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CASES

ON THE

LAW OF DAMAGES

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CASES
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LAW DAM.

(1)°

ISLAND MANUF'G CO.

(Fed. Cas. No. 17,322; 3 Sumn. 189.)

U. S. Circuit Court, D. Maine. May Term, 1838.

In equity. On bill for injunction.

Bill in equity by Joshua Webb against the Portland Manufacturing Company to restrain the diversion of water from plaintiff's mill. On the stream on which the mill was situated were two dams, the distance between which was about 40 or 50 rods, occupied by the mill-pond of the lower dam. Plaintiff owned certain mills and mill privileges on the lower dam. Defendants also owned certain other mills and mill privileges on the same dam. To supply water to one of such mills, defendants made a canal from the pond at a point immediately below the upper dam. The water thus withdrawn by them for that purpose was about one-fourth of the water to which defendants were entitled as mill-owners on the lower dam, and was returned into the stream immediately below that dam. A preliminary question, suggested by the court, was argued on the bill and answer.

C. S. Davels, for plaintiff. P. Mellen and Mr. Longfellow, for defendants.

STORY, J. The question which has been argued upon the suggestion of the court is of vital importance in the cause, and, if decided in favor of the plaintiff, it supersedes many of the inquiries to which our attention must otherwise be directed. It is on this account that we thought it proper to be argued separately from the general merits of the cause.

The argument for the defendants, then, presents two distinct questions. The first is whether, to maintain the present suit, it is essential for the plaintiff to establish any actual damage. The second is whether, in point of law, a mill-owner, having a right to a certain portion of the water of a stream for the use of his mill at a particular dam, has a right to draw off the same portion or any less quantity of the water, at a considerable distance above the dam, without the consent of the owners of other mills on the same dam. In connection with these questions, the point will also incidentally arise whether it makes any difference that such drawing off of the water above can be shown to be no sensible injury to the other mill-owners on the lower dam.

As to the first question, I can very well understand that no action lies in a case where there is *damnum absque injuria*; that is, where there is a damage done without any wrong or violation of any right of the plaintiff. But I am not able to understand how it can correctly be said, in a legal sense, that an action will not lie, even in case of a wrong or violation of a right, unless it is

followed by some perceptible damage, which can be established as a matter of fact; in other words, that *injuria sine damno* is not actionable. See *Mayor of Lynn, etc., v. Mayor of London*, 4 Term R. 130, 141, 143, 144; Com. Dig. "Action on the Case," B 1, 2. On the contrary, from my earliest reading, I have considered it laid up among the very elements of the common law that wherever there is a wrong there is a remedy to redress it; and that every injury imports damage in the nature of it; and, if no other damage is established, the party injured is entitled to a verdict for nominal damages. A fortiori this doctrine applies where there is not only a violation of a right of the plaintiff, but the act of the defendant, if continued, may become the foundation, by lapse of time, of an adverse right in the defendant; for then it assumes the character, not merely of a violation of a right tending to diminish its value, but goes to the absolute destruction and extinguishment of it. Under such circumstances, unless the party injured can protect his right from such a violation by an action, it is plain that it may be lost or destroyed, without any possible remedial redress. In my judgment, the common law countenances no such inconsistency, not to call it by a stronger name. Actual, perceptible damage is not indispensable as the foundation of an action. The law tolerates no further inquiry than whether there has been the violation of a right. If so, the party injured is entitled to maintain his action for nominal damages, in vindication of his right, if no other damages are fit and proper to remunerate him. So long ago as the great case of *Ashby v. White*, 2 Ld. Raym. 938, 6 Mod. 45, Holt, 324, the objection was put forth by some of the judges, and was answered by Lord Holt, with his usual ability and clear learning; and his judgment was supported by the house of lords, and that of his brethren overturned. By the favor of an eminent judge, Lord Holt's opinion, apparently copied from his own manuscript, has been recently printed. In this last printed opinion (page 14) Lord Holt says: "It is impossible to imagine any such thing as *injuria sine damno*. Every injury imports damage in the nature of it." S. P. 2 Ld. Raym. 955. And he cites many cases in support of his position. Among these is *Starling v. Turner*, 2 Lev. 50, 2 Vent. 25, where the plaintiff was a candidate for the office of bridge-master of London bridge, and the lord mayor refused his demand of a poll, and it was determined that the action was maintainable for the refusal of the poll. Although it might have been that the plaintiff would not have been elected, the action was nevertheless maintainable; for the refusal was a violation of the plaintiff's right to be a candidate. So in the case cited, as from 23 Edw. III. 18, tit. "Defense," (it is a mistake in the MS., and should be 29 Edw. III. 18b; Fitz. Abr. tit. "Defense," pl. 5,) and 11 Hen. IV. 47,

where the owner of a market, entitled to toll upon all cattle sold within the market, brought an action against the defendant for hindering a person from going to the market with the intent to sell a horse, it was, on the like ground, held maintainable; for though the horse might not have been sold, and no toll would have become due, yet the hindering the plaintiff from the possibility of having toll was such an injury as did import such damage, for which the plaintiff ought to recover. So in *Hunt v. Dowman*, Cro. Jac. 478, 2 Rolle, 21, where the lessor brought an action against the lessee for disturbing him from entering into the house leased, in order to view it, and to see whether any waste was committed; and it was held that the action well lay, though no waste was committed and no actual damage done, for the lessor had a right so to enter, and the hindering of him was an injury to that right, for which he might maintain an action. So *Herring v. Finch*, 2 Lev. 250, where it was held that a person entitled to vote, who was refused his vote at an election, might well maintain an action therefor, although the candidate, for whom he might have voted, might not have been chosen, and the voter could not sustain any perceptible or actual damage by such refusal of his vote. The law gives the remedy in such case, for there is a clear violation of the right. And this doctrine, as to a violation of the right to vote, is now incontrovertibly established; and yet it would be impracticable to show any temporal or actual damage thereby. See *Harman v. Tappenden*, 1 East, 555; *Drewe v. Coulton*, id. 563, note; *Kilham v. Ward*, 2 Mass. 236; *Lincoln v. Hapgood*, 11 Mass. 350; 2 Vin. Abr. "Action, Case," note c, pl. 3. In the case of *Ashby v. White*, as reported by Lord Raymond, (2 Ld. Raym. 953,) Lord Holt said: "If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy, if he is injured in the exercise or enjoyment of it; and, indeed, it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal." S. P. 6 Mod. 53.

The principles laid down by Lord Holt are so strongly commended, not only by authority, but by the common sense and common justice of mankind, that they seem absolutely, in a judicial view, incontrovertible. And they have been fully recognized in many other cases. The note of Mr. Sergeant Williams to *Mellor v. Spateman*, 1 Saund. 346a, note 2; *Wells v. Watling*, 2 W. Bl. 1233; and the case of the *Tunbridge Dippers*, (*Weller v. Baker*), 2 Wils. 414,—are direct to the purpose. I am aware that some of the old cases inculcate a different doctrine, and perhaps are not reconcilable with that of Lord Holt. There are also some modern cases which at first view seem to the contrary. But they are distinguishable from that now in judgment; and, if they were not, ego assentior scævolæ. The

case of *Williams v. Morland*, 2 Barn. & C. 9. 10, seems to have proceeded upon the ground that there was neither any damage nor any injury to the right of the plaintiff. Whether that case can be supported upon principle it is not now necessary to say. Some of the dicta in it have been subsequently impugned, and the general reasoning of the judges seems to admit that, if any right of the plaintiff had been violated, the action would have lain. The case of *Jackson v. Pesked*, 1 Maule & S. 235, turned upon the supposed defects of the declaration, as applicable to a mere reversionary interest, it not stating any act done to the prejudice of that reversionary interest. I do not stop to inquire whether there was not an overnicety in the application of the technical principles of pleading to that case, although, notwithstanding the elaborate opinion of Lord Ellenborough, one might be inclined to pause upon it. The case of *Young v. Spencer*, 10 Barn. & C. 145, turned also upon the point whether any injury was done to a reversionary interest. I confess myself better pleased with the ruling of the learned judge (Mr. Justice Bayley) at the trial than with the decision of the court in granting a new trial. But the court admitted that, if there was any injury to the reversionary right, the action would lie; and, although there might be no actual damage proved, yet, if anything done by the tenant would destroy the evidence of title, the action was maintainable. A fortiori, the action must have been held maintainable, if the act done went to destroy the existing right or to found an adverse right.

On the other hand, *Marzetti v. William*, 1 Barn. & Adol. 415, goes the whole length of Lord Holt's doctrine; for there the plaintiff recovered, notwithstanding no actual damage was proved at the trial; and Mr. Justice Taunton on that occasion cited many authorities to show that where wrong is done, by which the right of a party may be injured, it is a good cause of action, although no actual damage be sustained. In *Hobson v. Todd*, 4 Term R. 73, the court decided the case upon the distinction, which is most material to the present case, that if a commoner might maintain an action for an injury, however small, to his right, a mere wrong might, by repeated torts, in the course of time establish evidence of a right of common. The same principle was afterwards recognized by Mr. Justice Grose, in *Phipps v. Wadsworth*, 2 East, 162. But the case of *Bower v. Hill*, 1 Bing. N. C. 549, sustains the doctrine for which I contend, and, indeed, a stronger case of its application cannot well be imagined. There the court held that a permanent obstruction of a navigable drain of the plaintiff's, choked up with mud for 16 years, was actionable, although the plaintiff received no immediate damage thereby; for, if it continued in for 20 years, it would become

dence of a renunciation and abandonment of the right of way. The case of *Blanchard v. Baker*, 8 Greenl. 253, 268, recognizes the same doctrine in the most full and satisfactory manner, and is directly in point; for it was a case for diverting water from the plaintiff's mill. I should be sorry to have it supposed for a moment that *Tyler v. Wilkinson*, 4 Mason, 397, Fed. Cas. No. 14,312, imported a different doctrine. On the contrary, I have always considered it as proceeding upon the same doctrine.

Upon the whole, without going further into an examination of the authorities on this subject, my judgment is that, whenever there is a clear violation of a right, it is not necessary in an action of this sort to show actual damage; that every violation imports damage; and, if no other be proved, the plaintiff is entitled to a verdict for nominal damages; and a fortiori that this doctrine applies whenever the act done is of such a nature as that by its repetition or continuance it may become the foundation or evidence of an adverse right. See, also, *Mason v. Hill*, 3 Barn. & Adol. 304, 5 Barn. & Adol. 1. But if the doctrine were otherwise, and no action were maintainable at law, without proof of actual damage, that would furnish no ground why a court of equity should not interfere, and protect such a right from violation and invasion; for, in a great variety of cases, the very ground of the interposition of a court of equity is that the injury done is irremediable at law, and that the right can only be permanently preserved or perpetuated by the powers of a court of equity. And one of the most ordinary processes to accomplish this end is by a writ of injunction, the nature and efficacy of which for such purpose I need not state, as the elementary treatises fully expound them. See *Eden, Inj.*; 2 *Story, Eq. Jur. c. 23, §§ 86-99*; *Bollivar Manuf'g Co. v. Neponset Manuf'g Co.*, 16 Pick. 241. If, then, the diversion of water complained of in the present case is a violation of the right of the plaintiff, and may permanently injure that right, and become, by lapse of time, the foundation of an adverse right in the defendants, I know of no more fit case for the interposition of a court of equity, by way of injunction, to restrain the defendants from such an injurious act. If there be a remedy for the plaintiff at law for damages, still that remedy is inadequate to prevent and redress the mischief. If there be no such remedy at law, then, a fortiori, a court of equity ought to give its aid to vindicate and perpetuate the right of the plaintiff. A court of equity will not, indeed, entertain a bill for an injunction in case of a mere trespass fully remediable at law. But, if it might occasion irreparable mischief or permanent injury, or destroy a right, that is the appropriate case for such a bill. See 2 *Story, Eq. Jur. §§ 926-928*, and the cases there cited; *Jerome v. Ross*, 7 Johns. Ch.

315; *Van Bergen v. Van Bergen*, 3 Johns. Ch. 282; *Turnpike Road v. Miller*, 5 Johns. Ch. 101; *Gardner v. Village of Newburgh*, 2 Johns. Ch. 162.

Let us come, then, to the only remaining question in the cause, and that is whether any right of the plaintiff, as mill-owner on the lower dam, is or will be violated by the diversion of the water by the canal of the defendants. And here it does not seem to me that, upon the present state of the law, there is any real ground for controversy, although there were formerly many vexed questions, and much contrariety of opinion. The true doctrine is laid down in *Wright v. Howard*, 1 Sim. & S. 190, by Sir John Leach, in regard to riparian proprietors, and his opinion has since been deliberately adopted by the king's bench. *Mason v. Hill*, 3 Barn. & Adol. 304, 5 Barn. & Adol. 1. See, also, *Bealey v. Shaw*, 6 East, 208. "Prima facie," says that learned judge, "the proprietor of each bank of a stream is the proprietor of half the land covered by the stream; but there is no property in the water. Every proprietor has an equal right to use the water which flows in the stream; and consequently no proprietor can have the right to use the water to the prejudice of any other proprietor, without the consent of the other proprietors who may be affected by his operations. No proprietor can either diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above. Every proprietor, who claims a right either to throw the water back above or to diminish the quantity of water which is to descend below, must, in order to maintain his claim, either prove an actual grant or license from the proprietors affected by his operations, or must prove an uninterrupted enjoyment of twenty years, which term of twenty years is now adopted upon a principle of general convenience, as affording conclusive presumption of a grant." The same doctrine was fully recognized and acted upon in the case of *Tyler v. Wilkinson*, 4 Mason, 397, 400-402; and also in the case of *Blanchard v. Baker*, 8 Greenl. 253, 266. In the latter case the learned judge (Mr. Justice Weston) who delivered the opinion of the court, used the following emphatic language: "The right to the use of a stream is incident or appurtenant to the land through which it passes. It is an ancient and well-established principle that it cannot be lawfully diverted, unless it is returned again to its accustomed channel, before it passes the land of a proprietor below. Running water is not susceptible of an appropriation which will justify the diversion or unreasonable detention of it. The proprietor of the water-course has a right to avail himself of its momentum as a power, which may be turned to beneficial purposes." The case of *Mason v. Hill*, 5 Barn. & Adol. 1, contains language of an exactly similar import, used by Lord Denman in delivering

the opinion of the court. See, also, *Gardner v. Village of Newburgh*, 2 Johns. Ch. 162. Mr. Chancellor Kent has also summoned up the same doctrine, with his usual accuracy, in the brief, but pregnant, text of his Commentaries, (3 Kent, Com. [3d Ed.] lect. 42, p. 439;) and I scarcely know where else it can be found reduced to so elegant and satisfactory a formulary. In the old books the doctrine is quaintly, though clearly, stated; for it is said that a water-course begins *ex jure naturæ*, and, having taken a certain course naturally, it cannot be [lawfully] diverted. *Aqua currit, et debet currere, ut currere solebat*. *Shury v. Piggot*, 3 Bulst. 339, Poph. 106.

The same principle applies to the owners of mills on a stream. They have an undoubted right to the flow of the water as it has been accustomed of right and naturally to flow to their respective mills. The proprietor above has no right to divert or unreasonably to retard this natural flow to the mills below; and no proprietor below has a right to retard or turn it back upon the mills above to the prejudice of the right of the proprietors thereof. This is clearly established by the authorities already cited; the only distinction between them being that the right of a riparian proprietor arises by mere operation of law as an incident to his ownership of the bank, and that of a mill-owner as an incident to his mill. *Bealey v. Shaw*, 6 East, 208; *Saunders v. Newman*, 1 Barn. & Ald. 258; *Mason v. Hill*, 3 Barn. & Adol. 304, 5 Barn. & Adol. 1; *Blanchard v. Baker*, 8 Greenl. 253, 268; and *Tyler v. Wilkinson*, 4 Mason, 397, 400-405,—are fully in point. Mr. Chancellor Kent in his Commentaries relies on the same principles and fully supports them by a large survey of the authorities. 3 Kent Comm. (3d Ed.) lect. 52, pp. 441-445.

Now, if this be the law on this subject, upon what ground can the defendants insist upon a diversion of the natural stream from the plaintiff's mills, as it has been of right accustomed to flow thereto? First, it is said that there is no perceptible damage done to the plaintiff. That suggestion has been already in part answered. If it were true, it could not authorize a diversion, because it impairs the right of the plaintiff to the full, natural flow of the stream, and may become the foundation of an adverse right in the defendants. In such a case actual damage is not necessary to be established in proof. The law presumes it. The act imports damage to the right, if damage be necessary. Such a case is wholly distinguishable from a mere fugitive, temporary trespass, by diverting or withdrawing the water a short period without damage, and without any pretense of right. In such a case, the wrong, if there be no sensible damage, and it be transient in its nature and character, as it does not touch the right, may possibly (for I give no opinion upon such a case) be without redress at

law; and certainly it would found no ground for the interposition of a court of equity by way of injunction.

But I confess myself wholly unable to comprehend how it can be assumed, in a case like the present, that there is not and cannot be an actual damage to the right of the plaintiff. What is that right? It is the right of having the water flow in its natural current at all times of the year to the plaintiff's mills. Now, the value of the mill privileges must essentially depend, not merely upon the velocity of the stream, but upon the head of water which is permanently maintained. The necessary result of lowering the head of water permanently would seem, therefore, to be a direct diminution of the value of the privileges; and, if so, to that extent it must be an actual damage.

Again, it is said that the defendants are mill-owners on the lower dam, and are entitled, as such, to their proportion of the water of the stream in its natural flow. Certainly they are. But where are they so entitled to take and use it? At the lower dam; for there is the place where their right attaches, and not at any place higher up the stream. Suppose they are entitled to use for their own mills on the lower dam half the water which descends to it, what ground is there to say that they have a right to draw off that half at the head of the mill-pond? Suppose the head of water at the lower dam in ordinary times is two feet high, is it not obvious that, by withdrawing at the head of the pond one-half of the water, the water at the dam must be proportionally lowered? It makes no difference that the defendants insist upon drawing off only one-fourth of what they insist they are entitled to; for, pro tanto, it will operate in the same manner; and, if they have a right to draw off to the extent of one-fourth of their privilege, they have an equal right to draw off to the full extent of it. The privilege attached to the mills of the plaintiff is not the privilege of using half, or any other proportion merely, of the water in the stream, but of having the whole stream, undiminished in its natural flow, come to the lower dam with its full power, and there to use his full share of the water-power. The plaintiff has a title, not to a half or other proportion of the water in the pond, but is, if one may so say, entitled *per my et per tout* to his proportion of the whole bulk of the stream, undivided and indivisible, except at the lower dam. This doctrine, in my judgment, irresistibly follows from the general principles already stated; and, what alone would be decisive, it has the express sanction of the supreme court of Maine in the case of *Blanchard v. Baker*, 8 Greenl. 253, 270. The court there said, in reply to the suggestion that the owners of the eastern shore had a right to half the water, and a right to divert it to that extent: "It has been seen that, if they had been owners of both sides, they had no

right to divert the water without again returning it to its original channel, (before it passed the lands of another proprietor.) Besides, it was possible, in the nature of things, that they could take it from their side only. An equal portion from the plaintiff's side must have been mingled with all that was diverted."

A suggestion has also been made that the defendants have fully indemnified the plaintiff from any injury, and in truth have conferred a benefit on him, by securing the water, by means of a raised dam, higher up the stream, at Sebago pond, in a reservoir, so as to be capable of affording a full supply in the stream in the dryest seasons. To this suggestion several answers may be given. In the first place, the plaintiff is no party to the contract for raising the new dam, and has no interest therein, and cannot, as a matter of right, insist upon its being kept up, or upon any advantage to be derived therefrom. In the next place, the plaintiff is not compellable to exchange one right for another,

or to part with a present interest in favor of the defendants at the mere election of the latter. Even a supposed benefit cannot be forced upon him against his will; and, certainly, there is no pretense to say that, in point of law, the defendants have any right to substitute, for a present existing right of the plaintiff's, any other which they may deem to be an equivalent. The private property of one man cannot be taken by another simply because he can substitute an equivalent benefit.

Having made these remarks upon the points raised in the argument, the subject, at least so far as it is at present open for the consideration of the court, appears to me to be exhausted. Whether, consistently with this opinion, it is practicable for the defendants successfully to establish any substantial defense to the bill, it is for the defendants, and not for the court, to consider. I am authorized to say that the district judge concurs in this opinion.

Decree accordingly.

PAUL v. SLASON et al.
(22 Vt. 231.)

Supreme Court of Vermont. Rutland. Jan.
Term, 1850.

Trespass for taking two cords of wood, two baskets, two pitchforks, two horses, one harness, and one wagon. Plea, the general issue, with notice, that the defendant Charles H. Slason attached the property by virtue of a writ, which he was legally deputed to serve, in favor of one Langdon against the plaintiff, and that the other defendants aided him in so doing, at his request. Trial by jury, September Term, 1848,—HALL, J., presiding. On trial it appeared, that on the twenty sixth day of September, 1844, the defendant Francis Slason commenced a suit in the name of Benjamin F. Langdon against the plaintiff, and that the defendant Charles H. Slason, who was legally deputed to serve the writ, which was returnable to the county court, attached the property in question, except one pitchfork, and that the defendant Pelkey assisted in removing the property. It also appeared, that on the same day Charles H. Slason and Pelkey made use of the horse, wagon and harness, part of the property attached, in removing grain and other property, which was attached at the same time, on the same writ, and upon the same farm, and continued to use them for this purpose through the day; and that on the next day Charles H. Slason was seen driving the same horse and wagon, with the harness, in the highway in the vicinity,—but upon what business did not appear. It also appeared, that the defendants took a pitchfork belonging to the plaintiff, and used it during the day, on which the attachment was made, in removing the grain &c. The defendants offered in evidence the files and record of the supreme court, in the suit in favor of Langdon against the plaintiff, in which the property in question was attached, for the purpose of proving, that judgment was rendered therein in favor of Langdon;—to which evidence the plaintiff objected; but it was admitted by the court. The defendants then offered in evidence an execution, purporting to have been issued upon the judgment in the supreme court above mentioned, dated February 21, 1848;—to the admission of which the plaintiff objected, insisting, that an exemplified copy of the judgment should be produced, before the execution could be *given in evidence, and that the execution, and the issuing thereof, could be shown only by a certified copy of the record of the judgment;—but the objection was overruled by the court.

The defendants then offered in evidence the return of one Edgerton, as sheriff, upon the said execution, to show that the wagon in question was sold thereon and the proceeds applied in payment of the debt. To the admission of this evidence the plaintiff objected, upon the ground, that from the return it appeared, that the property was sold two days after the sheriff received the execution for service, as shown by his indorsement upon it. The counsel for the defendants then suggested, that there was a

mistake in the return, in stating the day of the sale, and moved the court, that the sheriff have leave to amend his return in that particular. To this the plaintiff objected; but the court permitted the sheriff to amend his return, so as to state the day of sale to have been one month later than stated originally in the return. The defendants then offered in evidence the return, as amended; to which the plaintiff objected,—but the objection was overruled by the court. The defendants then offered in evidence the return of the sheriff upon the original writ in favor of Langdon against the plaintiff, showing an appraisal of the horse and some other property attached, and that the plaintiff had furnished security to the sheriff and received possession of the property. It appeared, that the money had not been paid on the security, and no application of the property had ever been made upon the execution by the sheriff, or by any other person. The defendants also proved, that one McCune had executed a receipt to the sheriff for a portion of the property attached, and that the property, except the wagon which was sold upon the execution, went into the possession of the plaintiff. The plaintiff requested the court to charge the jury,—1. That the defendants could not justify the taking of the property in question under the writ in favor of Langdon, if the property attached, or any portion thereof, were put to use by the officer who had attached it. 2. That property attached must be considered as in the custody of the law, and the attaching officer has no authority to put it to use; and if, in this case, they found, that, upon the property being attached by Charles H. Slason, he put the horse, wagon and harness, to use, and continued to use them, during the greater part *of the day, *234 in removing the other property attached, he rendered himself a trespasser *ab initio*, and could not justify taking the property, or any part thereof, under the attachment. 3. That if the officer could justify the taking of the property under the attachment, if he so used any part of it, he could not justify the taking of the horse, wagon and harness so used; but, as to the property so used, the authority was rendered void by the abuse. 4. That the use of the horse, wagon and harness, on the next day after the attachment, was unjustifiable, and rendered the officer a trespasser *ab initio*. 5. That the application of the plaintiff to have the property appraised, under the statute, in order to regain the possession of it, and giving security to the sheriff, was not a waiver of the right of action against the defendant for the trespass; but that the plaintiff was entitled to recover the amount thus secured by him. 6. That if a portion of the property were delivered to the receiptor, the plaintiff was entitled to recover its value, unless it had come to his possession. 7. That if the jury found, that the defendants took the plaintiff's pitchfork and used it during the day, without right, he was entitled to recover its value, unless it were returned,—and that, if returned, he was entitled to recover nominal damages. 8. That the sale of the wagon and the application of its proceeds upon the execution in favor of

Langdon could have no effect upon the amount of damages in this suit. But the court charged the jury, that, from the testimony, the attachment and disposition of the property attached was a justification for the defendants, unless they had been guilty of such an abuse of the property, as to make them trespassers *ab initio*;—that whether the defendants were trespassers *ab initio* depended upon the character of the use of the property by them, after the attachment;—that the use of the horse, wagon and harness, in removing and securing other property of the plaintiff, attached the same day, on the same writ and on the same farm with the horse, wagon and harness,—the use being for a part of the day only,—would not necessarily be such an abuse of the officer's authority, as to make the defendants trespassers *ab initio*; but that if they found, either that such use of the property by the defendant was wanton, and with a design to injure the plaintiff, or that the property was injured by it so as materially to diminish its value, the defendants would be trespassers

*235 in the original taking and be liable in this action;—that whether the driving of the horse and wagon by the officer, the next day after the attachment, was an abuse of his authority depended upon the purpose and business, for which they were driven; that if the jury found, that the officer was using the horse and wagon for other purposes than that of removing and securing them in a convenient place for keeping, under the attachment, the defendants would be liable; but if for such a purpose, they would not be liable. In regard to damages, the court instructed the jury, that, the property having either been sold and applied on the execution, or delivered to the plaintiff on security furnished by him, the plaintiff would not be entitled to recover the full value of it; but that the measure of damages would be the amount, which the property had been diminished in value by the defendants' abuse of it. In regard to the pitchfork the court charged the jury, that if they believed, from the evidence, that the defendants took and carried it away, they should give the plaintiff its value; that if it was used and left upon the premises, so that the defendant received it again, and it was injured by the use, the plaintiff would be entitled to recover the amount of the injury; but that if they found, that it was merely used for a portion of a day in removing the plaintiff's property, there attached, and was left where it was found, so that the plaintiff had it again, and that it was not injured by the use, they were not bound to give the plaintiff damages for such use. The jury returned a verdict for the defendants. Exceptions by plaintiff.

M. G. Evarts and Thrall & Smith, for plaintiff, cited *Lamb v. Day* 8 Vt. 407; 8 Stark. Ev. 1108; 1 Chit. Pl. 171; 5 Bac. Abr. 161; *Strong v. Hobbs*, 20 Vt. 185; *Hart v. Hyde*, 5 Vt. 328; *Orvis v. Isle La Motte*, 12 Vt. 195; *Fletcher v. Pratt*, 4 Vt. 182; and *Brainard v. Burton*, 5 Vt. 97.

E. Edgerton, for defendants, cited 2 Greenl. Ev. § 253; *Ib.* 283, § 276, n. 5; 1 Stark. Ev. 151, § 33; *Mickles et al. v. Haskin*, 11 Wend. 125; *Lamb v. Day*, 8 Vt. 407.

*The opinion of the court was delivered by *23

POLAND, J. The first question, arising in this case, is in relation to the charge of the county court to the jury as to the use of the horse, wagon and harness by the defendants, in removing the other property of the plaintiff, which was attached at the same time. The jury were charged, that if they were only used in removing the other property, and were not injured or lessened in value thereby, such use would not make the defendants trespassers *ab initio*.

It was an early doctrine of the common law, that when a party was guilty of an abuse of authority given by the law, he became a trespasser *ab initio*, and lost the protection of the authority, under which he originally acted,—as, if beasts, taken *damage feasant*, or distrained for rent were killed, or put to work, by the party taking them, he might be sued in trespass as for an original wrongful taking. This doctrine has fully obtained in this country, and was acted upon by this court in the case of *Lamb v. Day et al.*, 8 Vt. 407 where it was held, that the defendants who had attached the plaintiff's mare (on being creditor and the other officer) and worked her for several weeks in running a line of stages, without the plaintiff's consent, became trespassers *ab initio*. The doctrine has, to our knowledge, never been extended to any case, except where there has been a clear, substantial violation of the plaintiff's rights, and of such a character as to show a wanton disregard of duty on the part of the defendants. Were the acts of the defendants, in using the horse, wagon and harness under the circumstances and for the purpose mentioned in this case, such an abuse of the property; and of the authority under which it was taken, as ought to deprive them of the benefit of its protection?

It was the duty of the officer to remove the property, in order to make his attachment effectual, and the expense of such removal must be borne by the debtor; and instead of the plaintiff being injured by the use of the property, he was really benefited by it. The doctrine, for which the plaintiff contends, goes the extent of saying that any use of the property makes the officer a trespasser;—so that if an officer attach a horse and wagon, and use the horse for the purpose of drawing away the wagon from the possession of the debtor, he becomes a tortfeasor. We are wholly unable to satisfy ourselves, that the law

has ever gone to so unreasonable an extent, or *has ever been applied to any case, except those where the property has been injured, or has been used by the officer for his own benefit, or for the benefit of some one other than the debtor. This was the rule laid down by the county court, and we are fully satisfied of its correctness.

2. The next question arises upon the charge to the jury in relation to the driving of the horse and wagon by the officer on the next day after the attachment. The case states, that the officer was seen driving the horse and wagon in the highway,

out upon what business did not appear. The jury were charged, that if they found, that the officer was using the horse and wagon for other purposes, than that of removing and securing them in a place for conveniently keeping them, while under the attachment, the defendants would be liable.—otherwise not.

The officer, no doubt, had the right to drive the horse and wagon for the purpose suggested in the charge; but the plaintiff claims, that the legal presumption should be, in the absence of express proof as to the object and purpose of driving the horse and wagon, that it was for an unlawful purpose. But in our opinion this would be contrary to the ordinary rule of legal presumption in relation to all persons, and especially persons acting under legal authority. *Omnia præsumuntur rite acta* is a maxim, which is always applied to the conduct of persons acting under the authority of law. Although there was no direct evidence as to the object and purpose of driving the horse and wagon, the jury might well infer the object from the time, circumstances and direction of the driving; and we think it was properly left to them to determine. We think, it was upon the plaintiff to show the act of the officer to be unlawful; and if he had it left to the jury to decide, even without any evidence to prove it, we do not see, that he has any ground of complaint.

3. Another question is also raised upon the charge to the jury in relation to the use of the pitchfork by the defendants. Under the charge the jury must have found, that the pitchfork was used by the defendants only in moving the plaintiff's property, that it was left where they found it, that the plaintiff received it again, and that it was in no way or manner injured. They were told by the court, that if they found all these facts proved, they were not obliged to give the plaintiff any damages for the fork.

It is true, that, by the theory of the ^{*238} law, whenever an invasion of a right is established, though no actual damage be shown, the law infers a damage to the owner of the property and gives nominal damages. This goes upon the ground, either that some damage is the probable result of the defendant's act, or that his act would have effect to injure the other's right, and would be evidence in future in favor of the wrong doer. This last applies more particularly to unlawful entries upon real property, and to disturbance of incorporeal rights, when the unlawful act might have an effect upon the right of the party and be evidence in favor of the wrong doer, if his right ever came in question. In these cases an action may be supported, though there be no actual damage done,—because otherwise the party might lose his right. So, too, whenever any one wantonly invades another's rights for the purpose of injury, an action will lie, though no actual damage be done; the law presumes damage, on account of the unlawful intent. But it is believed, that no case can be found, where damages have been given for a trespass to personal property, when no unlawful intent, or disturbance of a right, or possession is shown, and when not only all

probable, but all possible, damage is expressly disproved.

The English courts have recently gone far towards breaking up the whole system of giving verdicts, when no actual injury has been done, unless there be some right in question, which it was important to the plaintiff to establish. In the case of *Williams v. Mostyn*, 4 M. & W. 145, where case was brought for the voluntary escape of one Langford, taken on mesne process, and it was admitted, that the plaintiff had sustained no actual damage, or delay, the defendant having returned to the custody of the plaintiff, a verdict was found for the plaintiff for nominal damages. But, on motion, the court directed a nonsuit to be entered, saying that there had been no damage in fact or in law. So in a suit brought by the owner of a house against a lessee, for opening a door without leave, the premises not being in any way weakened, or injured, by the opening, the court refused to allow nominal damages, and remitted the case to the jury to say, whether the plaintiff's reversionary interest had in point of fact been prejudiced. *Young v. Spencer*, 10 B. & C. 145, [21 E. C. L. 70.] Mr. Broome, in his recent work on Legal Maxims, lays down the law in the following language,—“Farther, there are some injuries of so small and little consideration in the law, that no action will lie for them; for instance, in respect to the payment of tithes, the principle which ^{*239} may be extracted from the cases appears to be, that for small quantities of corn, involuntarily left in the process of raking, tithe shall not be payable, unless there be any particular fraud, or intention to deprive the parson of his full right.”

If any farther authority is deemed necessary, in support of the ruling of the county court on this point, we have only to refer to that ancient and well established maxim, —*de minimis non curat lex*,—which seems peculiarly applicable in this case, and would alone have been ample authority upon this part of the case; for we fully agree with Mr. Sedgwick, that the law should hold out no inducement to useless or vindictive litigation. *Sedgwick on Dam.* 62. This disposes of all the questions raised upon the charge.

4. The remaining questions in the case arise upon the admission of the original files and record of the case *Langdon v. Paul*. The plaintiff objected to the introduction of the original record, and claimed, that the judgment could only be proved by an exemplified copy of the record. But we think the objection not well founded. If the clerk of the supreme court were willing to bring the original record into court, we think it might well be used. He probably could not be compelled to do so, and might have required the party to procure a copy of the same; but when the original record is brought into court, we think it would be very difficult to give any substantial reason, why it is not evidence of as high a character, as a copy of the same record would be. The practice of receiving original records as evidence has been universal, as we believe, in this state, and is often much more convenient than to procure copies. *Nye et al. v. Kellam*, 18 Vt. 594.

In relation to the amendment of the execution by the officer, it is very clear, that the county court had no power to permit any such amendment; but we cannot perceive, that the case was in any way affected by it. If the officer, who held the execution, was guilty of any irregularity in his proceedings in the sale of the wagon upon

the execution, it could not have the effect to make these defendants trespassers, who took the property rightfully, and were in no way responsible for the act of the sheriff, who had the execution.

We find no error in the proceedings of the county court, and their judgment is affirmed.

C.C.

LUCAS v. MICHIGAN CENT. R. CO.

(56 N. W. 1039, 98 Mich. 1.)

Supreme Court of Michigan. Dec. 4, 1893.

Error to circuit court, Wayne county; Cornelius J. Reilly, Judge.

Action by Calvin Lucas against the Michigan Central Railroad Company for damages for wrongful ejection from defendant's train. Judgment for plaintiff, and defendant brings error. Reversed.

Henry Russel, (Ashley Pond, of counsel,) for appellant. Dickinson, Thurber & Stevenson, for appellee.

