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West Virginia Supreme Court would hold that a joint judgment could be taken against a survivor in his own right and a substituted trustee, where the substitution is made necessary by death of the jointly contracting original trustee. Such a judgment would be against parties in different capacities. Practically, the procedural difficulties ought not to be any greater in the case of a personal representative than in the case of a substituted trustee.

—L. C.

DATE FROM WHICH INTEREST ACCRUES ON JUDGMENT IN TORT.—
The Supreme Court of Appeals in a recent case¹ has removed some confusion that has confronted the bench and bar on the subject of the date from which interest is computed in entering up judgment in a tort action. At least we have the last unmistakable utterance of a majority of the court. There is a dissenting opinion on this question by one judge.² This decision follows one rendered about a year previously,³ in which the court divided exactly as in the

¹Wehrle v. Wheeling Traction Company, 102 S. E. 289 (1920), decided January 27, 1920 (rehearing denied March 24, 1920), in which it is said: "In the recent case of Long v. Pocahontas Consolidated Collieries Co., 83 W. Va. 380, 98 S. E. 289, Judge Williams dissenting, we ignored the ruling in the Easter Case on this question of interest, and in reversing the judgment below in a tort action rendered judgment for the plaintiff with interest from the date of the verdict. In the Easter Case we seem to have been misled by Talbott v. W. Va. C. & P. Ry. Co., 42 W. Va. 560, opinion by Judge Holt, decided subsequently to the amendments of sections 14, 16 and 18 of chapter 131 of the Code, by chapter 120 Acts of the Legislature, 1882, and to have overlooked our decision in Campbell v. City of Elkins, 58 W. Va. 308. As Judge Holt in Talbott v. W. Va. C. & P. Ry. Co. refers only to Hawker v. B. & O. R. R. Co., *supra*, and Murdock v. Insurance Co., 33 W. Va. 407, the latter case involving a judgment rendered after, but a verdict rendered before said amendments, he seems to have overlooked the effect of the amendments of 1882. In Campbell v. City of Elkins, due regard seems to have been had to the amendments of 1882, and the conclusion there reached that in tort actions like the present the judgment should bear interest from the date of the verdict, as provided in section 16 of chapter 131, the only provision of the law applicable in such cases. After a full review of these decisions, we are fully satisfied that in actions of tort the judgment should bear interest from the date of the verdict."

²Wehrle v. Wheeling Traction Company, 102 S. E. 289 (1920), where, in the dissenting opinion of Judge Williams it is said: "I dissent from so much only of the foregoing opinion as holds that interest on the judgment should run from the date of the verdict, for the same reason expressed in my dissenting opinion in the Long v. Pocahontas Consolidated Collieries Case 83 W. Va. 380, 98 S. E. 289. Properly construed, I do not think the statute cited in the opinion applies to judgments recovered in tort actions."

³Long v. Pocahontas Consol. Collieries Co., 83 W. Va. 280, 98 S. E. 289 (1919).

first mentioned case.⁴ The case in which the decision of a year previously was rendered came before the court on a writ of error awarded to the plaintiff to review the judgment of the circuit court in setting aside the verdict of the jury in the plaintiff's favor and granting the defendant a new trial. The court, holding that the plaintiff should have had judgment, proceeded to give judgment for the amount found by the verdict "with interest from the date of the verdict." In doing so, although without expressly mentioning it either in the syllabus or opinion, so that digesters and the profession generally would take note thereof, a former decision, of some four years' standing was overruled.⁵ In the case last referred to the court reversed a judgment of the circuit court awarding interest from the date of verdict, and entered judgment carrying interest from the date of the judgment in the

⁴Long v. Pocahontas Consol. Collieries Co., 83 W. Va. 380, 98 S. E. 289 (1919), Judge Williams, in his dissenting opinion, said: "I do not concur in so much of the judgment as holds that plaintiff is entitled to interest from the date of the verdict.

