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Recent Case Comments

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ADMINISTRATION—DISTRIBUTION OF PROCEEDS OF JUDGMENT RECOVERED IN ACTION FOR WRONGFUL DEATH—UNWORTHY BENEFICIARY—In the North Carolina case of *Avery v. Brantley*[1] the plaintiff brought suit for the distribution of the estate of his infant daughter. The facts showed that the plaintiff had abandoned his wife and child following a conviction of assault and battery for mistreatment of his wife. The wife subsequently obtained a divorce from the plaintiff and remarried. The child lived with the mother until the death of the child through negligence. The mother then qualified as administratrix of the child's estate and brought suit for wrongful death, recovering a judgment for two thousand dollars. Thereafter the plaintiff brings this action against the mother as administratrix of the child's estate. It was held that he was entitled to one half of the child's estate, in spite of his abandonment of the child and mother.

Statutes providing recovery in case of wrongful death are now common.[2] It is well settled that the right of the administrator or next of kin to sue for wrongful death is strictly limited by the terms of the statute. Likewise the disposition of the amount recovered in any such action depends on the statute.[3] The North Carolina statute giving an action for wrongful death provides that the amount recovered shall be disposed of as provided in the chapter for the distribution of personal property in case of intestacy.[4] The chapter referred to provides that when a child dies intestate . . . the estate shall be divided equally between the father and mother, when both survive.[5]

The plaintiff claimed one half of the child's estate under the provisions of these statutes. The defendant contended that the plaintiff had forfeited his rights by reason of the abandonment of the child, relying on the statute which provides that where the parent of a child has wilfully abandoned the care, custody, nurture and main-

[1] *Avery v. Brantley* (1926) 191 N. C. 396, 131 S. E. 721.

[2] See L. R. A. 1915 E 1141.

[3] *Baker v. R. R.* (1884) 91 N. C. 308; *Vance v. R. R.* (1905) 138 N. C. 460, 50 S. E. 860; *Hood v. Am. Telephone and Telegraph Co.* (1913) 162 N. C. 92, 77 S. E. 1094.

[4] C. S. 160.

[5] C. S. 137, sub. sec. 6.

tenance of such child to others, he shall be deemed to have forfeited all rights and privileges with respect to the care, custody and services of such child.[6] But the court pointed out that the section relied upon was part of the adoption statute and restricts the rights of a parent who abandons his child only in respect to the child's care, custody and services. Therefore the statute has nothing to do with the distribution of the child's estate. Natural parents, in cases of adoption, are allowed to prevail over adopting parents in the distribution of a child's estate.[7] Likewise the father in this case is entitled to his share.

Logically, in view of the statutes, the case is clearly correct. As a matter of substantial justice, it would seem preferable to have the mother take all of the child's estate. The mother cared for the child during its entire life without any assistance from the father. But there is no law to prevent an unworthy beneficiary in such a case as this from claiming his rights under the distribution statutes.

J. C. KESLER.

ADMINISTRATIVE LAW—CONSTITUTIONALITY OF REGULATION OF SCHOOL BOARD—In a recent Virginia case,[1] it was necessary to decide upon the validity of the following regulation of a county school board: "Student Regulation—Leaving the campus between the hours of 9 a.m. and 3:35 p.m. is strictly prohibited, unless students are accompanied by a teacher." The complainants are the parents of two children who were by this ruling prevented from leaving the campus at the noon hour to eat meals with their father. It was contended that the regulation is an unreasonable restraint of their liberty and of the liberty of their children and an infringement upon their right of property in the school. The Supreme Court of Appeals reversed a decree in favor of the plaintiff, reasoning in part as follows: "It is neither restraint nor infringement for the legislature to enact laws to debar a child from the mere privilege of acquiring an education at the expense of the state until he is willing to submit himself to all reasonable regulations enacted for the purpose of promoting efficiency and maintaining discipline."

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[6] C. S. 189.

[7] *Edwards v. Yearley* (1915) 168 N. C. 563, 84 S. E. 846.

[1] *Flory v. Smith* (Va.-1926) 134 S. E. 360.