McGRATH, J. Plaintiff purchased an excursion ticket at Dexter, good to Detroit and return, and rode to Detroit thereon. At about 8 o'clock on the evening of the same day he took the train at Detroit for Dexter, taking a seat in the smoking car. When a few miles out of Detroit, the conductor took up his ticket. When the train arrived at Ypsilanti, plaintiff left the smoker, and took a seat in a regular passenger car. After the train left Ypsilanti, the conductor came to plaintiff, and demanded his fare. Plaintiff informed him that he had given him his ticket in the other car. The conductor then asked him for his check. Plaintiff replied that he had not been given a check. The conductor threatened to put him off, but did not at that time, but told him that he would have to pay his fare, or get off at Ann Arbor. Plaintiff responded that he had surrendered his ticket, and would not pay his fare. After the train left Ann Arbor, the conductor returned, and, plaintiff refusing to pay his fare, the conductor called the brakeman, and they together pulled plaintiff from his seat, took him through the car, and put him off, about one mile west of Ann Arbor and eight miles east of Dexter. Plaintiff testified that when his ticket was taken up no check was given him; that when the conductor came to him the second time, and again just before he was put off, he told the conductor that if he would go back with him into the smoking car he would prove his assertions by the man who sat with him, but that the conductor told him that he had no time to bother with him; that the conductor insisted that he (plaintiff) had gotten on at Ypsilanti; that he was ejected from the car by force at about 10 o'clock at night; that the night was very dark; that he could not even see the fences on either side of the track, and that he was compelled to walk home. It was not claimed on the trial that plaintiff had not surrendered a ticket, but the conductor insisted that he had given him and all of the excursionists checks; that he told plaintiff that if he would bring one man that knew him, that said he came from Detroit, it would be all right, but he would not do that; that he used no force in ejecting him; and denied that plaintiff had re-

quested him to go into the smoking car for the purpose of identification. One of plaintiff's witnesses, who was in the smoker, testified that the conductor gave plaintiff no check when the ticket was taken up. Another witness, who was in the car from which plaintiff was ejected, testified that she was an excursionist, as were others who were with her; that no checks were given to her or the other excursionist with her, and that she heard plaintiff say to the conductor that if he would go into the smoking car with him (plaintiff) he could prove that he got on at Detroit, and had given up his ticket, and the conductor refused to go. Plaintiff had a verdict for \$1,200, and defendant appeals.

The alleged errors relate to the refusal of requests to charge, and to the instructions given on the question of damages. The defendant was entitled to have the jury instructed as to the law applicable to its version of the case. After the surrender of his ticket, plaintiff had left his seat in the smoking car, and taken a seat in another car. If plaintiff received a check from the conductor, and, when his fare was demanded, did not produce the check, and, when requested, refused to go into the other car for identification, he could not recover. The check, if given, was given him for the very purpose of identification. It was notice to him that the conductor would rely upon its production, and not upon recollection. The defendant was entitled to the instruction that there was no evidence of malicious intention on the part of the conductor; but, under the circumstances of this case, if the jury believed the testimony introduced on behalf of plaintiff, the plaintiff was entitled to recover, not only those damages, which are ordinarily termed "actual damages," but for whatever injury to his feelings or of indignity, pain, and disgrace such conduct would tend to produce in view of the time, place, and circumstances. Conduct may be so hasty and ill-timed, and so far disregard proper precaution and the rights of others, as to be reckless and oppressive, and the law regards recklessness and oppression as aggravating the injury. *Post Co. v. McArthur*, 16 Mich. 453; *Joselyn v. McAllister*, 22 Mich. 310; *Kreiter v. Nichols*, 28 Mich. 499; *Elliott v. Herz*, 29 Mich. 202; *Kehrig v. Peters*, 41 Mich. 475, 2 N. W. 801; *Ross v. Leggett*, 61 Mich. 445, 28 N. W. 695. If plaintiff's legal rights were violated by the expulsion from the train, it was for the jury to consider the injury to his feelings that such conduct would be likely to produce, in view of his consciousness that he was without fault, and had a right to remain upon the train to his destination. *Railroad Co. v. Flagg*, 43 Ill. 304; *Carsten v. Railroad Co.*, 44 Minn. 454, 47 N. W. 49; *Railroad Co. v. Rice*, 64 Md. 63, 21 Atl. 97; *Railroad Co. v. Holdridge*, 118 Ind. 281, 20 N. E. 837. It was expressly held in Rail-

road Co. v. Winter's Adm'r, 143 U. S. 60, 12 Sup. Ct. 353, that if plaintiff was rightfully on the train as a passenger, he had the right to refuse to be ejected from it, and to make a sufficient resistance to being put off to denote that he was being removed by compulsion, and against his will; and the fact that under such circumstances he was put off the train was of itself a good cause of action against the company. Defendant's belief cannot be held to justify unreasonable or reckless conduct. *Welch v. Ware*, 82 Mich. 77; *Raynor v. Nims*, 37 Mich. 34.

The court was in error, however, in instructing the jury that plaintiff was entitled to exemplary damages in the absence of any explanation as to what was meant by that term. *Post Co. v. McArthur*, supra. The court had already instructed the jury that plaintiff was entitled to recover as actual damages "for such pain and mortification and disgrace as the act entailed," and then informed the jury that if plaintiff made a proposition to the conductor to step back into the other car, and allow him to prove that he got on at Detroit, and surrendered his ticket, then he was entitled to recover, in addition to his actual damages, what the law calls "exemplary damages." The jury were left free to add to the amount which they found that plaintiff had suffered from mortification, pain, and disgrace a further sum as a punishment. (The aim of law which gives redress for private wrongs is compensation to the injured, rather than

the prevention of a recurrence of the wrong.) The law recognizes the fact that an injury may be intensified by the malice or willfulness or oppressiveness or recklessness of the act, and simply allows damages commensurate with the injury when these elements are present. The added injury in consequence of their presence is not always susceptible of proof, hence the matter is left to the sound discretion of the jury. Courts, however, should call attention to the elements that should be considered by juries in this class of cases, and caution them from acting upon improper theories. *Josselyn v. McAllister*, 22 Mich. 310; *Scripps v. Reilly*, 33 Mich. 10; *Stilson v. Gibbs*, 53 Mich. 280, 18 N. W. 815; *Wilson v. Bowen*, 64 Mich. 133, 31 N. W. 81. It is urged that the defendant is not liable in exemplary damages for the oppressive or reckless conduct of the conductor, and *Railroad Co. v. Prentice*, 147 U. S. 101, 13 Sup. Ct. 261, is relied upon. In that case the act was wholly without the line or scope of the conductor's authority, and the court expressly recognize the rule that, if any wantonness or mischief on the part of an agent acting within the scope of his employment causes additional injury to the plaintiff in body or mind, the principal is liable to make compensation for the whole injury suffered; and a number of cases are cited in support of the doctrine. For the errors mentioned, the judgment is reversed, and a new trial ordered. The other justices concurred.

CHELLIS v. CHAPMAN.¹

(26 N. E. 308, 125 N. Y. 214.)

Court of Appeals of New York. Jan. 13, 1891.

Appeal from supreme court, general term, fourth department.

Watson M. Rogers, for appellant. Hannibal Smith, for respondent.

GRAY, J. This plaintiff has recovered a verdict for \$8,000, as damages for the breach by defendant of his promise to marry her. The proofs abundantly justified the jury in finding as they did, but the defendant insists that the trial judge erred in his rulings upon the evidence, and in his charge. He does not raise any question about the fact of his agreement to marry the plaintiff, and, indeed, he could not well do so, as it was established out of his own mouth; but he thinks his case was prejudiced by the admission of certain evidence, and by the way in which the trial judge submitted the question of the damages to the consideration of the jury, and that he should, therefore, have a new trial. The general term, in affirming the judgment, have passed upon various points raised by the appellant, and we might well remit the case without further expression of opinion; but some of the questions still insisted upon seem to deserve further consideration from us. Evidence of the defendant's general reputation as to wealth, at the time of the agreement of marriage, was admitted against the objection to its competency upon the subject of damages in such an action. The exception to its admission presents an interesting question, and one which may be deemed not altogether free from difficulty. Such evidence, on first consideration, seems to conflict with the general rule that in actions for a breach of contract evidence as to the defendant's wealth is inadmissible. The plaintiff, in such actions, is entitled to recover only those damages which she may prove that she has suffered in consequence of the defendant's failure to perform on his part. The defendant's solvency, or insolvency, has nothing to do with the issue, and furnishes no measure for the computation of damages. And this rule of exclusion as to such evidence has been also applied to cases where damages are sought to be recovered for seduction, or for criminal conversation. *James v. Biddington*, 6 Car. & P. 589; *Dain v. Wycoff*, 7 N. Y. 191. Baron ALDERSON, in *James v. Biddington*, an action by a husband for criminal conversation with his wife, assigned as the reason for holding such evidence to be improper that "the plaintiff is entitled to as much damages as a jury think is a compensation for the injury he has sustained, and the amount of the defendant's property is not a question in the case." Judge GARDINER, in *Dain v. Wycoff*, an action by a father for the seduction of his daughter, reasoned, upon the exclusion of proof of what defendant was worth, that the jury should not be allowed "to go beyond the issue between the parties litigating, and, after indemnifying the plain-

tiff for the injury sustained by him, proceed as conservators of the public morals to punish the defendant in a private action for an offense against society." The principle underlying the exclusion of this kind of evidence, in the latter class of cases, is that vindictive or punitive damages would be improper, as the recovery in them should be confined to what the jury may deem to be a sufficient compensation for the injury sustained by the plaintiff. But the present action is quite other in its nature, and constitutes an exception to that general rule upon the subject of damages for violation of contract obligations which has been assented to by the judges of the courts in this country and in England. It is apparent that, in such an action as this, there can be no hard and fast rule of damages, and that they must be left to the discretion of the jury. Of course, that discretion is not so absolute as to be independent of a consideration of the evidence. It is one which is to be exercised with regard to all the circumstances of the particular case, and, as it has frequently been said, where the verdict has not been influenced by prejudice, passion, or corruption, the verdict will not be disturbed by the court. (That the amount of the suitor's pecuniary means is a factor of some importance in the case of a demand of marriage cannot fairly be denied.) It is a circumstance which very frequently must have its particular influence upon the mind of the woman in determining the question of consent or refusal; and, as I think, in a proper case, very naturally and properly so. The ability of the man to support her in comfort, and the station in life which marriage with him holds forth, are matters which may be weighed in connection with an agreement to marry.

In the case at bar the plaintiff was 47 years of age, and the defendant 74. Six years previously he had sought her acquaintance, unsolicited by her, and with matrimonial views on his part. He had visited her more or less frequently, and had twice proposed marriage before their engagement in 1886. She was and had been supporting herself as a teacher and superintendent in city schools. He had never been married, and had lived in the country as a farmer. He was possessed of pecuniary means, considerable in amount in the general estimation of his neighbors, and not inconsiderable if we take his own estimate. Though pretending to some cultivation of mind, which, among other ways, if we may judge from this record, he seemed to delight in displaying by a versification of the homely though not very inspiring or romantic topics and events of his farm life and surroundings, he yet was seemingly lacking in those outward graces of the person which are not infrequently deemed a substitute for more solid possessions. Nor does he seem to have had recourse to the adventitious aids of the wardrobe to adorn his exterior person, and thereby to compensate for personal shortcomings. I think that the jury should be made aware of all the circumstances which in this case, and in every such case, might be supposed to have presented themselves to the mind of the plaintiff when asked to change her position by marriage. Of

¹Affirming 7 N. Y. Supp. 78.

these circumstances, the home offered, which for its comforts and ease would depend upon the more or less ample pecuniary means of the defendant, the freedom from the personal exertions for daily support, the social position accompanying the marriage, all these are facts which have their proper bearing upon the question of marriage. The wealth and the reputation for wealth of a man are matters which, as this world is constituted, often aid in determining his social position, notwithstanding he may have other and more intelligible rights to it, and despite objectionable characteristics or traits. Where, therefore, the defendant has demanded an engagement of marriage, it seems proper enough that the jury should know what possible reinforcement his suit may have had, and what were the inducements offered by his social standing and surroundings. In the case of *James v. Bidlington*, supra, Baron ALDERSON, while holding it improper to give evidence of the amount of defendant's property in an action for criminal conversation, said: "In a case of breach of promise of marriage, the amount of the defendant's property is very material, as showing what would have been the station of the plaintiff in society if the defendant had not broken his promise." And see *Berry v. Da Costa*, L. R. 1 C. P. 331; *Wood v. Hurd*, 2 Bing. N. C. 166. It has been so held in this court, and in the courts of other states, to some of whose decisions the respondent's brief has directed our attention. *Kniffen v. McConnell*, 30 N. Y. 285; *Lawrence v. Cooke*, 56 Me. 187; *Bennett v. Beam*, 42 Mich. 346, 4 N. W. Rep. 8; *Allen v. Baker*, 86 N. C. 91. In *Mayne, Damages*, (Wood's Ed. § 677,) upon the strength of the English authorities I have cited, the same rule is given. I apprehend, however, that the difficulty, in the question before us, of the evidence, is not so much in adducing proof as to defendant's pecuniary means, as in the mode of their proof. But assuming, as I think we are bound to do under the authorities, that the amount of defendant's property is material in such an action, then evidence of the reputation which he enjoys for wealth is unobjectionable. Reputation is the common knowledge of the community, and, if it is exaggerated or incorrect, the defendant has the opportunity to correct it, and of giving the exact facts upon the trial. The admission of the evidence is not to establish an ability to pay, but to show the social standing which defendant's means did, or might, command. In *Kniffen v. McConnell*, 30 N. Y. 289, which was an action for a breach of promise of marriage, Judge INGRAHAM, delivering the opinion of the court, held that "it may be objectionable to particularize the defendant's property, and such evidence should be confined to general reputation under the circumstances of the defendant." To that extent I think it admissible." The judge does not reason upon the ground that I am not aware that this defendant's property has ever been questioned, and I do not think it can be. In *Kerfoot v. Kerfoot*, 100 Mich. 100, an action for breach of promise of marriage, in 1860, the court said: "You may ask in a general way what was the defendant's property,

but you cannot go into particular items as to his property." I think we must conclude upon authority, as well as upon the reason of the thing, that evidence of the reputation of the defendant as to wealth is admissible in these cases. The belief of the plaintiff must have been influenced by the opinions or beliefs of the members of the community in which the defendant resided. She could not be presumed to have personal cognizance of a matter, which is so peculiarly one within the individual's exclusive knowledge, and what credence she gave to general report was not without justification. She had some right to rely upon it. The action is intended as an indemnity for the temporal loss which the plaintiff has sustained, and that embraces the mortification to the feelings, the wounded pride, and all the disappointments from the failure of the marriage, as well in the losses it has occasioned as in the blow to the affections.

The appellant insists upon the error of the trial judge in submitting to the jury the question of exemplary damages. But we think, in such a case, that it is the province of the jury to determine upon the proof of the facts and of the surrounding circumstances what damages should be awarded. If the conduct of the defendant in violating his promise is characterized by a disregard of the plaintiff's feelings or reputation; if he has placed her, or induced her to place herself, in a false position, or to forego temporal advantages; if the breach of his promise is unjustifiable; if he spreads upon the record matters in defense of the action which are scandalous, and tend to reflect discredit upon the plaintiff, or stain her reputation,—then these are all circumstances which may be considered by the jury, and may be availed of by them to enhance the damages. (Here the trial judge did not say in his charge that this was a case for the infliction of punitive damages.) He instructed the jury, in substance, that if the plaintiff was entitled to damages they should certainly give compensatory damages, and that, in the exercise of their discretion based on the proofs and circumstances of the case, they might award exemplary or punitive damages. Upon this subject, of when such damages might be awarded, he read at length from the opinions of this court in *Thorn v. Knapp*, 42 N. Y. 474, and *Johnson v. Jenkins*, 24 N. Y. 252, for the purpose of showing the rule to be applied. It is clear that he left it to them to arrive at a decision upon the propriety of giving exemplary damages from a consideration of the defendant's motives and conduct. Now, there was evidence in the case upon which a verdict might well include exemplary damages. The wedding day was agreed upon, the usual preparations were made by the plaintiff, and relatives and guests were bidden to the ceremony. But the defendant did not appear. He alleged physical ailments in excuse of not fulfilling his marital engagement, but there was evidence that he was evading it, and shamming illness. He admits that he had no fault to find with her. She had resigned her position to marry him. He denies re-

questing her to do so; but his attempt at denial is weakened by his subsequent admission that he expected her to do it. Then, in his pleading, he charges the plaintiff with having no affection for him, but with entertaining a purpose to procure money from him, on the pretense of his promise to marry her, and his breach thereof. These were elements in the case which might properly enter into the decision of the jury as to the amount of damages.

The appellant alleges another error in the charge, when the trial judge instructed the jury: "In fixing the amount [of damages] the plaintiff is entitled at least to such damages as would place her in as good pecuniary condition as she would have been if the contract had been fulfilled." This was, of course, a careless use of language, but it could not have prejudiced the defendant's case. It was very plain from all the charge, in what preceded as in what immediately followed the sentence picked out for objection, that the trial judge intended to and did instruct his jury that they should compensate the plaintiff for what she had lost and was

deprived of by the failure of the marriage. They might affix to the marriage with the defendant that pecuniary value which, in their judgment, upon all the circumstances of the case, it would have to the plaintiff. The jury could not reasonably have understood the judge otherwise. It may often occur in a charge to the jury that particular words or expressions used, when taken by themselves, will be objectionable or seem to be erroneous; but they should not be considered independently of contextual phrases. If, when read in connection with the rest of the charge, the sense of language used is made clear, and its meaning explained, and the instruction is not uncertain as to the subject-matter, the result of the trial should not be disturbed for mere inaccuracies or carelessness in speech. There is no occasion for a further discussion of any questions, and the judgment and order appealed from should be affirmed, with costs. All concur, except EARL and PECKHAM, JJ., who dissent, on the ground that it was error to receive proof of the defendant's wealth by reputation.

Judgment affirmed.

McINTYRE, Adm'r, v. SHOLTY, Adm'r.

(13 N. E. 239, 121 Ill. 660.)

Supreme Court of Illinois. Sept. 27, 1887.

Error to appellate court, Third district; O. T. Reeves, Judge.

Blades & Neville, for plaintiff in error.
Kerrick, Lucas & Spencer and Tipton & Beaver, for defendant in error.

MAGRUDER, J. This is an action of trespass, brought by defendant in error against plaintiff in error, in the circuit court of McLean county, under the "Act requiring compensation for causing death by wrongful act, neglect, or default;" being chapter 70 of the Revised Statutes, entitled "Injuries." Hurd, Rev. St. 1885, p. 695. Jury was waived by agreement, and the case was tried without a jury before the judge of the circuit court, who gave judgment for the plaintiff for \$2,500. This judgment has been affirmed by the appellate court, and is brought before us for review by writ of error to the latter court.

Hannah Sholty was the wife of Levi Sholty, a farmer living in McLean county, near Bloomington. About February 17, 1886, a working-man upon Levi Sholty's farm discovered a man in the barn, who, to all appearances, had been concealing himself there for some time. The person so concealed is proven to have been defendant's intestate, Benjamin D. Sholty, a brother of Levi Sholty. Some efforts seem to have been made on February 17th or 18th to get the officers of the law in Bloomington to go out to the farm and arrest Benjamin D. Sholty, called by the witness David Sholty. This effort, however, failed. Accordingly, Levi Sholty and his hired man, and a number of his neighbors, gathered at his house on the afternoon of February 18, 1886, for the purpose of watching for the intruder, and getting him out of his hiding-place. The barn was 40 or 50 feet wide, and from 80 to 100 feet long. It was situated about 150 or 200 feet north-west from the house. The granary was in the western end of the barn, and, hence, in the end that was furthest from the house. About 6 o'clock in the evening, David Sholty was discovered in the granary by his brother Levi and one McCoy, who were on watch just outside of the granary door. He shot at them twice with a pistol, while they were trying to prevent his escape, and to capture him. Others who were waiting in the house came to their assistance. A rope was obtained, with the intention of tying him, if captured. Presently there was a cry of fire, and the flames are seen to be breaking out at the eastern end of the barn, being the end nearest towards the house. At this time Mrs. Hannah Sholty, plaintiff's intestate, went from the use towards the barn, and had advanced about half of the distance between the two, when David Sholty appeared in the door at

the eastern end of the barn, with a shot-gun. He was plainly visible in the light made by the fire that had broken out. He called upon Mrs. Sholty and her daughter Mary, who was with her, to stop. They stopped, turned, and had advanced a few feet on their way back towards the house, when David Sholty fired at them with the gun in his hand. Both were shot. The daughter was wounded in the wrist, and the mother was killed. This action is brought by her husband, as administrator of her estate, to recover damages for her death, against the administrator of the estate of David Sholty, who is said to have perished in the flames of the burning barn.

The defendant introduced no testimony, except that the examination of one witness was begun, and abandoned, after a few preliminary questions, on account of the ruling of the court as hereafter stated. The defense proposed to show by the witness on the stand, and by others there present in court, that defendant's intestate, Benjamin D. Sholty, was insane at the time Mrs. Sholty was killed. The court refused to receive evidence of his insanity, and exception was taken to the ruling. The question presented relates to the liability of an insane person for injuries committed by him.

(It is well settled that, though a lunatic is not punishable criminally, he is liable in a civil action for any tort he may commit.) However justly this doctrine may have been originally subject to criticism, on the grounds of reason and principle, it is now too firmly supported by the weight of authority to be disturbed. It is the outcome of the principle that in trespass the intent is not conclusive. Mr. Sedgwick, in his work on Damages (marg. page 456,) says that, on principle, a lunatic should not be held liable for his tortious acts. Opposed to his view, however, is a majority of the decisions and text writers. There certainly can be nothing wrong or unjust in a verdict which merely gives compensation for the actual loss resulting from an injury inflicted by a lunatic. He has properly no will. His acts lack the element of intent, or intention. Hence it would seem to follow that the only proper measure of damages in an action against him for a wrong, is the mere compensation of the party injured. Punishment is not the object of the law when persons unsound in mind are the wrong-doers. There is, to be sure, an appearance of hardship in compelling one to respond for that which he is unable to avoid, for want of the control of reason. But the question of liability in these cases is one of public policy. If an insane person is not held liable for his torts, those interested in his estate, as relatives, or otherwise, might not have a sufficient motive to so take care of him as to deprive him of opportunities for inflicting injuries upon others. There is more injustice in denying to the injured party the recovery of damages for the wrong suffered by him, than there is in calling upon the rela-

tives or friends of the lunatic to pay the expense of his confinement, if he has an estate ample enough for that purpose. The liability of lunatics for their torts tends to secure a more efficient custody and guardianship of their persons. Again, if parties can escape the consequences of their injurious acts upon the plea of lunacy, there will be a strong temptation to simulate insanity, with a view of masking the malice and revenge of an evil heart. The views here expressed are sustained by the following authorities: Cooley, Torts, 99-103; 2 Saund. Pl. & Ev. 318; Shear. & R. Neg. § 57; Weaver v. Ward, Hob. 134; Morse v. Crawford, 17 Vt. 499; Behrens v. McKenzie, 23 Iowa, 333; Krom v. Schoonmaker, 3 Barb. 647; also cases in note to said case, in *Ewell*, Lead. Cas. 642. In the light of the principles thus announced we find no error in the ruling of the circuit court upon this subject.

Plaintiff in error also contends that there should have been no recovery in this case because of alleged contributory negligence on the part of Mrs. Sholty. It is claimed that she knew of her brother-in-law's madness,

and that he was armed, when she started to go from the house towards the stable; and that by doing so, under the circumstances, she was guilty of a want of proper care and prudence. We forbear to express any opinion as to whether or not there could be any such thing as contributory negligence in a case of this kind, and under such circumstances as are herein disclosed. It is sufficient to say that there is a considerable amount of evidence in the case bearing upon this question. If it could be properly raised, the facts necessary to do so were fully developed in the testimony presented to the court by the plaintiff below. Therefore, plaintiff in error should have submitted to the trial court a proposition to be held as law embodying his theory of contributory negligence as applicable to the facts of the case, in accordance with section 41 of the practice act. Hurd, Rev. St. 1885, p. 904. He did not do so, and hence the question is not properly before us for our consideration.

The judgment of the appellate court is affirmed.

Judgment affirmed.

SHEIK v. HOBSON, Adm'r.

(19 N. W. 875, 64 Iowa, 146.)

Supreme Court of Iowa. June 11, 1884.

Appeal from circuit court, Clayton county.

Action for damages on account of slanderous words spoken of plaintiff by defendant's intestate. There was a verdict and judgment for plaintiff for \$1,000. Plaintiff appeals.

J. W. Rogers & Son, for appellant. Murdock & Larkin, Ainsworth & Hobson, Noble & Updegraff, and Cyrus Wellington, for appellee.

REED, J. The action was originally brought against Henry Rush, but during its pendency he died, and defendant, Hobson, administrator of his estate, was substituted as defendant. The alleged slanderous words imputed to plaintiff a want of chastity. They are alleged to have been spoken in the presence of plaintiff's husband, and were to the effect that Rush had had sexual intercourse with plaintiff.

At the trial plaintiff asked the court to give the following instructions:

"(1) If you find that the defendant, Henry Rush, did publish in substance the words alleged in petition as the grounds of the action, and that said publication was made maliciously and wantonly, you are instructed that you may give exemplary damages. (2) You are instructed that if you find from the evidence that the slanderous words were published, and that the same were dictated or accompanied by malice, oppression, or gross negligence, you can give exemplary damages in your verdict." The court refused to give these instructions, but told the jury that "damages on account of maliciously speaking the words, or, in other words, exemplary damages, are not to be given." Error is assigned by plaintiff on the giving of this instruction, and the refusal to give those asked.

✓ The question raised by the assignment is whether exemplary or punitive damages may be awarded against the personal representative of a deceased wrong-doer. There is no doubt but, at common law, the remedy for injury such as plaintiff complains of determines upon the death of the wrong-doer. 1

Chit. Pl. 89. But under our statute (Code, § 2525) all causes of action survive, "and may be brought, notwithstanding the death of the person entitled or liable to the same." Plaintiff's position is that, under this section, the right is preserved to her to have damages of this character assessed on account of the wrongful and malicious act by which she has suffered, notwithstanding the death of the one who committed the act. But we think the position is not sound. It cannot be said, in any case,—unless the right is created by statute,—that the person who suffers from the wrongful or malicious acts of another, has the right to have vindictive damages assessed against the wrong-doer. Such damages are awarded as a punishment of the man who has wickedly or wantonly violated the rights of another, rather than for the compensation of the one who suffers from his wrongful act. It is true, they are awarded to the one who has been made to suffer, but not as a matter of right; for, while he is entitled, under the law, to such sum as will fully compensate him for the injury sustained, the question whether punitive damages shall be assessed, and the amount of the assessment, is left to the discretion of the jury. Plaintiff had a right of action, on account of the slanderous words spoken by Rush, for such sum as would compensate her for the injury. This was her cause of action, and this is what was preserved to her by the statute at his death. But she had no personal interest in the question of his punishment. So far as he was concerned, the punitive power of the law ceased when he died. To allow exemplary damages now, would be to punish his legal and personal representatives for his wrongful acts; but the civil law never inflicts vicarious punishment. Our holding as to the object of assessing exemplary damages in any case is abundantly sustained by the authorities, both in this state and elsewhere. We content ourselves, however, with citing the following cases in this state: Hendrickson v. Kingsbury, 21 Iowa, 379; Garland v. Wholeham, 26 Iowa, 185; Ward v. Ward, 41 Iowa, 686.

We think, therefore, that the holding of the circuit court is correct, and the judgment is affirmed.

LAKE SHORE & M. S. RY. CO. v. PRENTICE.

(13 Sup. Ct. 261, 147 U. S. 101.]

Supreme Court of the United States. Jan. 3, 1893.

No. 58.

In error to the circuit court of the United States for the northern district of Illinois.

Action by Chalmer M. C. Prentice against the Lake Shore & Michigan Southern Railway Company to recover damages for unlawful arrest of plaintiff, while a passenger, by the conductor of one of the company's trains. Verdict and judgment for plaintiff. Defendant brings error. Reversed.

Statement by Mr. Justice GRAY:

This was an action of trespass on the case, brought October 19, 1886, in the circuit court of the United States for the northern district of Illinois, by Prentice, a citizen of Ohio, against the Lake Shore & Michigan Southern Railway Company, a corporation of Illinois, to recover damages for the wrongful acts of the defendant's servants.

The declaration alleged, and the evidence introduced at the trial tended to prove, the following facts: The plaintiff was a physician. The defendant was engaged in operating a railroad, and conducting the business of a common carrier of passengers and freight, through Ohio, Indiana, Illinois, and other states. On October 12, 1886, the plaintiff, his wife, and a number of other persons were passengers, holding excursion tickets, on a regular passenger train of the defendant's railroad, from Norwalk, in Ohio, to Chicago, in Illinois. During the journey the plaintiff purchased of several passengers their return tickets, which had nothing on them to show that they were not transferable. The conductor of the train, learning this, and knowing that the plaintiff had been guilty of no offense for which he was liable to arrest, telegraphed for a police officer, an employe of the defendant, who boarded the train as it approached Chicago. The conductor thereupon, in a loud and angry voice, pointed out the plaintiff to the officer, and ordered his arrest; and the officer, by direction of the conductor, and without any warrant or authority of law, seized the plaintiff, and rudely searched him for weapons, in the presence of the other passengers, hurried him into another car, and there sat down by him as a watch, and refused to tell him the cause of his arrest, or to let him speak to his wife. While the plaintiff was being removed into the other car, the conductor, for the purpose of disgracing and humiliating him with his fellow passengers, openly declared that he was under arrest, and sneeringly said to the plaintiff's wife, "Where's your doctor now?" On arrival at Chicago, the conductor refused to let the plaintiff assist his wife with her parcels in leaving the train, or to give her the check for their trunk; and, in the presence

of the passengers and others, ordered him to be taken to the station house, and he was forcibly taken there, and detained until the conductor arrived; and, knowing that the plaintiff had been guilty of no offense, entered a false charge against him of disorderly conduct, upon which he gave bail and was released, and of which, on appearing before a justice of the peace for trial on the next day, and no one appearing to prosecute him, he was finally discharged.

The declaration alleged that all these acts were done by the defendant's agents in the line of their employment, and that the defendant was legally responsible therefor; and that the plaintiff had been thereby put to expense, and greatly injured in mind, body, and reputation.

At the trial, and before the introduction of any evidence, the defendant, by its counsel, admitted "that the arrest of the plaintiff was wrongful, and that he was entitled to recover actual damages therefor;" but afterwards excepted to each of the following instructions given by the circuit judge to the jury:

"If you believe the statements which have been made by the plaintiff and the witnesses who testified in his behalf, (and they are not denied,) then he is entitled to a verdict which will fully compensate him for the injuries which he sustained, and in compensating him you are authorized to go beyond the amount that he has actually expended in employing counsel; you may go beyond the actual outlay in money which he has made. He was arrested publicly, without a warrant, and without cause; and if such conduct as has been detailed before you occurred, such as the remark that was addressed by the conductor to the wife in the plaintiff's presence, in compensating him you have a right to consider the humiliation of feeling to which he was thus publicly subjected. If the company, without reason, by its unlawful and oppressive act, subjected him to this public humiliation, and thereby outraged his feelings, he is entitled to compensation for that injury and mental anguish."

"I am not able to give you any rule by which you can determine that; but, bear in mind, it is strictly on the line of compensation. The plaintiff is entitled to compensation in money for humiliation of feeling and spirit, as well as the actual outlay which he has made in and about this suit."

"And, further, after agreeing upon the amount which will fairly compensate the plaintiff for his outlay and injured feelings, you may add something by way of punitive damages against the defendant, which is sometimes called 'smart money,' if you are satisfied that the conductor's conduct was illegal, (and it was illegal,) wanton, and oppressive. How much that shall be the court cannot tell you. You must act as reasonable men, and not indulge vindictive feelings towards the defendant."

"If a public corporation, like an individual,

acts oppressively, wantonly, abuses power, and a citizen in that way is injured, the citizen, in addition to strict compensation, may have, the law says, something in the way of smart money; something as punishment for the oppressive use of power."

The jury returned a verdict for the plaintiff in the sum of \$10,000. The defendant moved for a new trial, for error in law, and for excessive damages. The plaintiff thereupon, by leave of court, remitted the sum of \$4,000, and asked that judgment be entered for \$6,000. The court then denied the motion for a new trial, and gave judgment for the plaintiff for \$6,000. The defendant sued out this writ of error.

Geo. C. Greene, for plaintiff in error. W. A. Foster, for defendant in error.

Mr. Justice GRAY, after stating the case as above, delivered the opinion of the court.

The only exceptions taken to the instructions at the trial, which have been argued in this court, are to those on the subject of punitive damages.

The single question presented for our decision, therefore, is whether a railroad corporation can be charged with punitive or exemplary damages for the illegal, wanton, and oppressive conduct of a conductor of one of its trains towards a passenger.

This question, like others affecting the liability of a railroad corporation as a common carrier of goods or passengers,—such as its right to contract for exemption from responsibility for its own negligence, or its liability beyond its own line, or its liability to one of its servants for the act of another person in its employment,—is a question, not of local law, but of general jurisprudence, upon which this court, in the absence of express statute regulating the subject, will exercise its own judgment, uncontrolled by the decisions of the courts of the several states. *Railroad Co. v. Lockwood*, 17 Wall. 357, 368; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 120 U. S. 397, 443, 9 Sup. Ct. Rep. 469; *Myrick v. Railroad Co.*, 107 U. S. 102, 100, 1 Sup. Ct. Rep. 425; *Hough v. Railway Co.*, 100 U. S. 213, 226.

The most distinct suggestion of the doctrine of exemplary or punitive damages in England before the American Revolution is to be found in the remarks of Chief Justice Pratt (afterwards Lord Camden) in one of the actions against the king's messengers for trespass and imprisonment, under general warrants of the secretary of state, in which, the plaintiff's counsel having asserted, and the defendant's counsel having denied, the right to recover "exemplary damages," the chief justice instructed the jury as follows: "I have formerly delivered it as my opinion on another occasion, and I still continue of the same mind, that a jury have it in their power to give damages for more than the injury received. Damages are designed, not

only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself." *Wilkes v. Wood*, Lofft, 1, 18, 19 Howell, St. T. 1153, 1167, See, also, *Huckle v. Money*, 2 Wils. 205, 207; *Sayer, Dam.* 218, 221. The recovery of damages, beyond compensation for the injury received, by way of punishing the guilty, and as an example to deter others from offending in like manner, is here clearly recognized.

In this court the doctrine is well settled that in actions of tort the jury, in addition to the sum awarded by way of compensation for the plaintiff's injury, may award exemplary, punitive, or vindictive damages, sometimes called "smart money," if the defendant has acted wantonly, or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations; but such guilty intention on the part of the defendant is required in order to charge him with exemplary or punitive damages. *The Amiable Nancy*, 3 Wheat. 546, 548, 559; *Day v. Woodworth*, 13 How. 363, 371; *Railroad Co. v. Quigley*, 21 How. 202, 213, 214; *Railway Co. v. Arms*, 91 U. S. 489, 493, 495; *Railway Co. v. Humes*, 115 U. S. 512, 521, 6 Sup. Ct. Rep. 110; *Barry v. Edmunds*, 116 U. S. 550, 562, 563, 6 Sup. Ct. Rep. 501; *Railway Co. v. Harris*, 122 U. S. 597, 609, 610, 7 Sup. Ct. Rep. 1286; *Railway Co. v. Beckwith*, 129 U. S. 26, 36, 9 Sup. Ct. Rep. 207.

Exemplary or punitive damages, being awarded, not by way of compensation to the sufferer, but by way of punishment of the offender, and as a warning to others, can only be awarded against one who has participated in the offense. A principal, therefore, though of course liable to make compensation for injuries done by his agent within the scope of his employment, cannot be held liable for exemplary or punitive damages, merely by reason of wanton, oppressive, or malicious intent on the part of the agent. This is clearly shown by the judgment of this court in the case of *The Amiable Nancy*, 3 Wheat. 546.