"This is a tort action, and there is no provision in the statute for allowing interest in such cases prior to the date of the judgment. Sections 14 and 16 of chapter 131 (secs. 4923, 4925) Code of West Virginia, relate only to actions *ex contractu*, hence the amendment of those sections in 1882, so as to allow interest from the date of the verdict, did not change the rule as to interest in actions *ex delicto*. The cases of Hawker v. B. & O. R. R. Co., 15 W. Va. 628, 36 Am. Rep. 825, and Fowler v. B. & O. R. R. Co., 18 W. Va. 579, are binding authority notwithstanding the subsequent amendment of the statute. Talbott v. W. Va. C. & P. Ry. Co., 42 W. Va. 560, 26 S. E. 311, and Easter v. Virginian Ry. Co., 76 W. Va. 383, 86 S. E. 37, Campbell v. City of Elkins, 58 W. Va. 308, 52 S. E. 220, 2 L. R. A. (N. S.) 159, conflicts with the foregoing, but the opinion does not mention the Talbott Case, which was decided after the statute was amended."

⁵Easter v. Virginian Ry. Co., 76 W. Va. 383, 86 S. E. 37 (1915), in which it is said on this question, in the majority opinion: "The verdict was entered on the 3d of September, 1913, and the court did not enter judgment thereon until the 13th of May, 1914, and then rendered judgment for the amount of the verdict, with interest thereon from the date of the verdict. This is assigned as error. Section 18, c. 131, Code 1913 (sec. 4927), provides as follows:

'Every judgment or decree for the payment of money, except where it is otherwise provided by law, shall bear interest from the date thereof, whether it be so stated in the judgment or decree or not.'

"Section 14 (sec. 4923) of the same chapter authorizes a judgment for interest from the date of the verdict only in case of actions founded on contract. The judgment in the present case being for a tort, there is no authority in law for giving judgment for interest, except from the date of the judgment. The judgment would bear interest from that date, whether it so stated or not. Talbott v. W. Va. etc. R. Co., 42 W. Va. 560, 26 S. E. 311; Fowler v. B. & O. R. Co 18 W. Va. 579; and Hawker v. B. & O. R. Co., 15 W. Va. 628, 36 Am. Rep. 825."

circuit court. To this action there was dissent.⁶ But even this decision was in the face of a contrary one rendered some ten years earlier,⁷ which neither the majority nor dissenting opinion mentioned, holding that since the amendments of 1882⁸ a judgment in a tort action should carry interest from date of verdict. This decision, too, overruled, without referring thereto, a former de-

⁶*Easter v. Virginian Ry. Co.*, 76 W. Va. 383, 86 S. E. 37 (1915), in which, in the dissenting opinion, Judge Poffenbarger said: "I would not reverse the judgment for inclusion of interest on the verdict. Section 18 of chapter 131 (sec. 4927) of the Code does not pertain to the question at all. It merely gives interest on judgments and decrees, whether they specifically provided for it or not, in all cases in which the law does not expressly withhold or deny it. No limitation thereof to judgments in actions *ex delicto* can be found in its terms. It deals with judgments and decrees. There are no decrees in causes *ex delicto*. Section 16 (sec. 4925), of the chapter gives interest from the date of the verdict, if there be one, in all judgments for the payment of money. This is such a judgment. The reference to principal does not limit the application to judgments in cases arising out of contract. The verdict is the principal sum, the amount on which interest is to be computed, except in those cases in which there happens to be a bond or other obligation calling for payment of money. Section 14 (sec. 4923), giving interest on the aggregate of principal and interest from the date of the verdict, covers all actions founded on contract. Section 16 (sec. 4925) means something more. It says when there is a recovery on a bond conditioned for the payment of money, as well as in all cases where a judgment or decree is rendered or made for the payment of money, it shall be for the aggregate of principal and interest due at the date of the verdict, if there be one, with interest thereon from such date."

