Notre Dame Law Review

Volume 4 | Issue 3 Article 6

12-1-1928

Notes on Recent Cases

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NOTES ON RECENT CASES

CRIMINAL LAW—Searches and Seizures—Tapping of Telephone Wires—Admissibility of Evidence. By a five to four decision, the Supreme Court of the United States recently removed another stone from the protecting wall of liberty and personal security which was erected by our constitution and to which we have all pointed with pride. The decision referred to was handed down in three cases involving prosecutions for a conspiracy to violate the National Prohibition Act. *Olmstead et al. v. United States; Green et al. v. United States; McInnis et al. v. United States; 48 S. C. Rep. 564.* Some idea of the magnitude of the conspiracy may be formed from the statement that "in a bad month sales amounted to $176,000." The one decision covers the three cases. The petitioners therein were convicted in the District Court of the United States for the Western District of Washington of a conspiracy to violate the National Prohibition Act, and the conviction was affirmed by the Circuit Court of Appeals for the Ninth Circuit. Seventy-two others were originally included in the indictments. Writs of Certiorari were granted solely to determine the question of the admissibility of evidence of private telephone conversations obtained by the federal prohibition agents by tapping telephone wires. By the statutes of Washington wire tapping is made a crime. The information which led to the discovery of the conspiracy was obtained almost entirely by this method. Petitioners sought to have such evidence excluded on the ground that it was obtained by methods prohibited under the Fourth Amendment and that its admission constituted a violation of petitioners' rights under the Fifth Amendment to the Constitution of the United States.

The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated..." The majority opinion holds that the method of obtaining evidence in this case did not involve a violation of that amendment. The tapping of the wires was effected on lines extending from the residences of some of the petitioners to the central office. The federal agents did not enter the office nor the homes of the peti-

tioners; the connections were made in the street outside of the residences and in the basement of the office building. It is this conduct which the highest tribunal in the land has held does not constitute a violation of the Fourth Amendment to the Federal Constitution.

The majority opinion stresses the point that under the common law rule, which obtains in Washington, "the admissibility of evidence is not affected by the illegality of the means by which it was obtained." It later calls attention to the fact, however, that the same court, in *Weeks v. United States, 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas.* 1915C, 1177, recognized an exception to the common law rule where the evidence is obtained through a violation of the fourth and Fifth Amendments. The decision, therefore, that there was no violation of the Fourth Amendment disposed of the all-important point in the case. In treating of this point the opinion states: "The language of the amendment cannot be extended and expanded to include telephone wires, reaching to the whole world from the defendant's house or office", and even though, as is conceded in the opinion, those amendments are to be liberally construed to effect the purpose of the framers of the constitution, "that cannot justify enlargement of the language employed beyond the possible practical meaning of houses, persons, papers and effects. . . ."

The Fifth Amendment provides: "No person . . . shall be compelled in any criminal case to be a witness against himself." The majority opinion held that since the conversations of the petitioners were not compulsory in any way there could be no cause for complaint under this provision.

The chief dissenting opinion was written by Mr. Justice Brandeis. In justifying his position that the constitutional amendment applies to the present case, he says: "Clauses guaranteeing to the individual protection against specific abuses of power, must have a similar capacity of adaptation to a changing world. . . .When the Fourth and Fifth Amendments were adopted. 'the form that evil had therefore taken' had been necessarily simple . . . . But 'time works changes, brings into existence new conditions and purposes'. . . . Discovery and invention have made it possible for the government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what

is whispered in the closet. . . . As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire tapping."

"The protection guaranteed by the amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth."

"It is, of course, immaterial where the physical connection with the telephone wires leading into the defendants premises was made. And it is also immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficient. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

Justice Brandeis was not content with attacking the admissibility of such evidence under the constitutional provision. He also based his contention upon the broad and fundamental principle of the self-preservation of our courts. In order to preserve itself the court must require that those who invoke its aid must come with clean hands. To do otherwise would breed contempt for our laws, make our judicial processes a means of extending rather than limiting the field of crime, and make the administration of justice practically impossible.

Mr. Justice Holmes, Mr. Justice Butler, and Mr. Justice Stone wrote dissenting opinions.

