ANDERSON ET AL *vs.* WILSON.

Upon the death of the testator or intestate, if any injury is afterwards done to his goods and chattels, the executor or administrator may bring an action for the tort, either in his representative or individual character, at his option, he having a special property in the goods.

Where the cause of action accrues to the executor or administrator, after the death of the testator or intestate—as the wrongful detention of a slave hired out by him—profert of his leters testamentary, or of administration, is not necessary; and, if made, it will be treated as surplusage, and the plaintiff is not bound to produce them on prayer of oyer—and this, though he sue in his representative character for the wrong, it appearing, upon the face of the declaration that the injury complained of happened after the death of the testator or intestate.

Appeal from the Ashley Circuit Court.

PIKE & CUMMINS, for the plaintiffs, contended that there was no necessity for profert of the letters of administration; nor was the defendant entitled to oyer of them; that an executor or administrator may sue for any injury to the personal estate of the deceased, in trespass or trover, where the injury occurs after the death, either in his representative or in his individual character. (1 *Williams on Exs.*, 627-8-9. *Hollis et al. exs. vs. Smith,* 10 *East* 293. 3 *Greenl.* 254, 174. *Manwell vs. Briggs,* 17 *Verm. R.* 176. *Smith vs. Smith,* 11 *N. H. R.* 459. *Reynold's exs. vs. Torrence,* 2 *Bre.* 60. *Browning vs. Huff, ib.* 174. *Patipen vs. Wilson,* 4 *Hill* 57.) However a party may describe himself, in law he sues in his individual right whenever the conversion of property takes place, or other injury is done to personal or real estate during the time of the administrator or after the death of the intestate. *Reynold's exs. vs. Torrence,* 2 *Bre.* 50. *Charl.* (*T. U. P.*) *R.* 145.

11 *N. H.* 459. 1 *Blackf.* 176. 2 *Bailey* 174. *Com. Dig., title Pl.* 2 *D.* 1. 1 *Doug.* 4.

Where profert is unnecessarily made, the defendant is not entitled to oyer. 1 *Saund. R.* 9 *n. d.,* 317 *n.* 2. *Stephen Pl.* 68-9. *Gould's Pl.* 444, *s.* 47. *Cope vs. Lewyn, Hob.* 38. *Ib.* 218.

And if a party sues in his representative character as executor or administrator, but in truth discloses a cause of action in his private right, or one upon which he might sue either way, the court will treat the unnecessary allegation as surplusage, and permit the party to recover according to the proof adduced. *Hornsey ad. vs. Dimorke, Ventris R.* 119. *Aspinall et al. exs. vs. Wake et al.,* 10 *Bing.* 51. *Spurgen vs. Robinet,* 4 *Bibb* 75. *Baker vs. Baker & Cook,* 4 *Bibb* 347. 1 *Blackf.* 176. *Ib.* 342. 9 *Pick. R.* 432. 2 *Mon.* 37. 1 *Minor* 20. 4 *Scam.* 84. 6 *Blackf.* 364. 21 *Wend.* 32. 6 *Ala.* 399.

The circuit court clearly erred in refusing to permit the amendment under the circumstances appearing on the record in a mere matter of form. That the court will permit amendments in matter of form, where no delay is produced, and where they are required for the furtherance of justice. *Rees vs. Overbaugh,* 4 *Cow.* 124. *Jamison and another vs. Ball,* 6 *Cow.* 628. *Lyon, ex dem., &c. vs. Brutis et al.,* 18 *J. R.* 510. *Blackwell vs. Patten et al.,* 7 *Cranch* 475. 1 *Gall. C. C. R.* 257. 2 *Wash. C. C. R.* 200. 3 *Hill* 475. 7 *Cow.* 524. 21 *Wend.* 267.

YELL, contra.

Mr. Justice WALKER delivered the opinion of the Court.

This was an action of replevin, brought by Wilson Anderson and Malinda L. Anderson, late Malinda L. Sears, his wife, (the said Malinda being the administratrix of the estate and succession of Daniel Sears, deceased,) for the recovery of certain slaves, which, it is alleged, that said defendant, on the 20th May, 1849, received from the said Malinda, administratrix as aforesaid, and belonged to the succession of said Daniel Sears, deceased, and which were held by said Malinda, as and in her capacity of ad-

ministratrix, to be re-delivered to the said Malinda, as such administratrix, when said defendant should be thereafter requested.

The plaintiffs aver a demand of the slaves and a refusal on the part of the defendant to deliver them; that letters of adminstration were granted to the said Malinda, of the estate and succession of said Daniel Sears, deceased, by the district court of Clayborn Parish, in the State of Louisiana, of which profert was made, with the further averment that, thereafter, and before the commencement of the suit, she intermarried with the said Wilson Anderson, in the State of Louisiana, the domicile of both parties, whereby they became husband and wife, and that, by the laws of Louisiana, she continued in her office of administratrix, and that her husband thereby became and was entitled, under said laws, to hold a joint possession, interest, title and property in said slaves, and a right of possession to the same jointly with the said Malinda, in trust for said succession.

The defendant filed his prayer of oyer of the letters of administration granted to the said Malinda, and of which profert was tendered, and the plaintiff, without producing the letters of administration, filed several affidavits for leave to amend the declaration, so as to permit them to tender a copy of the letters of administration. But the court overruled the motion for leave to amend, struck out the motion and affidavits, and rendered final judgment against the plaintiffs for damages and costs.