⁷*Campbell v. City of Elkins*, 58 W. Va. 308, 52 S. E. 220 (1905), in which the court said on this question: "As the verdict was rendered May 8, 1903, the subsequent rendition of judgment for the amount thereof with interest from the date of the verdict was in strict obedience to the mandate of the statute. Code 1899, c. 131, sec. 16. Prior to Acts 1882, p. 341, c. 120, amending certain sections of the Code, including sections 14 and 16, this would have been error. *Fowler v. Railroad Co.*, 18 W. Va. 579. But the act of 1882 amended the chapter so as to make it say, in section 14, judgment shall be entered 'with interest from the date of the verdict,' instead of 'from the date of the judgment,' as in the Code of 1868, and, in section 16, for the aggregate of principal and interest due at the date of the verdict if there be one, otherwise at the date of the judgment or decree, with interest thereon from such date, in all cases as to which it is not otherwise provided. 'Such date' means the date of the verdict when there is one, and the date of the judgment or decree when there is no verdict. This is the plain, logical, as well as grammatical, connection and meaning of the words. *Fowler v. R. R. Co.*, cited, and *Hawker v. Railroad Co.*, 15 W. Va. 628, 36 Am. Rep. 825, assert that actions for damages are ruled by the two sections above referred to, and, as they have been amended so as to give interest from the date of the verdict instead of the date of the judgment, these two cases sustain the interpretation of the statute herein expressed."

⁸ACTS OF W. VA. 1882, c. 120.

cision rendered some nine years earlier,⁹ though subsequent to the amendments of 1882, of the opposite conclusion. Prior to 1882 the court had passed upon the question twice,¹⁰ holding that a judgment in a tort action should carry interest only from its date. Another case controlled by the law prior to 1882 is also

⁹Talbot v. West Virginia C. & P. Ry. Co., 42 W. Va. 560, 26 S. E. 311 (1896), in which it was said: "If this had been an action on contract, then section 14 of chapter 131 of the Code requires that the jury should have found the aggregate of principal and interest due at the time of the trial, and that the judgment should have been entered for such aggregate, with interest from the date of the verdict. But this action being for a tort, and not on contract, judgment should have been rendered for the sum found to bear interest from the date thereof, as required by section 18 of chapter 131 of the Code. In this case the judgment was, in violation of this statute, rendered for the sum found, . . . and interest, . . . from . . . the date of the verdict. This was error. See Hawker v. Railroad Co., 15 W. Va. 628; Murdock v. Insurance Co., 33 W. Va. 407, 10 S. E. 777."

¹⁰Fowler v. B. & O. R. R. Co., 18 W. Va. 579 (1881), in which it is said: "But the circuit court committed manifest error in giving judgment for interest from the date of the verdict. In an action for damages the judgment should be for the amount assessed by the jury and interest on this amount from the day the judgment is actually rendered, and not from the date of the verdict. Hawker v. B. & O. R. R. Co., 15 W. Va. 628."

Hawker v. B. & O. R. R. Co., 15 W. Va. 628 (1879), in which it is said: "The court also erred in giving judgment for interest on damages found by the jury prior to the day the judgment was actually entered, that is, the 7th day of May, 1878. The judgment entered by the circuit court erroneously gave interest from the first day of the term at which the judgment was entered, that is, from April 18, 1878. The 18th section of chapter 131 of the Code of W. Va. page 628 provides that every judgment or decree for the payment of money, except when it is otherwise provided by law, shall bear interest from the date thereof. If this section stood alone it might perhaps be argued that as a judgment or decree, whenever rendered, for some purposes is regarded as though it were rendered on the first day of the term, this interest should be under this statute from the first day of the term. But the 14th section of the same chapter page 627 shows clearly that this was not the meaning of the law; for this section provides that in an action on a contract the jury may allow interest on the principal due, or any part thereof, and in all cases shall find the aggregate of the principal and interest due at the time of the trial, and judgment shall be entered thereon with interest from the date of the judgment. This obviously does not mean with interest from the first day of the term; for the jury had already been directed to aggregate the principal and interest to a day, which must generally be subsequent to the first day of the term. Its meaning is obviously that the judgment shall be with interest from the day it is actually rendered; and we must construe the same words in the 18th section to have the same meaning, that is, the judgment in any action, unless it is otherwise provided by law, should bear interest only from the day it is actually entered of record."

cited in these cases,¹¹ but it was not an action of tort. The controversy therefore hinges, it seems, on the effect of the amendments of 1882.