In that case, upon a libel in admiralty by the owner, master, supercargo, and crew of a neutral vessel against the owners of an American privateer, for illegally and wantonly seizing and plundering the neutral vessel and maltreating her officers and crew, Mr. Justice Story, speaking for the court, in 1818, laid down the general rule as to the liability for exemplary or vindictive damages by way of punishment, as follows: "Upon the facts disclosed in the evidence, this must be pronounced a case of gross and wanton outrage, without any just provocation or excuse. Under such circumstances, the honor of the country and the duty of the court equally require that a just compensation should be made to the unoffending neutrals for all the injuries and losses actually sustained by

them; and, (if this were a suit against the original wrongdoers, (it might be proper to go yet farther, and visit upon them, in the shape of exemplary damages, the proper punishment which belongs to such lawless misconduct.) But it is to be considered that this is a suit against the owners of the privateer, upon whom the law has, from motives of policy, devolved a responsibility for the conduct of the officers and crew employed by them, and yet, from the nature of the service, they can scarcely ever be able to secure to themselves an adequate indemnity in cases of loss. They are innocent of the demerit of this transaction, having neither directed it, nor countenanced it, nor participated in it in the slightest degree. Under such circumstances, we are of the opinion that they are bound to repair all the real injuries and personal wrongs sustained by the libelants, but they are not bound to the extent of vindictive damages." 3 Wheat. 558, 559.

The rule thus laid down is not peculiar to courts of admiralty; for, as stated by the same eminent judge two years later, those courts proceed, in cases of tort, upon the same principles as courts of common law, in allowing exemplary damages, as well as damages by way of compensation or remuneration for expenses incurred, or injuries or losses sustained, by the misconduct of the other party. *Manufacturing Co. v. Fiske*, 2 Mason, 119, 121. In *Keene v. Lizardi*, 8 La. 26, 33, Judge Martin said: "It is true, juries sometimes very properly give what is called 'smart money.' They are often warranted in giving vindictive damages as a punishment inflicted for outrageous conduct; but this is only justifiable in an action against the wrongdoer, and not against persons who, on account of their relation to the offender, are only consequentially liable for his acts, as the principal is responsible for the acts of his factor or agent." To the same effect are *The State Rights*, Crabbe, 42, 47, 48; *The Golden Gate*, McAll. 104; *Wardrobe v. Stage Co.*, 7 Cal. 118; *Boulard v. Calhoun*, 13 La. Ann. 445; *Detroit Daily Post Co. v. McArthur*, 16 Mich. 447; *Grund v. Van Vleck*, 69 Ill. 478, 481; *Becker v. Dupree*, 75 Ill. 167; *Rosenkrans v. Barker*, 115 Ill. 331, 3 N. E. Rep. 93; *Kirksey v. Jones*, 7 Ala. 622, 629; *Pollock v. Gantt*, 69 Ala. 373, 379; *Eviston v. Cramer*, 57 Wis. 570, 15 N. W. Rep. 760; *Haines v. Schultz*, 50 N. J. Law, 481, 14 Atl. Rep. 488; *McCarthy v. De Armit*, 99 Pa. St. 63, 72; *Clark v. Newsum*, 1 Exch. 131, 140; *Clissold v. Machell*, 26 U. C. Q. B. 422.

The rule has the same application to corporations as to individuals. This court has often, in cases of this class, as well as in other cases, affirmed the doctrine that for acts done by the agents of a corporation, in the course of its business and of their employment, the corporation is responsible in the same manner and to the same extent as

an individual is responsible under similar circumstances. *Railroad Co. v. Quigley*, 21 How. 202, 210; *Bank v. Graham*, 100 U. S. 690, 702; *Salt Lake City v. Hollister*, 118 U. S. 256, 261, 6 Sup. Ct. Rep. 1055; *Railway Co. v. Harris*, 122 U. S. 597, 608, 7 Sup. Ct. Rep. 1286.

A corporation is doubtless liable, like an individual, to make compensation for any tort committed by an agent in the course of his employment, although the act is done wantonly and recklessly, or against the express orders of the principal. *Railroad Co. v. Derby*, 14 How. 468; *Steamboat Co. v. Brockett*, 121 U. S. 637, 7 Sup. Ct. Rep. 1039; *Howe v. Newmarch*, 12 Allen, 49; *Ramsden v. Railroad Co.*, 104 Mass. 117. A corporation may even be held liable for a libel, or a malicious prosecution, by its agent within the scope of his employment; and the malice necessary to support either action, if proved in the agent, may be imputed to the corporation. *Railroad Co. v. Quigley*, 21 How. 202, 211; *Salt Lake City v. Hollister*, 118 U. S. 256, 262, 6 Sup. Ct. Rep. 1055; *Reed v. Bank*, 130 Mass. 443, 445, and cases cited; *Krulevitz v. Railroad Co.*, 140 Mass. 573, 5 N. E. Rep. 500; *McDermott v. Journal*, 43 N. J. Law, 488, and 44 N. J. Law, 430; *Bank v. Owston*, 4 App. Cas. 270. But, as well observed by Mr. Justice Field, now chief justice of Massachusetts: "The logical difficulty of imputing the actual malice or fraud of an agent to his principal is perhaps less when the principal is a person than when it is a corporation; still the foundation of the imputation is not that it is inferred that the principal actually participated in the malice or fraud, but, the act having been done for his benefit by his agent acting within the scope of his employment in his business, it is just that he should be held responsible for it in damages." *Lothrop v. Adams*, 133 Mass. 471, 480, 481.

Though the principal is liable to make compensation for a libel published or a malicious prosecution instituted by his agent, he is not liable to be punished by exemplary damages for an intent in which he did not participate. In *Detroit Daily Post Co. v. McArthur*, in *Eviston v. Cramer*, and in *Haines v. Schultz*, above cited, it was held that the publisher of a newspaper, when sued for a libel published therein by one of his reporters without his knowledge, was liable for compensatory damages only, and not for punitive damages, unless he approved or ratified the publication; and in *Haines v. Schultz* the supreme court of New Jersey said of punitive damages: "The right to award them rests primarily upon the single ground,—wrongful motive." "It is the wrongful personal intention to injure that calls forth the penalty. To this wrongful intent knowledge is an essential prerequisite." "Absence of all proof bearing on the essential question, to wit, defendant's motive, cannot be permitted to take the place of evidence, without leading to a most dangerous

¹ Fed. Cas. No. 1,681.

extension of the doctrine respondent superior." 50 N. J. Law, 484, 485, 14 Atl. Rep. 488. Whether a principal can be criminally prosecuted for a libel published by his agent without his participation is a question on which the authorities are not agreed; and, where it has been held that he can, it is admitted to be an anomaly in the criminal law. *Com. v. Morgan*, 107 Mass. 199, 203; *Reg. v. Holbrook*, 3 Q. B. Div. 60, 63, 64, 70, 4 Q. B. Div. 42, 51, 60.

No doubt, a corporation, like a natural person, may be held liable in exemplary or punitive damages for the act of an agent within the scope of his employment, provided the criminal intent, necessary to warrant the imposition of such damages, is brought home to the corporation. *Railroad Co. v. Quigley*, *Railway Co. v. Arms*, and *Railway Co. v. Harris*, above cited; *Caldwell v. Steamboat Co.*, 47 N. Y. 282; *Bell v. Railway Co.*, 10 C. B. (N. S.) 287, 4 Law T. (N. S.) 293.

Independently of this, in the case of a corporation, as of an individual, if any wantonness or mischief on the part of the agent, acting within the scope of his employment, causes additional injury to the plaintiff in body or mind, the principal is, of course, liable to make compensation for the whole injury suffered. *Kennon v. Gilmer*, 131 U. S. 22, 9 Sup. Ct. Rep. 606; *Meagher v. Driscoll*, 99 Mass. 281, 285; *Smith v. Holcomb*, Id. 552; *Hawes v. Knowles*, 114 Mass. 518; *Campbell v. Car Co.*, 42 Fed. Rep. 484.

In the case at bar, the defendant's counsel having admitted in open court "that the arrest of the plaintiff was wrongful, and that he was entitled to recover actual damages therefor," the jury were rightly instructed that he was entitled to a verdict which would fully compensate him for the injuries sustained, and that in compensating him the jury were authorized to go beyond his outlay in and about this suit, and to consider the humiliation and outrage to which he had been subjected by arresting him publicly without warrant and without cause, and by the conduct of the conductor, such as his remark to the plaintiff's wife.

But the court, going beyond this, distinctly instructed the jury that, "after agreeing upon the amount which will fully compensate the plaintiff for his outlay and injured feelings," they might "add something by way of punitive damages against the defendant, which is sometimes called 'smart money,'" if they were "satisfied that the conductor's conduct was illegal, wanton, and oppressive."

The jury were thus told, in the plainest terms, that the corporation was responsible in punitive damages for wantonness and oppression on the part of the conductor, although not actually participated in by the corporation. This ruling appears to us to be inconsistent with the principles above stated, unsupported by any decision of this court, and opposed to the preponderance of well-considered precedents.

In *Railroad Co. v. Derby*, which was an action by a passenger against a railroad corporation for a personal injury suffered through the negligence of its servants, the jury were instructed that "the damages, if any were recoverable, are to be confined to the direct and immediate consequences of the injury sustained;" and no exception was taken to this instruction. 14 How. 470, 471.

In *Railroad Co. v. Quigley*, which was an action against a railroad corporation for a libel published by its agents, the jury returned a verdict for the plaintiff under an instruction that "they are not restricted in giving damages to the actual positive injury sustained by the plaintiff, but may give such exemplary damages, if any, as in their opinion are called for and justified, in view of all the circumstances in this case, to render reparation to the plaintiff, and act as an adequate punishment to the defendant." This court set aside the verdict, because the instruction given to the jury did not accurately define the measure of the defendant's liability; and, speaking by Mr. Justice Campbell, stated the rules applicable to the case in these words: "For acts done by the agents of the corporation, either in contractu or in delicto, in the course of its business and of their employment, the corporation is responsible, as an individual is responsible under similar circumstances." "Whenever the injury complained of has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity, the jury are not limited to the ascertainment of a simple compensation for the wrong committed against the aggrieved person. But the malice spoken of in this rule is not merely the doing of an unlawful or injurious act. The word implies that the act complained of was conceived in the spirit of mischief, or criminal indifference to civil obligations. Nothing of this kind can be imputed to these defendants." 21 How. 210, 213, 214.

In *Railway Co. v. Arms*, which was an action against a railroad corporation, by a passenger injured in a collision caused by the negligence of the servants of the corporation, the jury were instructed thus: "If you find that the accident was caused by the gross negligence of the defendant's servants controlling the train, you may give to the plaintiff punitive or exemplary damages." This court, speaking by Mr. Justice Davis, and approving and applying the rule of exemplary damages, as stated in *Quigley's Case*, held that this was a misdirection, and that the failure of the employees to use the care that was required to avoid the accident, "whether called 'gross' or 'ordinary' negligence, did not authorize the jury to visit the company with damages beyond the limit of compensation for the injury actually inflicted. To do this, there must have been some willful misconduct, or that entire want of care which would raise the presumption of a conscious indifference to consequences. Nothing of this kind

can be imputed to the persons in charge of the train; and the court, therefore, misdirected the jury." 91 U. S. 495.

In *Railway Co. v. Harris*, the railroad company, as the record showed, by an armed force of several hundred men, acting as its agents and employes, and organized and commanded by its vice president and assistant general manager, attacked with deadly weapons the agents and employes of another company in possession of a railroad, and forcibly drove them out, and in so doing fired upon and injured one of them, who thereupon brought an action against the corporation, and recovered a verdict and judgment under an instruction that the jury "were not limited to compensatory damages, but could give punitive or exemplary damages, if it was found that the defendant acted with bad intent, and in pursuance of an unlawful purpose to forcibly take possession of the railway occupied by the other company, and in so doing shot the plaintiff." This court, speaking by Mr. Justice Harlan, quoted and approved the rules laid down in *Quigley's Case*, and affirmed the judgment, not because any evil intent on the part of the agents of the defendant corporation could of itself make the corporation responsible for exemplary or punitive damages, but upon the single ground that the evidence clearly showed that the corporation, by its governing officers, participated in and directed all that was planned and done. 122 U. S. 610, 7 Sup. Ct. Rep. 1286.

The president and general manager, or, in his absence, the vice president in his place, actually wielding the whole executive power of the corporation, may well be treated as so far representing the corporation and identified with it that any wanton, malicious, or oppressive intent of his, in doing wrongful acts in behalf of the corporation to the injury of others, may be treated as the intent of the corporation itself; but the conductor of a train, or other subordinate agent or servant of a railroad corporation, occupies a very different position, and is no more identified with his principal, so as to affect the latter with his own unlawful and criminal intent, than any agent or servant standing in a corresponding relation to natural persons carrying on a manufactory, a mine, or a house of trade or commerce.

The law applicable to this case has been found nowhere better stated than by Mr. Justice Brayton, afterwards chief justice of Rhode Island, in the earliest reported case of the kind, in which a passenger sued a railroad corporation for his wrongful expulsion from a train by the conductor, and recovered a verdict, but excepted to an instruction to the jury that "punitive or vindictive damages, or smart money, were not to be allowed as against the principal, unless the principal participated in the wrongful act of the agent, expressly or impliedly, by his conduct authorizing it or approving it, either before or

after it was committed." This instruction was held to be right, for the following reasons: "In cases where punitive or exemplary damages have been assessed, it has been done, upon evidence of such willfulness, recklessness, or wickedness, on the part of the party at fault, as amounted to criminality, which for the good of society and warning to the individual, ought to be punished. If in such cases, or in any case of a civil nature, it is the policy of the law to visit upon the offender such exemplary damages as will operate as punishment, and teach the lesson of caution to prevent a repetition of criminality, yet we do not see how such damages can be allowed, where the principal is prosecuted for the tortious act of his servant, unless there is proof in the cause to implicate the principal and make him particeps criminis of his agent's act. No man should be punished for that of which he is not guilty." "Where the proof does not implicate the principal, and, however wicked the servant may have been, the principal neither expressly nor impliedly authorizes or ratifies the act, and the criminality of it is as much against him as against any other member of society, we think it is quite enough that he shall be liable in compensatory damages for the injury sustained in consequence of the wrongful act of a person acting as his servant." *Hagan v. Railroad Co.*, 3 R. I. 88, 91.

The like view was expressed by the court of appeals of New York, in an action brought against a railroad corporation by a passenger for injuries suffered by the neglect of a switchman, who was intoxicated at the time of the accident. It was held that evidence that the switchman was a man of intemperate habits, which was known to the agent of the company having the power to employ and discharge him and other subordinates, was competent to support a claim for exemplary damages, but that a direction to the jury in general terms that in awarding damages they might add to full compensation for the injury "such sum for exemplary damages as the case calls for, depending in a great measure, of course, upon the conduct of the defendant," entitled the defendant to a new trial; and Chief Justice Church, delivering the unanimous judgment of the court, stated the rule as follows: "For injuries by the negligence of a servant while engaged in the business of the master, within the scope of his employment, the latter is liable for compensatory damages; but for such negligence, however gross or culpable, he is not liable to be punished in punitive damages unless he is also chargeable with gross misconduct. Such misconduct may be established by showing that the act of the servant was authorized or ratified, or that the master employed or retained the servant, knowing that he was incompetent, or, from bad habits, unfit for the position he occupied. Something more than ordinary negligence is requisite; it must be reckless, and of a criminal nature, and

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clearly established. Corporations may incur this liability as well as private persons. If a railroad company, for instance, knowingly and wantonly employs a drunken engineer or switchman, or retains one after knowledge of his habits is clearly brought home to the company, or to a superintending agent authorized to employ and discharge him, and injury occurs by reason of such habits, the company may and ought to be amenable to the severest rule of damages; but I am not aware of any principle which permits a jury to award exemplary damages in a case which does not come up to this standard, or to graduate the amount of such damages by their views of the propriety of the conduct of the defendant, unless such conduct is of the character before specified." *Cleghorn v. Railroad Co.*, 56 N. Y. 44, 47, 48.

Similar decisions, denying upon like grounds the liability of railroad companies and other corporations, sought to be charged with punitive damages for the wanton or oppressive acts of their agents or servants, not participated in or ratified by the corporation, have been made by the courts of New Jersey, Pennsylvania, Delaware, Michigan, Wisconsin, California, Louisiana, Alabama, Texas, and West Virginia.

It must be admitted that there is a wide divergence in the decisions of the state courts upon this question, and that corporations have been held liable for such damages under similar circumstances in New Hampshire, in Maine, and in many of the western and southern states. But of the three leading cases on that side of the question, *Hopkins v. Railroad Co.*, 36 N. H. 9, can hardly be reconciled with the later decisions in *Fay v. Parker*, 53 N. H. 342, and *Bixby v. Dunlap*, 56 N. H. 456; and in *Goddard v. Railway Co.*, 57 Maine, 202, 228, and *Railway Co. v. Dunn*,

19 Ohio St. 162, 500, there were strong dissenting opinions. In many, if not most, of the other cases, either corporations were put upon different grounds in this respect from other principals, or else the distinction between imputing to the corporation such wrongful act and intent as would render it liable to make compensation to the person injured, and imputing to the corporation the intent necessary to be established in order to subject it to exemplary damages by way of punishment, was overlooked or disregarded.

Most of the cases on both sides of the question, not specifically cited above, are collected in 1 *Sedg. Dam.* (8th Ed.) § 380.

In the case at bar, the plaintiff does not appear to have contended at the trial, or to have introduced any evidence tending to show, that the conductor was known to the defendant to be an unsuitable person in any respect, or that the defendant in any way participated in, approved, or ratified his treatment of the plaintiff; nor did the instructions given to the jury require them to be satisfied of any such fact before awarding punitive damages; but the only fact which they were required to find, in order to support a claim for punitive damages against the corporation, was that the conductor's illegal conduct was wanton and oppressive. For this error, as we cannot know how much of the verdict was intended by the jury as a compensation for the plaintiff's injury, and how much by way of punishing the corporation for an intent in which it had no part, the judgment must be reversed, and the case remanded to the circuit court, with directions to set aside the verdict, and to order a new trial.

Mr. Justice FIELD, Mr. Justice HARLAN, and Mr. Justice LAMAR took no part in this decision.

GODDARD v. GRAND TRUNK RY. OF
CANADA.

(57 Me. 202.)

Supreme Judicial Court of Maine. 1869.

Action against the Grand Trunk Railway of Canada to recover damages for an assault made on a passenger by a brakeman in defendant's employment. There was a verdict for plaintiff, to which defendant excepted.

G. F. Shepley, for plaintiff. P. Barnes, for defendant.

WALTON, J. Two questions are presented for our consideration: First, is the common carrier of passengers responsible for the willful misconduct of his servant? or, in other words, if a passenger who has done nothing to forfeit his right to civil treatment, is assaulted and grossly insulted by one of the carrier's servants, can he look to the carrier for redress? and, secondly, if he can, what is the measure of relief which the law secures to him? These are questions that deeply concern, not only the numerous railroad and steamboat companies engaged in the transportation of passengers, but also the whole travelling public; and we have endeavored to give them that consideration which their great importance has seemed to us to demand.

I. Of the carrier's liability. It appears in evidence, that the plaintiff was a passenger in the defendants' railway car; that, on request, he surrendered his ticket to a brakeman employed on the train, who, in the absence of the conductor, was authorized to demand and receive it; that the brakeman afterwards approached the plaintiff, and, in language coarse, profane, and grossly insulting, denied that he had either surrendered or shown him his ticket; that the brakeman called the plaintiff a liar, charged him with attempting to avoid the payment of his fare, and with having done the same thing before, and threatened to split his head open and spill his brains right there on the spot; that the brakeman stepped forward and placed his foot upon the seat on which the plaintiff was sitting, and, leaning over the plaintiff, brought his fist close down to his face, and shaking it violently, told him not to yelp, if he did he would spot him, that he was a damned liar, that he never handed him his ticket, that he did not believe he paid his fare either way; that this assault was continued some fifteen or twenty minutes, and until the whistle sounded for the next station; that there were several passengers present in the car, some of whom were ladies, and that they were all strangers to the plaintiff; that the plaintiff was at the time in feeble health, and had been for some time under the care of a physician, and at the time of the assault was reclining languidly in his seat; that he had neither said nor done anything to provoke the assault;

that, in fact, he had paid his fare, had received a ticket, and had surrendered it to this very brakeman who delivered it to the conductor only a few minutes before, by whom it was afterwards produced and identified; that the defendants were immediately notified of the misconduct of the brakeman, but, instead of discharging him, retained him in his place; that the brakeman was still in the defendants' employ when the case was tried and was present in court during the trial, but was not called as a witness, and no attempt was made to justify or excuse his conduct.

Upon this evidence the defendants contend that they are not liable, because, as they say, the brakeman's assault upon the plaintiff was willful and malicious, and was not directly nor impliedly authorized by them. They say the substance of the whole case is this, that "the master is not responsible as a trespasser, unless by direct or implied authority to the servant, he consents to the unlawful act."

The fallacy of this argument, when applied to the common carrier of passengers, consists in not discriminating between the obligation which he is under to his passenger, and the duty which he owes a stranger. It may be true that if the carrier's servant willfully and maliciously assaults a stranger, the master will not be liable; but the law is otherwise when he assaults one of his master's passengers. The carrier's obligation is to carry his passenger safely and properly, and to treat him respectfully, and if he intrusts the performance of this duty to his servants, the law holds him responsible for the manner in which they execute the trust. The law seems to be now well settled that the carrier is obliged to protect his passenger from violence and insult, from whatever source arising. He is not regarded as an insurer of his passenger's safety against every possible source of danger; but he is bound to use all such reasonable precautions as human judgment and foresight are capable of, to make his passenger's journey safe and comfortable. He must not only protect his passenger against the violence and insults of strangers and co-passengers, but a fortiori, against the violence and insults of his own servants. If this duty to the passenger is not performed, if this protection is not furnished, but on the contrary, the passenger is assaulted and insulted, through the negligence or the willful misconduct of the carrier's servant, the carrier is necessarily responsible.

And it seems to us it would be cause of profound regret if the law were otherwise. The carrier selects his own servants and can discharge them when he pleases, and it is but reasonable that he should be responsible for the manner in which they execute their trust. To their care and fidelity are intrusted the lives and limbs and comfort and convenience of the whole traveling public, and it

is certainly as important that these servants should be trustworthy as it is that they should be competent. It is not sufficient that they are capable of doing well, if in fact they choose to do ill; that they can be as polite as a Chesterfield, if, in their intercourse with the passengers, they choose to be coarse, brutal, and profane. The best security the traveler can have that these servants will be selected with care, is to hold those by whom the selection is made responsible for their conduct.

This liability of the master is very clearly expressed in a recent case in Massachusetts. The court say, that wherever there is a contract between the master and another person, the master is responsible for the acts of his servant in executing that contract, although the act is fraudulent and done without his consent. *Howe v. Newmarch*, 12 Allen, 55 (paragraph nearest the bottom of the page). And Messrs. Angell and Ames, in their work on Corporations ([8th Ed.] p. 404, § 388), say: "A distinction exists as to the liability of a corporation for the willful tort of its servant toward one to whom the corporation owes no duty except such as each citizen owes to every other; and that toward one who has entered into some peculiar contract with the corporation by which this duty is increased; thus it has been held that a railroad corporation is liable for the willful tort of its servants whereby a passenger on the train is injured."

In *Brand v. Railroad Co.*, 8 Barb. 368, the court say, a passenger on board a stage-coach or railroad-car, and a person on foot in the street, do not stand in the same relation to the carrier. Toward the one the liability of the carrier springs from a contract, express or implied, and upheld by an adequate consideration. Toward the other he is under no obligation but that of justice and humanity. Hence a passenger, who is injured by a servant of the carrier, may have a right of action against him when one not a passenger, for a similar injury, would not.

In *Moore v. Railroad Co.*, 4 Gray, 465, the plaintiff was forcibly put out of a car for not giving up his ticket or paying his fare, when in fact he had already surrendered his ticket to some one employed on the train. The defendants insisted that they were not responsible for the misconduct of the conductor; and further, that an action for an assault would not lie against a corporation. But the court held otherwise, and the plaintiff recovered.

In *Seymour v. Greenwood*, 7 Hurl. & N. 354, the plaintiff was assaulted and taken out of the defendant's omnibus by one of his servants. The defendant insisted that he was not liable, because it did not appear that he authorized or sanctioned the act of the servant. But it was held in the exchequer chamber, affirming the judgment of the exchequer court, that the jury did right in returning a verdict for the plaintiff.

In *Railroad Co. v. Finney*, 10 Wis. 388, the plaintiff was unlawfully put out of a car by the conductor. After stating that it was insisted, by the counsel for the railroad, that in no case could a cause of action arise against the principal for the willful misconduct of the agent, the court went on to say, that after a careful examination of the position, they were satisfied it was not correct; that where the misconduct of the agent causes a breach of the principal's contract, he will be liable whether such misconduct be willful or merely negligent.

In *Railroad Co. v. Vandiver*, 42 Pa. St. 365, a passenger received injuries, of which he died, by being thrown from the platform of a railroad car because he refused to pay his fare or show his ticket, he averring he had bought one but could not find it. The evidence showed he was partially intoxicated. It was urged in defense that if the passenger's death was the result of force and violence, and not the result of negligence, then (such force and violence being the act of the agents alone without any command or order of the company) the company was not responsible therefor. But the court held otherwise. "A railway company," said the court, "selects its own agents at its own pleasure, and it is bound to employ none except capable, prudent, and humane men. In the present case the company and its agents were all liable for the injury done to the deceased."

In *Weed v. Railroad Co.*, 17 N. Y. 362, the jury found specially that the act of the servant by which the plaintiff was injured, was willful. The court held the willfulness of the act did not defeat the plaintiff's right to look to the railroad company for redress.

In *Railroad Co. v. Derby*, 14 How. 468, where the servant of a railroad company took an engine and run it over the road for his own gratification, not only without consent, but contrary to express orders, the supreme court of the United States held that the railroad company was responsible.

In *Railway Co. v. Hinds*, 53 Pa. St. 512, a passenger's arm was broken in a fight between some drunken persons that forced their way into the car at a station near an agricultural fair, and the company was held responsible, because the conductor went on collecting fares, and did not stop the train and expel the rioters, or demonstrate, by an earnest effort, that it was impossible to do so.

In *Flint v. Transportation Co.*, 34 Conn. 554, where the plaintiff was injured by the discharge of a gun dropped by some soldiers engaged in a scuffle, the court held that passenger carriers are bound to exercise the utmost vigilance and care to guard those they transport from violence from whatever source arising; and the plaintiff recovered a verdict for \$10,000.

In *Landreaux v. Bell*, 5 La. O. S. 275, the court say, that carriers are responsible for

the misconduct of their servants toward passengers to the same extent as for their misconduct in regard to merchandise committed to their care; that no satisfactory distinction can be drawn between the two cases.

In *Chamberlain v. Chandler*, 3 Mason, 242, Judge Story declared in language strong and emphatic, that a passenger's contract entitles him to respectful treatment; and he expressed the hope that every violation of this right would be visited, in the shape of damages, with its appropriate punishment.

In *Nieto v. Clark*, 1 Cliff. 145, where the steward of the ship assaulted and grossly insulted a female passenger, Judge Clifford declares, in language equally emphatic, that the contract of all passengers entitles them to respectful treatment and protection against rudeness and every wanton interference with their persons from all those in charge of the ship; that the conduct of the steward disqualified him for his situation, and justified the master in immediately discharging him, although the vessel was then in a foreign port. And we have his authority for saying that he has recently examined the question with care, in a case pending in the Rhode Island district, where the clerk of a steamboat unjustifiably assaulted and maltreated a passenger, and that he entertains no doubt of the carrier's liability to compensate the passenger for the injury thus received, whether the carrier previously authorized or subsequently ratified the assault or not. A report of the case will soon be published. See 3 Cliff.

And a recent and well-considered case in Maryland (published since this case has been pending before the law court, and very much like it in all respects), fully sustains this view of the law. *Railroad Co. v. Blocher*, 27 Md. 277.

The grounds of the carrier's liability may be briefly stated thus:

The law requires the common carrier of passengers to exercise the highest degree of care that human judgment and foresight are capable of, to make his passenger's journey safe. Whoever engages in the business impliedly promises that his passenger shall have this degree of care. In other words, the carrier is conclusively presumed to have promised to do what, under the circumstances, the law requires him to do. We say conclusively presumed, for the law will not allow the carrier by notice or special contract even to deprive his passenger of this degree of care. If the passenger does not have such care, but on the contrary is unlawfully assaulted and insulted by one of the very persons to whom his conveyance is intrusted, the carrier's implied promise is broken, and his legal duty is left unperformed, and he is necessarily responsible to the passenger for the damages he thereby sustains. The passenger's remedy may be either in assumpsit or tort, at his election. In the one case, he relies upon a breach of the

carrier's common-law duty in support of his action; in the other, upon a breach of his implied promise. The form of the action is important only upon the question of damages. In actions of assumpsit, the damages are generally limited to compensation. In actions of tort, the jury are allowed greater latitude, and, in proper cases, may give exemplary damages.

II. We now come to the second branch of the case. What is the measure of relief which the law secures to the injured party; or, in other words, can he recover exemplary damages? We hold that he can. The right of the jury to give exemplary damages for injuries wantonly, recklessly, or maliciously inflicted, is as old as the right of trial by jury itself; and is not, as many seem to suppose, an innovation upon the rules of the common law. It was settled in England more than a century ago.

In 1763, Lord Chief Justice Pratt (afterwards Earl of Camden), with whom the other judges concurred, declared that the jury had done right in giving exemplary damages. *Huckle v. Money*, 2 Wils. 205.

In another case the same learned judge declared with emphasis, that damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty. 5 Camp. *Lives Chan. (Am. Ed.)* p. 214.

In 1814, the doctrine of punitive damages was stringently applied in a case where the defendant, in a state of intoxication, forced himself into the plaintiff's company, and insolently persisted in hunting upon his grounds. The plaintiff recovered a verdict for five hundred pounds, the full amount of his ad damnum, and the court refused to set it aside. Mr. Justice Heath remarked in this case that he remembered a case where the jury gave five hundred pounds for merely knocking a man's hat off, and the court refused a new trial. It goes, said he, to prevent the practice of dueling; if juries are permitted to punish insult by exemplary damages. *Merest v. Harvey*, 5 Taunt. 442. See, also, to the same effect, *Sears v. Lyon*, 2 Starkie, 317 (decided in 1818).

In 1844, Lord Chief Baron Pollock said, that in actions for malicious injuries, juries had always been allowed to give what are called vindictive damages. *Doe v. Filliter*, 13 Mees. & W. 50.

In 1858, in an action of trespass for taking personal property on a fraudulent bill of sale, the defendant's counsel contended that it was not a case for the application of the doctrine of exemplary damages; but the court held otherwise. No doubt, said Pollock, C. B., it was a case in which vindictive damages might be given. *Thomas v. Harris*, 3 Hurl. & N. 961.

In 1860, in an action for willful negligence, the defendant contended that the plaintiff's declaration was too defective to entitle him to exemplary damages; but the court held

otherwise; and the judge who tried the case remarked that he was glad the court had come to the conclusion that it was competent for the jury to give exemplary damages, for he thought the defendant had acted with a high hand. *Emblen v. Myers*, 6 Hurl. & N. 54.

"Damages exemplary," is now a familiar title in the best English law reports. See 6 Hurl. & N. 969.

It was the firmness with which Lord Camden (then Chief Justice Pratt) maintained and enforced the right of the jury to punish with exemplary damages the agents of Lord Halifax (then secretary of state) for the illegal arrest of the publishers of the *North Briton*, that made him so immensely popular in England. Nearly or quite twenty of those cases appear to have been tried before him, in all of which enormous damages were given, and in not one of them was the verdict set aside. In one of the cases a verdict for a thousand pounds was returned for a mere nominal imprisonment at the house of the officer making the arrest, and the court refused to set it aside. *Beardmore v. Carrington*, 2 Wils. 244.

"After this," says Lord Campbell, in his *Lives of the Chancellors*, "he became the idol of the nation. Grim representations of him laid down the law from sign-posts, many busts and prints of him were sold not only in the streets of the metropolis, but in the provincial towns; a fine portrait of him, by Sir Joshua Reynolds, with the flattering inscription, 'in honor of the zealous assertor of English liberty by law,' was placed in the guildhall of the city of London; addresses of thanks to him poured in from all quarters; and one of the sights of London, which foreigners went to see, was the great Lord Chief Justice Pratt."

In this country, perhaps Lord Camden is better known as one of the able English statesmen who so eloquently defended the American colonies against the unjust claim of the mother country to tax them. Lord Campbell says some portions of his speeches upon that subject are still in the mouths of school-boys. But in England his immense popularity originated in his firm and vigorous enforcement of the doctrine of exemplary damages. And we cannot discover that the legality of his rulings in this particular was ever seriously called in question. On the contrary, we find it admitted by his political opponents that he was a profound jurist and an able and upright judge. His stringent enforcement of the right of the jury to punish flagrant wrongs with exemplary damages, arrested not only great abuses then existing, but it has had a salutary influence ever since. It won for him the title of the "assertor of English liberty by law."

In this country the right of the jury to give exemplary damages has been much discussed. It seems to have been first opposed by Mr. Theron Metcalf (afterwards reporter

and judge of the supreme court of Massachusetts), in an article published in 3 Am. Jur. 387, in 1830. The substance of this article was afterwards inserted in a note to Mr. Greenleaf's work on Evidence. Mr. Sedgwick, in his work on Damages, took the opposite view, and sustained his position by the citation of numerous authorities. Professor Greenleaf replied in an article in 9 Bost. Law Rep. 529. Mr. Sedgwick rejoined in the same periodical (volume 10, p. 49). Essays on different sides of the question were also published in 3 Am. Law Mag. N. S. 537, and 4 Am. Law Mag. N. S. 61. But notwithstanding this formidable opposition, the doctrine triumphed, and must be regarded as now too firmly established to be shaken by anything short of legislative enactments. In fact the decisions of the courts are nearly unanimous in its favor.

In a case in the supreme court of the United States, Mr. Justice Grier, in delivering the opinion of the court, says, it is a well-established principle of the common law, that in all actions for torts the jury may inflict what are called punitive or exemplary damages, having in view the enormity of the offense rather than the measure of compensation to the plaintiff. "We are aware," the judge continues, "that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument." *Day v. Woodworth*, 13 How. 363.

In a case in North Carolina, the court refer to the note in Professor Greenleaf's work on Evidence, and say that it is very clearly wrong with respect to the authorities; and in their judgment wrong on principle; that it is fortunate that while juries endeavor to give ample compensation for the injury actually received, they are also allowed such full discretion as to make verdicts to deter others from flagrant violations of social duty. And the same court hold that the wealth of the defendant is a proper circumstance to be weighed by the jury, because a thousand dollars may be a less punishment to one man than a hundred dollars to another. In one case the same court sustained a verdict which in terms assessed the actual damages at \$100, and the exemplary damages at \$1,000. The court held it was a good verdict for \$1,100. *Pendleton v. Davis*, 1 Jones (N. C.) 38; *McAulay v. Birkhead*, 13 Ired. 28; *Gilreath v. Allen*, 10 Ired. 67.

In fact, Professor Greenleaf is himself an authority for the doctrine of exemplary damages. Speaking of the action for assault and battery, he says the jury are not confined to the mere corporal injury, but may consider the malice of the defendant, the insulting character of his conduct, the rank in life of the several parties, and all the circumstances of the outrage, and thereupon award such exemplary damages as the circumstances may

in their judgment require. 2 Greenl. Ev. § 89.

But if the great weight of Professor Greenleaf's authority were to be regarded as opposed to the doctrine, we have, on the other hand, the great weight of Chancellor Kent's opinion in favor of it. He says, surely this is the true and salutary doctrine. And after reviewing the English cases, he continues by saying it cannot be necessary to multiply instances of its application; that it is too well settled in practice, and too valuable in principle to be called in question. *Tillotson v. Cheetham*, 3 Johns. 56, 64.