It is said that the government did not authorize the commission of these crimes on the part of its agents. In reference thereto, the government in its brief states: "The Prohibition Unit of the Treasury disclaims it and the Department of Justice has frowned on it." True, it did not tell its agents in advance to

use such methods in obtaining evidence in this case. But when they had in fact obtained the evidence by the commission of a crime, the government not only did not refuse to participate in the fruits of the crime, but it insisted on the right to use the same in the prosecution of the petitioners herein. The government, therefore, became morally responsible for these acts to the same extent as if it had originally authorized them. Even though the agents were not directed to commit a crime, the government by availing itself of the fruits thereof has unequivocally placed its stamp of approval thereon. We have, then, this deplorable state of affairs—the federal government paying its agents for the commission of crime against the state of Washington. Could anything be more subversive of the principles of federal government? Such a struggle between the state and national governments, if long continued, cannot but result in the entire subordination of one to the other,—a condition wholly at variance with and destructive to our political institutions, of which in the past we have been justly proud.

The decision seems to attach some importance to the fact that there was no trespass upon the property of the defendants. It would seem that such is not consonant with the facts of the case. Presumably, petitioners were in possession and had exclusive right to the use of the telephone wires while these conversations were being carried on. Doubtless petitioners paid a consideration to the telephone company for such use and possession. There is, therefore, absolutely no foundation for the assertion that no trespass was committed upon their property.

The opinion as a whole portrays vividly the shameful conditions engrafted upon our fair country by the adoption of the Eighteenth Amendment and the passage of the National Prohibition Act, and also the utter disregard for law and personal rights which has become the almost invariable accompaniment of the efforts on the part of our enforcement officers to compel compliance with the law. Greater cause for alarm arises from the fact tha hese outrages are perpetrated in the name of justice by the very ones to whom has been entrusted in large measure the enforcement of our laws and who should be the last to trample them underfoot. Everything possible should be done to prevent such an abomination of the principles upon which our fed-

eral government is founded, and the first step in that direction should be the refusal of our courts to recognize such nefarious conduct on the part of federal officers in any manner whatsoever, except in the prosecution of the officials themselves for the commission of such offenses. Thus will we revert to an observance of the maxim, "Our liberties we prize ,and our rights we will maintain."

Henry Hasley.

ATTORNEY AND CLIENT—Settlement could be made out of court by providing for payment of attorney's lien out of settlement.. *Levy et al. v. Grand Central Wicker Shop,* 249 N. Y. 168, 163, N. E. 244.

This was an appeal from a judgment of the Supreme Court Appellate Division First Department, (N. Y.).

The plaintiffs in this case were attorneys who represented John Coleman in an action against the Grand Central Wicker Shop. The plaintiff in that action had agreed that the attorneys should have as their fees, forty per cent of the amount recovered in the suit. There was a judgment given Coleman for $12,500, forty per cent of which was attorneys fees. Thereafter the plaintiff, pending an appeal, settled with the defendant company for $2,000, of which $800 represents the attorneys fees. The question is whether the plaintiff Coleman might settle with the defendants and release the judgment, despite an agreement with his attorneys for a contingent fee of forty per cent of the amount recovered.

The settlement was made in good faith, with the consent of the court and with notice to the attorneys.

The attorneys contend that their position is that of an equitable assignee of the judgment and as such their fee is to be based upon the judgment and not the amount of the settlement. It has been held in *Serwer v. Serwer,* 86 N. Y. S. 838, that court has no power after judgment to authorize a settlement which transfers the attorney's lien to the amount received in settlement, but the attorneys are entitled to the amount contracted for. However in *Corcoran v. George Kelloge Structural Co.* 166 N. Y. S. 269, it was held that, pending an appeal, the plaintiff has the right to make a settlement for less than the judgment providing he acts in good faith and gives notice to the attorneys, and provides payment for

attorneys from the settlement. The client has the right to determine whether he shall pursue the action or make a settlement in good faith. He may not however cheat his attorneys. The attorneys have a right to pursue their fee and insist that the share be ascertained and paid, 66 N. E. 397. This rule may be applied to settlements both before and after judgment. This does not defeat the attorneys lien as argued by the plaintiffs. This rule is based upon the fairness of the settlement made. Order affirmed. In accord. 102 N. Y. S. 374. *J. P. Berscheid.*

CONSTITUTIONAL LAW—Constitutionality of classification of subjects of taxation—Requirements of classification for purposes of taxation.