The West Virginia Code,¹² as it has stood since the amendments of 1882, clearly allows interest from date of verdict in actions *ex contractu* and recoveries on bonds, and the crux of the controversy lies in the fact whether the words, in section 16, "as well as in *all* cases where a judgment or decree is rendered or made for the payment of money, it [the recovery] shall be for the *aggregate of principal and interest* due at the date of the verdict if there be one, otherwise at the date of the judgment or decree, with interest thereon from such date, except in cases where it is otherwise provided," are intended to include actions *ex delicto*. The history of the statute, sections 14 and 16, would seem to say not, and to be opposed to the final conclusion of the court. The Code of Virginia of 1849,¹³ continued by the Code of 1860, allowed the jury to give interest in a tort action, as well as in an action on contract,

¹¹Murdock v. Franklin Ins. Co., 33 W. Va. 407, 10 S. E. 777 (1889). This was not a tort action, but one of covenant on an insurance policy. The question was whether the judgment should bear interest from date, or whether interest should run from date of verdict. The action was instituted in 1868, and the verdict was rendered in 1873, and judgment thereon in 1887. In the meantime Chapter 120, Acts 1882, amending Code of W. Va. 1868, ch. 131, was passed, and it was held that the law in force (Code of W. Va. 1868, ch. 131, sec. 14) at the time of the verdict governed and allowed interest only from date of judgment, the amendatory statute not being retrospective.

See, also, Baer's Sons Grocer Co. v. Cutting Fruit-Packing Co., 42 W. Va. 359, 26 S. E. 191 (1896).

¹²W. VA. CODE, c. 131 (as amended by Acts, 1882, c. 120):

"Sec. 14. The jury in any action founded on contract, may allow interest on the principal due, or any part thereof, and in all cases they shall find the aggregate of principal and interest due at the time of the trial, after allowing all credits, payments and set-offs, and judgment shall be entered for such aggregate with interest from the date of the verdict.

"Sec. 16. When there is a recovery on a bond conditioned for the payment of money, as well as in all cases where a judgment or decree is rendered or made for the payment of money, it shall be for the aggregate of principal and interest due at the date of the verdict if there be one, otherwise at the date of the judgment or decree, with interest thereon from such date, except in cases where it is otherwise provided.

"Sec. 18. Every judgment or decree for the payment of money, except where it is otherwise provided by law, shall bear interest from the date thereof, whether it be so stated in the judgment or decree or not."

¹³CODES OF VA., 1849 and 1860, c., 177, are identical for the following sections:

"14. The jury, in any action founded on contract, may allow interest on the

and to fix the period at which the interest should commence, and provided that the judgment should carry interest from the date so fixed or from the date of verdict.¹⁴ Prior to the taking effect

principal due, or any part thereof, and fix the period at which such interest shall commence. And in any action for a cause arising hereafter, whether from contract or from tort, the jury may allow interest on the sum found by the verdict, or any part thereof, and fix the period at which the said interest shall commence. If a verdict be rendered hereafter which does not allow interest, the sum thereby found shall bear interest from its date, whether the cause of action arose heretofore, or shall arise hereafter, and judgment shall be entered accordingly.

"16. When there is a recovery on a bond, conditioned for the payment of money, the judgment shall be for the penalty of the bond, to be discharged by the payment of the principal, and the interest due thereon.

"18. In any suit in equity, or in an action founded on contract, where no jury is impaneled, judgment or decree may be rendered for interest on the principal sum recovered, until such principal be paid; and where there is a jury which allows interest, the judgment shall in like manner be for such interest until payment."

¹⁴*Hepburn v. Dundas*, 12 Gratt. 219 (Va. 1856). This was an action of ejectment brought before the Code of 1849 was enacted. The court said: "The damages claimed and allowed are for a tort, for the trespass and ejectment alleged, prior to the 1st of July 1850, when the Code of 1849 became the law. The statute, ch. 177, sec. 14, p. 673, permits a jury to give interest on damages for tort arising after that law took effect; but leaves damages for tort theretofore committed as they formerly were; that is, bearing no interest. The usual and proper course for juries in cases of this kind has been to consider the amount of interest, and allow it as damages, but not as interest. Regarding the allowance of interest made by the jury in this case as mere surplusage, the case is left under the operation of the second clause of sec. 14, which requires judgment to be given for interest for money recovered in all cases from the date of the verdict, if no other proper time be fixed. The judgment in this case must, therefore, be for interest on the damages assessed from the 18th May 1853, the date of the verdict."