This brief review of the doctrine of exemplary damages is not so much for the purpose of establishing its existence, as to correct the erroneous impression which some members of the legal profession still seem to entertain, that it is a modern invention, not sanctioned by the rules of the common law. We think every candid-minded person must admit that it is no new doctrine; that its existence as a fundamental rule of the common law has been recognized in England for more than a century; that it has been there stringently enforced under circumstances which would not have allowed it to pass unchallenged, if any pretext could have been found for doubting its validity; and that in this country, notwithstanding an early and vigorous opposition, it has steadily progressed, and that the decisions of the courts are now nearly unanimous in its favor. It was sanctioned in this state, after a careful and full review of the authorities, in *Pike v. Dilling*, 48 Me. 539, and cannot now be regarded as an open question.

But it is said that if the doctrine of exemplary damages must be regarded as established in suits against natural persons for their own willful and malicious torts, it ought not to be applied to corporations for the torts of their servants, especially where the tort is committed by a servant of so low a grade as a brakeman on a railway train, and the tortious act was not directly nor impliedly authorized nor ratified by the corporation; and several cases are cited by the defendants' counsel, in which the courts seem to have taken this view of the law; but we have carefully examined these cases, and in none of them was there any evidence that the servant acted wantonly or maliciously; they were simply cases of mistaken duty; and what these same courts would have done if a case of such gross and outrageous insult had been before them, as is now before us, it is impossible to say; [and long experience has shown that nothing is more dangerous than to rely upon the abstract reasoning of courts, when the cases before them did not call for the application of the doctrines which their reasoning is intended to establish.]

We have given to this objection much consideration, as it was our duty to do, for the presiding judge declined to instruct the jury that if the acts and words of the defendants' servant were not directly nor impliedly au-

thorized nor ratified by the defendant, the plaintiff could not recover exemplary damages. [We confess that it seems to us that there is no class of cases where the doctrine of exemplary damages can be more beneficially applied than to railroad corporations in their capacity of common carriers of passengers; and it might as well not be applied to them at all as to limit its application to cases where the servant is directly or impliedly commanded by the corporation to maltreat and insult a passenger, or to cases where such an act is directly or impliedly ratified; for no such cases will ever occur. A corporation is an imaginary being. It has no mind but the mind of its servants; it has no voice but the voice of its servants; and it has no hands with which to act but the hands of its servants. All its schemes of mischief, as well as its schemes of public enterprise, are conceived by human minds and executed by human hands; and these minds and hands are its servants' minds and hands. All attempts, therefore, to distinguish between the guilt of the servant and the guilt of the corporation; or the malice of the servant and the malice of the corporation; or the punishment of the servant and the punishment of the corporation, is sheer nonsense; and only tends to confuse the mind and confound the judgment. Neither guilt, malice, nor suffering is predicable of this ideal existence, called a corporation. And yet under cover of its name and authority, there is in fact as much wickedness, and as much that is deserving of punishment, as can be found anywhere else. And since these ideal existences can neither be hung, imprisoned, whipped, or put in the stocks,—since in fact no corrective influence can be brought to bear upon them except that of pecuniary loss,—it does seem to us that the doctrine of exemplary damages is more beneficial in its application to them, than in its application to natural persons. If those who are in the habit of thinking that it is a terrible hardship to punish an innocent corporation for the wickedness of its agents and servants, will for a moment reflect upon the absurdity of their own thoughts, their anxiety will be cured. Careful engineers can be selected who will not run their trains into open draws; and careful baggage men can be secured, who will not handle and smash trunks and hand-boxes as is now the universal custom; and conductors and brakemen can be had who will not assault and insult passengers; and if the courts will only let the verdicts of upright and intelligent juries alone, and let the doctrine of exemplary damages have its legitimate influence, we predict these great and growing evils will be very much lessened, if not entirely cured. There is but one vulnerable point about these ideal existences, called corporations; and that is, the pocket of the monied power that is concealed behind them; and if that is reached they will wince. When it is thoroughly understood

that it is not profitable to employ careless and indifferent agents, or reckless and insolent servants, better men will take their places, and not before.

It is our judgment, therefore, that actions against corporations, for the willful and malicious acts of their agents and servants in executing the business of the corporation, should not form exceptions to the rule allowing exemplary damages. On the contrary, we think this is the very class of cases, of all others, where it will do the most good, and where it is most needed. And in this conclusion we are sustained by several of the ablest courts in the country.

In a case in Mississippi, the plaintiff was carried four hundred yards beyond the station where he had told the conductor he wished to stop; and he requested the conductor to run the train back, but the conductor refused, and told the plaintiff to get off the train or he would carry him to the next station. The plaintiff got off and walked back, carrying his valise in his hand. The plaintiff testified that the conductor's manner toward him was insolent, and the defendants having refused to discharge him, the jury returned a verdict for four thousand five hundred dollars, and the court refused to set it aside. They said the right of the jury to protect the public by punitive damages, and thus prevent these great public blessings from being converted into the most dangerous nuisances, was conclusively settled; and they hoped the verdict would have a salutary influence upon their future management. *Railroad Co. v. Hurst*, 36 Miss. 600.

In New Hampshire, in an action against this identical road, where, through gross carelessness, there was a collision of the passenger train with a freight train, and the plaintiff was thereby injured, the judge at nisi prius instructed the jury that it was a proper case for exemplary damages; and the full court sustained the ruling, saying it was a subject in which all the traveling public were deeply interested; that railroads had practically monopolized the transportation of passengers on all the principal lines of travel, and there ought to be no lax administration of the law in such cases; and that it would be difficult to suggest a case more loudly calling for an exemplary verdict. (If mere carelessness, however gross, calls loudly for an exemplary verdict, what shall be said of an injury that is willful and grossly insulting?) *Hopkins v. Railroad Co.*, 36 N. H. 9.

Judge Redfield, in his very able and useful work on Railways, expresses the opinion that there is quite as much necessity for holding these companies liable to exemplary damages as their agents. He says it is difficult to perceive why a passenger, who suffers indignity and insult from the conductor of a train, should be compelled to show an actual ratification of the act, in order to subject the company to exemplary damages. 2 Redf. R. R. 231, note. But if such a ratifi-

cation is necessary, he thinks the corporation, which is a mere legal entity, inappreciable to sense, should be regarded as always present in the person of its servant, and as directing and ratifying the servant's acts within the scope of his employment, and thus be made responsible for his willful misconduct. 1 Redf. R. R. 515 et seq.

And in a recent case in Maryland (published since this case has been pending before the law court), a case in all respects very similar to the one we are now considering, the presiding judge was requested to instruct the jury that the plaintiff was not entitled to recover vindictive or punitive damages from the defendants, unless they expressly or impliedly participated in the tortious act, authorizing it before or approving it after it was committed; but the presiding justice refused so to instruct the jury, and the full court held that the request was properly rejected; that it was settled that where the injury for which compensation in damages is sought, is accompanied by force or malice, the injured party is entitled to recover exemplary damages. *Railroad Co. v. Blocher*, 27 Md. 277.

But the defendants say that the damages awarded by the jury are excessive, and they move to have the verdict set aside and a new trial granted for that reason. That the verdict in this case is highly punitive, and was so designed by the jury, cannot be doubted; but by whose judgment is it to be measured to determine whether or not it is excessive? What standard shall be used? It is a case of wanton insult and injury to the plaintiff's character, and feelings of self-respect, and the damages can be measured by no property standard. It is a case where the judgment will be very much influenced by the estimation in which character, self-respect, and freedom from insult are held. To those who set a very low value on character, and think that pride and self-respect exist only to become objects of ridicule and sport, the damages will undoubtedly be considered excessive. It would not be strange if some such persons, measuring the sensibilities of others by their own low standard, should view this verdict with envy, and regret that somebody will not assault and insult them, if such is to be the standard of compensation. While others, who feel that character and self-respect are above all price, more valuable than life itself even, will regard the verdict as none too large. We repeat, therefore, that it is a case where men's judgments will be likely to differ. And suppose the court is of opinion that the damages in this case are greater, much greater even, than they would have awarded, does it therefore follow that the judgment of the court is to be substituted for that of the jury? By no means. It is the wisdom of the law to suppose that the judgment of the jury is more likely to be right than the judgment of the court, for it is to the former and not

to the latter that the duty of estimating damages is confided. Unless the damages are so large as to satisfy the court that the verdict was not the result of an honest exercise of judgment, they have no right to set it aside.

A careful examination of the case fails to satisfy us that the jury acted dishonestly, or that they made any mistake in their application of the doctrine of exemplary damages. We have no doubt that the highly punitive character of their verdict is owing to the fact that, after Jackson's misconduct was known to the defendants, they still retained him in their service. The jury undoubtedly felt that it was due to the plaintiff, and due to every other traveller upon that road, to have him instantly discharged; and that to retain him in his place, and thus shield and protect him against the protestation of the plaintiff, made to the servant himself at the time of the assault, that he would lose his place, was a practical ratification and approval of the servant's conduct, and would be so understood by him and by every other servant on the road.

And when we consider the violent, long-continued, and grossly insulting character of the assault; that it was made upon a person in feeble health, and was accompanied by language so coarse, profane, and brutal; that so far as appears it was wholly unprovoked; we confess we are amazed at the conduct of the defendants in not instantly discharging Jackson. Thus to shield and protect him in his insolence, deeply implicated them in his guilt. It was such indifference to the treatment the plaintiff had received, such indifference to the treatment that other travelers might receive, such indifference to the evil influence which such an example would have upon the servants of this and other lines of public travel, that we are not prepared to say the jury acted unwisely in making their verdict highly punitive. We cannot help feeling that if we should interfere and set it aside, our action would be most unfortunate and detrimental to the public interests. On the contrary, if we allow it to stand, we cannot doubt that its influence will be salutary. It will be an impressive lesson to these defendants, and to the managers of other lines of public travel, of the risk they incur when they retain in their service servants known to be reckless, ill-mannered, and unfit for their places. And it will encourage those who may suffer insult and violence at the hands of such servants, not to retaliate or attempt to become their own avengers, as is too often done, but to trust to the law and to the courts of justice, for the redress of their grievances. It will say to them, be patient and law-abiding, and your redress shall surely come, and in such measure as will not add insult to your previous injury.

On the whole, we cannot doubt that it is best for all concerned that this verdict be allowed to stand.

We see nothing in the rulings or charge of the presiding judge, of which the defendants can justly complain. And there is nothing to satisfy us that the jury were prejudiced or unduly biased; or that they made any mistake either as to the facts or the law. Our conclusion, therefore, is, that the exceptions and motion must be overruled.

Motion and exceptions overruled.

APPLETON, C. J., and DICKERSON, BARROWS, and DANFORTH, JJ., concurred.

TAPLEY, J., did not concur upon the question of damages, and gave his opinion as follows:

In so much of the opinion of Mr. Justice WALTON as determines the question of the liability of the defendants to answer in damages for the acts of the brakeman Jackson I concur; but I do not concur in sustaining the rulings of the court at the trial of the cause fixing the rule of damage for the jury; and I regard it so clearly wrong in principle, inequitable and unjust in practice, and so entirely wanting in precedent, that my duty requires something more than a silent dissent.

So much of the opinion as discusses the right of a jury to give in civil actions punitive damages, I do not propose now to review or express any opinion of or concerning, but it is to the application of the rule made in this case by the justice presiding at the trial of the cause. The rulings upon this matter are happily so clearly expressed and positive in terms, that no reasonable doubt concerning the proposition involved in them can be entertained. If by possibility any doubt could have arisen concerning them, the opinion he has drawn in the case sets them at rest.

The case shows that "on the subject of damages the presiding justice instructed the jury as follows: If the plaintiff has proved his case so that he is entitled to recover some damages, the question arises how much. That is a question which you must determine, being guided by the rules of law as I shall state them to you. In the first place, the plaintiff is entitled to such damages as he has actually suffered, and in estimating the amount, you will not be limited to what he has lost in dollars and cents. In fact, there is no evidence that he has suffered pecuniarily to any extent. You are to consider the injury to his feelings, his wounded pride, his wounded self-respect, his mental pain and suffering, occasioned by the assault, and the feeling of degradation that necessarily resulted from it. There are few men probably that would not rather suffer a severe pecuniary loss than a personal and insulting assault. Hence if one man should spit in another's face in public, the jury would not be limited to ten cents damages on the ground that that sum would pay him for washing his face. A man's feelings, self-respect, and pride of character are as much un-

der the protection of the law in such case as his property. And in estimating the damages for a personal assault attended with opprobrious and insulting language, the jury have a right to consider the character and standing of the person assaulted, and the injury to his feelings, as well as the injury to his person, and then to give him such damages as, in view of all the circumstances, will be a just compensation for the injury actually suffered. This amount must be left, in every case, to the sound judgment and discretion of the jury."

Pausing at this point of the instructions, we shall notice that they embrace all the elements of compensatory damages recognized by courts of the most liberal views in these matters; and embrace elements which many courts denominate exemplary; and they are stated in so clear and concise a manner, and accompanied by so forcible an illustration, that had they stopped at this point the plaintiff might well have expected his verdict to cover the utmost his injuries would warrant. With the rule thus far I am content, although carrying it to the very verge and utmost limit of precedent. I call attention to it at this point to show that the jury had, at this time, instructions which covered all the tangible and intangible elements of assessment in such cases. Instructions which if adhered to and followed by the jury restore him to the condition in which the assaulting party found him, so far as money can do it. Under these instructions he is to be made whole in the eyes of the law, just as if the injury had not been done; in every particular compensated so far as money can do it; what is done beyond is not to compensate, it is not to meet mere speculative or intangible injuries, is not to give him anything due him, for he has his full desert. These elements reach everything he, as an individual, can claim by reason of any infringement of his rights.

These instructions having been given, so full, clear, and liberal, the presiding judge proceeds to give the next element of damage, which has not for its basis any injury, invasion of right or privilege, discomfort, inconvenience, or indeed anything relating to the plaintiff, or anything in which he has any interest above that possessed by every other member of the community. It is not act or deed, word or menace,—these have all been adjusted; but it is mere motive, thought, interest, and secret desire. Being evil, morally wrong, somebody must be punished for their existence, and the judge says:

"There is also another important rule of law bearing upon the question of damages. If the injury was wanton, malicious, committed in reckless and willful disregard of the rights of the injured party, the law allows the jury to give what is called punitive or exemplary damages. It blends the interests of the injured party with those of the public, and permits the jury not only to give

damages sufficient to compensate the plaintiff, but also to punish the defendants. I feel it my duty, however, to say, that you ought to be very cautious in the application of this rule. The law does not require you to give exemplary damages in any case, and where the damages which the plaintiff is entitled to recover in order to compensate him for the injury he has actually suffered is sufficient to punish the defendants, and serve as a warning and example to others, the jury ought not to give more. But if they think it is not enough, then the law allows them to add such further sum as will make it enough for that purpose. But they should be careful in fixing the amount not to allow more than is just and reasonable, and not to allow their judgment to be swerved by their passions. Defendants' counsel requested the presiding judge to instruct the jury, that the plaintiff is not entitled to recover against the defendant company, any greater damages than he might against Jackson himself, for the same cause of action upon similar evidence. Upon which request the presiding judge stated to the jury: I decline to give you such instruction. I have endeavored to give you the correct rules by which the damages, if any, are to be assessed in this case; and I think you cannot rightfully be required to enter into a consideration of the damages which a party not now before the court, and has not therefore had an opportunity to be heard, ought to pay, and then measure the damages in this case which has been heard, by those which you think ought to be just in another which has not been heard; we will endeavor to decide this case right now, and when Jackson's case comes before us, if it ever does, we will endeavor to decide that right.

"Defendants' counsel further requested the presiding judge to instruct the jury, that if the jury find that the acts and words of Jackson were not directly nor impliedly authorized, nor ratified by the defendants, then the plaintiff is not in any event entitled to recover vindictive damages against the defendants, nor damages in the nature of smart-money, which request was not complied with, the presiding judge having already instructed the jury upon what state of facts the plaintiff would be entitled to such damages."

I have copied all the instructions "on the subject of damages." It will be seen that these latter instructions are substantially that the jury having given full compensatory damages, may give others in their discretion to punish these defendants for the wanton, willful, and malicious act of their brakeman in assaulting a passenger, although they neither directly nor impliedly authorized or ratified the act.

This proposition must be sustained, if at all, upon one of two grounds; either that it is competent to punish one man for the criminal intent of another, or that the malice of

the brakeman in this case was that of the defendant corporation.

A brief notice of some of the authorities touching the liability of the master for the acts of his servant will, I think, show the ground of liability, the reason for the rule, and exhibit a marked distinction between the ordinary case of master and servant and the case at bar.

In 2 Dane, Abr. c. 59, art. 2, it is said: "The master is not liable for the willful, voluntary, or furious act of his servant." "If my servant distrain a horse lawfully by my order, and then use him, this conversion is his act, and trover lies against him; for my order extends only to distraining the horse, and not to using him; this is his own act."

"Nor is the master bound for the voluntary acts of his servants; for if he be bound, servants may ruin their masters by willful acts; nor are willful acts, wrongs authorized by their masters."

"If I order my servant to do what is lawful, and he does more, he only is liable; it is his own act, otherwise he might ruin me, and in such case there can be no express or implied command from me for what he does beyond his orders; and whenever the question is how far the master is liable for his servant's acts, the material inquiry must be, how far he expressly or impliedly authorized it."

"The master is liable for the negligent act of his servant, but not for his willful wrong; is liable in trover; for which rule several reasons may be given: (1) A willful wrong is the servant's own act. (2) To allow him by his willful tortious act to bind his master and subject him to damages, would be to allow servants a power to ruin their masters. (3) In such cases there is no command from the master expressed or implied to do a willful wrong."

In 4 Bac. Abr. tit. "Master and Servant," it is said: "The master must also answer for torts, and injuries done by his servant in the execution of his authority. But though a master is answerable for damages occasioned by the negligence or unskillfulness of his servant acting in the execution of his orders, yet he is not answerable in trespass for the willful act of his servant done in his absence, and without his direction or assent."

Chancellor Kent says: "The master is only answerable for the fraud of his servant while he is acting in his business, and not for fraudulent or tortious acts, or misconduct in those things which do not concern his duty to his master, and which when he commits, he steps out of the course of his service. But it was considered in *McManus v. Cricket*, 1 East, 106, to be a question of great concern and of much doubt and uncertainty, whether the master was answerable in damages for an injury willfully committed by his servant while in the performance of his

master's business, without the direction or assent of the master. The court of K. B. went into an examination of all the authorities, and after much discussion and great consideration, with a view to put the question at rest, it was decided that the master was not liable in trespass for the willful act of his servant in driving his master's carriage against another, without his master's direction or assent. The court considered that when the servant quitted sight of the object for which he was employed, and without having in view his master's orders, pursued the object which his own malice suggested, he no longer acted in pursuance of the authority given him, and it was deemed so far a willful abandonment of his master's business. This case has received the sanction of the supreme court of Massachusetts and New York, on the ground that there was no authority from the master express or implied, and the servant in that act was not in the employment of his master."

In *Wright v. Wilcox*, 19 Wend. 343, Cowen, J., who gave the opinion of the court, says: "If the act was willful, the master is no more liable than if his servant had committed any other assault and battery. All the cases agree that a man is not liable for the willful mischief of his servant, though he be at the time in other respects engaged in the service of the former." After citing several cases he adds: "Why is a master chargeable for the act of his servant? Because what a man does by another he does by himself. The act is not within the scope of his agency." He says: "The authorities deny that when the servant willfully drives over the man, he is in his master's business. They held it a departure, and going into the servant's own independent business."

In *Turnpike Co. v. Vanderbilt*, 1 Hill, 480, case of a collision of steamboats, the supreme court held that if the collision was willful on the part of the defendant's servant, the defendant was not liable, referring to *Wright v. Wilcox*. The case afterward went to the court of appeals (2 Com. 479) where the doctrine applied in the supreme court was sanctioned; and it was further held that the corporation was not liable, although the willful act producing the injury was authorized and sanctioned by the president and general agent thereof; because a general or special agent, when he commits or orders a willful trespass to be committed, acts without the scope of his authority.

In *Hibbard v. Railroad Co.*, 15 N. Y. 455, which was "an action against the corporation for ejecting a passenger from the cars, who, having once exhibited his ticket, refused so to do when again requested by the conductor," Brown, J., in giving his opinion says, speaking of a requested instruction concerning damages, "the object of the request was, that the court should discriminate between those acts of the company's agent done in the execution of its directions, and

those done in the excess of its instructions and without authority or approbation. This I think should have been done. The plaintiff may have been injured by the use of unnecessary force to effect what the company had a right to do. The conductor and those who aided him are not the company. They are its agents and servants, and, whatever tortious acts they commit by its direction, it is responsible for and no other. This is upon the principle that what one does by another he does by himself. For injuries resulting from the carelessness of the servant in the performance of his master's business the latter is liable. But for the willful acts of the servant the master is not responsible, because such willful acts are a departure from the master's business;" and cites the case of *Wright v. Wilcox*, and cases there cited.

In the same case *Comstock, J.*, says: "If the conductor had no right to eject the plaintiff from the train after he had complied with the request and produced the ticket, then I do not see upon what principle the defendants can be made liable for the wrong. The regulation and instructions to the conductor, as we have said, were lawful, and they did not in their terms or construction profess to justify the trespass and eviction. The result is, the wrong was done without any authority, and, therefore, that those who actually did it are alone unanswerable." "If he mistook the authority conferred upon him both when he committed the trespass and when he was examined as a witness, it cannot alter the law or change the rights of the parties. His own mistake as to the extent of his powers cannot make the railroad company liable for acts not in fact authorized." These cases are all cited in a subsequent case. *Weed v. Railroad Co.*, 17 N. Y. 362.

The rule is thus stated in *Story, Ag. § 456*: "But although the principal is liable for the torts and negligence of his agents, yet we are to understand the doctrine with its just limitations, that the tort or negligence occurs in the course of the agency. For the principal is not liable for the torts or negligences of his agent in matters beyond the scope of the agency unless he has subsequently adopted them for his use or benefit. Hence it is that the principal is never liable for the unauthorized, the willful, or the malicious act or trespass of his agent."

Mr. Hilliard, in his work on Torts, says: "In general, a master is liable for the fault or negligence of his servant; but not for his willful wrong or trespass. The injury must arise in the course of the execution of some service lawful in itself, but negligently or unskillfully performed, and not be a wanton violation of law by the servant, although occupied about the business of his employer." *Hill. Torts, c. 40.*

In *Parsons v. Winchell*, 5 Cush. 592, *Metcalf, J.*, says: "But the act of a servant is not the act of a master even in legal intentment or effect unless the master personally di-

rects or subsequently adopts it. In other cases, he is liable for the acts of his servant when liable at all, not as if the act were done by himself, but because the law makes him answerable therefor. He is liable, says *Lord Kenyon*, 'to make compensation for the damage consequential for his employing of an unskillful or negligent servant.'" 1 East, 108.

Of this latter class of cases, *Story* says: "In every such case the principal holds out his agent as competent and fit to be trusted; and thereby, in effect, he warrants his fidelity and good conduct in all the matters of the agency." *Story, Ag. § 452.*

In *Southwick v. Estes*, 7 Cush. 385, *Dewey, J.*, instructed the jury "that if the act of the servant were not done negligently but willfully with the intention of disregarding the directions of the master, he would not be responsible therefor." This instruction was held correct, and the case of *McManus v. Crickett* was cited by the court.

In *Railroad Co. v. Langley*, 21 How. 202, *Mr. Justice Campbell* in delivering the opinion of the court says, "the result of the cases is that for acts done by the agents of a corporation either in contractu or in delicto in the course of its business and of their employment, the corporation is responsible as an individual is responsible under similar circumstances."

In *Weed v. Railroad Co.*, 17 N. Y. 362, this rule was invoked to relieve the defendants from the consequences of the willful act of the conductor in the detention of a train whereby a passenger was made sick and suffered permanent injury in her health. *Strong, J.*, in delivering the opinion of the court says: "The defendants insist that they are not liable for the willful act of the conductor followed by such a result; and they invoke, in support of their position, the rule, well sustained by principle and authority, that a master is not liable for a willful trespass of his servant." He then proceeds to say: "It is important, therefore, to inquire whether that rule extends to a case like the present, and for that purpose to consider the basis on which it is founded. The reason of the rule clearly appears by the cases in which it has been declared and applied." He then examines many of the cases where the rule has been stated and applied, and cites also *Story, Ag. § 456*, and then says: "All the cases on the subject, so far as I have observed, agree in regard to the principle of the rule, and also in limiting the rule to that principle. For acts of an agent within his authority, the principal is liable, but not for willful acts without his authority." *Railroad Co. v. Derby*, 14 How. 468. He then proceeds, in reference to the case then under consideration, to say: "In the light of this examination of the class of cases which has been considered, it cannot fail to be seen that there is an important difference between those cases and the one before the court. The former are cases of willful, unauthorized, wrongful acts by agents, unapproved by their princi-

pals, occasioning damage, but which do not involve nor work any omission or violation of duty by their principals to the persons injured; wrongs by the agents only with which the principals are not legally connected. In the present case, by means of the wrongful, willful detention by the conductor, the obligation assumed by the defendants, to carry the wife with proper speed to her destination, was broken. The real wrong to the wife in this case, and from which the damage proceeded, was the not carrying her in a reasonable time to Aspinwall as the defendants had undertaken to do, and this was a wrong of the defendants unless the law excused them for their delay on account of the misconduct of their agent." In the conclusion of his discussion he says, the rule of law, relied on by the defendants to sustain their position, is inapplicable to the case, and that it makes no difference whether the act was willful or negligent as to the liability of the defendants for a nonfulfillment of their contract. From an examination of these authorities, I think it will be found that the principal is liable for the act of his agent in three classes of cases:

I. Where the act is done by the previous command of the principal, or is subsequently ratified or adopted by him.

This command may appear from proof of specific directions, or implied from the circumstances of the case.

II. Where the agent negligently, unskillfully or otherwise improperly performs the duties pertaining to his employment.

III. Where the act of the agent has caused the breach of a contract, or prevented the performance of an obligation due from, and existing between, the principal and a third person.

The liability, in the first class of cases, rests solely upon the maxim, "Qui facit per alium facit per se;" and in no other cases is he liable as an actor, but in those cases where he has commanded the act or subsequently ratified it, which is regarded in law as a previous command.

The authorities, ancient and modern, are believed to be uniform upon this proposition, and wherever a liability attaches for an unauthorized act, it is founded upon some other reason.

In the second class the agent is held out as competent and fit to be trusted (by the principal), and he, in effect, warrants his fidelity and good conduct in all the matters of the agency; by reason of this, as Lord Kenyon says, he becomes liable "to make compensation for the damage consequential for his employing of an unskillful or negligent servant." As to whether this warranty covers the willful tortious acts of the agent while engaged in and about the master's business, the authorities do not all agree. Some hold that as soon as the act becomes a willful trespass, the master is no longer liable; others hold that for acts done in the course of his employment the master is responsible whatever may be the animus of

the actor. A review of the authorities, touching this question, will be found in the case of Railroad Co. v. Baum, 26 Ind.

The liability, in the third class of cases, rests not upon the lawfulness or unlawfulness of the act done by the agent, but as grounded upon the failure of the principal to perform a contract or fulfill an obligation with the party injured. In this class of cases it matters not whether the act be a "willful trespass" or not; whether it was done in the course of the employment of the servant is immaterial; if the act produces the breach of the contract, or causes a failure to fulfill the existing obligation, the liability to answer attaches. The gravamen of the charge is not that the agent has done this or that act, but that the principal has not fulfilled his agreement.

That the case at bar comes within this class of cases I think there can be no doubt, and the liability of the defendants is well placed upon those grounds, by Mr. Justice WALTON, and could be sustained upon no other.

In the light of these authorities and decisions, ancient and modern, emanating from courts of the highest jurisdiction, character, and ability, what is the true rule of damages in the case at bar? Or, putting the question in a more pertinent form, were the defendants liable to punitive damages, such as "is sufficient to punish the defendants and serve as a warning and example to others."

If the act of Jackson was a willful, wanton, and malicious trespass upon his part, and was neither directly nor impliedly authorized or ratified by the defendants, the act was neither in fact nor legal intentment the act of the defendants. This is quite clear from reason and authority. Although it may be one which devolved upon them a liability, it is in no sense their act; so that, if ordinarily the malice of the acting agent was so inseparably connected with the act that it would attach to the principal, *nolens volens*, in those cases where, by legal intentment, it was his, the principal's act, in this case it would not, it being neither in act or legal intentment the act of the defendants.

The requested instruction clearly presented the proposition that unless the act was authorized directly or impliedly, or subsequently ratified by the defendants, they could not be chargeable with the motive and intent of the actor. This was refused and the rule left, that, regardless of authorization or ratification, they might be punished for the willful, wanton, and malicious acts of Jackson.

The ruling, it is apparent, extends to cases not within the first class, and the result of placing it in either of the other classes is to punish one for the malice of another. To relieve the case from this difficulty an effort is made to make corporations an excep-

tion to the rule, although all the authorities, whether found in elementary treatises or judicial decisions, place them upon the same footing. The idea put forward seems to be, that the servant is the corporation. In order, however, that the position may certainly stand as it is made, and the argument proceed upon no erroneous deductions of mine, I quote: "A corporation is an imaginary being. It has no mind but the mind of its servants; it has no voice but the voice of its servants, and it has no hands with which to act but the hands of its servants. All its schemes of mischief, as well as its schemes of public enterprise, are conceived by human minds and executed by human hands, and those minds and hands are its minds and hands. All attempts, therefore, to distinguish between the guilt of the servant and the guilt of the corporation; or the malice of the servant and the malice of the corporation; or the punishment of the servant and the punishment of the corporation is 'sheer nonsense,' and only tends to confuse the mind and confound the judgment."

In relation to this proposition one inquiry may be made, viz.: Have these servants no "minds," no "hands," and no "schemes" except those of the corporation? Are all their schemes, all their acts, and all the emanations of their minds those of the corporation? If they have any other, shall the corporation be punished for them?

Does not the argument attach a responsibility to the corporation for all the acts of a person in its employ? If it does not, where is the dividing line? It is all, or part. What part? This is the question which law-writers and judges have been answering for many years, and whether, in the estimation of any, it be or not "sheer nonsense," they have distinguished between those acts of the agent for which the corporation is, and those for which it is not liable.

What its "voice" commands, what its "hands" do, and the "schemes" which it executes, it should be and is held responsible for, whether done by direct or implied authority or subsequently ratified by them; and when they do this in wanton and willful disregard of the rights of others, they may, under the law as now administered, be punished by punitive damages.

But when the "voice" which speaks, and the "hand" which executes, is not that of the principal, however wanton, willful, and malicious it may be, the "stones," even, "cry out" against inflicting upon him a punishment therefor, and the more wanton and malicious the act, the more horrible is the doctrine.

Corporations are but aggregated individuals acting through the agency of man. They may consist of a single individual, or more, and they are no more ideal beings when thus acting than the individual thus acting. For certain acts the individual, though not manually engaged in it, is held

responsible. For the same acts the body of individuals, denominated a corporation, are held responsible. The principal and agent, in both cases, are separate and independent beings. Agents presuppose a principal,—somebody to act for. Somebody whose orders they are to execute, and somebody for whom they are to perform service; somebody who is answerable to them, and who may be answerable for the acts done under their direction. Mr. Justice Brown, in *Hibbard v. Railroad Co.*, before cited, says, "The conductor and those who aided him are not the company; they are its agents and servants." If the employee and servant is the corporation, in fact or legal intendment, it does not act through agents. Its acts are all the direct acts of principals without the intervention of any other power, and it carries us back to a responsibility for all the acts of a person employed by a corporation, whether those acts have any relation to his particular employment or not, a proposition too absurd and monstrous in its results to be entertained at all. Mr. Justice Campbell, in giving the opinion of the supreme court of the United States, in the case before cited (21 How. 202), says, the result of the cases is that for acts done in the course of its business and of their employment "the corporation is responsible, as an individual is responsible, under similar circumstances."

I, therefore, come to the conclusion that if liable at all to be punished for the malice of Jackson, it must be upon some other ground than their legal identity with him, and that in no sense can his malice be said to be their malice; and there seems to be strong indications in the charge of the presiding judge, that he, at that time, placed it upon no such grounds. The defendants, in view of this assumption by the plaintiff, "requested the presiding judge to instruct the jury that the plaintiff is not entitled to recover against the defendant company any greater damages than he might recover against Jackson himself, for the same cause of action upon similar evidence." This instruction the court declined to give, and remarked to the jury, "I think you cannot rightfully be required to enter into a consideration of the damages which a party, not now before the court, and has not, therefore, had an opportunity to be heard, ought to pay, and then measure the damages in this case which has been heard by those which you think might be just in another case which has not been heard. We will endeavor to decide this case right now, and when Jackson's case comes before us, if it ever does, we will endeavor to decide that right."

I think the argument is very strong from this remark, that it was not the malice and ill-will of Jackson that was designed to be punished, for he says his case has not been heard. The court say, substantially, we know not what excuses or justification he may offer when heard, if ever, "and when

his case comes before us, if ever it does, we will endeavor to decide that right." One would suppose that it was some "wanton, malicious act, committed in reckless and willful disregard of the rights of the injured party," by these defendants that was to receive such punishment as should "serve a warning and example to others," and not such an act done by Jackson. The argument would seem to proceed and say Jackson, for his act, may deserve one punishment, and those defendants, for their acts, may deserve another; and I cannot well forbear the inquiry here, if there is not here some evidence of an "attempt to distinguish between the guilt of the servant and the guilt of the corporation; or the malice of the servant, and the malice of the corporation; or the punishment of the servant, and the punishment of the corporation?" Was it here that "sheer nonsense" was enacted, and "the mind confused," and the "judgment confounded"?

If it was the malicious act of the defendants that was to be punished, the enormity of Jackson's wrong had indeed nothing to do with it. If it was the malicious wrong of Jackson that was to be punished, why should a party, innocent of all wrong in the matter, be punished more than the wrong-doer himself. If he was the corporation, why would not all the acts of extenuation and justification surrounding him be also the acts of the corporation, and be proper elements to be considered in graduating or fixing the penalty? How could his case come before us, if he was the corporation? Would it be to be punished for the act of the corporation?

If we hold both guilty and both liable, it must be founded upon the idea of two actors, and that the employee is not only the corporation but somebody else, and the nonentity of agent becomes itself a nonentity, and instead of a mere imaginary thing which swallows up and extinguishes all the relations of principal and agent, and renders any attempt to distinguish between them "sheer nonsense," we do have two distinct, independent, accountable subjects, susceptible of being brought before the courts to answer and be punished, and we are not left to the ideal action of punishing an ideal existence. Again; if the actor is brought before the court and punished, would he be punished for the act of the corporation or his own act? for the malice of the corporation, or his own malice? If imprisoned, should we say the corporation was imprisoned?

If not, and he is (as undoubtedly he may be) called to answer for an assault, and punished for an assault, when we come to fix the punishment, do we not distinguish between his guilt and the guilt of the corporation, his malice and the malice of the corporation? And when the rule is required that we punish him in the same manner and to the same extent as the corporation, should we not reply very much as did the presiding judge at the trial? I think there can be no two opinions

about the matter, and that there is manifestly a distinction between the two, and that there are two to distinguish between, and that when the act is authorized by any previous command or subsequent adoption, it is not, and cannot in the nature of things be made the act of another than the actor. Laws may be made making others responsible therefor, but it is the act of him who does it, and not of him who neither does nor authorizes it; and no amount of judicial legislation or refinement can make it so; as before remarked, it is not possible in the nature of things.