The Great Atlantic and Pacific Tea Co. and others brought action against Rufus A. Doughton, Commissioner of Revenue of North Carolina, to recover money paid by each of the plaintiffs to the defendant as a license tax for the privilege of maintaining and operating chain stores in the state of North Carolina, the tax being provided for by a statute, alleged to be null and void as contravening the Constitution of North Carolina, and Section 1 of the 14th Amendment to the Constitution of the United States. *Great Atlantic and Pacific Tea Co. et al. v. Doughton,* Commissioner of Revenue of North Carolina, 1928. 144 S. E. 701.

The statute, passed by the legislature for the purpose of raising revenue for payment of the expenses of the state government, provided that "any person, firm, corporation or association operating or maintaining within this state, under the same general management, supervision or ownership, six or more stores or mercantile establishments, shall pay a license tax of $50 for each such store for the privilege of operating such stores or mercantile establishments." The plaintiffs were partnerships composed of citizens of the state, and corporations organized in the state, or licensed to do business there, and alleged that the tax was not imposed in the exercise of the police power of the state, but was imposed merely as a tax for the purpose of revenue, and that the classification for this purpose was arbitrary, unreasonable, and unjust.

The section of the Constitution of North Carolina alleged to have been violated provided that "laws shall be passed taxing, by

uniform rule all moneys, credits, investments and bonds, stocks, joint stock companies, or otherwise; also all real and personal property according to its true value in money". The same section further provided that "the General Assembly may also tax trades, professions, franchises and incomes". In *State v. Williams,* 73 S. E. 1000, it was held that the rule uniformly applies to such taxes as well as to taxes on property. Although, therefore, the power of the Legislature to classify the subjects of such taxation has been recognized, this power must be exercised subject to the limitation that the classification must not be arbitrary, unreasonable or unjust; there must be some real and substantial difference to justify the classification.

Article 14, sec. 1 of the Constitution of the United States, also alleged to have been violated, provides that no state shall "deny to any person within its jurisdictinn the equal protection of the laws". In deciding this question, the court held the decisions of the Supreme Court of the United States are controlling and must be accepted as authoritative. Although it has been held that this provision does not prohibit classification for purposes of taxation, it is also true that the classification must be reasonable and based on a real and substantial difference having a reasonable relation to the subject of the particular legislation. *Quaker City Cab Co. v.Commonwealth of Pennsylvania,* 48 Sup. Ct. 553. If therefore, the statute in question was contrary to the Constitution of North Carolina, it also contravened the 14th Amendment to the United States Constitution.

Since other merchants doing a similar business within the state were not required to pay the tax merely because they operated fewer stores than did plaintiffs, it was held that the classification was arbitrary; the business of plaintiffs differed from that of the owners of fewer stores only in matters of detail and methods of buying and selling merchandise. Such a classification was unjust and unreasonable and deprived plaintiffs of equal protection of the laws.

The tax was also condemned on the grounds that it was directed against stores operated under the same general management or ownership, which was held to be an arbitrary distinction; also, when the sixth store was taxed, the tax became retroactive because the first five, as well as the sixth, became subject to a tax

to which they had not been subject before. It was therefore decided by the court that the statute was in opposition to both the Constitution of North Carolina and to the 14th Amendment to the Constitution of the United States, and as a result, was null and void.

J. J. Canty.

CONSTITUTIONAL LAW—Equitable relief—Exclusion of negroes from democratic state primary election.

In the case of *Grigsby et al. v. Harris et al.* reported in 27 Federal Reporter (2nd series) 942, equitable relief was sought against the Democratic State Executive Committe for excluding negroes from participation in the Democratic primary election pursuant to Rev. St. Tex. 1925, article 3107, providing that a political party through its state executive committee has power to prescribe qualifications of its own members and determine who shall be qualified to vote in such party.

The opinion, written by Judge Hutcheson, of District Court of the United States for the Southern District of Texas, holds that the action complained of was purely a party action, as to which like other voluntary associations, the party has a complete *delectus personarum*, and may select or reject as members whom it will.

Although the whole opinion is not given and it does not appear how the court ruled as to the constitutionality of the Texas statute, apparently the statute as it stands, is constitutional both as to the Fourteenth and Fifteenth Amendments of the Federal Constitution because every state has the right to prescribe the qualifications of its own citizens whether voting in a state or a federal election, *Minor v. Happersett,* 21 Wallace 162 (U. S.), 22 Law Edition 627; *Pope v. Williams,* 193 (U. S.) 621, 24 Sup. Ct. Rep. 573, 48 Law Edition 817.