The Constitution of Virginia provides that "The General Assembly shall establish and maintain an efficient system of public free schools throughout the state."[2] Under this provision, various statutes concerning public education have been passed from time to time. The act under which the instant case arose provides that the county school board shall have power to make local regulations for the conduct of the schools and for the proper discipline of students.[3] Consequently, the regulation as to leaving the school grounds during lunch hour comes within the scope of the school board's power. As in typical cases of administrative action, the legislature has made certain general provisions, prescribing the broad outlines of policy, and leaves it to the administrative body "to fill up the details."[4]

There are two principal questions in every case where the validity of administrative action is contested:

1. Is the administrative body acting within its jurisdiction?
2. Is the action reasonable?

These limitations on administrative action are found in the Fourteenth Amendment that "no state shall deprive a person of life, liberty or property without due process of law." Clearly, in the principal case, the school board has power to pass rules of the kind in question and so there is no question of jurisdiction. "The only concern of the court is the reasonableness of the regulation promulgated."[5]

Whether the regulation is reasonable presents more difficulty. Free education is a gratuitous privilege conferred by the state. It is not a natural right and is not guaranteed by either the state or federal constitution. As a privilege it is subject to whatever *reasonable* limitations the donor sees fit to place upon it. If the regulation is to maintain discipline or promote efficiency, it is not the business of the court to consider the wisdom of the administrative ruling, but only to consider whether it is arbitrary or unreasonable. When, however, all schools are included, private as well as public, the question is affected by the rights of individuals to own and conduct schools,

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[2] Virginia Const., sec. 129.

[3] Pub. Laws of 1922, ch. 423.

[4] *Wayman v. Southard,* 10 Wheat. 42, 6 L. Ed. 262, Marshall, C. J.

[5] *Flory v. Smith* (Va.-1926) 134 S. E. 360, 362; see Nichols, *Judicial Review of Corporation Commission,* 2 N. C. L. Rev. pp. 75-77.

i.e. rights of private property, or to teach certain subjects, i.e. the right to pursue a lawful calling.[6]

Restricting the present discussion to public schools, the question of reasonableness may be illustrated by the following examples. Thus a rule classifying students on the basis of examinations or mental tests would be valid. Classification according to height, weight, color of hair or eyes would clearly be arbitrary. High school fraternities may be prohibited,[7] likewise fraternities at a state university.[8] Upon the theory that proper nourishment promotes mental efficiency, a rule requiring students to buy lunches at a school might be upheld. Compulsory Bible reading or compulsory religious exercises are affected by the constitutional provisions concerning religious freedom. Recently, a lower New York court has held that a school board was within its rights in allowing students to be excused thirty minutes a week during school hours to attend religious exercises outside the school.[9] The case of *Stein v. Brown*[10] appears to be contra, taking the view that such a provision amounts to giving religious instruction in the public schools. Whether the state has power to prescribe a curriculum for its schools, as in the anti-evolution laws, is an issue before the courts of this country today. The United States Supreme Court has intimated that such action may be valid.[11] In the principal case, the regulation seems to be reasonable for the proper control of students during recess.

J. L. CANTWELL.

CONSTITUTIONAL LAW—IMPRISONMENT FOR DEBT—BAD CHECK LAW—In 1925, the North Carolina legislature passed the Bad Check Law providing that any person who shall give a worthless check and who shall fail to make it good upon presentation, or within ten days after notice, shall be guilty of a misdemeanor.[1]

The court has never expressed an opinion of the constitutionality of this act, but it has been suggested that the act cannot be recon-

[6] *Meyer v. Nebraska* (1922) 262 U. S. 390, 67 L. Ed. 1042; *Oregon School Case* (1924) 268 U. S. 510, 69 L. Ed. 1070.

[7] *Bradford v. Board of Education*, 18 Calif. App. 19, 121 Pac. 929.

[8] *Waugh v. Board of Trustees of University of Mississippi* (1914) 237 U. S. 589, 59 L. Ed. 1131.

[9] See New York Times, April 25, 1926.

[10] *Stein v. Brown*, 211 N. Y. Supp. 822.

[11] *Meyer v. Nebraska*, 262 U. S. 390, 402.

[1] Pub. Laws 1925, ch. 14, discussed in 3 N. C. L. Rev. 141.

ciled with Art. I, sect. 16 of the Constitution of North Carolina which provides that "There shall be no imprisonment for debt in this State, except in cases of fraud." Cases involving the statute have come to the Supreme Court, but have been dismissed on other grounds. The case of *State v. Edwards*[2] was dismissed on appeal because of a defective indictment, and the case of *State v. Corpening*[3] was dismissed on appeal because of a variance between the indictment and the proof.