Again, if this servant is the corporation, what becomes of the law regulating the liability of the principal for an injury received by an employee while in the business of the corporation. It is held, that if the injury was produced by the carelessness or negligence of the master or corporation, they must respond in damages; but if produced by the act of a fellow-servant, they are not liable. Is not here a distinction recognized between the guilt of the servant and the guilt of the corporation? Is not here a manifest distinction noted and acted upon between the servant and corporation? If the servant is the corporation, it is the act of the corporation when done by the fellow-servant. But these cases say, no. You assume the risks arising from the acts of your fellow-servants, but not the acts of your principal, the corporation; when the corporation is negligent you may recover, but when it is the servant, you cannot. Again, I ask, how can this be, if the servant is the corporation? This new idea, it appears to me, has in it more of ingenuity than logic or substance; it is altogether ideal, and if it finds place in the law, it will be among its fictions.

The learned judge then adds, "And it might as well not be applied to them at all, as to limit its application to cases where the servant is directly and specially directed by the corporation to maltreat and insult a passenger, or to cases where such an act is directly and specifically ratified; for no such cases will ever occur." The instruction requested and refused, used the term directly or "impliedly," and with this sentence so amended, I have simply to say, that if no such case ever does occur, there is no occasion, right, or propriety in inflicting the punishment. If the act is neither directly nor impliedly authorized or ratified, there is in it no wantonness, no malice, and no ill-will toward the person injured, and no public wrong by them done to be redressed or atoned for. Repentance with them is absolutely impossible. The argument is simply this: if we do not punish you when you do not directly or impliedly authorize or adopt a wrong, we shall never have an opportunity, for you never will thus authorize or adopt one. The argument is clearly stated by the learned judge, and I leave it as he left it, remarking, that if the end to be attained is the punishment of railroad corporations whether guilty or innocent,

the rule requiring them first to be guilty of wrong had better be abolished.

That the learned judge meant to state his argument thus, is, I think, apparent from the remark which immediately follows: "that if those who are in the habit of thinking that it is a terrible hardship to punish an innocent corporation for the wickedness of its agents and servants, will for a moment reflect upon the absurdity of their own thoughts, their anxiety will be cured."

In *Railroad Co. v. Baum*, 26 Ind. 70, the court say: "Nor will sound policy maintain the application of a rule to railways or corporations on this subject, which shall not be alike applied to others, as has been intimated in some quarters. The suggestion is not fit to be made, much less sanctioned, in any tribunal pretending to administer justice impartially."

In another case it is said: "The law lays down the same rule for all, and we cannot make a different rule in the case of a servant of a railway company and an ordinary tradesman;" "and, therefore, treating Phillips as the servant, the company are not liable for his tortious act any more than other individuals would be." *Roe v. Railroad Co.*, 7 Eng. Law & Eq. 547.

With the criticism (if it be entitled to that appellation) of the opinion upon railroads and their management I have, in the position I now occupy, no occasion to deal. My duty I consider performed, and best performed, when I have endeavored to ascertain the law as it is, and apply it to causes as they are presented, rather than in making rules for any real or supposed grievances. The law-making power is ample to afford the necessary means of redress where none now exists; and did these great and growing evils really exist, we might reasonably expect to find the law-makers, the people, those who must suffer by their existence, exercising their corrective powers.

If the evil is not sufficient to induce the sufferers to provide a remedy, it will hardly justify the judiciary in leaving the clear path of the duty of expounding the law, and assuming the powers and responsibilities of law-makers. Perhaps there has been no one thing that has introduced into the law so much confusion and embarrassment as the engrafting policy of courts; adding here a little and there a little, till the original is covered with these judicial excrescences; and not unfrequently the jewel is lost in its surroundings of dross.

The plaintiff, in the printed brief of his argument presented in this case, says: "If, therefore, an individual master, perhaps personally innocent of positive evil intent is liable to punishment by exemplary damages for the malice of his servant, for a much stronger reason ought a soulless corporation to be responsible for the wicked and wanton acts of its sole representative."

In my judgment, if the premise were right

in this proposition, there is no reason why the conclusion is not right. But I know of no case where the master, innocent of all wrong upon his own part, has been held to be liable to punishment for the malice of his servant. It is only where he has been a participator in some manner in the wantonness and malice displayed in the act, and it is his own wanton and malicious act that is then punished. The plaintiff says further: "Besides, if corporations cannot be reached in exemplary damages for the malice of their servants, they escape entirely, and thus stand infinitely better than citizens who are liable in punitive damages, not only for their own personal acts, which latter it is obvious a corporation can never be guilty of in the strict sense." If citizens were liable in punitive damages for the malice of their servants, in nowise participated in by themselves, the conclusion that corporations would stand better than citizens, if they escaped a punishment for the malice of their servants, is irresistible; but again I say, I know of no law, authority, or reason for holding an innocent citizen to punishment for the malice of his servant or agent. It is quite as much as one can reconcile with just accountability to hold him to compensate for injuries maliciously inflicted in the course of his employment, without adding punishment.

The theory of punitive damages is the infliction of a punishment for an offense committed. It presupposes the existence of a moral wrong, an infraction of the moral code; a wrong in which the community has some interest in the redress, and in securing immunity from in the future. It presupposes also an offender, and designs to punish that offender. To punish one not an offender is against the whole theory, policy, and practice of the law and its administrators. "It is better that ten guilty men should escape than one innocent man should suffer." Before the smallest fine can be inflicted, evidence, leaving no reasonable doubt of the guilt of the party to be thus punished, must be adduced. Evidence that he possessed the evil intent, wicked and depraved spirit; that it was he that was regardless of social duty. The idea of punishing one who is not particeps criminis in the wrong done is so entirely devoid of the first principles and fundamental elements of law, that it can never find place among the rules of action in an intelligent and virtuous community. There is no parallel, for it is in the administration of the law, and courts of the highest repute have, whenever the question has arisen, declared it unsound in principle and inequitable in practice.

In *Hagan v. Railroad Co.*, 3 R. I. 188, Broughton, J., in delivering the opinion of the court says: "In cases where punitive or exemplary damages have been assessed, it has been done upon evidence of such willfulness, recklessness, or wickedness on the part of the party at fault as amounted to criminality, which for the good of society and

security to the individual ought to be punished. If, in such cases, or in any case of a civil nature, it is the policy of the law to visit upon the offender such exemplary damages as will operate as a punishment, and teach the lesson of caution to prevent repetition of such criminality, yet we do not see how such damages can be allowed, when a principal is prosecuted for the tortious act of a servant, unless there is proof in the case to implicate the principal, and make him particeps criminis of his agent's act. No man shall be punished for that of which he is not guilty. Cases may arise in which the principal is deeply implicated in the servant's guilt or fault,—cases in which the conduct of the principal is such as to amount to a ratification. In all such cases, the principal is particeps criminis, if not the principal offender; and whatever damages might properly be visited upon him who commits the act, might be very properly inflicted upon him who thus criminally participates in it. But where the proof does not implicate the principal, and however wicked the servant may have been, the principal neither expressly nor impliedly authorizes or ratifies the act, and the criminality of it is as much against him as against any other member of society, we think it is quite enough that he shall be liable in compensatory damages for the injury sustained in consequence of the wrong of a person acting as his servant."

In *Railroad v. Finney*, 10 Wis. 388, which was a case for putting a passenger off the cars before reaching the end of the route to which his ticket entitled him, the court below instructed the jury that "in this case, if you find the complaint sustained by evidence, you may give such damages as shall compensate the plaintiff for his loss by the act of the defendant, and also such exemplary damages as you may find proper under the circumstances." The defendants requested an instruction "that they should give the plaintiff such damages only as would compensate him for his loss by reason of putting off the cars; that they could not give vindictive or punitive damages, called smart-money." This instruction was refused. The court, in giving their opinion, say: "The judge improperly refused to instruct the jury as requested by defendants' counsel, that the plaintiff was only entitled to recover such sum as would compensate him for his actual loss by being put off the cars, and that he was not entitled to vindictive damages or smart-money. If it be admitted that the action of the conductor in expelling the plaintiff from the cars was willful and malicious, or so grossly negligent, oppressive, or insulting as to bring the case within the rule authorizing exemplary damages, if the suit had been brought against him; yet there was not one word of testimony offered showing, or tending to show, that such conduct on his part was either previously directed, or subsequently ratified or adopted by the company; although they may

be liable in this action to indemnify the plaintiff for the actual loss or damage which he sustained by reason of the misconduct of the conductor, because it occasioned a breach of their duty or obligation to carry him from Madison to Edgerton. Still it does not follow that they may be visited with damages by way of punishment, without proof that they directed the act, or subsequently confirmed it. Defendants are not to be visited with damages by way of punishment, without proof that they directed the act to be done, or subsequently confirmed it. Such damages are given by way of punishing the malice or oppression, and are graduated by the intent of the party committing the wrong. But how can such damages be assessed against a principal with such intent? Surely they cannot be. But in an action against the principal for the act of the agent, how can the question of their assessment be properly submitted to the jury when there is no evidence connecting the principal with such intent on the part of the agent? Clearly it cannot." The damages in this case were \$175, and the judgment of the court below was reversed.

Turner v. Railroad Co., 34 Cal. 594, was an action for unlawfully ejecting the plaintiff from a car by the conductor. The court below ruled "that the injury, if committed, and if a willful one on the part of the defendants in their servant the conductor, and accompanied by malice or such acts as in their nature tended to show a purpose of resentment or ill-will, or a disposition to degrade the plaintiff, entitled her to what is called exemplary damages." After some comment, and citing *Story, Ag. § 456*, 19 Wend. 343, and 14 How. 486, before referred to, the court say: "Tested by these principles, it is obvious that in this case the defendant was not liable for any malicious and wanton conduct of the conductor. If liable at all, its liability must be confined to the actual damages which the plaintiff suffered. To render the defendant liable to punitive damages, it was incumbent on the plaintiff to show that the act complained of was done with the authority either express or implied of the defendant, or was subsequently adopted by the company." "If her expulsion resulted from the malice of the conductor, or was accompanied by violence or personal indignity, the conductor alone is responsible for such damages as she may be entitled to for this cause beyond the actual damages resulting from her exclusion from the car, unless as before stated the company expressly or tacitly participated in the malice and violent conduct of the conductor. In other words, if the act of the conductor was wholly unauthorized, the company is liable for the actual damage, and the conductor alone for the punitive damages, if any."

There is another case in the same volume (34 Cal. 586,—*Pleasants v. Railroad Co.*), and decided upon the same grounds.

In *Clark v. Newson*, 1 Exch. 131, and 1 Welsb. H. & G. (a case of joint trespass by two), Pollock, C. B., said: "I think it would be very wrong to make the malignant motive of one party a ground of aggravation of damages against the other party who were altogether free from any improper motive. In such case the plaintiff ought to select the party against whom he means to get aggravated damages."

In relation to the views thus expressed, it is said by Mr. Justice WALTON, in his opinion, that: "In none of them was there any evidence that the servant acted wantonly or maliciously; they were simply cases of mistaken duty. And what these same courts would have done if a case of such gross and outrageous insult had been before them, as is now before us, it is impossible to say; and long experience has shown that nothing is more dangerous than to rely upon the abstract reasoning of courts, when the cases before them did not call for the application of the doctrines which their reasoning is intended to establish." Waiving, for the present, the question of fact as to whether they were or not simply cases of mistaken duty, we find in each of them the question of punitive damages legitimately and clearly raised and discussed, and the reasoning, such as it is, is before the profession. The cases are not cited as mere authority by reason of their being decided cases by courts of competent jurisdiction, but because the reasoning is believed to support the decision. If the reasoning is bad, fallacious, inconclusive, some would adopt the plan of exhibiting these facts by a course of reasoning of their own, rather than by promulgating a general proposition that it is unsafe to rely upon their reasoning. If the reasoning is sound and applicable to case at bar, it does not matter that it was, or was not necessarily called out in the case into which it has been introduced, and it requires some other answer than mere criticism upon course of proceeding by the judges in those cases.

That the gentlemen, composing the several courts alluded to, supposed the cases called for the decisions and reasonings they made, cannot well be doubted, and an examination of the cases as reported in the printed volumes of the reports referred to, will, I think, leave the reader in no doubt concerning that question.

There are some other cases to be found in the books not referred to on the defendant's brief to which I will advert as indicating the views of some of the courts in other states.

Ackerson v. Railway Co., 32 N. J. Law, 254, was an action to recover damages for injuries sustained while traveling in their cars by reason of the carelessness and disobedience of the employees of the road. The court say: "It appeared on trial that the defendants had adopted all needful rules and regulations for the running of their trains, and had employed competent persons as ten-

ders of the switch at which the accident occurred. No care or caution, required for the safety of the passengers, had been omitted by the company. Through the carelessness and disobedience of their agents the accident happened." "In fact, the only fault or negligence complained of was that of the employees of the company. Where a railroad company adopts all rules and regulations needful for the safety of passengers, and employs competent agents, whose duty it is to see that these rules and regulations are observed, I do not think that the company, in case of injury to the passengers happening by reason of the failure of the agent to perform his duty, can be held liable for punitive damages. If, however, the company, as such, is in fault, a different rule applies. The company, for its own carelessness, may be justly held liable for smart-money. This rule does not prevail where the carelessness is only that of a subordinate agent. There is no justice in punishing the company after it has done all in its power to prevent an injury. The agent, if guilty of negligence, may, in certain cases, be proceeded against by indictment. I cannot yield to the argument so earnestly urged by the counsel of the plaintiff, that by construction of law the company is guilty of gross negligence whenever its agent is, and is, therefore, to be treated the same as if through its own negligence the injury happened. I think the verdict was against the charge of the court in that it is, to some extent at least, for punitive damages. Full compensation to the plaintiff for all real loss, present and prospective, was the measure of damages."

Porter v. Railway Co., 32 N. J. Law, 261, argued at the same time, was determined upon the rules announced in this case.

These cases well indicate the views of the court in New Jersey. *McKeon v. Railway Co.*, 42 Mo. 79, was an action for an injury done to a passenger. The court, in giving their opinion, say: "If the conduct of this driver was willful and malicious with intent to injure the plaintiff, he might be liable to indictment for assault with intent to kill, or some other criminal offense; but his employer was not responsible for his crimes, nor liable for his acts of willful and malicious trespass. The company was answerable only for his negligence, or his incapacity, or unskillfulness in the performance of the duties assigned to him. In such cases we have no hesitation in saying, that punitive damages, or any damages beyond a full compensation for the injury sustained, cannot be allowed."

Railroad Co. v. Smith, 2 Duv. (Ky.) 556, was a case where the evidence tended to show that the car of the plaintiffs was upset by the carelessness of their driver, and defendant injured thereby. The instruction was, "That if the car was thrown from the track by the fast and careless driving of the defendants' (now plaintiffs') agent, they

should find for plaintiff (now defendant), and that the jury are not necessarily restricted to actual damages, but may, in their discretion, award such exemplary damages as they deem just and proper in view of all the facts in the case." The court say, the facts did not authorize a punishment of the defendants, and the court below should have restricted them to compensatory damages, and for this reason the judgment was reversed.

In the case of *Hill v. Railroad Co.*, 11 La. Ann. 292, the court used the following language: "In actions of this kind, it is not within the province of the jury, although negligence is clearly proven, to give vindictive damages, as is sometimes allowed in case of willful and malicious injuries. The company, in such cases, is not to be punished for the negligence of its agents as a crime."

Keene v. Lizardi, 8 La. 27, was an action brought to recover damages of defendants, ship-owners, for injuries to plaintiff's wife, at the hands of a master of a vessel on which she was a passenger. The evidence showed gross neglect and wanton outrage on the part of the master against the lady. In delivering the opinion of the court, the judge said: "It is true, juries sometimes give what is called smart-money. They are often warranted in giving vindictive damages as a punishment inflicted for outrageous conduct. But this is only justifiable in an action against the wrong-doer, and not against persons who, on account of their relation to the offender, are only consequentially liable for his acts, as the principal is liable for the acts of his factor or agent."

In *Railroad Co. v. Rogers*, 28 Ind. 1, it is said: "Whatever rule of damages would apply in a suit against a natural person, ought to apply in a suit against a corporation. Any discrimination in that regard would shock the public sense of impartial justice, and would be an unjust innovation. The instructions, governing subordinate employees and agents, may be devised in such utter disregard of the rights of others, that obedience to them will result in palpable wrong to individuals; whether it was so here was a question for the jury,"—thus putting the question whether the acts are done in obedience to instructions that the execution of would result in palpable wrong.

Post Co. v. McArthur, 16 Mich. 447, was an action by McArthur for publishing an alleged libel. The court say: "The employment of competent editors, the supervision, by proper persons, of all that is to be inserted, and the establishment and habitual enforcement of such rules as would probably exclude improper items, would reduce the blame-worthiness of a publisher to a minimum for any libel inserted without his privacy or approval, and should confine his liability to such damages as include no redress for wounded feeling, beyond what is inevitable from the nature of the libel. And no

amount of express malice in his employees should aggravate damages against him, when he has thus purged himself from blame." "While, therefore, in the present case the reporters were guilty of carelessness in receiving hearsay talk of legal charges, which could only be lawfully published in accordance with the documentary facts, and while there could be no justification for publishing outside scandal against an individual from any source whatever, yet the defendants were only responsible beyond the damages recoverable under any circumstances, for such a libel to the extent of their own conduct in the case, or want of care used in guarding their columns against the insertion of such articles."

In the case of *Railroad Co. v. Baum*, before cited, the court say: "But when the act is unnecessary to the performance of the master's service, and not really intended for that purpose, but is done by the servant to gratify his own malice, though, under pretense of executing his employment, it is not done to serve the master, and is not, in fact, within the scope of the employment, and the master is not, therefore, liable." "Under these circumstances, last enumerated, it is not easy to perceive, in the nature of things, any just reason for holding the master responsible. It will not do to say he shall answer in damages, because by employing the servant he gives him opportunity to maltreat those with whom he comes in contact in discharging his duties, that reason would hold the shop-keeper for any outrage committed by his clerk upon a customer; the merchant for the like conduct of his journeyman; and, indeed, it would be equally applicable to almost every department of business in the conduct of which it is necessary or convenient to employ assistants to deal with the public. Even the inn-keeper, whose cook feloniously mingles poison with the food of a guest, must then respond in damages."

In *Kleen v. Railroad Co.*, 37 Cal. 400, the court say: "As to the general rule upon that subject there can be no doubt. If the act of the conductor, in pulling the plaintiff off the cars was a wanton and malicious act, committed out of the course of his agency, the defendant cannot be held responsible for the manner in which he did it, unless, however, the defendant expressly authorized the act."

In the case of *The Amiable Nancy*, 3 Wheat. 546, which was a suit for a marine trespass, Mr. Justice Story, in delivering the opinion of the court, among other things says: "Upon the facts disclosed in the evidence, this must be pronounced a case of gross and wanton outrage without any just provocation or excuse; under such circumstances, the honor of the country and the duty of the court equally require that a just compensation should be made to the unoffending neutrals for all the injuries and losses actually sustained by them. And if this were a suit

against the original wrong-doers. It might be proper to go yet further and visit upon them, in the shape of exemplary damages the proper punishment which belongs to such lawless misconduct. But it is to be considered that this is a suit against the owners of a privateer upon whom the law has, from motives of policy, devolved a responsibility for the conduct of the officers and crew employed by them, and yet from the nature of the service they can scarcely ever be able to secure to themselves an adequate indemnity in cases of loss. They are innocent of the demerit of this transaction, having neither directed it, nor countenanced, nor participated in it in the slightest degree. Under such circumstances, we are of opinion that they are bound to repair all real injuries and personal wrongs sustained by the libellants, but they are not bound to the extent of vindictive damages.

In *Wardrobe v. Stage Co.*, 7 Cal. 118, the jury found for actual and exemplary damages in the sum of \$2,500. The chief justice, in delivering the opinion of the court, quoted with approval the opinion of Judge Story in *The Amiable Nancy*, and said: "When it appears that the coach at the time of the accident was driven by a servant or agent of the owner, the rule in such case is, that the principal is liable only for simple negligence, and that exemplary damages cannot be enforced against him."

In the case of *Moody v. McDonald*, 4 Cal. 297, the facts were similar to the above, and in the action brought against the principal for tortious acts of his servant, where the jury gave \$2,500 damages, and \$2,500 smart-money, the court disallowed the verdict for the smart-money, holding the principal liable only for compensatory damages.

In *McLellan v. Bank*, 24 Me. 566, the court says: "The first question obviously presented by the case is, can a corporation aggregate be chargeable with malice? Such corporations have been held answerable in trover; and might, perhaps, in other actions sounding in tort for all acts done by their officers under circumstances implying authority to do them. But it may well be doubted if such corporations can be implicated by the acts of their servants in transactions in which malice would be necessary to be found in order to the sustaining an action against them therefor."

Two cases are cited by Mr. Justice WALTON as sustaining the rulings of the presiding judge; one in New Hampshire, and one in Mississippi.

In the case in New Hampshire (*Hopkins v. Railroad Co.*, 36 N. H. 1) the ruling complained of was, "That if the jury should find the defendants guilty of gross negligence at the time of the collision, and the plaintiff's injury was occasioned by such negligence, they might in their discretion give exemplary damages."

"To this instruction two objections are made:

(1) That it is not a case for exemplary damages, because the negligence, which is the foundation of the suit, was the negligence of the defendant's servants;

(2) Because the facts of the case disclose no fraud, malice, violence, cruelty, or the like, nor any turpitude or moral wrong."

Upon the last point, the court hold that "gross carelessness in such case implies a heedless disregard for human life, and for the safety of passengers who intrust themselves to the care of the road, which brings the case very strongly within the rule that the wrong complained of, to warrant exemplary damages, must have something of a criminal character."

In relation to the first objection the court say: "The defendants are a corporation, and can act in no way but by their officers, agents, and servants; and when their officers, agents, or servants act within the scope of their authority and employment, it is the act of the corporation, and their negligence is the negligence of the corporation;" and they cite *Ang. & A. Priv. Corp.*, 386, and *Chestnut Hill Turnpike v. Rutter*, 4 Serg. & R. 6.

It will be noticed that the learned chief justice, who drew this opinion, makes only such acts of the agent, as are authorized by the corporation, their acts. It is such as are within the scope of their authority as well as employment. He does not say that unauthorized acts by the agent become the acts of the principal. His proposition conforms to the rules which we have before deduced from the authorities. A recurrence to the authorities, cited by him, will show this. Section 386, *Ang. & A. Priv. Corp.*, which is cited, reads as follows: "Yet it is somewhat remarkable that the question whether an action of trespass would be against a corporation should not, until within a very late period, have been the subject of express judicial decision. In the case of *Maud v. Canal Co.* it was expressly decided by the English court of common pleas, in 1842, that trespass will lie against a corporation. The action was brought for breaking and entering locks on a canal, and seizing and carrying away barges and coal. The trespasses, it was proved, had been committed by an agent of the company, which was incorporated by an act of parliament, and the barges and coal, it appeared, had been seized for tolls claimed to be due them. The only question being whether trespass would lie against a corporation aggregate for an act done by their agent within the scope of their authority. The court held, that when it is established that trover will lie against a corporation, there could be no reason why trespass should not also lie against them; that it was impossible to see any distinction between the two actions."

This section which is cited relates alone to the question whether or not trespass can be maintained when the act done was within the scope of their authority; that is the authority conferred by the corporation, and it is held, when the act is done by the authority of the corporation, it is the act of the corporation, and trespass will lie.

The next section, save one, which follows (388) says: "It is of importance, however, to be observed, that an action of trespass cannot be sustained against a private corporation for an act done by one of its agents unless done *communicato consilio*, or, in other words, unless the act has been directed, suffered, or ratified by the corporation. A corporation is liable for an injury done by one of its servants in the same manner and to the same extent only as a natural individual would be liable under like circumstances. The well-known rule of law is, that if the cause of an injury to a person be immediate, though it happens accidentally, the author of it is answerable in trespass as well as in case; but a master, whether a natural individual or an artificial one, is not liable for a willful act of trespass of his servant."

With these authorities before him we cannot well suppose he meant to include any unauthorized act of the agent. He was too good a lawyer to say that an act done against the master's orders and directions was the act of the master. Did these, however, leave us in doubt, what follows upon the same page of his opinion would seem to put the matter at rest, for he proceeds to say: "Corporations may be sued in trespass for the authorized acts of their servants; and if the trespass is committed by their authority, with circumstances of violence and outrage such as would authorize exemplary damages against an individual defendant, it is not easy to discover any ground for a different rule of damages against the corporation which the law charges with the consequences of the act as the responsible party. If a corporation like this is guilty of an act or default such as, in case of an individual, would subject him to exemplary damages, we think the same rule must be applied to the corporation."

This we understand to be in harmony with all the authorities, and comes within the first class of cases to which I have referred. The act is theirs, because done by their authority. Being theirs, they are held as would be an individual defendant. If unauthorized, it is not their act, although they may, upon other principles, be liable to compensate for the injury done.

The ground upon which exemplary damages is allowed is, that the trespass is committed by their authority with such circumstances of violence and outrage as would authorize exemplary damages against an individual defendant. I regard the law, as stated by the chief justice, as directly sustain-

ing the views that I present, viz.: that to be chargeable with the animus of the transaction, it must be theirs by previous authority, direct or implied, or subsequently adopted or ratified by them. The instruction in the court below required the defendants to be guilty of gross negligence to subject them to exemplary damages; and the sum total of the decision was that this was right, and that if the act was done by the authority of the defendants, it was the act of the principal. What evidence there was, if any, that the defendants participated in the act which produced the injury, does not appear; nor does it appear that the jury found the defendants were guilty of gross carelessness. All the remarks of the chief justice are made upon the hypothetical case of an injury happening through the gross carelessness of the defendant corporation.

The case in Mississippi came before the court on a motion to set aside the verdict. The discussion in the opinion is upon the propriety and authority of the court to set aside verdicts on account of the amount of damages in those cases where there is no fixed rule of computation, and the authorities cited are almost all of them upon this point. There was no ruling excepted to, and no question of law presented. Upon the matter of punitive damages, referred to by Judge Walton in his opinion, they say: "The case is much stronger for the defendant in error, than were the facts in the case of *Heirn v. McCaughan*, 32 Miss. 18. The decision in that case was conclusive in this, as to the form of action as well as the right of the jury, in such cases, to protect the public, by punitive damages, against the negligence, folly, or wickedness which might otherwise convert these great public blessings into the most dangerous nuisances."

It will be perceived that this case, so far as any consideration of punitive damages was concerned, was regarded as settled by the case in 32 Miss.

Looking at that case I find it was an action brought for an act done by a partner. *Heirn* with others were owners of a vessel. Grant, one of the owners, was the captain. The court say, by Hand, J.: "There was testimony tending to show that the captain in charge of the boat, which was published to stop at Pascagoula at the time specified, willfully and capriciously disregarded the obligation incurred by the publication, and that the failure occasioned great bodily exposure, and mental suffering and disappointment to the plaintiffs (now defendants); these circumstances were properly submitted to the jury, to be considered by them, with the circumstances of excuse or extenuation relied upon by the defendants; and it was their province to determine whether there was such fraud or willful neglect of duty causing oppression to the plaintiffs, and under such circumstances of aggravation as to warrant exemplary

damages. This was the substance of the rulings of the court upon this point, and we perceive no error in them."

This is the case which decided all that was said in 36 Miss. about punitive damages, and was an action brought against several partners for the act of one of them. The value of this case, in support of the principle that a railroad corporation may be punished for the malice of an employee, cannot, I think, be considered great, especially when, in the case in the 36th, we find this remark: "It is not enough that, in the opinion of the court, the damages are too high. It may not, rightfully, substitute its own sense of what would be a reasonable compensation for the injury, for that of the jury." Since the opinion in this case was drawn, and since writing this opinion, my attention has been directed by Mr. Justice WALTON to the case of *Railroad Co. v. Blocher*, 27 Md. 277, as a case sustaining the ruling of the court in the case at bar.

Upon an examination of that case, it will be found that a difficulty arose between the conductor of train upon the appellant's road and appellee about his ticket; the one contending it had been surrendered to the conductor, and the other averring it had not, and to prevent being put off the train, the appellee paid his fare; it subsequently appeared that he was right, and properly surrendered his ticket when called upon so to do. He alleged that the conduct of the conductor was violent and insulting.

At the trial of the case, the appellants requested the court to instruct the jury as follows:

"(7) If the jury believe the conductor caught the appellee violently, etc., by the collar and dragged him from his seat, while a passenger in the train, the appellee is not entitled to recover for the same in this action against the appellants, unless they believe the appellants authorized the act, and adopted and justified it since its commission."

"(8) That if the jury believe the conductor wrongfully extorted from the appellee the fare from Martinsburg to Baltimore, after the appellee had surrendered his ticket, etc., the appellee was not entitled to recover vindictive or punitive damages from the appellants, unless they expressly or impliedly participated in the tortious act authorizing it before, or approving it after, it was committed."

Concerning these two requests, the court say: "The conductors and employees of the corporation represent them in the discharge of these functions, and being in the line of their duty in collecting the fare or taking up tickets, the corporation is liable for any abuse of their authority, whether of omission or commission. Vide *Redf. R. R.* 381, note 6, and authorities there cited. The court was, therefore, right in rejecting so much of the defendants' prayers, as limited their lia-

bility to such tortious acts of their agents as they had either personally authorized or subsequently approved."

The seventh and eighth prayers, requiring the plaintiff to prove either previous authority or subsequent approval of the acts of the conductor to render the defendant liable, were rejected for reasons before assigned (those above copied). "The prayer of the appellee claims compensation for injury to his feelings and degradation of character. The appellant's eighth prayer affirms he is not entitled to recover vindictive or punitive damages against the company, unless they expressly or impliedly participated in the tort, by authorizing it before, or approving it after. We have already declared our opinion on the latter branch of this proposition. This court, in the case of *Gaither v. Blowers*, 11 Md. 552, said, that where the injury was accompanied with force or malice, the injured party might recover exemplary damages. The action being *vi et armis*, or in that character, the jury were authorized to give whatever damages the evidence showed the immediate consequence of the wrong warranted, and which necessarily resulted from the act complained of. 2 Greenl. Ev. §§ 80, 254; *McNamara v. King*, 2 Gilman, 436; *McTavish v. Carroll*, 13 Md. 439."

This is all that is said upon this question. I have quoted the requested instructions, and the remarks of the court upon them. The conclusion of the court, and the law of that case, is found in these words: "The action being *vi et armis*, or in that character, the jury were authorized to give whatever damages the evidence showed the immediate consequences of the wrong warranted, and which necessarily resulted from the act complained of."

A careful examination of that case will disclose the fact that the question of damage raised and decided, was whether the plaintiff had a right in such case to recover "for injury to his feelings, and degradation of character." This was the prayer of the appellee, and he asked no more, and no other instruction was given. These were treated as exemplary damages by the appellants, and they sought, by their request, to limit the damages to the actual physical and pecuniary injuries. An examination of the authorities cited by the court in their opinion will lead to the conclusion that they regarded that as the question, and considered such damages exemplary damages. They cite Mr. Greenleaf for the rule they lay down, and I hazard the opinion that Mr. Greenleaf never expected to be quoted as an authority for punitive damages in civil actions. (See his note to section 253, volume 2, on Evidence.) The case of *Gaither v. Blowers*, referred to, goes no further than Mr. Greenleaf, and his language, *totidem verbis*, is used as the authority for the doctrine advanced.

Mr. Greenleaf, in the note referred to,

speaking of the term "exemplary damages," as used by the courts in a case he is reviewing, says: "From this and other expressions it may well be inferred, that by actual damages the court meant those which were susceptible of computation, and that by exemplary damages or smart-money they intended those damages which were given to the plaintiff for the circumstances of aggravation attending the injury he had received, and going to enhance its amount, but which were left to the discretion of the jury, not being susceptible of any other rule."

The rulings, in the case at bar, covered all these intangible matters before reaching the point of punishing the defendant corporation. They had been told "to consider the injury to his feelings, his wounded pride, his wounded self-respect, his mental pain and suffering occasioned by the assault, and the feeling of degradation that necessarily resulted from it." This was going as far as the court in Maryland went or was asked to go, and does not reach the ground of complaint in the case at bar. I find no evidence in it of a design to go beyond this; the rule was declared in plain terms to be such damages as "the evidence showed the immediate consequence of the wrong warranted, and which necessarily resulted from the act complained of." This certainly does not include damages by way of punishing the defendants. Such damages would not be the immediate consequence of the wrong, and necessarily resulting from it.

Some comment is made concerning the retention of Jackson in the defendant's employ. All that I find, in the report of the case concerning the matter, is a statement, made by the plaintiff in his testimony, that he had seen him several times since, in performance of duties upon the train.

So far as any question arises upon the rule of damages laid down in the instruction, it is quite apparent this is perfectly immaterial, and could be regarded, in any event, only as remote evidence of ratification. If he was retained in their employ, we do not know under what circumstances; possibly they were such as would have furnished to the mind of any reasonable man a perfect justification; sitting here, we must take the report as we find it. The opinion states that the jury undoubtedly regarded it as "a practical ratification and approval of his conduct." Could they have done so if they had been correctly instructed in the theory now advanced? What was there to ratify? Yea, more, who was there to ratify? If the servant is the corporation, and the act of commission was the act of the corporation, was there anything to ratify? Was it not an original act of the corporation? Did they ratify their own act? If the act of commission was originally theirs, the act of retention was a subsequent act, having no relation to the first. Did that infringe any right of his? If it did, it was a new and substantive cause of

complaint not embraced in this declaration. If, however, the theory which is now advanced is not only novel but unsound, and that previous command or subsequent approval was necessary to warrant the infliction of punishment, the matter was of vital importance, and the defendants should have had the advantage of the instruction. It is not quite right, I think, to now assume that the jury regarded it as a ratification. Possibly the gentlemen composing that jury were not quite prepared to find that the gentlemen composing the administrative and executive departments of that corporation were so lost to all that is decent and honorable among men, and so blind to their own interests that they would justify an act condemned by everybody. Giving full force to the encomiums bestowed in the opinion upon juries, might we not conclude that they would be more likely to infer, from the circumstances, that such amends had been made as honorable gentlemen would require, rather than convict them of an act that any prison convict would cry out against?

Will it do to shield the verdict with that which the jury were substantially told was immaterial?

I have not considered this case upon the motion, or upon any facts supposed to be proved by the evidence reported, nor have I considered the question whether, under the plaintiff's declaration, he can recover upon the grounds set forth in the opinion. I have only considered the rule advanced by the instructions. Under this rule a railroad corporation may exercise all possible care in the selection of servants, and strictly enjoin them from day to day against any irregularity of conduct; yet if one of them, unmindful of his duty, regardless of his master's interest, and bent on exercising some private malice against a person who happened to be a traveler, assaults him, the corporation must not only make full compensation for all the injury, under the most liberal rules, but may be punished for an act they have used every endeavor within the reach of human power to prevent. One committed by another, against their wishes, interest, and positive commands; and it is to be such a punishment as will "serve as a warning and example to others."

If we were punishing the actor himself, we should consider the probable effect of a given punishment upon him; but when, for his offense, we punish another, how can we form any idea of the influence of a punishment he cannot feel. The master may discharge him from his employment, and he thus feel the punishment another suffers indirectly, and to that extent. It will be perceived, however, that this is the extent for all classes, kinds, and degrees of offense. It is the only channel through which he can be made to feel it. But suppose it were otherwise, is the punishment which is inflicted upon the innocent

party any the less keen, unjust, and onerous?

Is that in any degree affected by the manner in which the offender receives the intelligence of its infliction upon another? Again; how shall the corporation avoid the constant recurrence of penalties for the offenses of others? Can they, when they select another servant, exercise any more care or be more watchful over him? Can they change the passions of men? What is their fault if they have exercised all the care, wisdom, and prudence with which men are invested? Must they be punished for not being omnipotent?