Not enough of the facts are given in the case to understand the courts ruling, but it will be interesting to know when the case is fully published how the court arrived at its decision and the reasons given in support of it, together with the authorities cited on the subject.

J. Angelino.

CONTRIBUTORY NEGLIGENCE—*Plucker v. C. M. St. P. Ry. Co.* The plaintiff, Plücker, alleges that he was seriously injured, and his automobile completely destroyed by a collision with the defendant's train. He claimed damages to his person in the sum of $10,000 and to his automobile in the sum of $500. The plaintiff received judgement in the lower court and the defendant was granted a new trial on the ground of contributory negligence. The defendant contends that the evidence shows that the plaintiff was guilty of contributory negligence, as a matter of law, barring a recovery against the defendant.

The accident occured at a grade crossing where the plaintiff was struck by one of the defendant's trains. It was a dangerous crossing through a deep cut and a train could not be seen either way until two or three feet from the tracks. The cut and the crossing were well known to him, and he well knew that he could not see a train coming until he was within two feet of the track. He was driving at the rate of 6 miles an hour.

The engineer of the defendant Railroad failed to ring the bell or sound the whistle, and the plaintiff contends, that his negligence, if any, was caused by the failure of the company to comply with the rules.

The court held that the plaintiff knowing that he could not see a train within 2 feet of the track, was negligent in driving at a rate of speed which must carry him within striking distance of a train, if a train was coming, before he could stop his car.

Failure of the engineer to ring the bell or sound the whistle did not relieve the plaintiff from the necessity of taking ordinary precaution. Negligence of the company's employee is no excuse for negligence on the part of the plaintiff. This case was decided in 219 N. W. 254, May 4, 1928.

On this point 22 R. C. L. 1018, par. 250 says:

"At an obstructed crossing it is the duty of a traveler to exercise a greater degree of care and caution than is incumbent upon him usually, and common prudence requires him to approach at such speed that when an approaching train may be seen he may be able to stop and allow it to pass. The greater the danger, the greater the care necessary for him to exercise and the greater caution necessary to constitute ordinary care."

Plucker v. C. M. St. P. Ry. Co. is followed by many other cases decided in different states. 124 Ind. 280; 8 L. R. A. 539; 20 So. 207; 182 Cal. 369; 178 Wis. 513; 195 Iowa 86, 190 N. W. 21; 241 S. W. 671; 120 Wash. 91; 237 S. W. 1018; 27 N. M. 349; 224 Mich. 91; 107 Ore. 587; 112 Kans. 402; 297 Mo. 633; 257 S. W. 469; 95 U. S. 697; 24 L. Ed. 542; 118 Fed. 234.

F. Earl Lamboley.

CORPORATIONS—Acceptance of stock in consolidated corporation by minority stock holders not consenting to consolidation held not ratification of consolidation where they believed themselves bound by decision of majority.

Action by the minority stockholders of Garrett Sheep Company to set aside a merger of the company with the defendant company and to have reconveyed to the Garrett Company its assets, or, in lieu thereof, for the value of plaintiffs' shares of stock in the Garrett Company at the time of the merger. The individual defendants were the majority stockholders of the Garrett Company. They were also its directors and likewise directors of the company with which the Garrett Company merged. By vote of the defendants, as majority stockholders of the Garrett Company, a merger with the other company was authorized, plaintiffs voting against the merger. After the merger plaintiffs believing themselves bound by the vote of the majority stockholders accepted stock in the consolidated company in exchange for the stock previously held by them in the Garrett Company and one of the plaintiffs was elected a director of the new company and acted officially as such. Six months after the merger this action was brought in which a judgment for defendants was had; from which judgment plaintiffs appealed. *(Garrett et al. v. Reid Cashion Land & Cattle Co. et al.* Arizona, 1928. 270 P. 1044.)

The right to consolidate or merge two corporations into one is governed by statute or charter provisions. There was no statute here authorizing such merger nor was there a provision in the charter of the Garrett Company giving that right, so that, in the first instance, what was done was without sanction of law. The entire assets of a corporation cannot be sold or exchanged for the stock of another corporation in accordance with a vote of the majority of the stock of the corporation unless power to do so is

given by law and the articles of incorporation of the business. The exercise of such power in the absence of the conditions mentioned is illegal as against nonconsenting stockholders. *Mason v. Pewabic Mining Co.*, 133 U. S. 50.