¹⁵*Lewis v. Arnold*, 13 Gratt. 454 (1856). This was a tort action instituted in 1848. Verdict was rendered November 10th, 1852, and judgment was entered with interest from that date. The question on writ of error was whether, under Code of 1849, c. 177, s. 14, the judgment rightfully carried interest from date of verdict, in view of the general repeal provisions of Code of 1849, c. 16, s. 18, and c. 216, ss. 1 & 2. In holding that c. 177, s. 14, was not affected by the general repeal provisions, the court said: "The true point of objection (if any) to the clause in question is, that it attaches to a cause of action already existing, a consequence which under the former law did not belong to it, the defendant not being compellable by any former law in case of a verdict for damages assessed in actions for tort, to pay interest thereon from the date of the verdict. But I do not think that in this respect the clause stands in any respect opposed to the spirit of these general regulations.

"No one who has inflicted injury by the commission of a tort can be properly said to have an established right to withhold for any space of time the measure of reparation ascertained by the verdict of a jury to be due to the injured party. The justice of requiring the prompt payment of the sum which may be assessed by a jury in such case, and of allowing the party injured to receive, and of compelling the party withholding to pay, a fair compensation for retaining it, is just as clear as it is to make a similar requisition of one who is found to be the debtor of another by contract. And when it is entirely within the power of the wrongdoer wholly to avoid the new consequence which the clause in question attaches to the verdict, (as it is, by the prompt discharge of the damages,) I

(July 1, 1850) of the Code of 1849, no judgment in a tort action could carry interest from the date of verdict.¹⁵ The statute prior to that date covered only actions *ex contractu*.¹⁶ The present law in Virginia still allows a judgment in a tort action to give interest from date of verdict.¹⁷ The law of Virginia that was in force within the boundaries of the State of West Virginia when the Constitution of 1863 was adopted became the law of West Virginia.¹⁸ The statute contained in the Codes of 1849 and 1860, allowing interest from date of verdict in a tort action, therefore be-

cannot see how the law can be said to be objectionable as being of a retrospective character."

After pointing out that at the date of the CODE OF 1849 the law allowed juries to give interest and fix the date at which it was to commence only in actions founded on contract, the court continues: "In respect to actions founded on tort, there was, at the date of the passage of the Code, no act of assembly either directing or forbidding the jury to allow interest on the damages, or prescribing whether interest should or should not go on the damages assessed by the jury in such cases, where the verdicts did not allow interest. These matters were regulated by the common law. In respect to them there was, therefore, no act of assembly to be repealed; and consequently, the clause in question does not come within the terms of the last chapter of the Code declaring the repeal of 'all acts and parts of acts' of a general nature.

"So far as the said clause declares a new rule in conflict with the common law, it does so in terms definite and precise, leaving nothing for a general rule of construction to operate upon. It ascertains clearly the right to the interest as an incident to every verdict to be thereafter rendered, which does not allow interest, whether the cause of action arose theretofore or shall arise thereafter; makes no distinction between suits pending or thereafter to be brought; fixes the date of the verdict as the period from which the interest is to run, and declares that judgment shall be rendered accordingly."

¹⁵*Brugh v. Shanks*, 5 Leigh, 598 (Va. 1833). The court, in correcting the judgments below, said: Carr, J.: "This interest, if the action had been founded on contract, might have been given, but being founded, wholly and clearly, in tort, is unquestionably erroneous." And by Tucker, P.: "The jury had no right to allow interest. It was not within its province or power. It has meddled with a matter with which it had no concern."

Gibson v. The Governor, at the Relation of Stewart's Admr., 11 Leigh, 600 (Va. 1841): "This was an action of debt upon a sheriff's official bond to recover damages sustained by the relator by reason of a false return of *nulla bona* on a *fi. fa.* sued out by the relator. The court treated the action as one, in its real nature, of tort, and held that "no interest on such damages (amount due upon relator's execution at the return day thereof) should have been allowed by the verdict, or given by the judgment of the court."