The first thing to be determined in considering the constitutionality of a statute is to find what it includes, i.e. its meaning. The language of this act clearly does not require an intent to defraud, and is sufficiently comprehensive to cover a case where a party innocently and without any evil design gives a worthless check or draft to cover an indebtedness. The new Bad Check Law must, of course, be read in conjunction with the existing law on the subject which prohibits the giving of worthless checks where there is an intent to "cheat and defraud" and provides that the giving of such worthless check or draft shall be prima facie evidence of such intent to cheat and defraud.[4] Considered together the old and new laws supplement each other. Thus the old law covers cases where there is intent to defraud; the new law contains no provision as to fraudulent intent, but seems to apply to all other cases including those where worthless checks or drafts are given through negligence.

It might be argued, however, that the mere giving of a worthless check or draft is a fraud, because there is a false representation of a fact which the giver might have ascertained, but which he fails to determine. There are cases holding that there is fraud where the party charged did not have actual knowledge of the falsity of his representations of facts, but should have ascertained them since they were peculiarly within the reach of his knowledge.[5] Hence a person who exercised due care would not come within this class of cases. But the new Bad Check Law would seem to cover any giving of a worthless check or draft, regardless of the care exercised in so giving.

[2] *State v. Edwards* (1925) 190 N. C. 322, 130 S. E. 10.

[3] *State v. Corpening* (1926) 191 N. C. 751, 133 S. E. 14.

[4] C. S. 4283.

[5] *Whitehurst v. Life Insurance Co.* (1908) 149 N. C. 273, 62 S. E. 1067; *Unitype Co. v. Ashcroft Bros.* (1911) 155 N. C. 63, 71 S. E. 61; *Bell v. Harrison* (1920) 179 N. C. 190, 102 S. E. 200; *Evans v. Davis* (1923) 186 N. C. 41, 118 S. E. 845.

It might also be argued that the giving of the worthless check is itself a crime and therefore not within the constitutional prohibition. Many acts which are not inherently wrong are made crimes by statute, and it seems that where an act is detrimental to commerce and tends to impede business transactions, working hardships to the public in general and to the commercial world in particular, as the giving of worthless checks does, that the legislature should have power to make such acts crimes. The new Bad Check Law is not extremely harsh or unreasonable. It encourages a drawer to use care in drawing checks and drafts, and allows him ten days to rectify his mistake where the act is done unintentionally. If then the act of giving a worthless check is itself a crime, the statute would not be repugnant to the constitutional provision which refers only to debts arising ex contractu and not those arising ex delicto.[6]

But this argument cannot stand. In the last analysis imprisonment for the crime of giving a worthless check is in reality an imprisonment for the debt for which such worthless check is given. And if the giving of such check were itself a crime, it would be absurd to insert a proviso for the condonation of the crime within ten days after notice, or to allow the oriminal himself to bar prosecution by making the check good. If the act of giving a worthless check is a crime, debt seems to be the essential element of that crime.

It is very doubtful that the validity of the new Bad Check Law can be upheld unless it can be construed to require some element of fraud to make it come within the exception in the constitutional prohibition of imprisonment for debt. It has been held that statutes making it a misdemeanor for a tenant to procure advances from his landlord to enable him to make a crop on the rented land, and then abandon the land before paying for such advances were unconstitutional as providing for an imprisonment for debt.[7] On the other hand, such statutes have been upheld where there was a provision requiring an intent to cheat or defraud.[8] These cases seem to indicate that the new Bad Check Law is unconstitutional because there is no provision requiring intent to defraud as an element of the

[6] *Long v. McLean* (1883) 88 N. C. 3; see also *Imprisonment for debt in North Carolina,* I N. C. L. Rev. 229.

[7] *State v. Williams* (1909) 150 N. C. 802, 63 S. E. 949; *Minton v. Early* (1922) 183 N. C. 199, 111 S. E. 347; *State v. Barbee* (1924) 187 N. C. 703, 122 S. E. 753.

[8] *State v. Norman* (1892) 110 N. C. 484, 14 S. E. 968; *Ledford v. Emerson* (1906) 143 N. C. 527, 55 S. E. 969, 10 L. R. A. (N. S.) 362.

offense. What decision will be reached by the Supreme Court when the constitutionality of the Bad Check Law comes before them is a matter for the future.