There can be no doubt but that if profert of the letters of administration was indispensably necessary, then a failure, on the part of the plaintiffs, to grant the oyer when required to produce it, would be fatal to their right of recovery; and the rule upon this subject, as laid down by *Williams on Executors,* (*vol.* 1, *p.* 627,) is, that upon the death of the testator or intestate, if any injury is afterwards done to his goods and chattels, the executor or administrator may bring an action for damages for the tort. And under such circumstances, he has his option either to sue in his representative capacity and declare as executor or administrator, or to bring the action in his own name and in his individual character. This rule we have recognized in the case of *Hemphill v.*

Hamilton, (6 *Eng.* 425); and it is founded upon a special right in the executor or administrator to the personal property of the testator or intestate; for, after their death, such executor or administrator acquires a special property in such personal property, and may declare, as any other person, upon their own property, when wrongfully damaged by another. In all such cases, the mere statement of the cause of action, whether in the representative or individual right of the plaintiff, shows on its face, without the aid of profert of letters of administration, that the plaintiff has a right to maintain his action. But where the plaintiff declares upon a cause of action which accrued to his testator or intestate, as, for instance, for the recovery of a slave that had been taken from the possession of the testator or intestate in his life time, it is very different: for then, the declaration would disclose a wrong done to the testator or intestate, in which the executor or administrator would have no right, only such as might be derived through his representative capacity, and such capacity must necessarily be shown. In the case before us, the plaintiffs have declared on a cause of action which is alleged to have accrued to them as such administrators, and not to their intestate; and whether this right be asserted by a suit in their individual or representative capacity, it is not the less their cause of action, and needs not the additional evidence of letters of administration to show their right to sue for the property.

In the case of *Campbell et al. vs. Baldwin, ex.,* (6 *Blackf. Rep.* 364,) where a judgment had been obtained by an executor, upon *sci. fa.* brought by the executor in his representative right to revive the judgment, in which it was objected to the *sci. fa.,* upon demurrer, that profert of the letters of administration had not been made, it was held, that, when it is necessary for the plaintiff to sue as executor or administrator, an omission to show his authority is fatal on special demurrer; but when he can sustain the action in his own right, the omission is immaterial, though he describe himself as executor or administrator. So, also, in the case of *Talmage, adm. v. Chappel et al.,* (16 *Mass.* 71,) the plaintiff declared as administrator in debt upon a judgment recovered

by him in that capacity, in the court of common pleas in New York. The court said, "Here the action is on a judgment already recovered by the plaintiff, and it might have been brought by him in his own name, and not as administrator, for the debt was due to him, he being answerable for it to the estate of the intestate; and it ought to be considered as so brought, his style of administrator being merely descriptive, and not being essential to his right to recover. And so also in the case of *Biddle, ad. vs. Wilkins et al.,* (1 *Peter's R.* 686,) in an action upon a judgment in favor of an administrator, it was held that the plaintiff, in declaring on such judgment, is not bound to make profert of his letters of administration; and although he sues as administrator, he may reject such description as surplusage. And such also was the decision of the court in the case of *Savage et al. admr. vs. Meuam et al.,* (1 *Blackf. R.* 176,) in a case where suit was brought on a bond executed to the plaintiff as administrator.

These decisions hold that where the cause of action accrues to the administrator or executor, profert is unnecessary, and that if made, it will be treated as surplusage. And both Chitty and Saunders hold, that if unnecessarily made, the plaintiff is not bound to produce the letters upon prayer of oyer. (1 *Chit. Pl.* 430. 1 *Saund. R.* 9, *n. d.*) And so we held in the case of *Knott vs. Clements,* where the question arose upon an alleged variance between the profert tendered and that produced upon oyer. Here no oyer was given, and the question is not, whether the plaintiffs shall be permitted to abandon a right of action asserted in their representative capacity and insist upon a recovery in their individual right, as in the case of *Hemphill vs. Hamilton, ad.,* but as to the necessity of showing their authority and right to sue in their representative right, when the facts sufficiently appear from the cause of action as disclosed in the pleading. We are not, however, to be understood as holding it unnecessary for the plaintiff to connect himself with the subject matter in suit for the purpose of entitling him to recover; as, for instance, where the suit is for a tort to property, committed since the death of the testator or intestate, although it is not necessary to sue for such tort

as administrator, still it may become necessary to show upon the trial that the plaintiffs are administrators, in order to establish a special property, in the subject matter of the suit; and, for this purpose, the letters of administration, or other competent evidence, would be necessary. (*Reynold, ex. vs. Torrence,* 2 *Brev.* 61. *Patchen vs. Wilson,* 4 *Hill* 58.) But not to show a right in the plaintiff to sue in a particular capacity, for that would sufficiently appear by the cause of action disclosed.

The circuit court therefore erred in deciding it necessary to produce letters of administration upon the defendant's prayer of oyer, and in rendering final judgment against the plaintiff for having failed to do so.

As regards the question of amending the declaration, there was certainly a very strong case made out, when we consider that no costs or delay could likely have arisen from it, or if so, terms might have been imposed. But as this was a matter of discretion in the circuit court, we would not feel at liberty upon that ground alone to reverse the decision of the circuit court.

Let the judgment be reversed, and the cause be remanded.