The stock of the defendant company received by the Garrett Company in payment for its assets cannot be forced upon dissenting stockholders of the latter company in a distribution of its assets, they being entitled to received their share in money. *Koehler v. St. Mary's Brewing Co.* 228 Pa. 648.

The individual defendants being directors and majority stockholders of both the defendant company and the Garrett Company were both the sellers and the buyers of the assets of the latter company and under the facts set out must be considered as actual if not technical trustees for the holders of the minority of the stock. *Jones v. Missouri Edison Electric Co.*, 144 Fed. 765. As such trustees the defendants owed certain duties to the plaintiffs; one being the duty not to sell to themselves the trust property, and another being that they should disclose to the plaintiffs their legal rights. Both of these duties devolving on the defendants were breached by them and they cannot claim that acceptance by the plaintiffs of the stock of the consolidated company was such a ratification of the merger on the part of the plaintiffs as to relieve them of liability. The term ratification implies knowledge of a defect in the act to be confirmed and of the right to reject or ratify it. *Adair v. Brimmer,* 74 N. Y. 539. Plaintiffs were without this necessrry knowledge and their action cannot be deemed a ratification of the agreement.

While a mistake of law alone is not adequate ground for equitable relief, the facts here bring this case within a well recognized exception to the general rule, that is, where a mistake by a party as to his antecedent existing legal rights, as distinguished from a mistake as to the legal import of the act done, is shown, equity will relieve such a party from the consequences of such a mistake. In Re McFarlin et al., 75 A. 281; Pomeroy on Equity Jurisprudence (3d. ed.) sec. 849.

D. M. Donahue.

CRIMINAL LAW—In this case of *State v. Purdin* 221 N. W. 562 (Iowa) the defendant was charged with unlawful transporta-

tion of liquor in violation of the statute. While the case was pending another information was sworn out against him charging him with transporting liquor without proper labeling in violation of Sec. 1936 of the Code. The last named action was the first prosecuted and the defendant was convicted and fined by the justice of the peace. He appealed to the district court and was again found guilty.

As a defense against the charge of unlawful transportation of liquor the defendant pleaded the former judgment of transporting liquor without proper labeling as a former conviction for the same offense. The court granted his request for a directed verdict on the ground that there had been a prior conviction and that the defendant had been in jeopardy for substantially the same offense as charged in the indictment. The case wos appealed by the state and the supreme court affirmed the district court and followed the rule laid down in *State v. Sampson* 157 Iowa 257, 138 N. W. 473 where it was held that the effect of prosecuting first the lesser offense where a larger offense has been committed and could be prosecuted is a method of splitting a larger offense into its lesser parts and that the state is bound by its election.

EQUITABLE RELIEF—The "Clean Hands Doctrine" of Equity—Where equitable relief is sought in a court of equity, the party seeking such relief must come in with clean hands.

In the case of *Knights of the Ku Klux Klan v. Strayer,* reported in 26 Fed. Rep. (2nd series) 727, plaintiff alleged that defendants had been banished from the organization, were wrongfully using its name and retaining in their possession property and funds belonging to plaintiff; wherefore the plaintiff prayed that defendants be enjoined from further use of its name, and that they be required to account for and turn over all the property or funds in their possession which rightfully belong to the plaintiff.

Defendants in their answer, after denying the allegations of plaintiff's bill, alleged that they were members in good standing, and also that plaintiff had been guilty of such gross violations of law as would bar it from any relief in equity.

Judge Thomson, of the United States District Court for the Western District of Pennsylvania, denied plaintiff's prayer on the

principle that he who comes into equity must come in with clean hands. The Court said:

"In view of all the facts disclosed by the evidence, the plaintiff corporation, stigmatized as it is by its unlawful acts and conduct, could hardly hope for judicial assistance in a court of the United States, which is highly commissioned to extend to all litigants before it, without distinction of race, creed, color, or condition, those high guarantees of liberty and equality vouchsafed by the Constitution of the United States; a court whose duty it is to recognize and uphold religious freedom as the first fruit of civilization, to secure to every accused the right to a full knowledge of the accusation against him, and a fair and impartial trial of the issue before a jury of his peers; a court which fully recognizes that this is a government of law, and not of men, and that no man shall be deprived of his life, liberty or property without due process of law."