C. W. HALL.

CONTRACTS—EXTENSION OF TIME IN TIMBER LEASE—In the recent South Carolina case of *Montague Corp. v. E. P. Burton Lumber Co.*,[1] the plaintiff is seeking to establish the timber rights in certain lands of which defendant is owner of the fee. The plaintiff corporation contracted to sell the timber rights but the purchaser questions the ability of the plaintiff to convey good title, which is claimed to have reverted to the owner in fee by reason of the plaintiff's predecessors having failed to fulfill the conditions precedent in obtaining an extension of the lease for cutting and removing the timber. The original deed, dated July 4, 1902, conveyed the timber rights "for the period of ten years, beginning from the date hereof, in which to cut and remove" and "have such additional time therefor as he or they may desire." The holders of the timber rights at the end of the ten year period sought to take advantage of the option for an extended period and by telephone, July 3, 1912, informed the defendant Smith that they wished to make a formal tender and arranged an appointment with him at his office the next day, July 4th. The next day, though the plaintiffs were ready and willing, the tender was not made because Smith absented himself.

The case immediately revives the *controversia controversissima* as to whether the date of the deed, July 4, 1902, is included or excluded in computing the time when the title in the grantees reverts to the owner of the fee. The decision of the court holds that the first day is excluded so that a tender on the 4th of July, 1912, would be made before reversion took place. This position prevents a forfeiture of the grantee's rights, a doctrine evolving from *Pugh v. Leeds*,[2] and today supported by American decisions[3] and adopted by South Carolina.[4] The dissenting opinion objected to this view quoting dicta in several cases where the point in controversy was not decided.[5] North

[1] *Montague Corp. v. Lumber Co.* (S. C.-1926) 134 S. E. 147.

[2] *Pugh v. Leeds*, Cowp. 714.

[3] *Sheets v. Selden*, 2 Wall. 177, 17 L. Ed. 822; *Seward v. Hayden*, 150 Mass. 158, 22 N. E. 629; also cases cited in 26 R. C. L. 740, n. 18.

[4] *Williamson v. Farrow*, 1 Bailey L. 611. 21 Am. Dec. 492.

[5] See *United Timber Co. v. Bivens*, 253 Fed. 968, 971.

Carolina follows *Pugh v. Leeds* and so is in accord with South Carolina on this question.[6]

Another point raised is whether the owner of the fee can defeat the grantee's right to an extension by declining a tender or by preventing a tender through absence. That this cannot be done is in accord with the weight of authority.[7]

Admitting that the court was right in holding that the grantee made sufficient tender within the life of the lease, was the court correct in holding that an extension of fifteen years was valid? In timber contracts in which the grantee can avail himself of such additional time "as he may desire" the courts generally have held that this means a reasonable period.[8]

However, in the instant case, the basis of the decision is not that fifteen years is a reasonable period, but that the grantee is actually entitled to such extension of time as may be desired. The court declines to set any fixed period of extension, as a reasonable period, but construes the words, "as he may desire," literally, holding that those words are clear and unambiguous. The dissent points out that the timber was shown to be capable of being removed in two hundred working days and that an extension of fifteen years in case of a ten year contract is unreasonable and absurd.

It is a general rule of the law of Contracts that where the time for the fulfillment of a contract is indefinite, the courts will fix a reasonable time.[9] Looking at the terms of the contract literally, it is evident that the period for the ultimate removal of the timber is indefinite. Therefore, it would appear that the dissenting judges express the better view, supported by the weight of authority. What is a reasonable time must be determined in the light of the facts and circumstances of each case, what was in the contemplation of the parties at the time of signing the timber contract, the amount of timber, its accessibility, the facilities of the grantee for removing the same and such other facts as may be determinant in fixing this finite quantity called reasonable time.[10]

F. B. GUMMEY.

[6] *Houser v. Reynolds,* 2 N. C. 114, 1 Am. Dec. 551; the rule of *Pugh v. Leeds* has been adopted in statutory form, see C. S., sec. 922 and cases cited.

[7] See cases cited in 38 Cyc. 135.