If the idea and design of punishment is to restrain the offender and make the punishment serve as a warning to others, how can it better be done than by making it personal; inflicting it upon the offender? How can its influence upon others be made more restraining than by the reflection that they must personally suffer the same punishment if they offend? Is the reflection that others will suffer it, more potent with that class of individuals? Has the observation of men led to this conclusion? And if it has, have all the principles of reason, right, and justice yielded to it and made it right?

If the punishment, thus inflicted, is to serve as a warning to others, who must take warning? Evidently the innocent as well as guilty. The innocent are to be the greatest sufferers by reason of the offense, and punished alone directly. It is to serve as a warning to all innocent persons, that they may be punished for the offenses of others, after having fully compensated the injury done.

One other consideration I barely suggest. The liability in this case is based upon a contract; purely so. No liability could, under the proof, arise by the rules of law applicable to master and servant. Had the plaintiff been a stranger to the defendants, and had no claims upon them, except such as each citizen owes to the other, no liability of any kind would have attached to these defendants for the willful trespass of their servant. Not only would they be saved punishment, but compensation even. Now it being a case where no liability would attach, but for the contract, and the liability which does attach being for breach of contract, the rule in this

case is not only punishing one for the act of another, but it is doing this in an action *ex contractu*, for this declaration must be construed to be such to meet the law of the opinion.

All consideration of the matter tends to show the fundamental error in holding an innocent party liable to punishment. In all these acts, done by the command of the principal (whether the authority appears by direct command or by fair implication from the proceedings of the party charged), there is propriety in punishing if the act be wrong and an infraction of the moral code; but in those cases where the act is unauthorized, and the principal is in nowise connected with the animus of the actor, and becomes liable to compensate upon grounds other than that the act was done by his command, it appears to me that all punishment inflicted, or rather all suffering imposed under the name of punishment, is flagrant injustice; it is not punishment, for it has not its necessary antecedent, wrong: both reason and authority are opposed to it, and no case can be found, where the question has been presented and discussed, in which such doctrines are not denounced as unsound and unjust. In addition to the cases which I have cited, there is the pregnant fact that no case can be found in Massachusetts or New York where it has ever had any sanction, even in the inferior courts; and no case can be found, that I am aware of, where any party has sought to establish any such rule by an appeal to the superior courts or courts of last resort in those states. Yet these states are a net-work of railroads, and questions of liability are constantly arising and being settled by the courts of those states. It appears to me the fact has some significance.

The rule established in this case is so important, and fraught with such results under the ordinary modes of administering law, that I have felt impelled to enter my dissent at length, and regret that the pressure of other duties has prevented me from giving a more extended examination of the authorities, and the compression of them and my own views into a narrower compass.

WHEELER & WILSON MANUF'G CO. et
al. v. BOYCE.

(13 Pac. 609, 36 Kan. 350.)

Supreme Court of Kansas. April 8, 1887.

Error from Shawnee county.

Waters & Eusminger, for plaintiffs in error.
G. N. Elliott, for defendant in error.

JOHNSTON, J. This is a proceeding to reverse a judgment rendered in an action for false imprisonment, brought by Jacob F. Boyce against the Wheeler & Wilson Manufacturing Company, C. S. Baker, and J. W. Hughes. Hughes was dismissed from the action, and the judgment went only against the plaintiffs in error. The facts upon which the case was disposed of are substantially these: The Wheeler & Wilson Manufacturing Company, a corporation organized for the manufacture and sale of sewing-machines, was engaged in business at Topeka, Kansas, and C. S. Baker was its general agent at that place. The company had sold a sewing-machine to Mary Hatfield, who subsequently married Jacob F. Boyce, the defendant in error. She paid a part of the purchase money, and signed a contract, in substance that the title to the machine should remain in the company until the balance of the purchase money was paid. In November, 1881, the company directed its general agent to bring an action of replevin against Mary Boyce to recover the machine, claiming that there was a balance due thereon, a claim which she denied. An action of replevin was begun before a justice of the peace, and a writ was issued and placed in the hands of Constable Hughes, who reported that he had made search for the machine, and was unable to obtain possession of it. C. S. Baker, the agent of the company, then directed Hughes to make and file an affidavit before the justice of the peace, alleging that Mary Boyce and her husband, Jacob F. Boyce, were in possession of the machine, and had refused to deliver it to him, and thus obtain a warrant for their arrest. This was done, and the justice issued a warrant to the constable commanding him to arrest Boyce and his wife, and commit them to the Shawnee county jail, there to remain until they should deliver the machine. Under this warrant, Jacob F. Boyce was arrested and placed in jail without being taken before the justice, and without any examination, hearing, or trial. The constable informed the general agent of the company that he had arrested Boyce, and placed him in the county jail as requested, and Baker replied: "Now, I guess he will give up the machine." The replevin action resulted in a judgment in favor of Mary Boyce. Jacob F. Boyce was held in the county jail for 10 days, and was never taken before any court or officer for examination or trial, and was finally discharged

at the instance of the plaintiffs in error, and he became sick in consequence of his confinement. He at once instituted this action, and the jury awarded him damages in the sum of \$1,000, and the verdict was approved by the trial court.

The plaintiffs in error complain chiefly of the rulings of the court in the matter of charging the jury. The jury were instructed that, if the evidence justified it, they could find exemplary damages or smart-money against the defendants. After the jury had been out some time, and had practically agreed upon their verdict, the court recalled them, and advised them that he was in error in giving the instruction that they might in their discretion assess exemplary damages, and withdrew it from the jury, telling them that in their deliberations they should not consider the instruction ~~withdrawn~~. Objection was made to the withdrawal of the instruction, and an application of plaintiffs in error for leave to address the jury after the modification had been made was denied, and this ruling is assigned as error. This decision affords the plaintiffs in error no ground for complaint. The action of the court was favorable rather than prejudicial to their interests. The instruction given was predicated upon sufficient facts, was warranted under the law, and the defendant in error alone had reason to complain of its withdrawal. It is a well-established principle of jurisprudence that corporations may be held liable for torts involving a wrong intention, such as false imprisonment; and exemplary damages may be recovered against them for the wrongful acts of their servants and agents done in the course of their employment, in all cases and to the same extent that natural persons committing like wrongs would be held liable. In such cases the malice and fraud of the authorized agents are imputable to the corporations for which they acted. This principle is too well settled to require argument, and the authorities sustaining it are numerous and well-nigh unanimous. *Railroad Co. v. Slusser*, 19 Ohio St. 157; *Railroad Co. v. Dunn*, 19 Ohio St. 162; *Goddard v. Railway*, 57 Me. 202; *Railroad Co. v. Quigley*, 21 How. 213; *Railroad Co. v. Arms*, 91 U. S. 489; *Railroad Co. v. Bailey*, 40 Miss. 395; *Railroad Co. v. Blocher*, 27 Md. 277; *Hopkins v. Railroad Co.*, 36 N. H. 9; *Railroad Co. v. Hammer*, 72 Ill. 353; *Reed v. Bank*, 130 Mass. 443; *Fenton v. Machine Co.*, 9 Phila. 189; *Goodspeed v. Bank*, 22 Conn. 530; *Boogher v. Association*, 75 Mo. 319; *Wheless v. Bank*, 1 Baxt. 469; *Jordan v. Railroad Co.*, 74 Ala. 85; *Williams v. Insurance Co.*, 57 Miss. 759; *Vance v. Railway Co.*, 32 N. J. Law. 334; *Cooley, Torts*, 119; 3 *Suth. Dam.* 270, and cases cited; 2 *Wait, Act. & Def.* 447, and cases cited. The same doctrine has been fully recognized on several occasions by this court. *Railroad Co. v. Rice*, 10 Kan. 437; *Railway Co. v. Weaver*, 46 Kan. 456;

Railway Co. v. Kessler, 18 Kan. 523; Railway Co. v. Little, 19 Kan. 269; News Co. v. Wilmarth, 33 Kan. 510, 6 Pac. 786. The withdrawal of the instruction, although erroneous, was beneficial to the plaintiffs in error, and there can be no reversal unless the erroneous ruling is injurious to the party complaining.

It is next contended that the company cannot be held liable for the wrongful acts of Baker and the constable, and an instruction is challenged which holds that, if the agent of the company caused and procured the illegal arrest and detention of the defendant in error as charged, the company and its agents were both liable. Baker was the managing agent of the company; his authority was general, and the constable acted wholly under his direction and sanction. He had not only authority to sell machines, and collect the money due for the same, but it is conceded that he had authority to institute legal proceedings to recover possession of the machines conditionally sold, and for which payment had not been made in accordance with the terms of sale. The arrest and detention of Boyce was incidental to the replevin action, and was made, as alleged, to compel the delivery of the machine under a provision of the Justices' Code relating to replevin, which provides that where the defendants, or any other persons, knowingly conceal the property replevied, or, having the control thereof, refuse to deliver the same to the officer, they may be committed until they disclose where the property is, or deliver the same to the officer. Comp. Laws 1879, c. 81, § 69. He had full authority to represent the company, and whatever was done by him was done for the benefit of the company, and for the accomplishment of its purpose. His act, although wrongful, was in the line of his employment, was done in the execution of the authority conferred upon him, and must be regarded as the act of the company. To make the corporation responsible, it is not necessary, as plaintiffs in error contend, that the principal should have directly authorized the particular wrongful act of the agent, or should have subsequently ratified it. Judge Story, in treating of the liability of principals for the acts of their agents, says that "the principal is held liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances or misfeasances and omissions of duty of his agent in the course of his employment, although the principal did not authorize or justify or participate in, or, indeed, know of such misconduct, or even if he forbade or disapproved of them," and to sustain this he cites numerous authorities. "In all such cases," he says, "the rule applies, respondent superior, and it is founded upon public policy and convenience, for in no other way could there be any safety to third persons in their dealings, either directly with the principal,

or indirectly with him through the instrumentality of agents." Story, Ag. § 452.

They complain, further, of an instruction in which the court stated that the warrant under which Boyce was taken and held in custody was illegal and void, and insufficient in law to justify his arrest and imprisonment. The warrant, as we have seen, was issued upon an affidavit charging Boyce with having control of the property replevied, and of refusing to deliver it to the officer who had the writ. There was no process issued except the warrant, and it commanded that he be committed at once to the county jail until he should deliver the property to the officer. No notice was given to him that the charge stated in the affidavit had been made against him, nor was an opportunity given him to refute it. The order of commitment was not based upon any examination, hearing, or trial, but was arbitrarily made, in the absence of Boyce, upon ex parte statement. The plaintiffs in error attempt to justify this action, though not seriously, we think, under section 69 of the Justices' Code, already referred to, which reads as follows: "Whenever it shall be made to appear, to the satisfaction of the justice, by the affidavit of the plaintiff or otherwise, that the defendant, or any other person, knowingly conceals the property sought to be recovered, or, having control thereof, refuses to deliver the same to the officer, the justice may commit such defendant or other person until he or they disclose where such property is, or deliver the same to the officer." The proceeding authorized by this statute is virtually one for the punishment of contempt. Whether a party is to be brought before the justice of the peace upon a notice or by attachment, or what the initial proceeding shall be, is not expressly provided. The section quoted does provide what punishment shall finally be visited upon a party; but this punishment is not to be administered until the guilt of the party is "made to appear to the satisfaction of the justice." This language implies that there is to be a hearing and an adjudication of the charge upon its merits. When a contempt is committed in facie curiæ, the punishment is generally summary, and no initial proceeding is required; but, when it is not committed in the view of the court, the initial proceedings are necessary, and the party must have notice and opportunity to defend. The most common initial process is a rule or order to show cause why an attachment or warrant for contempt should not issue, of which service should be made; and, in a proceeding to punish for criminal contempt, personal notice of the accusation is indispensable. Whatever procedure may be adopted, it is certain that a party cannot be condemned without notice; and a final judgment rendered, as was done in this case, without a hearing or an opportunity to defend, is void. Rap. Contempt, § 96. While the language of the statute is not very ex-

plicit, it does not require the interpretation contended for, and, if it did, it would necessarily be held void.

The final error assigned is that the damages awarded are excessive. This assignment is as groundless as those already considered. The case is an aggravated one, and the conduct of the plaintiffs in error exhibited a wanton and reckless disregard of the rights of the defendant in error. He was not a party to the replevin action, and the testimony is that the machine in controversy was purchased long before he was married to the plaintiff in that action, and that he had no interest in or control over it. He was thrust into jail, without warning or trial, when there was no civil or criminal suit pending against him, and kept there for 10 days with 17 or 18 prisoners who were either charged with or convicted of crimes. The sewing-machine sought to be recovered from his wife had been paid for, and belonged absolutely to her; and plaintiffs in error, with knowledge of this fact, undertook to

compel the payment of money not due, or the recovery of property which they did not own, by the arrest and incarceration of the defendant in error, without cause, and in a manner that was clearly illegal. Apart from the loss of time and interruption to his business, as well as the humiliation and indignity suffered by him by being thrust into jail upon a false charge, it appears that the confinement resulted in his sickness; and when we consider the malicious and oppressive conduct of the plaintiffs in error, and that the case is one which calls for the infliction of exemplary or punitive damages, we can only conclude that the verdict of \$1,000 in favor of the defendant was fully justified, if not too small. We can say without hesitation that an award of a larger amount would not have been disturbed on the ground that it was excessive.

It follows that the assignments of error must be overruled, and the judgment of the district court affirmed.

All the justices concurring.

LOUISVILLE & N. R. CO. v. BALLARD.

(3 S. W. 530, 85 Ky. 307.)

Court of Appeals of Kentucky. March 5, 1887.

Appeal from circuit court, Marion county.

Wm. Lindsay and Rountree & Lisle, for appellant. Hill & Rives, for appellee.

HOLT, J. The appellee, Lou. E. Ballard, after purchasing a proper ticket, took passage from one intermediate station to another, upon a passenger train of the Louisville & Nashville Railroad. It failed to stop at the platform at her place of destination, which was a flag station. It was a down grade at that point, and there is some evidence tending to show that the car brakes did not operate well, in consequence of which the train ran some 50 or 60 yards beyond the platform, where it was stopped, and the station then announced by the proper person, but the appellee did not get off the train. Upon the other hand, there is testimony tending to show that this stop was not made, and that no effort was made to stop the train, until it was done at the request of the appellee, at a point between her destination and the next station. The weight of the evidence shows that the conductor then informed her that she could either go on to the next station, or he would stop the train and she could get off there; and that, upon his so telling her the second time, he did stop it, and she got off at that point, which was a lonely place, and about a mile beyond her station.

She says that the conductor "seemed very impatient, and his tone was rather rough for a gentleman;" that he did not assist her in getting off with her baggage, which consisted of a valise and bundle; and that, as she jumped from the lower step of the platform to the ground, he stood upon the platform, while a brakeman of the train, who was standing by, looked at her and "grinned." Upon the other hand, there is evidence to the effect that the conductor did assist her out of the car, and was altogether kind and polite in his manner. There was no request upon her part that the train should be backed to her station, but this should have been done, under the circumstances. The appellee was compelled to walk back to her station, and from thence, three-quarters of a mile, to her home, in consequence of which she was confined to her bed the most of the time for three or four days, and unable to teach her school for a week. The jury in this action by her for damages returned a verdict for \$3,000.

Manifestly it cannot be sustained upon the ground that it did not include exemplary damages, and was compensatory only, for a breach of the contract for transportation. If upheld, it must be on the ground that she was entitled to exemplary damages, and that this question was submitted to the jury by

proper instructions. They were told: "If the jury believe from the evidence that the defendant's agents or employes, or any of them, in charge of defendant's train, carried the plaintiff beyond the station for which she had purchased a ticket, and refused to put her off at her station, and were indecorous or insulting, either in words, tone, or manner, they should find for the plaintiff, and award her damages in their discretion, not exceeding five thousand dollars, the amount claimed in the petition."

A corporation can act only through natural persons. It of necessity commits its business absolutely to their charge. They are, however, selected by it. In the case of a railroad, the safety and comfort of passengers is necessarily committed to them. They act for it. Its entire power, pro hac vice, is vested in them, and as to passengers in transitu they should be considered as the corporation itself. It is therefore as responsible for their acts in the conduct of the train, and the treatment of the passengers, as the officers of the train would be for themselves, if they were the owners of it. Public interests require this rule. They also demand that the corporation should be and it is liable for exemplary damages in case of an injury to a passenger resulting from a violation of duty by one of its employes in the conduct of the train, if it be accompanied by oppression, fraud, malice, insult, or other willful misconduct, evincing a reckless disregard of consequences. *Dawson v. Louisville & N. R. Co.*, 6 Ky. Law Rep. 668.

As to female passengers the rule goes still farther. Their contract of passage embraces an implied stipulation that the corporation will protect them against general obscenity, immodest conduct, or wanton approach. *Com. v. Power*, 7 Metc. (Mass.) 596; *Craker v. Railway Co.*, 36 Wis. 657; *Nieto v. Clark*, 1 Cliff. 145, Fed. Cas. No. 10,202; *Chamberlain v. Chandler*, 3 Mason, 242, Fed. Cas. No. 2,575.

It was improper, however, to instruct the jury, as was in effect done in this instance, that "indecorous" conduct alone is sufficient to authorize exemplary damages. The term is too broad. It may embrace conduct which would not authorize their infliction. It is true that the peculiar element which, entering into the commission of wrongful acts, justifies the imposition of such damages, cannot be so definitely defined, perhaps, as to meet every case that may arise. It has been said that they are allowable where the wrongful act has been accompanied with "circumstances of aggravation," (*Chiles v. Drake*, 2 Metc. [Ky.] 146;) or if a trespass be "committed in a high-handed and threatening manner," (*Jennings v. Maddox*, 8 B. Mon. 430;) or where the tort is "accompanied by oppression, fraud, malice, or negligence so great as to raise a presumption of malice," (*Parker v. Jenkins*, 3 Bush, 587;) or, as was said in

Dawson v. Railroad Co., *supra*, where the wrongful act is accompanied by "insult, indignity, oppression, or inhumanity."

It would, however, be extending the rule unwarrantably to hold that they could be imposed provided the conduct was merely "indecorous." This, as defined by Webster, and as commonly understood, means impolite, or a violation of good manners or proper breeding. It is broad enough to cover the slightest departure from the most polished politeness to conduct which is vulgar and insulting. It does not necessarily, or, indeed, generally, involve an insult. The latter assumes superiority, and offends the self-respect of the person to whom it is offered, while the former excites pity or contempt for the one guilty of it. A word or act may be both indecorous and insulting, but yet it often lacks the essential elements of an insult.

In the case now under consideration the jury may have believed it was indecorous in the conductor not to stop the train at the platform, or not to carry her valise for her when she was leaving the train, or to let her get off between stations, although she chose to do so rather than suffer inconvenience by being carried to the next one, or in merely telling her that she could walk back to her station; yet none of these things amounted to "insult, indignity, oppression, or inhumanity."

The lower court properly refused the request as made for special findings. The interrogatories offered merely required the jury to say what amount they found as compensatory, and what sum as exemplary damages. They involved mixed questions of law and of fact.

Upon a retrial the question of limiting the finding to compensatory damages should be presented to the jury under proper instructions, and the difference between them and those which are exemplary defined.

The evidence as to the conduct of the brakeman was competent. It is true that it was not specifically complained of in the petition, but only that of the conductor. The brakeman was, however, one of the agents of the railroad company in the management of the train upon which the appellee was a passenger. It is not necessary that a petition should enumerate specifically that this or that person connected with the management of the train was guilty of improper conduct in order to authorize the admission of evidence as to this or that particular party. It is sufficient to aver the breach of duty upon the part of those in control of the train. Besides, in this instance, the conduct of the brakeman complained of was in the immediate presence of the conductor, and occurred at the time of the other alleged acts of which the appellee complains. We do not mean to say whether he was guilty of improper conduct or not, but it was a part of the *res gestæ*, and therefore admissible. Any circumstances attending the commission of a trespass or a wrong, although not set forth in the declaration, may be given in evidence, with a view of affecting the question of damages, save where they within themselves constitute an independent cause of action. Sedg. Dam. side p. 538, note 3.

For the reason indicated, the judgment below is reversed, and cause remanded for a new trial and further proceedings consistent with this opinion.

SOUTHERN KANSAS R. CO. v. RICE.

(16 Pac. 817, 38 Kan. 398.)

Supreme Court of Kansas. Feb. 11, 1888.

Error to district court, Johnson county; J. P. Hindman, Judge.

Action brought by Benjamin Rice against the Southern Kansas Railroad Company on October 31, 1885, to recover as damages the sum of \$1,000 for being unlawfully assaulted and ejected from a passenger car by the conductor thereof while returning from Kansas City, Missouri, to Olathe, in this state; the plaintiff at the time having a ticket to ride as a passenger in the car. Subsequently the railroad company filed an answer containing a general denial. Trial had at the March term, 1886. The jury returned a verdict for the plaintiff, and assessed his damages at \$117.46, and also made the following special findings of facts: "(1) Did the conductor act willfully, and in a grossly negligent manner, in putting the defendant off the train? Answer. He willfully put him off the train. (2) Did the conductor act with a reckless disregard of the plaintiff's rights? A. Yes. (3) Did the plaintiff state to the conductor that he had purchased his ticket the day before, and could the conductor have easily ascertained that fact from the passengers who were acquainted with plaintiff? A. In this case he could. (4) How much do you allow plaintiff as exemplary damages? A. \$71.75." "First. How much do you allow plaintiff for pecuniary loss? A. \$71. Second. Was plaintiff injured in person by the conductor? A. No. Third. How much do you allow plaintiff for injury to his person? A. Nothing. Fourth. Did plaintiff lose any time by reason of defendant's conductor refusing to honor his ticket, and, if so, how much? A. No. Fifth. How much do you allow plaintiff for loss of time? A. Nothing. Sixth. How much do you allow plaintiff for inconvenience in going from his seat to the platform and back again? A. Nothing. Seventh. Was plaintiff treated in an insulting or brutal manner by the conductor? And, if so, state fully how. A. An insulting manner. Eighth. How much, if anything, do you allow plaintiff for injury to his feelings? A. \$10.00. Ninth. How much, if anything, do you allow plaintiff for expenses, attorney's fees, or time in prosecuting this case? A. \$35.00." The defendant filed a motion to set aside the verdict of the jury, and for a new trial, which was overruled. Subsequently, judgment was entered upon the verdict. The railroad company accepted, and brings the case here.

Geo. R. Peck, A. A. Hurd, and Robert Dunlap, for plaintiff in error. John T. Little and Samuel T. Seaton, for defendant in error.

HORTON, C. J. (after stating the facts as above). On October 29, 1885, Benjamin Rice, a colored man, purchased of the ticket agent of the Southern Kansas Railroad Company

at Olathe, in this state, for 50 cents, a limited railroad ticket to Kansas City, Missouri, and return, good for three days; the date of issue being stamped on the back. On that day he was carried as a passenger by the railroad company upon one of its passenger trains from Olathe to Kansas City. The "going coupon" of the ticket was torn off, and taken up by the conductor of the train. On the next day, October 30th, Rice, desiring to return to Olathe, boarded one of the passenger trains of the company, which left Kansas City about 10 o'clock p. m., and, when the conductor called upon him for his fare, presented the "return coupon" of the ticket, which he had purchased the day before. The conductor took it to the light, and, after examining it, handed it back to Rice, saying it was not good, and informed him that he could not honor it. Rice insisted that the ticket was good, and said to the conductor that he had purchased the ticket the day before, and that he (the conductor) had carried him upon the ticket to Kansas City on that day. Another passenger also stated to the conductor, at the time, that he had seen Rice purchase the ticket on the 29th. The conductor replied that he could not honor the ticket, and subsequently took hold of Rice's coat-collar, and led him out of the car. Rice had no money to pay any extra fare; and when he was off the car, or about to get off, a friend gave him 75 cents, which he gave to the conductor, who returned him 5 cents, punched a receipt for his fare, and permitted him to ride to Olathe.

On the part of Rice, it is contended that the ticket he presented showed plainly on its back that it was stamped at Olathe on the 29th of October; that he told the conductor that he did not have any money to pay any more fare; that he was quietly in his seat as a passenger when ordered by the conductor to leave the train; that he did not make any forcible resistance to the orders of the conductor; but that the conductor took him out of the car, and off upon the steps of the platform. On the part of the railroad company, it is claimed that the ticket had been folded up and creased at the date; that the conductor took it to the light, and examined it carefully; that the date was obliterated; that the ticket looked so old and worn that the conductor believed it had expired; that he informed Rice that the ticket was not good, and that he could not ride upon it, but would have to pay fare; that, when the train reached Holliday, the conductor inquired of Rice what he was going to do; that Rice then refused to pay fare or get off the train; that the conductor then took hold of Rice's coat-collar, and led him to the platform of the station, or to the last step of the car; that then a friend told Rice to come back, and he would give him money to pay his fare; and the conductor permitted Rice to take his seat and ride to his destination; that, when Rice was informed that he would

have to pay his fare or leave the car, it was his duty to do one or the other; that he should have paid his fare, and relied upon his remedy to recover it back; that, if he could not do this, he should have quietly left the train, and not provoked or made necessary an assault; that therefore he should have recovered only 71 cents, that amount being the sum assessed by the jury for his pecuniary loss.

The railroad company asked instructions which tended to limit the amount of damages that Rice was entitled to recover to the exact fare paid by him, with interest thereon. The court refused to give these instructions, but directed the jury, among other things, as follows: "I instruct you that if you find the plaintiff presented to the conductor for his passage a limited ticket, good only for three days from the date of its sale; and that the conductor, from the mutilated and worn condition of the ticket, was unable to read the date on the ticket, and honestly believed that the ticket was an old one, and not good; and for this reason, and without any unnecessary force or indignity to the plaintiff, required him to pay his fare or get off, and did, upon refusal and failure to pay fare, remove said plaintiff without any unnecessary force, and without injury to his person, to the platform of the car, or to the platform or ground at a regular station; and then plaintiff paid his fare, and continued his journey on the same train, and without delay,—then, if you find as a fact that the ticket presented by plaintiff was a good and valid ticket, and that the conductor had no right to collect this fare from the plaintiff, you must find a verdict for the plaintiff, and the measure of his damages would be the amount of fare paid by him, with interest at seven per cent. per annum from October 30th, 1885, and actual compensation for the injury and outrage, if any, suffered by plaintiff from the alleged assault." We perceive no error in this instruction. Inactions for the recovery of damages for the wrongful expulsion of a passenger from a train, the passenger may recover for his time, inconvenience, the necessary expenses to which he is subjected, and if treated with violence, or in an insulting manner, for the injuries to his person and feelings. If the expulsion be malicious, or through negligence which is gross and wanton, then exemplary damages may be awarded. "There is a special duty on the carrier to protect its passengers, not only against the violence and insults of strangers and co-passengers, but, a fortiori, against the violence and insults of its own servants; and that for a breach of that duty he ought to be compelled to make the amplest reparation. The law wisely and justly holds him to a strict and rigorous accountability. We would not relax in the slightest degree this strict accountability. We know that upon it, in no small degree, depends the safety and comfort of passengers." *Railway Co. v. Weaver*,

16 Kan. 456; *Railway Co. v. Kessler*, 18 Kan. 523. We fully concede that no one has a right to resort to force to compel the performance of a contract made with him by another; and a passenger about to be wrongfully expelled from a railroad train need not require force to be exerted to secure his rights, or increase his damages. For any breach of contract or gross negligence on the part of the conductor, or the other employes of a railroad company, redress must be sought in the courts, rather than by the strong arm of the person who thinks himself about to be deprived of his rights. A passenger should not be permitted to invite a wrong, and then complain of it. *Hall v. Railroad Co.*, 15 Fed. 57; *Townsend v. Railroad Co.*, 56 N. Y. 301; *Bradshaw v. Railroad Co.*, 135 Mass. 409; *Railroad Co. v. Connell*, 112 Ill. 296; *Car Co. v. Reed*, 75 Ill. 125; 3 Wood, Ry. Law, § 364. Of course, a party upon a train may resist when, under the circumstances, resistance is necessary for the protection of his life, or to prevent probable serious injury; nor can a party be lawfully ejected from a train while in motion, so that his being put off would subject him to great peril. In this case Rice made no unreasonable resistance. He did not resort to force or violence. Having a good ticket, and being entitled to ride, he refused to pay fare or get off the train. The conductor had no difficulty in leading him off, and about all that Rice did was merely to assert his lawful right to ride upon the train. Where a passenger with a clear right and a clean ticket is entitled to ride on that trip and train, and is wrongfully ejected without forcible resistance upon his part, the jury are, and ought to be, allowed great latitude in assessing damages. They should award liberal damages in full compensation for the injuries received. The quiet and peaceable behavior of a passenger is to his advantage, rather than to his detriment.

Complaint is also made of other instructions of the court regarding the measure of damages. Among other things, the court said to the jury that if "the assault was malicious, and without cause or provocation, or was accompanied by acts of gross insult, outrage, or oppression, you may award the plaintiff exemplary or vindictive damages." Also, "that in estimating damages they might take into consideration the indignity, insult, and injury to plaintiff's feelings by being publicly expelled." Further, that, if they found "there was on the part of the conductor either malice, gross negligence, or oppression, they would not be confined in fixing damages to the actual damages received, but were justified in giving exemplary damages." It is said that these instructions were misleading and erroneous, because there was no evidence whatever to show that the conductor acted with malice or gross negligence. Upon the evidence of Rice, corroborated by McCulloch, another passenger, who said that

he saw Rice purchase the ticket on October 29th, there was evidence before the jury upon which to found these instructions. *Hufford v. Railroad Co.* (Mich.) 31 N. W. 544. The forcible expulsion of Rice from the car where he was rightfully seated was such a wrong as is inevitably accompanied with more or less outrage and insult. There was no excuse for the act of expulsion, except the honest mistake or the gross negligence of the conductor. If that mistake was due to such reckless indifference to the rights of a passenger on the part of the conductor as established gross negligence, amounting to wantonness, and the jury so found, they might find exemplary damages. *Railroad Co. v. Kessler*, supra; *Railroad Co. v. Rice*, 10

Kan. 426. Whether the conductor was grossly negligent, amounting to wantonness, or actuated by malice, were matters before the jury, for their determination upon the evidence. Under the authority of *Titus v. Corkins*, 21 Kan. 722, Rice was entitled to recover the expenses incurred by him in the litigation, if entitled to exemplary damages. *Hall v. Railroad Co.*, 15 Fed. 95-97. The amount of the verdict in this case was only \$117.46; therefore the damages are not so excessive as to indicate passion or prejudice on the part of the jury. The other matters submitted are immaterial.

The judgment of the district court will be affirmed.

All the justices concurring.

*A dissenting opinion
this case not in law*

LOUISVILLE, N. A. & C. RY. CO. v.
WOLFE.

(27 N. E. 606, 128 Ind. 347.)

Supreme Court of Indiana. May 23, 1891.

Appeal from circuit court, Harrison county;
W. T. Zenor, Judge.

C. L. Jewett, H. E. Jewett, E. C. Field, D.
J. Wile, and S. O. Pickens, for appellant. A.
Dowling, for appellee.

OLDS, C. J. This is an action by the appellee against the appellant for being wrongfully expelled from the appellant's train by its servants, with force and violence, under humiliating circumstances. Issues were joined on the complaint by a general denial and answers in justification,—one alleging the non-payment of fare, and the other non-payment of fare, and the use of profane and indecent language, and that he was guilty of disorderly conduct. The appellee replied in denial to the answers in justification. There was a trial by jury, and a verdict in favor of the appellee for \$1,500 damages. The jury also returned answers to special interrogatories. Appellant moved for judgment on the interrogatories and answers, also for a new trial, and to modify the judgment; all of which motions were overruled, and judgment rendered on the verdict. Appellant's counsel discuss three propositions: First, that appellee, by his conduct and language, forfeited his right to be carried as a passenger, and appellant had the lawful right to eject him from the train; second, that the damages are excessive; and, third, that the court erred in the instruction given in relation to damages. The jury by their answers to interrogatories find that appellee, on August 29, 1887, purchased a ticket at New Albany for passage on appellant's train from New Albany to Mitchell, Ind., and on said day he took passage on appellant's train for Mitchell, and, on demand of the conductor, surrendered his ticket. That the conductor demanded fare or a ticket twice before stopping the train to put appellee off, and the train was stopped not at a regular station or stopping-place to put him off. That the train was stopped before any effort was made to eject appellee, and before he was put off the train he said to the conductor: "If you say I did not give you a ticket, you are a God damned lying son of a bitch." That the words were spoken in a loud voice, and there were ladies in the car at the time. That when the trainmen undertook to put the appellee off the train he resisted, and struggled, and attempted to hold onto the seats in the car, and while so resisting he was injured about the arms and hands, and this was all the physical injuries he received. It is insisted that these facts entitled the appellant to a judgment, notwithstanding the general verdict, on the theory that the appellee, by the use of the profane and improper language in a loud tone in the presence of the lady passengers, forfeited

his right to be carried as a passenger, and the conductor had the right to stop the train and put him off. It is assumed in the argument that this finding of fact shows the appellee to have used this improper language before the train was stopped for the purpose of putting him off, but this assumption is not warranted by the finding. The finding is that he used this language "just before he was put off of defendant's train." We do not think it presents the proposition discussed by counsel, viz., that if a passenger delivers to a conductor a ticket or pays his fare, and afterwards the conductor calls upon him to again pay his fare, and disputes the first payment, and a dispute arises, in which the conductor demands fare, and the passenger refuses to pay it on the ground that he has once paid, but in his refusal he becomes boisterous, and is guilty of unbecoming conduct, or the use of vulgar, obscene, and profane language, he forfeits his right to be carried further, notwithstanding he has paid his fare; and the conductor may stop the train, and expel him without liability. For aught that appears in the finding in this case, the appellee may have conducted himself in a perfectly civil and gentlemanly manner until the train was stopped, and the employes of the appellant had taken hold of him, and a struggle ensued, and the appellee taken from his seat; and that it was just as he was about to be finally ejected from the car when he used the language. If such were the facts,—and they may have been, for aught that appears from the finding,—it would present a very different case than if the language was used in the first instance; for in such a case as we have put it would be clear that the language used had nothing to do with the ejection from the train. It would be clearly apparent, under such a state of facts, that he would have been ejected without regard to the use of the language; but, conceding that the language was used before the train was stopped, it does not appear that he was ejected on account of the vile language used. It is undoubtedly true that a passenger, by a breach of decorum, either by his acts or his language, may forfeit his right to be carried as a passenger, and may be expelled from the train, notwithstanding he has paid his fare; and this may be true even if he be led to such breach by reason of an insult offered him by an employe of the company. A wanton insult or false accusation often causes a sudden outburst of temper, and the use of language which one in an instant after regrets, and feels the mortification more keenly than do those in whose presence it is uttered. One who utters language in a heat of passion, caused by a sudden and wanton insult and unexpected charge against his truthfulness and honesty, must be dealt with more leniently than if the language is used deliberately, without provocation, or after reasonable time for second thought, and opportunity to bridle and control his passion.

The fact that a false and slanderous charge is made in the heat of passion may be proven in mitigation of damages. If a conductor, after having received a ticket for fare from a passenger, should return to him, and falsely deny having collected his fare or received a ticket, and demand pay again, and it is refused, and the conductor should abandon any further effort to collect again the fare or refrain from making any threats of putting him off the train, and the passenger, after having reasonable time to control himself, should persist in the use of profane or indecent language, to the annoyance of other passengers, he would no doubt violate his right to be carried; at least, if the unearned fare was tendered back to him; but the company cannot justify the act of the conductor in expelling a passenger who has paid his fare on account of his having, in the heat of passion, when he was falsely charged with the failure to pay, used improper language, such as was used in this case, in response to such false charge, even though it was heard by other passengers; the wrong committed by the passenger was provoked by the conductor. It does not lie in the mouth of the appellant to say: "True, you paid your fare. You had the right to be carried. But when the conductor falsely charged you, in the presence of the other passengers, with not having paid your fare, and demanded that you again pay fare or he would stop the train and put you off, you became angry; you used improper language to the conductor in the presence of lady passengers." If the theory contended for by the appellant be the true one, then it would be an inducement for the employees of railroad companies, under such circumstances, to wantonly and purposely address the passenger in such a manner as to provoke him to the use of bad language or bad conduct as affording an excuse, in case he refused to pay a second time, to eject him from the train. The damages sued for accrue on account of an injury on the part of the employé of the appellant to the appellee. The offense committed by the appellee is against the other passengers. He was provoked to the commission of it by the act of the employé of the appellant in falsely accusing him, in the presence of the other passengers, of not having paid his fare. Certainly the company ought not to defend against the unlawful act of their agent on account of such unlawful act having provoked a breach of decorum, or even a breach of the peace, on the part of the appellee. It is true the lan-

guage used was unjustifiable, and was an insult to those in whose presence it was uttered; but it is evidently the fact that this breach of decorum was provoked and caused by an insult offered by the conductor to the appellee in the presence of the passengers; and we see no just reason why, under such circumstances, it should operate as a defense to appellee's right of action, and bar him from a recovery.