¹⁶1 REV. CODE OF VA., 1819, p. 508, c. 128, s. 80: "In all actions founded on contracts, where judgment shall be rendered in court, if interest be allowed, such interest shall be upon the principal sum due, and shall continue until such principal sum be paid. And in all actions, founded on contracts, and tried before a jury, the jury shall ascertain the principal sum due, and fix the period at which interest shall commence, if interest be allowed by them; and judgment shall be rendered accordingly, carrying on the interest till the judgment shall be satisfied."

¹⁷CODE OF VA., 1904, s. 3390; *BURKS PL. & PR.*, 546; 4 *MINOR, INST.*, 2 ed., §19. See also *Fry v. Leslie*, 87 Va. 269, 12 S. E. 671 (1891), where a judgment in an action of tort was amended because it failed to follow the statute in allowing interest from the date of verdict.

¹⁸CONSTITUTION OF WEST VIRGINIA, 1863, Art. XI, s. 8.

came the law of West Virginia. However, the first code adopted by West Virginia, which became effective April 1, 1869, changed the statute,¹⁹ so that interest ran only from date of judgment. This continued to be the law until the amendments of 1882. Those amendments, with one other slight change, not material here, changed sections 14 and 16 of chapter 131 of the Code to carry interest from date of verdict instead of from date of judgment. But does such amendment of section 16, by force of the expression "in all cases," which had theretofore been in the statute, after referring to recoveries on bonds, include actions *ex delicto*? We have already shown that the Supreme Court of Appeals has swung back and forth on the proposition, finally answering in the affirmative. It may well be doubted whether this final construction is correct: first, because the intent of the legislature seems not so to be; and, secondly, construing the statute with reference to the doctrine of *ejusdem generis* the effect of section 16 is limited.

If the Legislature, after having changed, by the Code of 1868, the law contained in the Codes of 1849 and 1860, which included actions *ex delicto* as well as *ex contractu* in allowing interest from date of verdict, had intended to go back to the law as it existed from 1850 to 1869, so as to allow interest from date of verdict, it would, in all probability, have simply re-enacted the statute as given by the Code of 1860. The law as contained in that Code, as well as the present statute of Virginia, were prominent examples expressly covering actions *ex delicto*. Further, section 16 of the statute uses the words, "[the recovery] shall be for the aggregate of principal and interest due at the date of verdict if there be one, otherwise at the date of the judgment or decree." There is no principal in a tort action; so the statute must refer to an action where some instrument, in the nature of a bond, or a contract, or another writing, or possibly a verbal agreement, calling for the

¹⁹W. VA. CODE 1868, c. 131:

"14. The jury, in any action founded on contract, may allow interest on the principal due, or any part thereof, and in all cases they shall find the aggregate of principal and interest due at the time of the trial, and judgment shall be entered thereon with interest from the date of the judgment.

"16. When there is a recovery on a bond conditioned for the payment of money, as well as in all cases where a judgment or decree is rendered or made for the payment of money, it shall be for the aggregate of principal and interest due at the date of the judgment or decree, with interest thereon from that date, except in cases where it is otherwise provided.

"18. Every judgment or decree for the payment of money, except where it is otherwise provided by law, shall bear interest from the date thereof, whether it be so stated in the judgment or decree, or not."

payment of money, is involved. In a tort action, too, there is almost without exception, a verdict; so from this view the Legislature did not intend to include tort actions. And is not such a construction called for by the doctrine of *ejusdem generis*?²⁰ By such doctrine the phrase "all cases," following reference to recoveries on bonds, should be held to mean "all like cases," or "all cases of like kind or character." Section 16, during all of its complete history, from the Code of 1849 to the present, has, it seems, referred and was intended to refer, to recoveries on bonds and like instruments, and was not intended to be so broadened in its meaning as to read "as well as in cases of every kind and character" interest shall be given in the judgment from the date of verdict. And this notwithstanding that there seems to be, as pointed out in an old Virginia case,²¹ no good reason why a verdict in a tort action, as well as in an action on a contract, should not bear interest from its date.

—J. R. C.

²⁰36 Cyc. 1119.

²¹*Lewis v. Arnold*. See Note 16, *supra*.