[8] *Weaver v. King* (Tex. Civ. App.-1906) 98 S. W. 902; *Young v. Camp Mfg. Co.* (1910) 110 Va. 678, 66 S. E. 843; *Branch v. Johnson* (1911) 9 Ga. App. 699, 71 S. E. 1123, 34 L. R. A. (N. S.) 615 and note.

[9] *Duke v. R. R.* (1906) 106 Va. 152, 55 S. E. 548; see cases cited in note 8, *supra.*

[10] *Crown Orchard Co. v. Dennis,* 220 Fed. 516; *United Timber Co. v. Bivens,* 253 Fed. 968.

EVIDENCE—PAROL EVIDENCE RULE—EXTRINSIC AGREEMENT BY ARCHITECT WITH OWNER AS TO CONSTRUCTION OF A HOUSE—The plaintiff sued the defendant for services rendered in drawing up plans and specifications for the erection of a building for defendant. In the formation of the contract, the defendant, in writing, accepted the written proposition of the plaintiff. There was no provision in the writing about the cost of the building; but it was specified that the architect was to receive five percent of the construction cost as his remuneration. There was a provision that the work contemplated "shall be approximately as outlined in the preliminary sketches," but these sketches were not attached to the written agreement. There was evidence that these "preliminary sketches" would entail an expenditure of not more than $17,000; that the plaintiff assured defendant the work could be done for that figure, whereas the lowest bid received for the work was in excess of $22,000. The defendant alleges that the plaintiff has failed to perform the terms of the whole agreement, in that he has failed to furnish the agreed plans and specifications, in accordance with which the work could be done for $17,000. Defendant offers evidence of an oral agreement to that effect. *Held,* admission of such oral agreement allowed. *Hite v. Aydlett* (1926) 192 N. C. 166, 134 S. E. 419.

The court is very careful to announce its adherence to the "Parol Evidence Rule," namely: that parol evidence of prior or contemporary oral agreements will not be admitted to contradict, vary, or add to the terms of a contract in so far as the same have been reduced to writing. In a number of North Carolina cases where the point has come up, the Supreme Court has excluded such evidence.[1] This case is not meant to be a denial of that general rule. There is a distinction between writings which profess to set out all the transaction and those which on the face are obviously incomplete expressions of the contract or other transaction. The latter class of cases embody the agreements of the parties only as to part of the subject of the contract, and as to that, the courts say, the writing is supreme and may not be contradicted by evidence of oral expressions,—but manifestly, as to other parts not professing to be covered there, the parties

[1] *Bank v. Moore* (1905) 138 N. C. 529, 51 S. E. 79; *Drug Co. v. Drug Co.* (1917) 173 N. C. 502, 92 S. E. 376; *Farquhar v. Hardy Hardware Co.* (1917) 174 N. C. 369, 93 S. E. 922; *Patton v. Lumber Co.* (1919) 179 N. C. 103, 101 S. E. 613.

are free to show the extrinsic oral agreements.[2] As to the former class of cases, the writing by its terms embraces the whole transaction, and all oral agreements are therefore superseded and hence are inadmissible.

There is a preliminary question in each case as to which of these classes the writing properly belongs. In the present case the writing suggests the existence of a special, collateral agreement between the parties not contained therein. The construction work contemplated was to be done "as approximately outlined in the preliminary sketches"; but the sketches were not attached to the writing. How else than by reference to extrinsic matter is the jury to determine whether the architect has performed his part of the agreement in accord with the "preliminary sketches"? The writing was manifestly incomplete and hence subject to be supplemented by proof of the oral agreements—not being actually contradictory of the written provisions.

C. R. JONAS.

EVIDENCE—REPUTATION—CHARACTER—ADMISSIBILITY OF EVIDENCE AS TO A PHYSICIAN'S REPUTATION FOR EFFICIENCY AND CAREFULNESS IN A SUIT FOR MALPRACTICE—Plaintiff brought a suit for damages caused by injuries sustained through the alleged negligence of a surgeon. The defendant offered evidence to show his reputation for efficiency in the community where he practiced the profession. The judge in the lower court allowed such evidence to be admitted, whereupon the jury found for the defendant. On appeal the decision was reversed, the evidence in regard to the surgeon's reputation held inadmissible, and the case remanded for new trial in the lower court. *Green v. Shaw* (South Carolina—1926) 134 S. E. 226.

