab Co.* v. *Becker* (1920) 176 N. W. 345; Nims, *Unfair Competition*, pp. 235-236.

[16] *Blackwell* v. *Wright* (1875) 73 N. C. 310; *In re Waterman and Co.* (1906) 28 App. D. C. 446.

[17] *Newromen and Lewis* v. *Scriven and Co.* (1909) 168 Fed. 621.

[18] *Morgan's Sons* v. *Ward* (1907) 152 Fed. 690, 81 C. C. A. 616, 12 L. R. A. (N. S.) 729; *Bonnie and Co.* v. *Bonnie Bros.* (1914) 169 S. W. 871.

[19] *Taxi and Yellow Taxi Operating Co.* v. *Marten* (1919) 91 N. J. Eq. 233, 108 Atl. 763; *Yellow Cab Co.* v. *Becker* (1920) 145 Minn. 152, 176 N. W. 345.

[1] *Shore* v. *Holt* (1923) 185 N. C. 212, 117 S. E. 165.

[2] *Pippen* v. *Wesson* (1876) 74 N. C. 437.

[3] *Roberts* v. *Lisenbee* (1882) 86 N. C. 136, 41 Am. Rep. 450.

her crimes.[4] At a later stage in the evolution of the law, a married woman could sue and be sued if the husband was joined as a party. The basis for this joinder of the husband when the wife was a party to a suit was the theory of the unity of person. This theory was incorporated into the common law by the early ecclesiastical judges, who found authority for it in the biblical account of the Garden of Eden,[5] and upon this theory of the unity or identity of person, it follows that the husband must be joined in the wife's actions.

The North Carolina statute provided that the husband must be joined when the wife is a party, except when the suit concerns her separate property in which case she may sue alone.[6] The constitution of 1868 secured to a married woman her separate property,[7] i. e. all real and personal property acquired before or after marriage. The court and the legislature have gone further, and it is now settled that personal earnings and damages for personal injuries are separate property of the wife, and she can sue alone to recover the same.[8]

There are four typical situations in which the wife is a party in actions at law. These are (a) when wife is plaintiff in a contract action, (b) when she is defendant in a contract action, (c) when the wife is plaintiff in a tort action, and (d) when she is defendant in a tort action. The problem is to find out when, if ever, it is necessary to join the husband as a party in these various actions.

Taking up the situations named, suppose the wife is a party plaintiff in a contract action. At common law a married woman could not make a binding contract. But under modern statutes she can contract in regard to her separate property.[9] In such a case she can sue alone. The present case[10] illustrates that point, that the husband is not a necessary party when the wife is suing for personal services.

Suppose instead of suing she is being sued upon a contract. Prior to 1911, a married woman could be sued upon a contract without the joinder of her husband if she was a free trader.[11] In 1911 the Martin Act[12] was passed which gave a married woman the right to contract and deal with her property as if unmarried. The court in construing this statute said that it practically made a married woman a free trader as to all her ordinary dealings.[13] Since the passage of this act it is not necessary to join the husband when the wife is sued upon a contract. In a North Carolina case, where the wife was sued on a contract, the court said that the husband was not a necessary or *even a proper party*.[14] This is far reaching, if true, but is clearly a dictum.

[4] *State* v. *Williams* (1871) 65 N. C. 398.
[5] *Young* v. *Newsome* (1920) 180 N. C. 315, 104 S. E. 660.
[6] C. S. s. 454.
[7] N. C. Const., Art. X, s. 6.
[8] *Patterson* v. *Franklin* (1915) 168 N. C. 75, 84 S. E. 18; C. S. s. 2513.
[9] C. S. s. 2507.
[10] *Shore* v. *Holt*, note 1, *supra*.
[11] *Neville* v. *Pope* (1886) 95 N. C. 346.
[12] C. S. ss. 2507, 2515.
[13] *Lipinsky* v. *Revell* (1914) 167 N. C. 508, 83 S. E. 820.
[14] *Ibid.*

Taking up the third situation, suppose the wife is the plaintiff in a tort action. Before 1913 it was necessary to join the husband when the wife was a party plaintiff in a tort action for damages, since any damages recovered belonged to the husband.[15] In 1913 the legislature passed an act conferring upon a married woman the right to sue alone for damages for personal injuries.[16] This act of the legislature made personal earnings and damages for personal injuries the separate property of the wife, which without any express provision, would have given her the right to sue alone, since the existing law gave her the right to sue alone in regard to her separate property.[17]

