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PRACTICE AND PROCEDURE - GENERAL VERDICT ON SEVERAL COUNTS - IS NEW TRIAL NECESSARY WHEN ONE OF TWO COUNTS IS UNSUPPORTED BY EVIDENCE?

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PRACTICE AND PROCEDURE — GENERAL VERDICT ON SEVERAL COUNTS — IS NEW TRIAL NECESSARY WHEN ONE OF TWO COUNTS IS UNSUPPORTED BY EVIDENCE? — Plaintiff sued defendant to recover damages arising from personal injuries claimed to have been suffered by him while in the employ of defendant, who was not under the workmen's compensation statute. In the first count of his declaration plaintiff claimed that defendant did not furnish him a safe place in which to work, and in the second count that defendant set him at work on dangerous materials. The jury returned a verdict of "guilty on both counts" and assessed "total damages" at $998.71. The trial court, on

a motion for judgment notwithstanding the verdict, ruled that as a matter of law there was insufficient evidence to support count one, but entered a judgment for the sum assessed by the jury. Defendant appealed. *Held*, since there is no way of knowing whether part of the jury assessed damages on one count and part on the other, and since they could not "legally have found defendant guilty on both counts and awarded damages on but one count. . . . 'there must consequently be a new trial.'" *Hughes v. Michoff*, 288 Mich. 259, 284 N. W. 718 (1939).

In his declaration plaintiff complains of only one loss or injury, but makes his allegation in two separate counts, each count charging a different negligent omission on the part of the defendant. Now, although each count states a cause of action on a different theory, this much is clear: Even if the plaintiff had been able to prove both counts he could have recovered only one compensation for his injury.[1] The measure of damages would be governed by the injury or loss he had suffered [2] and was able to show in evidence.[3] But does it make any difference in the amount which can be recovered that only one of the two causes of action is proved? The answer depends upon the degree of separateness or distinction between them. Thus, if each count complains of a different loss,[4] it may make a difference in the amount recoverable, depending on whether the plaintiff can prove one, the other, or both counts.[5] But if both counts allege the same loss,[6] differing only in the theory of defendant's liability, and the elements of statutory or exemplary damages do not enter the picture so as to make the measure of damages applicable under either count different, then the amount recoverable will be the same whether the plaintiff proves one count, the other, or both.[7] The principal case is of the latter kind, and therefore it seems that so long as the jury correctly found for the plaintiff on count two, it matters not that in addition they erroneously found for him on count one.[8] If the plaintiff

[1] Payne v. New York, Susquehanna & Western R. R., 201 N. Y. 436, 95 N. E. 19 (1911); BALDWIN, LAW OF PERSONAL INJURIES IN MICHIGAN, 2d ed., § 587 (1909).

[2] Griggs v. Saginaw & Flint Ry., 196 Mich. 258, 162 N. W. 960 (1917); Huizega v. Cutler & Savidge Lumber Co., 51 Mich. 272, 16 N. W. 643 (1883); Wabash & W. Ry. v. Morgan, 132 Ind. 430, 31 N. E. 661, 32 N. E. 85 (1892).

[3] Refrigerating Equipment Co. v. Finch, 257 Mich. 623, 242 N. W. 217 (1932); Pittsburgh, C., C. & St. L. Ry. v. Story, 63 Ill. App. 239 (1896); Morris v. Chicago, B. & Q. R. R., 45 Iowa 29 (1876).

[4] For an example of such a case, see Toledo, Wabash & Western Ry. v. Foss, 88 Ill. 551 (1878).

[5] Glines v. Smith, 48 N. H. 259 (1869).

[6] For examples of such cases, see Moseley v. Missouri Pacific Ry., 132 Mo. App. 642, 112 S. W. 1010 (1908); Leu v. St. Louis Transit Co., 106 Mo. App. 329, 80 S. W. 273 (1904).

[7] Glines v. Smith, 48 N. H. 259 (1869).

[8] West v. Platt, 127 Mass. 367 (1879), is directly in point. In that case plaintiff's declaration contained seven counts, each stating substantially the same contract, with variations in the several counts relating only to the time of performance. At the conclusion of plaintiff's case, defendant asked the court to rule that there was a variance between the evidence and each of the first six counts. Having been refused, defendant appealed. In supporting the trial court's refusal to rule as requested by defendant, the

had stated the two alleged negligent omissions in one count, the Michigan court probably would not have fallen into the error of requiring him to prove both in order to recover under a general verdict.

Edmund R. Blaske

upper court said (p. 371): "It is useless to consider whether this evidence was such that it could properly be submitted to the jury in support of each and all the counts; for if the evidence is sufficient for any one good count, the [general] verdict will stand and judgment will be entered on that count, in accordance with what has long been the practice." See also: Waltham Bleachery & Dye Works v. Clark-Rice Corp., 267 Mass. 402, 166 N. E. 867 (1929); Commercial Wharf Corp. v. City of Boston, 208 Mass. 482, 94 N. E. 805 (1911); Merrill v. Kohlberg, 29 Cal. App. 382, 155 P. 824 (1916); Ayrshire Coal Co. v. West, 72 Ind. App. 699, 125 N. E. 84 (1919). Nor is the case under discussion essentially different in principle from that group of cases where "the separate counts in a petition are substantially for the same cause of action," and where if any count is bad a general verdict will be referred to the good count and a judgment entered for the amount of damages assessed by the jury will stand. 30 MICH. L. REV. 154 (1931); Glines v. Smith, 48 N. H. 259 (1869); Campbell v. King, 32 Mo. App. 38 (1888); McKee v. Calvert, 80 Mo. 348 (1883); Small v. Rogers, 46 N. H. 176 (1865); Hoag v. Hatch, 23 Conn. 585 (1855); Bradshaw v. Hubbard, 6 Ill. 390 (1844); Louisville, N. A. & C. Ry. v. Fox, 101 Ind. 416 (1884). The rule of these cases has been enacted by statute in West Virginia, Kentucky, Florida, Alabama, and Illinois. For a typical provision, see Ill. Ann. Stat. (Smith-Hurd, 1936), c. 110, § 192 (2).