In some cases character or reputation may be directly in issue, as in an action for criminal conversation; there the extent of injury done to the plaintiff is greatly affected by the previous character of

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[2] *Evans v. Freeman* (1906) 142 N. C. 661, 54 S. E. 847; *Kernodle v. Williams* (1910) 153 N. C. 97, 69 S. E. 431; *Lytton Mfg. Co. v. Home Lumber Co.* (1913) 161 N. C. 430, 77 S. E. 233; *First Nat'l. Bank v. Hancock Warehouse Co.* (1914) 142 Ga. 99, 82 S. E. 481; *Martin v. Home Bank* (S. C.-1912) 76 S. E. 404; *Citizens Nat'l. Bank v. Davisson* (1912) 229 U. S. 212; *Terra Cotta Co. v. Mason's Supply Co.* (1910) 180 Fed. 332.

This phase of the subject is discussed in 4 Wigmore, *Evidence,* Chapter LXXXV, section 2430 and 2 Williston, *Contracts,* Chapter XXI, sections 631-636; see also 22 Corpus Juris, Chapter XXI, sections 1530-1532 for a collection of the authorities.

his wife before her seduction, and, therefore, the defendant is permitted to show that she was unchaste.[1] Similarly in an action of libel or slander, proof of the actual character or reputation of the plaintiff, as regards the matters charged, is admissible on the issue of damages.[2]

In the care of his patient, a doctor is required to exercise the degree of learning and skill ordinarily possessed by those of his profession. Is the court, in an action for breach of this duty, directly concerned with the doctor's reputation or character as a skillful man, or is it concerned solely with the *acts* committed at the time of the injury out of which the cause of action accrued? Several decisions have held that the character of the defendant doctor may be put in issue in such an action,[3] and where this is the case, evidence of reputation and character would be admissible under the principle of the preceding paragraph. The soundness of these holdings, however, may be doubted, and there are other decisions which hold that no such issue of character in the particular malpractice case was raised.[4] Such, impliedly, was the holding in the principal case. Consequently, if evidence of the doctor's character is to be received it is only relevant as shedding a faint light on his probable conduct as alleged. In some cases, on the issue of conduct, evidence of character is allowed. Thus the defendant may offer his good reputation to show the improbability of his guilt in a criminal action, and the prosecutor may then refute that evidence by the introduction of testimony to the contrary.[5] Generally, in criminal actions, the defendant has the right to introduce evidence of his good character to disprove malice or to prevent unfair prejudice.[6] *Hien v. Holdridge,* 78 Minn. 468, presents a modern tendency which allows the defendant's good moral character to be received in civil suits "where the moral element is marked and prominent in the nature of the issue."[7] And in some cases where the evidence as to particular conduct is purely circumstantial, or there are no eye-witnesses, some courts allow evidence of char-

[1] *Bottoms v. Kent* (1855) 48 N. C. 159.

[2] *Sowers v. Sowers* (1862) 87 N. C. 304.

[3] 21 R. C. L. sec. 27; Wigmore, *Evidence,* sec. 67.

[4] *Mertz v. Detwieler* (1845) 8 Watts. & S. 376 (Pa.)

[5] *State v. Holly* (1911) 155 N. C. 485, 71 S. E. 450; *State v. Laxton* (1877) 76 N. C. 216; *State v. Webster* (1897) 121 N. C. 586, 28 S. E. 254.

[6] *People v. Harrison* (1892) 93 Mich. 594, 53 N. W. 725; *State v. Beatty* (1891) 45 Kans. 492, 25 Pac. 899.

[7] Wigmore, *Evidence,* sec. 64.

acter to show a probability that the person in question acted in a manner consistent with such character on the occasion in question.[8]

But in situations other than these, evidence as to character is generally excluded because its slight probative value is outweighed by its tendency to mask the real issue and center the dispute around character. The effect of such evidence on the jury is exemplified by the principal case where it is likely that the jury's verdict was unduly influenced by the evidence of the physician's character.