J. Angelino.

HUSBAND AND WIFE—**Parents have the right to advise their son to leave his wife, if they act in good faith, honestly believing, for substantial reasons, that such advice is proper.**

This was an action by Malinda Kadow against Wenzel Kadow and Mary Kadow to recover damages for alienation of the affections of plaintiff's husband by the defendants, who were the parents of the husband. From a judgment for the plaintiff the defendants appealed. This is a Wis. case decided in 219 N. W. 276.

The record showed in this case that there isn't any competent evidence whatever that the parents advised their son to leave the plaintiff. The most that can be said is that there is proof of circumstances which plaintiff contends is sufficient to show that the parents did advise separation. This proof consists of such circumstances such as the failure of the defendants to give the plaintiff a Christmas present or to invite her to meals in their house or failure of the mother to answer the door bell when the plaintiff called at the house of the parents.

The court held that the spouse, suing parents-in-law for alienation of affections, has the burden of showing that their acts and advice were controlling cause of separation, and result of

malice and bad intent. Parents have a right to object to their son's marriage, to refuse to make his wife a member of their family, and to advise him to leave her, if they honestly believe that conditions demand separation, act in good faith, and have substantial reasons for believing that such advice is proper

If parents, sued by their son's wife for alienation his affections, were actuated by reasonable parental regard for him, rather than unreasonable ill will towards plaintiff, in what they did, but were wrong from the standpoint of best judgment, excusably mistaking true situation, resulting injury is *damnum absque injuria.*

The court said: "The relations of a parent and child in their moral aspects, and legal as well, begin at the inception of life, and so do not wholly end until life ends, and those relations carry with them certain duties and privileges as to advice and protection and helpfulness in case of need, the observation of which is so natural and so laudable and so essential to the family happiness and welfare that acts ostensibly promotive thereof are not to be lightly held to have a wicked purpose for their mainspring. Acts done by a stranger might well be regarded as malicious, while similar acts done by the parents would not give rise to a well-grounded suspicion of bad intentions."

The law presumes that these parents did what they did for the purpose of promoting the welfare of their son and not to maliciously wrong this plaintiff. 186 Wis. 137; 202 N. W. 156; 147 N. W. 834, 835; 129 Am. St. Rep. 1082; 119 N. W. 179.

F. Earl Lamboley.

HUSBAND AND WIFE—In this case of *Gjesdahl v. Harmon* 221 N. W. 639 the Plaintiff sues for the alienation of his wife's affections, to which the defendant entered a general denial. There was a verdict for the defendant, and the plaintiff appealed on the ground that evidence of his own misconduct was not admissible unless specially pleaded and that the court erred in admitting such evidence under the general denial. The supreme court affirmed the decision of the lower court and applied the rule laid down in a great number of cases of the state of Minnesota whose holdings in substance are set out by this court in part of its opinion to the effect that, "The general denial put in issue all the

facts which the plaintiff was required to prove in order to establish his cause of action and under it the defendant could present any evidence tending to show that if the plaintiff has lost the affections of his wife the estrangement resulted from his own misconduct. Such evidence was not in the nature of confession and avoidance, but tended to show that the alleged loss of affections resulted from causes from which the defendant was not responsible."

Marc Wonderlin.

INSURANCE—Authority of insurance agent to waive forfeiture for failure to pay premium within time specified—Methods of establishing waiver of forfeiture by insurer.

Action by Annie Foscue, administratrix of John Foscue, against the Greensboro Mutual Life Insurance Co. to recover the amount of an accident insurance policy in the sum of $500.00. *Foscue v. Greensboro Mutual Life Insurance Co. et al.,* Supreme Court of North Carolina, 1928. 144 S. E. 689.

The policy in question had been issued on Sept. 8, 1925 by the defendant to John Foscue, husband of the plaintiff, in consideration of a monthly premium of $3.40 paid in advance by the insured. It was provided in the policy that after three months from the date of the policy a grace period of ten days in payment of premiums was allowable, the policy being forfeited in case of failure to pay premiums within that time. The policy further provided that no agent of the company had authority to change the policy or waive any of its provisions, and that no change in the policy should be valid unless approved by an executive officer of the company, such approval being endorsed by him on the policy.