In the fourth situation, suppose the wife is defendant in tort action, then is it necessary to join the husband as a party? At common law, the husband was liable to be sued jointly with his wife for her torts, not because of any wrong on his part, "but from the necessity of the thing, arising from the incapacity of the wife to be sued without him."[18] This liability attached although the husband and wife were living separate and apart, and although the wife's tort was committed without the husband's knowledge. The legislature in 1871 provided that "every husband *living with his wife* shall be jointly liable with her for any tort committed by her."[19] Under this statute the husband could be sued alone for the wife's tort, or both husband and wife could be joined, but if the wife was sued, the husband was joined "ex necessitate," because the wife could not be sued alone. The purpose of the statute was to limit the husband's responsibility to cases where the husband and wife were living together in the matrimonial relation, and as soon as that terminated, whether by separation or death, the liability should no longer exist.[20] That statute was repealed in 1921,[21] and, under the present law, a husband is not liable for his wife's torts in North Carolina. No case has as yet arisen that will throw any light upon the problem presented. The Code of Civil Procedure provides that the husband must be joined in all actions where the wife is a party, except, that when it concerns her separate property, she may sue alone.[22] Another statute provides that the husband must be served with process when the wife is sued, except when she is a free trader as provided by statute.[23] This looks as if it is necessary to join the husband when the wife is being sued, regardless of whether he is liable for her torts. But on the other hand the North Carolina court has said that the effect of the Martin Act is to make a married woman a free trader. If the married woman is a free trader for the purposes of the statute, why should it be necessary to serve the husband with summons when the wife is

[15] *Price* v. *Electric Co.* (1912) 160 N. C. 450, 76 S. E. 502. See concurring opinion of Clark, C. J., which is said to have resulted in the Act of 1913.
[16] C. S. s. 2513.
[17] C. S. s. 454.
[18] *Roberts* v. *Lisenbee* (1882) 86 N. C. 136, 137, 41 Am. Rep. 450.
[19] C. S. s. 2518 (repealed in 1921).
[20] See note 18, *supra*.
[21] Public Laws 1921, ch. 102.
[22] C. S. s. 454.
[23] C. S. s. 2520.

sued for a tort, as he is no longer liable for her torts and as the common law idea of the duty of the husband to protect the wife in a suit at law no longer prevails.

The reason for the joinder passed when the law, making the husband jointly liable with the wife for her torts, was repealed. It is not necessary in the other cases considered, and there is no good reason why the husband should be joined when the wife is being sued in tort. This is an age when the wife has been put on an equality with the husband at the polls, in business, and in regard to separate property and personal rights. The day of the married woman's disability at law in North Carolina is past, and the services of Chief Justice Clark in bringing this result to pass must be given due recognition.[24]

C. E. C.

THE MEASURE OF DAMAGES FOR THE BREACH OF AN EXECUTORY CONTRACT—There was a contract between the plaintiff and defendant whereby the plaintiff was to manufacture certain calendars containing advertising matter serviceable only to the defendant. The defendant broke the contract before it was completed, but the plaintiff proceeded to finish the job and sue for the full contract price. It was held that the plaintiff was not entitled to proceed to finish the work and recover the full contract, but that he was entitled only to the actual damages incurred up to the time when the contract was broken by the defendant.[1]

Lord Cockburn laid down the broad rule in England that where there was notice given by one party of an intent to break a contract the other party had the election, either to treat the notice of the breach as inoperative and continue to keep the contract alive for the benefit of all parties concerned, or to treat the contract at an end and bring an action at once for the damages resulting from the breach.[2]

This first alternative laid down by Lord Cockburn may conflict with the rule of damages which prevents the injured party to enhance his damages by continuing after he had been notified not to do so. According to the American authorities the general rule is that the party notified not to proceed with the manufacture of goods cannot afterwards complete the work and recover the full contract price.[3] In such cases if the goods being manufactured have a market value at the time of the breach the measure of damages is the difference between the contract price and the market value of the goods at the time of the breach.[4] This rule is based

[24] *Young* v. *Newsome* (1920) 180 N. C. 315, 104 S. E. 660; concurring opinion of Clark, C. J., said to have resulted in the repeal of C. S. 2518.

[1] *Novelty Advertising Co.* v. *Warehouse Co.* (1923) 186 N. C. 196, 119 S. E. 196.

[2] *Frost* v. *Knight*, L. R. 7 Ex. 111; *Johnstone* v. *Milling*, 16 Q. B. D. 460.

[3] Sedgwick, *Damages* (9th. Ed. 1920), Vol. 2, p. 1245; *Clark* v. *Marsiglia* (1845) 1 Den. 317, 43 Am. Dec. 670; *Davis* v. *Bronson* (1891) 2 N. D. 300, 50 N. W. 836; *Gibbons* v. *Bente* (1892) 51 Minn. 499, 53 N. W. 756; *Peck* v. *Kansas City* (1902) 96 Mo. App. 212, 70 S. W. 169; *Outcault* v. *Wilson* (1915) 186 Mo. App. 492, 172 S. W. 394; *Official Catalogue Co.* v. *American Car Co.* (1906) 120 Mo. App. 575, 97 S. W. 231; *Collyer and Co.* v. *Moulton* (1868) 9 R. I. 90, 98 Am. Dec. 370.