J. WIIG.

PROCEDURE—ARREST AND BAIL—VERDICT OF RECKLESS DRIVING IN CIVIL ACTION DOES NOT WARRANT AN ORDER FOR ARREST OF DEFENDANT—In the recent case of *Short v. Kaltman*,[1] the North Carolina Supreme Court decided that a jury's verdict of reckless driving in a civil action was insufficient to support an order for arrest and bail or an execution against the person of the defendant. The plaintiff suffered personal injuries in an automobile accident and alleged in his complaint that the defendant was driving in a reckless and wanton manner in disregard of the plaintiff's rights at the time of the injury. There was a verdict for the plaintiff, the jury answering yes to the following issue, "Was the defendant, Brinkley, guilty of reckless driving at the time as alleged in the complaint?"

The order for arrest and bail was sought under a statute which provides that person may be arrested and held to bail "for injury to person or character. . . ."[2] In construing this statute, it has been held that the injury must have been intentionally or maliciously inflicted, i.e. with some element of violence, fraud or criminality.[3]

In the instant case, the court said that the words "wanton and reckless," used conjunctively, convey the meaning of wilfull misconduct or intentional wrong. Thus it seems that if the verdict had been for "reckless and wanton driving," as alleged in the complaint, the order for arrest would have been allowed. But, while the complaint alleged "reckless and wanton" driving, the verdict was for "reckless driving as alleged in the complaint." The court might with reason have held that the jury verdict incorporated the terms of the

[8] *Ga. So. & F. Ry. Co. v. Ranson* (1909) 5 Ga. App. 740, 63 S. E. 525; *Ill. Cent. Ry. Co. v. Prickett* (1904) 210 Ill. 140, 71 N. E. 435.

[1] *Short v. Kaltman* (1926) 192 N. C. 154, 134 S. E. 425.

[2] C. S. 768; see also C. S. 673 for execution against the person.

[3] *Oakley v. Lasater* (1916) 172 N. C. 96, 89 S. E. 1063.

complaint and so the case was one of wilful misconduct or intentional wrong, justifying an arrest.

In a previous case,[4] where the complaint was for "unlawful, wilful and malicious assault" and the verdict was for "wrongful and unlawful assault as alleged in the complaint," it was held that the verdict was insufficient to support an execution against the person of the defendant. But the case is distinguishable. The word "wrongful," which was substituted by the jury, does not imply "wilful and malicious," as used in the complaint. Clearly that which is wilful and malicious is wrongful, but that which is wrongful may neither be wilful or malicious.

In the present case, the complaint alleged "reckless and wanton" driving. While not synonymous, the two words are closely related. It would be reasonable to say that "reckless driving as alleged in the complaint" means wanton and reckless driving. The court says that reckless might mean anything from "careless, inattentive or negligent" to "desperately heedless, wanton or wilful";[5] but holds that in this case it means mere negligence, citing as authority *Bailey v. R. R.*,[6] which held that mere forgetfulness does not constitute a wilful or wanton neglect of duty. This statement from the Bailey case is clearly right, but does not assist us in defining "reckless driving" as returned by the jury in the instant case. The definition of "reckless" from another North Carolina case as "regardless of consequences, more than careless and implies wilfulness"[7] might with greater reason have been applied. Webster defines reckless as "rashly negligent, utterly careless or heedless." Bouvier says that "in popular use recklessness is a stronger term than mere or ordinary negligence." It is more than likely that the jury used the word reckless in the popular sense indicated by Bouvier's definition.

It is clear that a jury's verdict of "mere forgetfulness" is not sufficient to support an order of arrest and bail;[8] likewise a verdict

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[4] *Coble v. Medly* (1923) 186 N. C. 479, 119 S. E. 892.

[5] The case of *Towne v. Eisner*, 245 U. S. 418, 62 L. Ed. 372, is cited for this statement; but the case of *Towne v. Eisner* involved the income tax law and is not concerned with recklessness. The reference is no doubt to the following language of Mr. Justice Holmes, "A word is not a crystal, transparent and unchanged. It is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."

[6] *Bailey v. R. R.* (1908) 149 N. C. 169, 62 S. E. 912.

[7] *Pegram v. R. R.* (1905) 139 N. C. 303, 51 S. E. 975.

[8] *Bailey v. R. R.*, note 5 supra.

of "mere negligence."[9] But those decisions cannot stand as authority for the present case, where the verdict was for "reckless driving as alleged in the complaint." Perhaps it would have been more logical to have allowed the arrest under the circumstances, but the court follows a wise policy in restricting the use of proceedings for arrest and bail.

T. B. LIVINGSTON, JR.

[9] *Oakley v. Lasater,* note 3 supra.