It is next contended that the verdict is excessive, for the reason that the jury find that all the physical injuries inflicted were caused by the appellee resisting, and that he cannot recover for the injury caused by his resistance. There is nothing to show that the jury did include any damages for the injury occurring by reason of appellee's resistance; but, the appellee being lawfully in the car, and having paid his fare, he had the right to be carried, and had the right to make reasonable resistance, as he did by holding onto the seats; and he was forced loose and taken from the car; and for such damages as he sustained on account of such removal from the car the appellant is liable. *English v. Canal Co.*, 68 N. Y. 454; *Railroad Co. v. Rice*, 38 Kan. 398, 16 Pac. 817; *Railway Co. v. Acres*, 108 Ind. 548, 9 N. E. 453; *Railroad Co. v. Holdridge*, 118 Ind. 281, 20 N. E. 837.

Some objection is made to the giving of the seventh instruction, and the refusal to give instruction 7 asked by appellant. We have examined these instructions, and think there is no available error in the instruction given. It is evident the jury was not misled by any technical error in the language used, even if it is erroneous. The instruction relates to the right to give exemplary damages, and there was some evidence which, if true, authorized the assessment of exemplary damages. *Railroad Co. v. Rogers*, 38 Ind. 116. When the offense is not punishable by the criminal law, and malice or oppression weigh in the controversy, exemplary or vindictive damages may be assessed. What we have said as to the other alleged errors disposes of the question presented by the instruction refused.

It is further contended that a new trial should have been granted by reason of accident and surprise on account of an absent witness. There is no diligence shown, no application for a continuance, and the evidence is merely cumulative. There is no error in the record. Judgment affirmed, at costs of appellant.

STEVENSON v. SMITH et al.

(28 Cal. 103.)

Supreme Court of California. April, 1885.

Appeal from district court, Second judicial district, Tehama county.

The facts are stated in the opinion of the court.

George Cadwalader, for appellant. W. S. Long, for respondents.

SAWYER, J. This is an action to recover a mare and colt seized by the defendant (sheriff of Tehama county) under an attachment, and damages for their detention. Plaintiff recovered the property. Plaintiff moved for a new trial on the ground that certain special damages, claimed to have been proved, were not found for him. The motion was denied, and the plaintiff appeals from the order denying a new trial.

The appellant claims that the evidence shows that the animals were placed by defendants in fields where the pasturage was poor, and that in consequence of this act they lost flesh and depreciated in value to the extent of five hundred dollars. Also that the mare was a valuable brood mare, taken to Tehama county for the purpose of being bred to a particular horse, and that by reason of the taking and detention by defendants the breeding season was lost, whereby a further damage was shown to have been sustained to the amount of five hundred dollars, and that the court should upon the evidence have found these items of damage for plaintiff.

On examination of the pleadings, we find no averments in the complaint that would authorize the recovery of the items claimed. These damages are special, and the facts out of which they arise must be averred, or they cannot be recovered.

Mr. Chitty says: "Damages are either general or special. General damages are such as the law implies, or presumes to have accrued from the wrong complained of. Special damages are such as really took place, and are not implied by law, and are either super-added to general damages arising from an act injurious in itself,—as when some particular damage arises from the uttering of slanderous words actionable in themselves,—or are such as arise from an act indifferent, and not actionable in itself, but only injurious in its consequences," etc. 1 Chit. Pl. 395.

Again: "It does not appear necessary to state the former description of the damages in the declaration, because presumptions of law are not in general to be pleaded or averred as facts, etc. * * * But when the law does not necessarily imply that the plaintiff sustained the damages by the act complained of, it is essential to the validity of the declaration that the resulting damage should be

shown with particularity. * * * And whenever the damages sustained have not necessarily accrued from the act complained of, and consequently are not implied by law, then, in order to prevent surprise on the defendant, which might otherwise ensue at the trial, the plaintiff must in general state the particular damage which he has sustained, or he will not be permitted to give evidence of it. Thus in an action of trespass and false imprisonment, where the plaintiff offered to give in evidence that during the imprisonment he was stinted in his allowance of food, he was not permitted to do so, because the fact was not, as it should have been, stated in the declaration; and in a similar action it was held that the plaintiff could not give evidence of his health being injured, unless specially stated. So in trespass for taking a horse, nothing can be given in evidence which is not expressed in the declaration, and if money was paid over in order to regain possession, such payment should be alleged as special damages." Id. 396.

The complaint in this case only alleges the ownership of the animals, the value, the wrongful taking and detention, the demand, and that plaintiff "has sustained damages by reason of such wrongful taking and detention of said chattels and property in the sum of one thousand dollars."

From these facts alone the law does not imply either of the items of damages claimed to have been proved. The first item is not even consequential upon any of the facts alleged, but results from other acts of defendants while the animals were in his possession. And the second item of damages would not necessarily result from a mere taking and detention. These damages depend upon an extraordinary value of the animal for a particular purpose, and upon the special use to which she was capable of being applied. The facts out of which these items of special damages arise must be alleged in the complaint, or they cannot be recovered. They are not alleged, and are, therefore, not embraced within the issues to be tried. For this reason, if for no other, the plaintiff is not entitled to judgment for such items of damages. There was, then, no error in not finding for plaintiff on these points.

The only other point made by appellant is, that the court erred in not giving plaintiff costs. There is no doubt in our minds that the plaintiff was entitled to costs. But this error in no way affects the finding, and is not a ground for new trial. The error cannot, therefore, be corrected on appeal from an order denying a new trial. The proper mode of reviewing and correcting this error is on appeal from the judgment, but no such appeal has been taken in this case.

Judgment affirmed.

WABASH WESTERN RY. CO. v. FRIEDMAN.

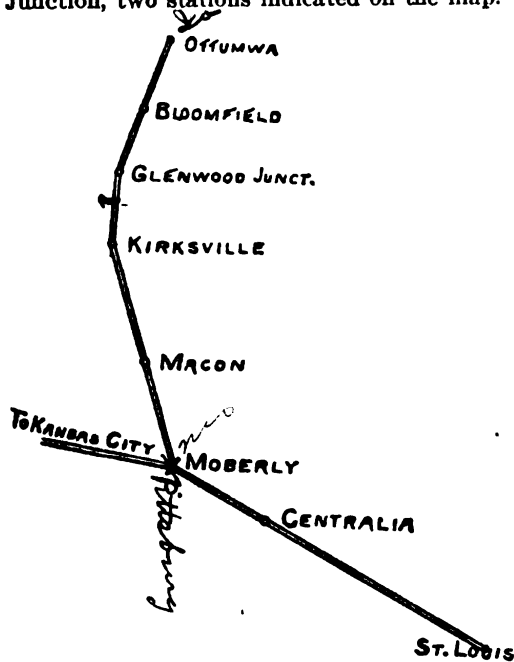
(30 N. E. 353, 34 N. E. 1111, and 146 Ill. 583.)
Supreme Court of Illinois. March 24, 1892.

Appeal from appellate court, First district.

Action by Oscar J. Friedman against the Wabash Western Railway Company to recover damages for personal injuries. Plaintiff obtained judgment, which was affirmed by the appellate court. Defendant appeals. Reversed.

George B. Burnett (Black & Fitzgerald, of counsel), for appellant. Page, Eliel & Rosenthal (J. W. Duncan, of counsel), for appellee.

CRAIG, J. This was an action brought by Oscar J. Friedman against the Wabash Western Railway Company to recover damages for a personal injury received on the 1st day of May, 1888, while plaintiff was a passenger on the defendant's line of road, running from Moberly, Mo., to Ottumwa, Iowa. The following map shows the line of defendant's road. The accident which resulted in the injury complained of occurred in the state of Missouri, between Kirksville and Glenwood Junction, two stations indicated on the map.



Distance from Centralia to Moberly, 24 miles.
Distance from Moberly to Ottumwa, 131 miles.
Distance from Kirksville to Glenwood Junction 25 miles.

The declaration contained five counts, but they are all substantially alike. In the second count, it is averred that defendant was on May 1, 1888, operating a railroad from Kirksville, Mo., to Glenwood Junction, Mo., and operating trains for the conveyance of passengers for reward; "and the said plaintiff, at said Kirksville, then became and was a passenger in a certain train of the said defendant on the said railroad, to be carried,

and was accordingly then being carried, in the said train, from Kirksville to said Glenwood Junction," for reward, etc.; that it became and was the duty of the said defendant to properly and safely construct and maintain the track and road-bed of said railway, but the defendant so negligently constructed and maintained the same that the same were not then safe for the use of passengers on defendant's trains, "and the rails of said track of said railroad were then and there in bad repair and condition, and a certain rail in the said track had become broken by reason of the said negligence of the said defendant, and thereby a certain car then being in the said train, and of a sort commonly called 'sleeping-cars,' was then and there thrown with great force and violence from and off the said track;" and plaintiff, being then and there asleep and in the exercise of due care, was thrown from the berth in said car, in which he was sleeping, with great force and violence, across the car, and into the opposite berth, "by means whereof, then and there, the spine and spinal column, including the spinal cord, of the said plaintiff, became and were greatly bruised, hurt, and injured, and the said plaintiff suffered and incurred an injury of the kind known as 'concussion of the spine,' " whereby he incurred expenditures, in endeavoring to be healed, amounting to \$5,000, and became sick, lame, etc., "from thence hitherto," suffering great pain and being prevented from attending to his business, and thereby losing profits, etc. In the conclusion of the declaration the plaintiff claimed damages amounting to \$50,000. The defendant pleaded the general issue, and on a trial before a jury the plaintiff recovered \$30,000, and the judgment, on appeal to the appellate court, was affirmed.

It will be observed that in each count of the declaration the plaintiff, in stating where the relation of passenger and common carrier commenced, and where such relation existed between the plaintiff and the defendant, averred as follows: "And the said plaintiff, at said Kirksville, then became and was a passenger on a certain train of the said defendant on the said railroad, to be carried, and was accordingly then being carried, in the said train, from Kirksville to said Glenwood Junction," for reward, etc. No evidence was introduced on the trial that the plaintiff became a passenger at Kirksville for Glenwood Junction; but the plaintiff testified that he took the sleeper at Moberly to go to Ottumwa, and that he had a ticket which read, from Moberly to Ottumwa, which he had purchased at Moberly in the fall of 1887. The testimony offered for the purpose of proving the averment of the declaration was objected to on the ground of a variance between the evidence and the declaration; but the court overruled the objection, and allowed the evidence to be introduced. Upon the question of variance the defendant asked the court to instruct the jury as follows:

"The averment in plaintiff's declaration that he became a passenger in the train of defendant at Kirksville, Mo., to be carried from said Kirksville to Glenwood Junction, is material, and must be proved as alleged; and if the jury believe from the evidence that said plaintiff did not at the time in question become a passenger in said train of defendant at said Kirksville, to be carried to said Glenwood Junction, then the jury will find for defendant, regardless of all other questions in the case." But the court refused to give the instruction as prayed, but qualified it by adding as follows, to-wit: "But if it appear from the evidence that plaintiff was a passenger on the train of the defendant between the points mentioned, traveling from a point south of said Kirksville to a point beyond Glenwood Junction, then the averment in the plaintiff's declaration is sufficiently made out." It may be said that the question involved is a technical one, and hence not entitled to that consideration which a court should give to a question which goes to the merits of an action. The plaintiff had the right, when the question was raised, to amend his declaration, and thus obviate the difficulty; but he saw proper to take another course, and he occupies no position now to complain, should the rules of law that control in such cases be strictly enforced against him. But, while the question involved may be regarded somewhat technical, still it will be remembered that the plaintiff is seeking to recover a large sum of money, and the defendant has the right to demand and insist that the grounds upon which the plaintiff claims a right of recovery should be clearly and concisely stated, and that the case made on the declaration should be proven as laid. If a plaintiff may allege in his declaration one ground of recovery, and on the trial prove another, a defendant never could be prepared for trial. One great object of a declaration is to notify the defendant of the nature and character of the plaintiff's demand, so that he may be able to prepare for a defense; but if one ground of action may be alleged, and another proven, a declaration would be a delusion, and, instead of affording a defendant notice of what he was called upon to meet, it would be a deception. Here the plaintiff claimed that the relation of passenger and common carrier existed between him and the defendant, and that the defendant owed him a duty growing out of that relation. In speaking of a declaration in such a case, Chitty on Pleading says: "When the plaintiff's right consists in an obligation on the defendant to observe some particular duty, the declaration must state the nature of such duty, which we have seen may be founded either upon a contract between the parties or on the obligation of law arising out of the defendant's particular character or situation, and the defendant must prove such duty as laid; and a variance will, as in actions on contract, be

fatal." Chit. Pl. 382. The same author also says: "In an action on the case founded on an express or implied contract, as against an attorney, agent, carrier, innkeeper, or other bailee, for negligence, etc., the declaration must correctly state the contract or the particular duty or consideration from which the liability results, and on which it is founded; and a variance in the description of a contract, though in an action *ex delicto*, may be fatal, as in an action *ex contractu*. The declaration in such case usually begins with a statement of the particular profession or situation of the defendant and his retainer, and consequent duty or liability. The declaration will be defective if it does not show that by express contract or by implication of law, in respect to the defendant's particular character or situation, etc., stated by the plaintiff, the defendant was bound to do or omit the act in reference to which he is charged." Chit. Pl. p. 384.

It may, however, be said that the statement in the declaration of the point from which and to which the plaintiff was being carried was mere inducement, and need not be proved as laid. Upon a question of this character, Chitty on Pleading (page 292) says: "In general, however, every allegation in an inducement which is material, and not impertinent and foreign to the cause, and which, consequently, cannot be rejected as surplusage, must be proved as alleged, and a variance would be fatal; and consequently great attention to the facts is necessary in framing the inducement, and care must be taken not to insert any unnecessary allegation." If, therefore, the allegation is to be regarded as inducement, it was necessary to prove it as alleged. And at page 385 the author further says: "It is also a rule that if a necessary inducement of the plaintiff's right, etc., even in actions for torts, relate to and describe and be founded on a matter of contract, it is necessary to be strictly correct in stating such contract; it being matter of description. Thus, even in case against a carrier, if the termini of the journey which was to be undertaken be misstated, the variance will be fatal. Here the allegation in the inducement relates to matter of description." *Harris v. Rayner*, 8 Pick. 541, is a case in point. The action was brought to recover for an injury sustained by the oversetting of a stage-coach. The plaintiff alleged in his declaration that he paid defendants, for his passage in their stage from Albany to Boston, \$10, the usual fee for said passage, and defendants, in consideration thereof, undertook and promised carefully to transport plaintiff in said passage from Albany to Boston. In support of the declaration the plaintiff proved that he was in a stage from Worcester to Boston, and that he arrived at Boston the coach was overturned by the carelessness of the driver, and he was thereby injured. It was held that the evidence did not prove the

contract set out in the declaration, and in passing upon this point the court said: "We think there was no sufficient proof at the trial of the contract as alleged in the declaration. The declaration alleges a contract on the part of the defendants to transport the plaintiff from Albany to Boston. The proof was that the plaintiff rode in defendants' stage from Worcester to Boston; and, although this is part of the route from Albany to Boston, yet it is part, also, of many other lines of travel. So that the contract as alleged remains without proof." In *Tucker v. Cracklin*, 2 Starkie, 385, and in *Railroad & Banking Co. v. Tucker*, 79 Ga. 123, 4 S. E. 5, actions were brought against carriers for the loss of goods; and in each case it was held that a variance between the proof and allegation as to the termini of the carriage was fatal. In *Phillips, Ev.* (volume 3, p. 268,) the author says: "The plaintiff will be nonsuited if the termini of the journey are not correctly set forth." In *Railroad Co. v. Sutton*, 53 Ill. 398, the point was made that an averment in the declaration of defendant's undertaking to convey the plaintiff from West Urbana to Tolono is not sustained by proof of an undertaking to convey from Champaign City to Tolono. In disposing of the question of variance, it is said: "It would appear from the testimony that West Urbana and Champaign City are one and the same place; consequently, there was no variance." The averment in plaintiff's declaration that he became and was a passenger at Kirksville, to be carried to Glenwood Junction, for reward, was, in effect, a statement that he took the defendant's train at Kirksville for Glenwood Junction, and that he had paid or was ready to pay his fare from one point to the other when called upon, whereupon there was an implied contract on the part of the railway company to safely carry him from one point to the other. We think it plain that the averment in plaintiff's declaration was not sustained by proof that he became a passenger at Moberly for Otumwa. It may be true that plaintiff stated more in his declaration than he might have stated; that he might have relied upon an allegation that he was a passenger upon defendant's cars, being carried for reward, without stating definitely the termini of his journey on defendant's line of road. But, having gone into detail in his allegation, the law requires him to prove them as laid. What is said in *Bell v. Senneff*, 83 Ill. 125, is in point here: "As a general rule a party is required to prove the averments of his pleadings as he makes them. He may aver more than is required; but, as a general rule, he must prove them, although unnecessarily made." In *Derragon v. Rutland*, 58 Vt. 128, 3 Atl. 332, it was held that every averment which the pleadings make material as a descriptive part of the cause of action must be proved as alleged; and any variance which destroys the legal identity of

the matter or thing averred with the matter or thing proved is fatal. In *State v. Copp*, 15 N. H. 212, it is said: "It is a most general rule that no allegation which is descriptive of the identity of that which is legally essential to the claim or charge can be rejected." See, also, 1 *Phillips, Ev.* pp. 709, 710; *Steph. Pl.* p. 124, appendix. Here the plaintiff was bound to allege that he was a passenger on defendant's train of cars for reward. This was material, and the further averment that he became a passenger at Kirksville for Glenwood Junction was descriptive of the identity of that which was legally essential. It could not be rejected or disregarded. In conclusion, we think it plain, under the authorities, that there was a variance between the proof and the declaration; and the court erred in the admission of the evidence, and in the modification of defendant's instruction.

On the trial the plaintiff was permitted, against the objection of the defendant, to introduce evidence tending to prove that the plaintiff at the time of the injury was receiving a compensation for his services as a traveling salesman of \$3,000 per annum. The declaration contained no allegation of any special contract or engagement of the plaintiff with any person under which he might earn money for his services. In *Railway Co. v. Klauber*, 9 Ill. App. 613, in discussing a question of this character it is said: "Neither of these allegations points to any damages growing out of or depending upon the peculiar circumstances or business of the defendant. In *Tomlinson v. Derby*, 43 Conn. 562, the plaintiff was injured by means of a defective highway, and his allegation was that he was thereby 'prevented from transacting his ordinary business;' and it was held that, under such allegation, he could not show that he was earning \$100 a month in carting and sawing timber. So, in *Taylor v. Munroe*, 43 Conn. 36, under a similar allegation, it was held that the plaintiff could not show that she was a button-maker, and what wages she earned in that business. In *City of Chicago v. O'Brennan*, 65 Ill. 160, the plaintiff brought suit for an injury caused by the falling of a portion of the brick and plastering in the common council chamber in the city. The allegation in the declaration was that 'the plaintiff, who was pursuing his occupation as journalist,' was injured, etc., 'and thereby the plaintiff, as lawyer, lecturer, and journalist, became and was sick, sore, and incapacitated from attending to his business, and so continued for a long time, to-wit, for two months; and, as regards plaintiff's profession as a lecturer, he has been almost wholly, ever since, disabled from pursuing it.' It was held that under these allegations the plaintiff could not give in evidence the fact of a particular engagement to lecture in Virginia, and the probable gains thereof. The court say: 'In order to subserve the ends of good pleading,

which are to apprise the opposite party of the nature of the claim, and prevent surprise, it was necessary that these special damages, and the facts on which they were based, should have been set out in the declaration." *Baldwin v. Railroad Corp.* 4 Gray, 333. *City of Bloomington v. Chamberlain*, 104 Ill. 272, is also a case in point. There the admitted evidence was held not to be erroneous, but the ruling was placed on the express ground that the evidence was not as to the loss of profits of a particular engagement. Had the evidence gone to that extent, as is the case here, it is plainly laid down that the evidence would have been erroneous, as held in *City of Chicago v. O'Brennan*, 65 Ill. 100. This is apparent from what is said in the opinion of the court on page 274. We think the rule established in the cases cited is the correct one, and the court erred in the admission of the evidence. It cannot be said that the error was a harmless one, as the evidence was of a character calculated to produce on the minds of the jury an impression that the plaintiff, on account of his capacity to earn a large salary before the injury, which he had lost by the accident, and hence should recover large damages.

It may, however, be said that the error was cured by an instruction given by the court as follows: "The court permitted the testimony of what plaintiff was earning at the time of the injury charged. This testimony was admitted for no other purpose than to show plaintiff's capacity to earn money, and must not be considered in any respect as a measure of damages." It is not entirely clear what the instruction means. While the court directed the jury that the evidence was not to be considered as a measure of damage the court failed to point out what use they should make of the evidence. The court ruled, when the evidence was offered, that it was competent for the consideration of the jury. That ruling was never changed. The evidence was allowed to remain with the jury for their consideration, and it could have no other effect than to swell the damages. Had the court, when it was ascertained that an error had been

committed in admitting it, excluded the evidence entirely from the consideration of the jury, the error would in a great measure have been removed; but that course was not pursued. The instruction did not, in our judgment, cure the error. For the errors indicated the judgment of the appellate and circuit courts will be reversed, and the cause remanded.

(Oct. 23, 1893.)

MAGRUDER, J., (dissenting.) It seems to me that the petition for rehearing in this case has demonstrated beyond question the right of the appellee to a rehearing. First, the declaration is sufficient as a declaration upon the common-law liability of the carrier; second, the declaration alleges that the plaintiff "was hindered and prevented from transacting and attending to his business and affairs, and lost and was deprived of divers great gains, profits, and compensations, which he might and otherwise would have made and acquired." This was a sufficient allegation of special damage to justify the admission of evidence that plaintiff at the time of the injury was receiving a compensation for his services as a traveling salesman of \$3,000 per annum, under the decision made in *City of Bloomington v. Chamberlain*, 104 Ill. 268. In the latter case the allegation in the first count of the declaration was that "plaintiff was hindered from transacting her business and affairs and deprived of large gains and profits, which she otherwise would have earned," and, in the second count, "that she had been rendered unable to earn or make for herself a living, and had been deprived of large gains and profits which she otherwise would have earned." Under these allegations the plaintiff was there permitted to testify that she had taught school at \$50 per month. If the law is a science of precedents, no instance can be found where a precedent so exactly fits a subsequent state of facts as the *Chamberlain* Case fits the facts disclosed by the record in the case at bar upon the second point here designated.

BAILEY, C. J., and BAKER, J., concur.

PRESENT AND PROSPECTIVE DAMAGES.



NATIONAL COPPER CO. v. MINNESOTA
MIN. CO.

(23 N. W. 781, 57 Mich. 83.)

Supreme Court of Michigan. June 3, 1885.

Error to Ontonagon.

T. L. Chadbourne, for appellant. Chandler,
Grant & Gray and G. V. N. Lothrop, for ap-
pellee.

COOLEY, C. J. This is an action of trespass. The following is a statement of the case, as made for the plaintiff, for the argument in this court:

"The plaintiff and defendant are corporations, which for 25 years and more have been engaged in copper mining in Ontonagon county. Their mines adjoin each other. Each owns the land in fee on which its mine is situated. The plaintiff, in carrying on its mining operations, left a wall of rock, from 15 to 18 feet thick, next to the boundary line of defendant's mine. This was left as a barrier and protection to its mine against water or other encroachments from the Minnesota. The Minnesota left no such barrier; it not only worked up to the boundary line, but broke through into defendant's mine. About the year 1866 the plaintiff, at about 40 feet above its fourth level, and from 20 to 25 feet from the boundary line, drilled a hole, of the ordinary size, about one and one-half inches in diameter, and when the blast was fired it blew through into the opening which had been previously made by the defendant into the plaintiff's territory. The drill-hole was left through from two to two and one-half feet of solid rock. Capt. Chynoweth, then the agent of plaintiff, examined this hole and the surroundings, and immediately gave orders to cease work there. This was done as a further protection against the defendant. No work was done at this point after that until the winter of 1883-4. The plaintiff had no knowledge of any further trespass at this point until February, 1884, under the circumstances related hereafter. The pump of the defendant was stopped in 1870, and that of the plaintiff in 1871 or 1872. Plaintiff's mine filled up to the adit level in about five years. Since 1870 the defendant has worked its mine more or less upon tribute, and so did the plaintiff, until May, 1880, when it resumed work. In order to avoid liability for the trespass committed by it at the plaintiff's fourth level, (being the defendant's fifth level,) the defendant sought to show, and did show, another hole at the first level, between the two mines. A continuation of the inquiry showed that this hole also was about 20 feet from the boundary line, on the plaintiff's side, and that defendant had here trespassed 20 feet upon plaintiff's land. We do not think that the history of mining upon Lake Superior will disclose another instance of such reckless disregard of the rights of an adjoining mine-owner. This encroachment and trespass by the de-

fendant at the defendant's fifth level occurred about the year 1859.

"In May, 1880, the plaintiff resumed mining operations and commenced to pump the water from its mine. The six-inch pump, formerly used by the mine, and which had always been adequate to keep the mine unwatered, proved wholly inadequate, and it was compelled to get a 12-inch pump, and even this was not sufficient in the spring; and in 1882 the water gained on them 120 feet, and in 1883, 222 feet, with the pump working night and day. Capt. Parnell, the agent of the plaintiff's mine, was thoroughly acquainted with it, having worked in the mine years before; he soon became convinced that the bulk of the water came from the defendant's mine. He found that the water came from the fourth level. He cleaned out the level, and, on reaching the point where the drill-hole had been made years before, he found that the rock had been all blasted away from the Minnesota side, and that the water was rushing through an opening from 20 to 25 feet high and 12 feet wide. When discovered there was a volume of water seven feet wide flowing from the Minnesota into the National. When the defendant made its second encroachment at this point does not clearly appear; according to the defendant's witness Spargo it was in 1871 or 1872. This witness was an employé of the defendant, and one of its tributers. He says he saw the hole from the Minnesota side, and it was then six to eight feet high, and from four to five feet wide. William George, a witness for defendant, last saw the hole in 1870 or 1871. It was then about a foot in diameter. The witness was then working for the defendant as tributer and captain. Thomas James was in charge of the mine. He admits that the defendant's tributers were then mining there. This same Capt. James has been in charge of the defendant's mine as agent ever since.

"It was not denied in the court below, and we presume will not be in this court, that the defendant committed these several acts of trespass. But, in proof of the fact, we refer to the admission of the agent Harris, the evidence that the track of a tram-road, sollars, and a system of timbering were found constructed from the fifth level of defendant's mine into this opening, and the testimony of plaintiff's witnesses already referred to. Furthermore, it is beyond dispute that the defendant knowingly and willfully committed these acts of trespass, and broke down the barrier which the plaintiff had so carefully left to protect its mine for all future time, and against all possible dangers.

"About 1870 the defendant concluded to abandon regular mining, stopped its pumps, and commenced what is known among miners as robbing the mine. It placed its tributers at work at the bottom of the mine, took out all the copper ground that could be found, took out the supports of the roof of the mine, and allowed it to settle or cave in. This was all done under the direction of the defendant's

agent, James. The defendant's mine is situated upon a hill or mountain side. The result was that the surface of the ground became depressed, and openings were made in it. Defendant's agent, James, testified to openings of this character on the surface of the Minnesota, amounting in all to over 500 feet in length; some were 3 or 4 feet wide. Into these openings the water from rains and melting snow ran into the defendant's mine, and from thence flowed into the plaintiff's mine, through the opening at its fourth level. But for these openings the water would have run down the hillside. As one of defendant's own witnesses expressed it, 'There has been a general falling away of the bluff.' There were no such openings on the surface of the National. In fact, we everywhere find the plaintiff conducting its mining operations with due regard to the rights of adjoining owners; while we find the defendant conducting its operations in the most reckless disregard of such rights."

The above is a sufficient statement of the facts for a discussion of the principal question in the case, viz: Is the plaintiff's right of action barred by the statute of limitations?

The count in the declaration on which the parties went to trial alleged that the defendant, on March 15, 1882, and on divers days and times between that day and the commencement of suit, with force and arms broke down the partition wall between the mine of the plaintiff and the mine of the defendant, and let the water from its said mine into the mine of the plaintiff, and then and there filled the mine of the plaintiff with water, greatly damaging its timbering, workings, walls, and machinery, hindered and prevented the plaintiff from carrying on and transacting its lawful and necessary affairs and business, caused the plaintiff great damage and expense in removing water from its mine, etc.

The defendant pleaded the general issue, with notice that the statute of limitations would be relied upon. The plaintiff recovered a large judgment.

1. The time limited for the commencement of suit for trespass upon lands in this state is two years from the time the right of action accrues. How. St. § 8714. This action was commenced in May, 1884, and it is not claimed that damages for the original trespass can be recovered in it. The contention of the plaintiff may be succinctly stated as follows: (1) Had the plaintiff instituted suit within two years from the original trespass, the recovery would have been limited to such damages as were the direct and immediate result of the trespass. The subsequent flowage of water through the opening was not the direct, immediate, or necessary result of breaking down the barriers; therefore no damages could have been recovered therefor in an action so brought. (2) Two trespasses may be the result of one act. In other words, one trespass may cause another, and he who commits the wrongful act in such a case will be responsible for both trespasses. (3) In this case no action accrued

for the flowage of water into the plaintiff's mine until the flowage actually took place, but when the flowage occurred as a result of defendant's wrongful act it was a trespass, and if it continued from day to day there was a continuous trespass for which repeated actions might be maintained.

Upon these positions the plaintiff plants its case, and unless they are sound in law the recovery cannot be supported. All right of recovery for the original trespass, which consisted in breaking through into the plaintiff's mine, was long since barred, and it is not claimed that there was, from the time of the first wrong, a continuous trespass which can give a right of action now. The merely leaving an opening between the two mines is not the wrong for which suit is brought, but it is the flowing of water through the opening which is complained of as a new trespass; the original wrongful act of the defendant in breaking through being the cause, and the injurious consequence when it happened, connecting itself with the cause to complete the right of action.

In support of its contention that the case before us may be regarded as one of continuous trespass from the first, several authorities are cited for the plaintiff, which may be briefly noticed. Among them is *Holmes v. Wilson*, 10 Adol. & E. 503. It appeared in that case that a turnpike company had built buttresses on the plaintiff's land for the support of its road. The act was a trespass, and the plaintiff recovered damages therefor; but this, it was held, did not preclude its maintaining a subsequent action for the continuance of the buttresses where they had been wrongfully placed. The ground of the decision was that in the first suit damages could be recovered only for the continuance of the trespass to the time of its institution. There could be no legal presumption that the turnpike company would persist in its wrongful conduct, and consequently, prospective damages, which would only be recoverable on the ground of such persistent wrong-doing, would not have been within the compass of the first recovery. The cases of *Bowyer v. Cook*, 4 C. B. 236; *Thompson v. Gibson*, 7 Mees. & W. 456; *Russell v. Brown*, 63 Me. 203; and *Powers v. Council Bluffs*, 45 Iowa, 652, are all decided upon the same principle. *Cumberland, etc., Co. v. Hitchings*, 65 Me. 140, was one of the wrongful filling up of a canal by a trespasser. It was held that the trespasser was under legal obligation to remove what he had unlawfully placed on the plaintiff's premises, and that, so long as he suffered the obstruction to remain, he was guilty of a continuous trespass from day to day.

In *Adams v. Railroad Co.*, 18 Minn. 260 (Gil. 236,) and *Troy v. Railroad Co.*, 23 N. H. 83, railroad companies which, by trespass, had entered upon the lands of individuals and constructed and begun the operation of railroads, were held liable as trespassers from day to day so long as the oper-

ation of the road was continued. The principle of decision in all these cases is clear and not open to question. In each of them there was an original wrong, but there was also a persistency in the wrong from day to day; the plaintiff's possession was continually invaded, and his right to the exclusive occupation and enjoyment of his freehold continually encroached upon and limited. Each day, therefore, the plaintiff suffered a new wrong, but no single suit could be made to embrace prospective damages, for the reason that future persistency in the wrong could not legally be assumed.

To make these cases applicable, it is necessary that it should appear that the action of the defendant has been continuously wrongful from the first. Whether it can be so regarded will be considered further on. The plaintiff, however, does not, as we have seen, rely exclusively upon this view. Its case is likened by counsel to that of a farmer, whose fences are thrown down by a trespasser; the cattle of the trespasser on a subsequent day entering through the opening. In such a case it is said there are two trespasses: the one consisting in throwing down the fences, and the other in the entry of the cattle; and the right of action for the latter would accrue at the time the entry was actually made. The plaintiff also cites and relies upon a number of cases in which the act of the party which furnishes the ground of complaint antedates the injurious consequence, as the original trespass in this case antedated the flowing from which the plaintiff has suffered damage.

One of these cases is *Bank of Hartford Co. v. Waterman*, 26 Conn. 324. In that case action was brought against a sheriff for a false return to a writ of attachment. The falsity consisted in a misdescription of the land attached. When suit was brought, the period of limitation, if it was to be computed from the time the return was made, had already run; but under the statute the plaintiff was entitled to bring suit only after he had taken out execution and had a return made upon it, which would show a necessity for a resort to the attached lands. It was only after such a return of execution that the plaintiff would suffer even nominal damage from the official misfeasance; and it was therefore a necessary consequence that the time of limitation must be computed from that time, and not from the time of the false return.

Another case is that of *McGuire v. Grant*, 25 N. J. Law, 356, which is to be referred to the same principle. The defendant removed the lateral support to the plaintiff's land by an excavation, made within his own boundaries. Injury subsequently resulted to the plaintiff in consequence. The statute of limitations was held to run from the time the damage occurred; the excavation not being of itself a tort until damage resulted. The case of *Bonomi v. Backhouse*, El. Bl. & El.

622, was like the last in principle, and was decided in the same way.

The plaintiff also, in this connection, likens its case to that of one who, in consequence of a ditch dug upon his neighbor's land, has water collected and thrown upon his premises to his injury. It is not the act of digging the ditch that sets the time of limitation to running in such a case, but it is the happening of the injurious consequence. The case supposed, however, is not a case of trespass. The act of digging the ditch was not in itself a wrongful act. The owner of land is at liberty to dig as many ditches as he pleases on his own land, and he becomes a wrong-doer only when, by means of them, he causes injury to another. If he floods his neighbor's land the case is one of nuisance, and every successive instance of flooding is a new injury. But here, as in the case of a continuous trespass, prospective damages cannot be taken into account, because it must be presumed that wrongful conduct will be abandoned rather than persisted in, and that the party will either fill up his ditches or in some proper way guard against the recurrence of injury. *Battishill v. Reed*, 18 C. B. 696. Cases of flooding lands by dams or other obstructions to running water are cases of this description. *Baldwin v. Calkins*, 10 Wend. 169; *Mersereau v. Pearsall*, 19 N. Y. 108; *Plate v. Railroad Co.*, 37 N. Y. 472. So are cases of diverting water, to the flow of which upon his premises the plaintiff is entitled. *Langford v. Owsley*, 2 Bibb, 215. So are cases of the wrongful occupation of a public street, whereby the access of the plaintiff to his premises is obstructed. *Carl v. Railroad Co.*, 46 Wis. 625; *S. C. 1 N. W.* 295. Other cases cited for the plaintiff, and resting on the same principle, are *Thayer v. Brooks*, 17 Ohio, 489; *Blunt v. McCormick*, 3 Denio, 283; *Winchester v. Stevens Point*, 58 Wis. 350, 17 N. W. 3, 547; *Union Trust Co. v. Cuppy*, 26 Kan. 754; *Spilman v. Navigation Co.*, 74 N. C. 675; *Loweth v. Smith*, 12 Mees. & W. 582.