[4] *Heiser* v. *Mears* (1897) 120 N. C. 443, 27 S. E. 117; *Clements* v *State* (1877) 77 N. C. 142; *Sonka* v. *Chatham* (1893) 2 Tex. Civ. App. 312, 21 S. W. 948; *Rhodes* v. *Cleveland* (1883) 17 Fed. 426.

on the principle that the just thing is to compensate the injured party rather than to punish the party breaking the contract.[5]

Under the above rule we are at once faced with the problem of whether in every case the manufacturer must stop performance upon receiving notice of the cancellation of the order by the other party. The authorities are unanimous in holding that the manufacturer is not entitled to continue where in doing so he would clearly enhance the damages.[6] Also where no expenses have been incurred or work done on the contract before the notice of cancellation, the proper course would be to refrain from proceeding with the work, and, in that case, the measure of damages would be the profits that would have accrued to the manufacturer had performance been allowed by the buyer.[7] However where the process of manufacture has been begun before notice of cancellation there are other factors that must be considered in determining whether the manufacturer must stop performance or not. If there will clearly be no enhancement of damages he may proceed with the work. But in contracts where if the manufacturer stops it will cause waste of what has already been done and thereby enhance the damages, he should continue with the work in order to avoid liability for the increased damages.[8] However where the article to be manufactured is already finished before notice of cancellation and there is no demand for that particular type of article the manufacturer is not liable for the waste that results from altering the article so that it will have a market value. In such a case the waste would be included in the amount of damages recoverable for the breach. This is illustrated in the case where there was a contract calling for ten inch leather hose. The leather had been cut prior to the time of repudiation by the buyer. There was no market for hose of such large size so the seller cut the leather down and made nine inch hose from it. In that case the court held that the seller was entitled to profit and for the waste due to cutting the leather down.[9]

Also where other contracts are so involved that if the manufacturer stopped work upon notice of cancellation he himself would become liable to third parties for breaking contracts which he has with them, he must continue to perform or render himself liable to these third parties for damages. This is illustrated by the case where there was a contract to buy all the cotton meal and cake produced by a certain milling company during the year. The buyer notified the manufacturer that he would not take the meal and cake. In this case the manufacturer was entitled to continue with the work because the meal and cake were only one of

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[5] *Norman* v. *Vandenberg* (1911) 157 Mo. App. 488, 138 S. W. 47; *McFadden* v. *Shanley* (1914) 16 Ariz. 91, 141 Pac. 732; *Atkinson* v. *Pack* (1894) 114 N. C. 597, 19 S. E. 628; *Hendrickson* v. *Anderson* (1858) 50 N. C. 246; The Uniform Sales Act now adopted by about half the states, is in accord with this, s. 64, sub. s. 4, as follows: "If, while labor or expense, of material amount, are necessary on the part of the seller to enable him to fulfill his obligations under the contract to sell or the sale, the buyer repudiates the contract or the sale, or notifies the seller to proceed no further therewith, the buyer shall be liable to the seller for no greater damages than the seller would have suffered if he did nothing towards carrying out the contract or the sale after receiving notice of the buyer's repudiation or countermand. The profit the seller would have made if the contract or the sale had been fully performed shall be considered in estimating such damages."

[6] See cases in note 3, *supra.*

[7] Williston, *Sales,* pp. 966-977, contains an excellent discussion.

[8] Note 7, *supra.*

[9] *Chicago* v. *Greer* (1869) 9 Wallace 726.

the products obtained from cotton seed, and if he stopped performance of this contract he would break contracts which he had with third parties to supply oil and other products obtained from cotton seed.[10] The same principle is involved in the case where a test suit was brought in defense of a patent. Several parties were interested and agreed that each should contribute his share in employing an attorney to defend the suit. One of the parties notified the attorney not to proceed with the suit. And in that case it was held that the attorney was entitled to continue the suit and collect the proportionate amount from the party who notified him not to proceed with the suit.[11]

Where, as in the case which is the subject of this note, the contract is executory, work already begun, and it is for the manufacture of special goods useful only to the defendant and where the materials used prior to the time of the breach have no market value at the time of the breach, three factors must be considered in determining the amount of damages the plaintiff is entitled to recover. In the first place he is entitled to just compensation for the labor expended up to the time of the cancellation; secondly, he is entitled to just pay for the materials used up to the time of cancellation; and thirdly, he is entitled to such profits as would have accrued had performance not been prevented by the defendant.[12] In case the materials already used have a market value or have any value to the manufacturer these facts should be taken into consideration by the jury in determining the measure of damages. The cases do not specifically say so, in speaking of profits, but it is evident that the courts mean the present value at the time of the breach of such profits as the plaintiff would have been entitled to had performance not been prevented by the defendant. Thus we see that in cases like this the plaintiff is entitled to recover the actual damages which he can show that he has suffered plus the profits that would have accrued had performance been allowed. In every case the measure of damages is a question to be determined by the jury.

C. C. P.

[10] *Southern Cotton Oil Co.* v. *Heflin* (1900) 99 Fed. 339, 39 C. C. A. 546.

[11] *Martin* v. *Meles* (1901) 179 Mass. 114, 60 N. E. 397.

[12] *Long Island Supply Co.* v. *City of New York* (1912) 204 N. Y. 73, 97 N. E. 483; *Spencer v. Hamilton* (1893) 113 N. C. 49, 18 S. E. 167; *Wilkinson* v. *Dunbar* (1908) 149 N. C. 20, 62 S. E. 748; *Hawk* v. *Lumber Co.* (1908) 149 N. C. 10, 62 S. E. 752.

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