Plaintiff's husband was killed on the 19th of August, 1926. It appeared that he had paid all premiums due on the policy on or before the 10th day of each month up to the month of August, but that on the 4th of that month, he had come to the agent of the company, who wrote the policy and to whom he had previously paid the premiums, and informed him that he could not pay the premium for that month. The agent declined to accept a partial payment, but told the deceased that if he would take out and pay for an industrial policy, he would extend the time of

the premium on the existing policy until the next pay day of the deceased, who took out the new policy, and had not paid the premium on the existing policy at the time of his death.

It was contended by the defendant that its agent, who was merly a soliciting and collecting agent, had no authority to waive the provisions of the policy by agreeing to extend the time of payment of premiums. In passing on this contention, the court held that courts will liberally construe in favor of an insured acts indicating an election to waive forfeitures, or an agreement to waive them, because the courts do not favor forfeitures. Especially is this true when the insured has relied and acted on such waiver, which may be astablished by (1) express agreement, (2) conduct or course of dealing, or (3) ratification. *Turlington v. Ins. Co.*, 137 S. E. 422; *Dawson v. Ins. Co.*, 135 S. E. 34. By these methods it may be shown that the power of an agent, expressed in the policy, may have been enlarged by the insurer, but unless there is evidence tending to show that his powers have been so enlarged, the authority expressed must be regarded as the measure of his power. *Gazzam v. Ins. Co.*, 71 S. E. 434. And when one deals with an agent, it behooves him to ascertain correctly the extent of his authority and power to contract.

The court further held that the authoriy of an agent whose powers are limited, as were those of the agent of the defendant, to waive the terms and conditions of written policies of insurance, is ordinarily restricted to negotiations connected with the inception of the contract, and not to provisions of a written contract which has already taken effect and been in force for a period of time. *Johnson v. Ins. Co.*, 90 S. E. 124. In this case there was no evidence to show that defendant's agent had either express or implied authority to waive the conditions expressed in the policy, nor did it show a course of dealing from which waiver could be inferred, since premiums had always been paid within the time stipulated in the policy. From these facts and principles the court reasoned that there was nothing to indicate a waiver by defendant of forfeiture of the policy, and that the plaintiff could not recover its amount. *J. J. Canty.*

LANDLORD AND TENANT—Landlord obligated to repair water pipes had, as regarded injury to tenant as result of con-

tinued leakage, duty of reasonable inspection.

This suit is against the landlord for personal injury sustained by the wife of the tenant thru the fall of part of a plastered ceiling in the demised premises upon the wife's head. Evidence shows that water was leaking badly thru the kitchen ceiling and part of the ceiling came down. Landlord was notified and contracted with two colored masons to fix it. About ten months later, the leak started again, landlord came and tested the ceiling with a broom and pronounced it all right except the water pipes, which he would fix stating that the water would stop. On January 5th, 1926, part of ceiling fell again this time on Mrs. Dulberger's head.

Clause of the written lease stated that the landlord was from time to time, to examine and repair the water pipes, if any may be broken.

The Judge instructed the jury that; "If you are satisfied by the evidence that the defendant had no notice that the ceiling was in a defective condition, then in such an event your verdict shall be for the defendant."

The vice of this instruction is that it ignores any duty on the part of the defendant to make any inspection himself of the conditions and predicates his liability solely on the fact of actual notice. It is, of course, a fundamental rule that a duty of care normally involves the duty of making reasonable inspection at proper times, and of reasonable diligence in making repairs, if such reasonable inspection disclose defective conditions. As to the waterpipes, this duty of reasonable inspection was recognized by the express language of the lease and hence it follows that the defendant's negligence could be inferred from lack of such inspection. It was clearly opened to a jury to infer that if the ceiling fell on account of water they were entitled to find that defendant should have anticipated this as a possible result of the leakage and should have made inspection accordingly. The instruction as given to the jury, erroneously limited the scope of inquiry and to the prejudice of the plaintiffs. 143 A. 323 *Dulberger v. Radli.*

Cases in accord; 222 Mass. 557, 129 N. Y. S. 681, 158 Ky. 118, 192 Ill. App. 348, 89 Conn. 169, 76 Cal. 173, 73 Md. 469, 268 Mo. 463, 19 Ga. app. 485, 209 S. W. 372, 157 N. Y. S. 642, 124 N. E. 283, 13 Ohio App. 285. *A. J. DeDario.*