The case of *Whitehouse v. Fellowes*, 10 C. B. (N. S.) 765, was one of nuisance. A turnpike company made a covered drain with gratings at intervals and catchpits. In consequence of the insufficiency of the catchpits, or of their not being kept in proper condition, the plaintiff's colliery was flooded every time there was a heavy shower. In an action for this flooding it was held that every damage was a new injury and gave a new right of action. The ruling sustained the position taken for the plaintiff in the case, which was thus succinctly stated by counsel arguendo: "The distinction which pervades the cases is this: Where the plaintiff complains of a trespass, the statute runs from the time when the act of trespass was committed, except in the case of a continuing trespass. But where the cause of action is not in itself a trespass, as an act done upon a man's own land, and the cause of action is

the consequential injury to the plaintiff, there the period of limitation runs from the time the damage is sustained."

The case before us was one of admitted trespass, from which immediate damage resulted. Had suit been brought at that time, all the natural and probable damage to result from the wrongful act would have been taken into account, and the plaintiff would have recovered for it. [But there was no continuous trespass from that time on.] The defendant had built no structure on the plaintiff's premises, was occupying no part of them with anything it had placed there, and was in no way interrupting the plaintiff's occupation or enjoyment. All it had left there was a hole in the wall. But there is no analogy between leaving a hole in a wall on another's premises and leaving houses or other obstructions there to incumber or hinder his occupation; the physical hindrances are a continuance of the original wrongful force, but the hole is only the consequence of a wrongful force which ceased to operate the moment it was made.

If, therefore, the plaintiff had brought suit more than two years after the original trespass, and before the flooding of its mine by water flowing through the opening had begun, and if the statute of limitations had been pleaded, there could have been no recovery. The action for the original wrong would then have been barred, and there had been no repetition of the injury in the mean time to give a new cause of action. The mere continuance of the opening in the wall could not be a continuous damage. *Lloyd v. Wigney*, 6 Bing. 489.

The right of action, if any, for which the plaintiff can complain, must therefore arise from the flowing itself as a wrongful act; there being no longer any action for the original breaking, and no continuous acts of wrong from that time until the flowing began. The flowage caused a damage to the plaintiff; but damage alone does not give a right of action; there must be a concurrence of wrong and damage. The wrong, then, must be found in leaving the opening unclosed and permitting the water to flow through. It must therefore rest upon an obligation on the part of the defendant either to close the opening, because persons for whose acts it was responsible had made it, or to restrain water which had collected on its own premises from flowing upon the premises of the plaintiff to its injury. The latter seems to be the ground upon which the plaintiff chiefly relies for a recovery.

In the argument made for the plaintiff in this court stress is laid upon the fact that the damage which has actually resulted from the flooding could not have been anticipated at the time of the original trespass, and therefore could not then have been recovered for. This consideration, it is urged, ought to be decisive. But, while we agree that it is to be considered in the case for what it is worth, it

is by no means necessarily conclusive.) The plaintiff must fix some distinct wrong upon the defendant within the period of statutory limitation, or the action must fail; and there is no such wrong in this case unless the failure to prevent the flowing constitutes one. The original act of wrong is no more in question now, after having been barred by the statute, than it would have been if damages had been recovered or settled for amicably; nor do we see that it can be important in a case like the present, where the wrong must be found in the injurious flowing, whether there was or was not a wrong originally. If there was, it stands altogether apart from the wrong now sued for, with an interval between them, when no legal wrong could have been complained of. The mere fact that an opening was made by the defendant between the two mines, would not of itself have been a trespass unless the defendant invaded the plaintiff's premises in making it. Each party had a right to mine on its own side to the boundary, (*Wilson v. Waddell*, L. R. 2 App. Cas. 95;) and if the plaintiff had first done so, the defendant might have done the same at the same point, and in that way have made an opening rightfully. The difference between the case supposed and this, is that here the defendant was found to have gone beyond the boundary and committed a trespass. But suppose the defendant had then made compensation for the trespass, so far as it was then damaging; how would the case have differed from the present? The opening would remain, made by the defendant, through which, if the water was allowed to collect in his mine, it must eventually pass; and if he was under obligation to keep it within the bounds of his own premises, he would be liable for allowing it to pass; otherwise not. The fact that compensation was not actually made for the breaking away of the plaintiff's barrier is immaterial when the statute has run, as has been already explained.

The case of *Clegg v. Dearden*, 12 Q. B. 576, is not unlike in its facts the case before us. In that case, also, there had been a wrongful breaking through from one mine to another, and an injurious flowage of water through the opening. The facts were found by special verdict, and Lord Denman, in pronouncing judgment, said: "The gist of the action, as stated in the declaration, is the keeping open and unfilled up of an aperture and excavation made by the defendant into the plaintiffs' mine. By the custom the defendant was entitled to excavate up to the boundary of his mine without leaving any barrier; and the cause of action, therefore, is the not filling up of the excavation made by him on the plaintiffs' side of the boundary and within their mine. It is not, as in the case of *Holmes v. Wilson*, 10 Adol. & E. 503, a continuing of something wrongfully placed by the defendant upon the premises of the plaintiff. Nor is it a continuing of something placed upon the land of a third person to the nuisance of

the plaintiff, as in the case of *Thompson v. Gibson*, 7 Mees. & W. 456. There is a legal obligation to discontinue a trespass or remove a nuisance; but no such obligation upon a trespasser to replace what he has pulled down or destroyed upon the land of another, though he is liable in an action of trespass to compensate in damages for the loss sustained. The defendant having made an excavation and aperture in the plaintiffs' land was liable to an action of trespass; but no cause of action arises from his omitting to re-enter the plaintiffs' land and fill up the excavation. Such an omission is neither the continuation of a trespass nor of a nuisance; nor is it the breach of any legal duty. It was, however, contended on the part of the plaintiffs, that, admitting this to be so, there nevertheless was a legal obligation or duty upon the defendant to take means to prevent the water from flowing from his mine into that of the plaintiffs through the aperture he had made;" but "the plaintiffs have not alleged any such duty or obligation in their declaration, nor is their action founded upon the breach of any such duty, if it exists, but upon the omission to fill up the aperture made by them in the plaintiffs' mine. It appears to us that the defendant, upon the facts found by the jury, is entitled to have the verdict entered for him upon the plea of not guilty."

If this case was rightly decided, it should rule the one before us. It has been followed by the supreme court of Ohio in *Williams v. Coal Co.*, 37 Ohio St. 583, in a case which also closely resembles this upon its facts, and is not distinguishable in principle. It seems to us that these cases are sound in law as well as conclusive. The only wrongful act with which the defendant is chargeable, was committed so long before the bringing of suit that action for it was barred. Had suit been brought in due time, recovery might have been had for all damages which could then have been anticipated as the natural and probable result of the wrongful act. If the particular damages which have been suffered could not then have been anticipated, it is because it could not then be known that the defendant would cease mining operations and the plaintiff would not. There could be no flowing from one mine into the other while both were worked; and had the plaintiff ceased operations and the defendant contin-

ued to work, the defendant would have suffered the damage instead of the plaintiff. But neither party was under obligation to keep its mine pumped out for the benefit of its neighbor. Either was at liberty to discontinue its operations and abandon its mine whenever its interest should seem to require it. And had the plaintiff brought an action within two years from the time of trespass, its recovery would necessarily have been had with this undoubted right of abandonment in view. But a jury could not have awarded damages for any exercise of a right, and they could not, therefore, have given damages for a possible injury to flow from such an abandonment. This is on the plain principle that the mere exercise of a right cannot be a legal wrong to another, and if damage shall happen, it is *damnum absque injuria*.

This view of the case is conclusive; but there is another that is equally so. The wrong to the plaintiff consisted in breaking down the wall which had been left by it in its operations. If any damage might possibly result from this which was not then so far probable that a jury could have taken it into account in awarding damages, the plaintiff was not without redress. It would have been entitled in a suit then brought to recover the cost of restoring the barrier which had been taken away; and if it had done so, and made the restoration, the damage now complained of could not have happened. It thus appears that complete redress could have been had in a suit brought at that time; and, that being the case, the plaintiff is not entitled to recover now for an injury for which an award of means of prevention was within the right of action which was suffered to become barred. The right which then existed, being a right to recover for all the injury which had then been suffered, including the loss of the dividing barrier, it would not have been competent for the plaintiff, had suit then been brought, to leave the loss of the barrier out of account, awaiting possible special damages to flow therefrom as a ground for a new suit. The wrong which had then been committed was indivisible; and the bar of the statute must be as broad as the remedy was which it extinguishes.

The judgment must be set aside and a new trial ordered.

The other justices concurred.

JOSEPH SCHLITZ BREWING CO. v.
COMPTON.

(32 N. E. 693. 142 Ill. 511.)

Supreme Court of Illinois. Nov. 2, 1892.

Appeal from appellate court, Third district.

Action on the case by Sophie Compton against the Joseph Schlitz Brewing Company. Plaintiff obtained judgment, which was affirmed by the appellate court. Defendant appeals. Reversed.

The other facts fully appear in the following statement by MAGRUDER, J.:

This is an action on the case, begun on April 17, 1890, in the circuit court of Sangamon county, by the appellee against the appellant company. In the trial court the verdict and judgment were in favor of the plaintiff, which judgment has been affirmed by the appellate court. The declaration consists of two counts. The first count alleges that plaintiff was possessed of certain premises in Springfield, in which she and her family resided, and that the defendant, to wit, on April 20, 1885, wrongfully erected a certain building near said premises in so careless, negligent, and improper a manner that on said day and afterwards, "and before the commencement of this suit," large quantities of rain water flowed upon, against, and into said premises and the walls, roofs, ceilings, beams, papering, floors, stairs, doors, cellar, basement, and other parts thereof, and weakened, injured, and damaged the same, by reason whereof said messuage and premises became and are damp and less fit for habitation. The second count alleges that plaintiff was the possessor, occupier, and owner of said messuage and premises, in which she and her family dwelt, and the defendant, to wit, on said day, caused quantities of water to run into, against, and upon the same, and the walls, roofs, floors, cellars, etc., thereof, and thereby greatly weakened injured, wetted, and damaged the same. By reason whereof said premises became and were and are damp, incommodious, and less fit for habitation. The plea was not guilty. The proof tends to show that plaintiff's building is a two-story brick building, with a cellar underneath, the front room on the first floor being used as a butcher's shop, and the rest of the building being used as a dwelling; that her building was erected several years before that of the defendant; that defendant's building is on the lot west of plaintiff's lot, and is about 60 feet long, having an office in front and a beer-bottling establishment in the rear, and has one roof, which slants towards plaintiff's property; that there are three windows on the west side of plaintiff's house, besides the three cellar windows; that her wall is a little over two feet from the west line of her lot; that when it rains the water flows against her west wall, and some of it into her win-

dows and cellar from the roof of defendant's building; that the eave trough is so far below the eave that the water runs over it into the windows, etc.

Palmer & Schutt, for appellant. Patton & Hamilton, for appellee.

MAGRUDER, J. (after stating the facts). Proof was introduced of damage done to plaintiff's property after the commencement of the suit by reason of rain storms then occurring. The defendant asked, and the court refused to give, the following instruction: "The court instructs the jury that the suit now being tried was commenced in the month of April, 1890, and that they are not to take into consideration the question as to whether or not any damage has accrued to plaintiff's property since the commencement of this suit." The question presented is whether plaintiff was entitled to recover only such damages as accrued before and up to the beginning of her suit, leaving subsequent damages to be sued for in subsequent suits, or whether she was entitled to estimate and recover in one action all damages resulting both before and after the commencement of this suit. The rule originally obtaining at common law was, that in personal actions damages could be recovered only up to the time of the commencement of the action. 3 Com. Dig. tit. "Damages." D. The rule subsequently prevailing in such actions is that damages accruing after the commencement of the suit may be recovered, if they are the natural and necessary result of the act complained of, and where they do not themselves constitute a new cause of action. Wood's Mayne, Dam. § 103; Birchard v. Booth, 4 Wis. 67; Slater v. Rink, 18 Ill. 527; Fetter v. Beale, 1 Salk. 11; Howell v. Goodrich, 69 Ill. 556. In actions of trespass to the realty, it is said that damages may be recovered up to the time of the verdict, (Com. Dig. 363, tit. "Damages," D;) and the reason why, in such cases, all the damages may be recovered in a single action, is that the trespass is the cause of action, and the injury resulting is merely the measure of damages. 5 Am. & Eng. Enc. Law, p. 16, case cited in note 2. But in the case of nuisances or repeated trespasses recovery can ordinarily be had only up to the commencement of the suit, because every continuance or repetition of the nuisance gives rise to a new cause of action, and the plaintiff may bring successive actions as long as the nuisance lasts. McConnel v. Kibbe, 29 Ill. 483, and 33 Ill. 175; Railroad Co. v. Moffitt, 75 Ill. 524; Railroad Co. v. Schaffer, 124 Ill. 112, 16 N. E. 239. The cause of action, in case of an ordinary nuisance, is not so much the act of the defendant as the injurious consequences resulting from his act, and hence the cause of action does not arise until such consequences occur; nor can the damages

be estimated beyond the date of bringing the first suit. 5 Am. & Eng. Enc. Law, p. 17, and cases in notes. It has been held, however, that where permanent structures are erected, resulting in injury to adjacent realty, all damages may be recovered in a single suit. *Id.* p. 20, and cases in note.

But there is much confusion among the authorities which attempt to distinguish between cases where successive actions lie and those in which only one action may be maintained. This confusion seems to arise from the different views entertained in regard to the circumstances under which the injury suffered by the plaintiff from the act of the defendant shall be regarded as a permanent injury. "The chief difficulty in this subject concerns acts which result in what effects a permanent change in the plaintiff's land, and is at the same time a nuisance or trespass." Sedg. Dam. (8th Ed.) § 94. Some cases hold it to be unreasonable to assume that a nuisance or illegal act will continue forever, and therefore refuse to give entire damages as for a permanent injury, but allow such damages for the continuation of the wrong as accrue up to the date of the bringing of the suit. Other cases take the ground that the entire controversy should be settled in a single suit, and that damages should be allowed for the whole injury, past and prospective, if such injury be proven with reasonable certainty to be permanent in its character. *Id.* § 94. We think, upon the whole, that the more correct view is presented in the former class of cases. 1 *Suth. Dam.* 190-202; 3 *Suth. Dam.* 369-399; 1 *Sedg. Dam.* (8th Ed.) §§ 91-94; *Uline v. Railroad Co.*, 101 N. Y. 98, 4 N. E. 536; *Duryea v. Mayor*, 26 Hun, 120; *Blunt v. McCormick*, 3 Denio, 283; *Cooke v. England*, 92 Am. Dec. 630, notes; *Reed v. State*, 108 N. Y. 407, 15 N. E. 735; *Hargreaves v. Kimberly*, 26 W. Va. 787; *Ottenot v. Railroad Co.*, 119 N. Y. 603, 23 N. E. 169; *Cobb v. Smith*, 38 Wis. 21; *Canal Co. v. Wright*, 21 N. J. Law, 469; *Wells v. Northampton Co.*, 151 Mass. 46, 23 N. E. 724; *Barrick v. Schifferdecker*, 123 N. Y. 52, 25 N. E. 365; *Silsby Manuf'g Co. v. State*, 104 N. Y. 562, 11 N. E. 264; *Aldworth v. City of Lynn*, 153 Mass. 53, 26 N. E. 229; *Town of Troy v. Railroad Co.*, 23 N. H. 83; *Cooper v. Randall*, 59 Ill. 317; *Railroad Co. v. Hoag*, 90 Ill. 389. We do not wish to be understood, however, as holding that the rule laid down in the second class of cases is not applicable under some circumstances, as in the case of permanent injury caused by lawful public structures, properly constructed and permanent in their character. In *Uline v. Railroad Co.*, supra, a railroad company raised the grade of the street in front of the plaintiff's lots so as to pour the water therefrom down over the sidewalk into the basement of her houses, flooding the same with water, and rendering them damp, unhealthy, etc., and injuring the rental value, etc. In dis-

cussing the question of the damages to which the plaintiff was entitled the court say: "The question, however, still remains, what damages? All her damages upon the assumption that the nuisance was to be permanent, or only such damages as she sustained up to the commencement of the action? * * * There has never been in this state before this case the least doubt expressed in any judicial decision * * * that the plaintiff, in such a case, is entitled to recover only up to the commencement of the action. That such is the rule is as well settled here as any rule of law can be by repeated and uniform decisions of all the courts, and it is the prevailing doctrine elsewhere." Then follows an exhaustive review of the authorities, which sustain the conclusion of the court as above announced. In *Duryea v. Mayor*, supra, the action was brought to recover damages occasioned by the wrongful acts of one who had discharged water and sewerage upon the land of another, and it was held that no recovery could be had for damages occasioned by the discharge of the water and sewage upon the land after the commencement of the action. In *Blunt v. McCormick*, supra, the action was brought by a tenant to recover damages against his landlord because of the latter's erection of buildings adjoining the demised premises, which shut out the light from the tenant's windows and doors; and it was held that damages could only be recovered for the time which had elapsed when the suit was commenced, and not for the whole term. In *Hargreaves v. Kimberly*, supra, the action was case to recover damages for causing surface water to flow on plaintiff's lot, and for injury to his trees by the use of coke ovens near said lot, and for injury thereby to his health and comfort; and it was held to be error to permit a witness to answer the following question: "What will be the future damage to the property from the acts of the defendant?" the court saying: "In all those cases where the cause of the injury is in its nature permanent, and a recovery for such injury would confer a license on the defendant to continue the cause, the entire damage may be recovered in a single action; but where the cause of the injury is in the nature of a nuisance, and not permanent in its character, but of such a character that it may be supposed that the defendant would remove it rather than suffer at once the entire damage which it may inflict if permanent, then the entire damage cannot be recovered in a single action; but actions may be maintained from time to time as long as the cause of the injury continues." In *Wells v. Northampton Co.*, supra, where a railroad company maintained a culvert under its embankment, which injured land by discharging water on it, it was held that the case fell within the ordinary rule applicable to continuing nuisances and continuing tres-

passes. Reference was made to *Uline v. Railroad Co.*, supra, and the following language was used by the court: "If the defendant's act was wrongful at the outset, as the jury have found, we see no way in which the continuance of its structure in its wrongful form could become rightful as against the plaintiff, unless by release or grant by prescription or by the payment of damages. If originally wrongful, it has not become rightful merely by being built in an enduring manner." In *Aldworth v. City of Lynn*, supra, where the action was for damages sustained by a landowner through the improper erection and maintenance of a dam and reservoir by the city of Lynn on adjoining land, the supreme court of Massachusetts say: "The plaintiff excepted to the ruling that she was entitled to recover damages only to the date of her writ, and contended that the dam and pond were permanent, and that she was entitled to damages for a permanent injury to her property. An erection unlawfully maintained on one's own land, to the detriment of the land of a neighbor, is a continuing nuisance, for the maintenance of which an action may be brought at any time, and damages recovered up to the time of bringing the suit. * * * That it is of a permanent character, or that it has been continued for any length of time less than what is necessary to acquire a prescriptive right, does not make it lawful, nor deprive the adjacent landowner of his right to recover damages. Nor can the adjacent landowner, in such a case, who sues for damage to his property, compel the defendant to pay damages for the future. The defendant may prefer to change his use of his property so far as to make his conduct lawful. In the present case we cannot say that the defendant may not repair or reconstruct its dam and reservoir in such a way as to prevent percolation with much less expenditure than would be required to pay damages for a permanent injury to the plaintiff's land."

In the case at bar the defendant did not erect the house upon plaintiff's land, but upon its own land. It does not appear that such change might not be made in the roof, or in the manner of discharging the water from the roof, as to avoid the injury complained of. The first count of the declaration, by its express terms, limits the recovery for damages arising from the negligent and improper construction of defendant's building to such injuries as were inflicted "before the commencement of the suit." The second count was framed in such a way as to authorize a recovery of damages for the flow of water upon plaintiff's premises from some other cause than the wrongful construction of defendant's building; and accordingly plaintiff's evidence tends to show that the eave trough, designed to carry off the water from the roof, was so placed as to fail of the purpose for which it

was intended. It cannot be said that the eave trough was a structure of such a permanent character that it might not be changed, nor can it be said that the defendant would not remove the cause of the injury rather than submit to a recovery of entire damages for a permanent injury, or suffer repeated recoveries during the continuance of the injury. The facts in the record tend to show a continuing nuisance, as the same is defined in *Aldworth v. City of Lynn*, supra. There is a legal obligation to remove a nuisance; and the law will not presume the continuance of the wrong, nor allow a license to continue a wrong, or a transfer of title, to result from the recovery of damages for prospective misconduct." 1 *Suth. Dam.* 199, and notes. The question now under consideration has been before this court in *Cooper v. Randall*, supra. The action was for damages to plaintiff's premises, caused by constructing and operating a flouring mill on a lot near said premises, whereby chaff, dust, dirt, etc., were thrown from the mill into plaintiff's house. It was there held that the trial court committed no error in refusing to permit the plaintiff to prove that the dust thrown upon his premises by the mill after the suit was commenced had seriously impaired the value of the property, and prevented the renting of the house; and we there said: "When subsequent damages are produced by subsequent acts, then the damages should be strictly confined to those sustained before suit brought." It is true that the operation of the mill, causing the dust to fly, was the act of the defendant; but it cannot be said that it was not the continuing act of the present appellant to allow the roof or the eave trough to remain in such a condition as to send the water against appellee's house upon the occurrence of a rain storm. Nor is appellant's house or eave trough any more permanent than was the mill in the *Cooper Case*. In *Railroad Co. v. Hoag*, supra, a railroad company had turned its waste water from a tank upon the premises of the plaintiff, where it spread and froze, and a recovery was allowed for damages suffered after the commencement of the suit; but it there appeared that the ice, which caused the damage, was upon plaintiff's premises before the beginning of the suit, and the damage caused resulted from the melting of the ice after the suit was brought. It was there said: "The injury sustained by appellee between the commencement of the suit and the trial was not from any wrongful act done by appellant during that time, but followed from acts done before the suit was commenced." Here, the water, which caused the injury, was not upon plaintiff's premises, either in a congealed or liquid state, before the beginning of the suit, but flowed thereon as the result of rain storms which occurred after the suit was commenced. We think

the correct rule upon this subject is stated as follows: "If a private structure or other work on land is the cause of a nuisance or other tort to the plaintiff, the law cannot regard it as permanent, no matter with what intention it was built; and damages can therefore be recovered only to the date of the action." 1 Sedg. Dam. (8th Ed.) § 93. It follows from the foregoing observations that it was error to allow the plaintiff to in-

roduce proof of damage to her property caused by rain storms occurring after the commencement of her suit, and that the instruction asked by the defendant upon that subject, as the same is above set forth, should have been given. The judgments of the appellate and circuit courts are reversed, and the cause is remanded to the circuit court.

Judgment reversed.

HADLEY et al. v. BAXENDALE et al.

(9 Exch. 341.)

Court of Exchequer, Hilary Term. Feb. 23, 1854.

At the trial before CROMPTON, J., at the last Gloucester assizes it appeared that the plaintiffs carried on an extensive business as millers at Gloucester; and that on the 11th of May their mill was stopped by a breakage of the crank shaft, by which the mill was worked. The steam engine was manufactured by Messrs. Joyce & Co., the engineers, at Greenwich, and it became necessary to send the shaft as a pattern for a new one to Greenwich. The fracture was discovered on the 12th, and on the 13th the plaintiffs sent one of their servants to the office of the defendants, who are the well-known carriers trading under the name of Pickford & Co., for the purpose of having the shaft carried to Greenwich. The plaintiffs' servant told the clerk that the mill was stopped, and that the shaft must be sent immediately; and in answer to the inquiry when the shaft would be taken the answer was that if it was sent up by twelve o'clock any day it would be delivered at Greenwich on the following day. On the following day the shaft was taken by the defendants, before noon, for the purpose of being conveyed to Greenwich, and the sum of £2 4s. was paid for its carriage for the whole distance. At the same time the defendants' clerk was told that a special entry, if required, should be made, to hasten its delivery. The delivery of the shaft at Greenwich was delayed by some neglect, and the consequence was that the plaintiffs did not receive the new shaft for several days after they would otherwise have done, and the working of their mill was thereby delayed, and they thereby lost the profits they would otherwise have received.

On the part of the defendants it was objected that these damages were too remote, and that the defendants were not liable with respect to them. The learned judge left the case generally to the jury, who found a verdict with £25 damages beyond the amount paid into court.

Keating & Dowdeswell, showed cause. Whateley, Willes & Phipson, in support of the rule.

The judgment of the court was now delivered by

ALDERSON, B. We think that there ought to be a new trial in this case; but in so doing we deem it to be expedient and necessary to state explicitly the rule which the judge, at the next trial, ought, in our opinion, to direct the jury to be governed by when they estimate the damages.

It is, indeed, of the last importance that we should do this; for, if the jury are left without any definite rule to guide them, it will, in such cases as these, manifestly lead

to the greatest injustice. The courts have done this on several occasions; and in *Blake v. Railway Co.*, 21 L. J. Q. B. 237, the court granted a new trial on this very ground, that the rule had not been definitely laid down to the jury by the learned judge at nisi prius. "There are certain established rules," this court says, in *Alder v. Keighley*, 15 Mees. & W. 117, "according to which the jury ought to find." And the court in that case adds: "And here there is a clear rule that the amount which would have been received if the contract had been performed is the measure of damages if the contract is broken." Now, we think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally,—i. e., according to the usual course of things, from such breach of contract itself,—or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them. Now, the above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract. It is said that other cases, such as breaches of contract in the nonpayment of money, or in the not making a good title to land, are to be treated as exceptions from this, and as governed by a conventional rule. But as, in such cases, both parties must be supposed to be cognizant of that well-known rule, these cases may, we think, be more properly classed under the rule above enunciated as to cases under known special circumstances, because there both parties may reasonably be presumed to contemplate the estimation of the amount of damages according to the conventional rule. Now, in the present case, if we are to apply the principles

above laid down, we find that the only circumstances here communicated by the plaintiffs to the defendants at the time the contract was made were that the article to be carried was the broken shaft of a mill, and that the plaintiffs were the millers of that mill. But how do these circumstances show reasonably that the profits of the mill must be stopped by an unreasonable delay in the delivery of the broken shaft by the carrier to the third person? Suppose the plaintiffs had another shaft in their possession, put up or putting up at the time, and that they only wished to send back the broken shaft to the engineer who made it, it is clear that this would be quite consistent with the above circumstances, and yet the unreasonable delay in the delivery would have no effect upon the intermediate profits of the mill. Or, again, suppose that, at the time of the delivery to the carrier, the machinery of the mill had been in other respects defective, then, also, the same results would follow. Here it is true that the shaft was actually sent back to serve as a model for a new one, and that the want of a new one was the only cause of the stoppage of the mill, and that the loss of profits really arose from not sending down the new shaft in proper time, and that this arose

from the delay in delivering the broken one to serve as a model. But it is obvious that in the great multitude of cases of millers sending off broken shafts to third persons by a carrier under ordinary circumstances, such consequences would not, in all probability, have occurred; and these special circumstances were here never communicated by the plaintiffs to the defendants. It follows, therefore, that the loss of profits here cannot reasonably be considered such a consequence of the breach of contract as could have been fairly and reasonably contemplated by both the parties when they made this contract. For such loss would neither have flowed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances, nor were the special circumstances, which, perhaps, would have made it a reasonable and natural consequence of such breach of contract, communicated to or known by the defendants. The judge ought, therefore, to have told the jury that upon the facts then before them they ought not to take the loss of profits into consideration at all in estimating the damages. There must therefore be a new trial in this case.

Rule absolute.

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GRIFFIN v. COLVER et al.

(16 N. Y. 489.)

Court of Appeals of New York, March Term, 1858.

Action to recover the purchase price of an engine. Defendants sought to recoup damages for delay in delivery of the engine. There was a judgment for plaintiff, from which defendants appealed.

John C. Churchill, for appellants. D. Coats, for respondent.

SELDEN, J. The only point made by the appellants is that in estimating their damages on account of the plaintiff's failure to furnish the engine by the time specified in the contract, they should have been allowed what the proof showed they might have earned by the use of such engine, together with their other machinery, during the time lost by the delay. This claim was objected to, and rejected upon the trial as coming within the rule which precludes the allowance of profits, by way of damages, for the breach of an executory contract.

To determine whether this rule was correctly applied by the referee, it is necessary to recur to the reason upon which it is founded. It is not a primary rule, but is a mere deduction from that more general and fundamental rule which requires that the damages claimed should in all cases be shown, by clear and satisfactory evidence, to have been actually sustained. It is a well-established rule of the common law that the damages to be recovered for a breach of contract must be shown with certainty, and not left to speculation or conjecture; and it is under this rule that profits are excluded from the estimate of damages in such cases, and not because there is any thing in their nature which should per se prevent their allowance. Profits which would certainly have been realized but for the defendant's default are recoverable; those which are speculative or contingent are not.

Hence, in an action for the breach of a contract to transport goods, the difference between the price, at the point where the goods are and that to which they were to be transported, is taken as the measure of damages; and in an action against a vendor for not delivering the chattels sold, the vendee is allowed the market price upon the day fixed for the delivery. Although this, in both cases, amounts to an allowance of profits, yet, as those profits do not depend upon any contingency, their recovery is permitted. It is regarded as certain that the goods would have been worth the established market price at the place and on the day when and where they should have been delivered.

On the other hand, in cases of illegal capture, or of the insurance of goods lost at sea, there can be no recovery for the probable loss of profits at the port of destination. The

principal reason for the difference between these cases and that of the failure to transport goods upon land is, that in the latter case the time when the goods should have been delivered, and consequently that when the market price is to be taken, can be ascertained with reasonable certainty; while in the former the fluctuation of the markets and the contingencies affecting the length of the voyage render every calculation of profits speculative and unsafe.

There is also an additional reason, viz. the difficulty of obtaining reliable evidence as to the state of the markets in foreign ports; that these are the true reasons is shown by the language of Mr. Justice Story in the case of *The Lively*, 1 Gall. 315, Fed. Cas. No. 8,403, which was a case of illegal capture. He says: "Independent, however, of all authority, I am satisfied upon principle that an allowance of damages, upon the basis of a calculation of profits, is inadmissible. The rule would be in the highest degree unfavorable to the interests of the community. The subject would be involved in utter uncertainty. The calculation would proceed upon contingencies, and would require a knowledge of foreign markets to an exactness in point of time and value which would sometimes present embarrassing obstacles. Much would depend upon the length of the voyage and the season of the arrival; much upon the vigilance and activity of the master, and much upon the momentary demand. After all, it would be a calculation upon conjectures and not upon facts."

Similar language is used in the cases of *The Amiable Nancy*, 3 Wheat. 546, and *La Amistad de Rues*, 5 Wheat. 385. Indeed, it is clear that whenever profits are rejected as an item of damages it is because they are subject to too many contingencies and are too dependent upon the fluctuations of markets and the chances of business to constitute a safe criterion for an estimate of damages. This is to be inferred from the cases in our own courts. The decision in the case of *Blanchard v. Ely*, 21 Wend. 342, must have proceeded upon this ground, and can, as I apprehend, be supported upon no other. It is true that Judge Cowen, in giving his opinion, quotes from Pothier the following rule of the civil law, viz.: "In general, the parties are deemed to have contemplated only the damages and injury which the creditor might suffer from the non-performance of the obligations in respect to the particular thing which is the object of it, and not such as may have been accidentally occasioned thereby in respect to his own (other) affairs." But this rule had no application to the case then before the court. It applies only to cases where, by reason of special circumstances having no necessary connection with the contract broken, damages are sustained which would not ordinarily or naturally flow from such breach: as where a party is prevented by

the breach of one contract from availing himself of some other collateral and independent contract entered into with other parties, or from performing some act in relation to his own business not necessarily connected with the agreement. An instance of the latter kind is where a canon of the church, by reason of the non-delivery of a horse pursuant to agreement, was prevented from arriving at his residence in time to collect his tithes.

In such cases the damages sustained are disallowed, not because they are uncertain, nor because they are merely consequential or remote, but because they cannot be fairly considered as having been within the contemplation of the parties at the time of entering into the contract. Hence the objection is removed, if it is shown that the contract was entered into for the express purpose of enabling the party to fulfill his collateral agreement, or perform the act supposed. Sedg. Dam. c. 3.

In *Blanchard v. Ely* the damages claimed consisted in the loss of the use of the very article which the plaintiff had agreed to construct; and were, therefore, in the plainest sense, the direct and proximate result of the breach alleged. Moreover, that use was contemplated by the parties in entering into the contract, and constituted the object for which the steamboat was built. It is clear, therefore, that the rule of Pothier had nothing to do with the case. Those damages must then have been disallowed, because they consisted of profits depending, not, as in the case of a contract to transport goods, upon a mere question of market value, but upon the fluctuations of travel and of trade, and many other contingencies. The citation, by Cowen, J., of the maritime cases to which I have referred, tends to confirm this view. This case, therefore, is a direct authority in support of the doctrine that whenever the profits claimed depend upon contingencies of the character referred to, they are not recoverable.

The case of *Masterton v. Mayor, etc.*, of Brooklyn, 7 Hill, 61, decides nothing in opposition to this doctrine. It simply goes to support the other branch of the rule, viz., that profits are allowed where they do not depend upon the chances of trade, but upon the market value of goods, the price of labor, the cost of transportation, and other questions of the like nature, which can be rendered reasonably certain by evidence.

From these authorities and principles it is clear that the defendants were not entitled to measure their damages by estimating what they might have earned by the use of the engine and their other machinery had the contract been complied with. Nearly every element entering into such a computation would have been of that uncertain character which has uniformly prevented a recovery for speculative profits.

But it by no means follows that no allow-

ance could be made to the defendants for the loss of the use of their machinery. It is an error to suppose that "the law does not aim at complete compensation for the injury sustained," but "seeks rather to divide than satisfy the loss." Sedg. Dam. c. 3. The broad, general rule in such cases is, that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained; and this rule is subject to but two conditions. The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract; that is, must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed.

The familiar rules on the subject are all subordinate to these. For instance: That the damages must flow directly and naturally from the breach of contract, is a mere mode of expressing the first; and that they must be not the remote but proximate consequence of such breach, and must not be speculative or contingent, are different modifications of the last.

These two conditions are entirely separate and independent, and to blend them tends to confusion; thus the damages claimed may be the ordinary and natural, and even necessary result of the breach, and yet, if in their nature uncertain, they must be rejected; as in the case of *Blanchard v. Ely*, where the loss of the trips was the direct and necessary consequence of the plaintiff's failure to perform. So they may be definite and certain, and clearly consequent upon the breach of contract, and yet if such as would not naturally flow from such breach, but, for some special circumstances, collateral to the contract itself or foreign to its apparent object, they cannot be recovered; as in the case of the loss by the clergyman of his tithes by reason of the failure to deliver the horse.

Cases not unfrequently occur in which both these conditions are fulfilled; where it is certain that some loss has been sustained or damage incurred, and that such loss or damage is the direct, immediate and natural consequence of the breach of contract, but where the amount of the damages may be estimated in a variety of ways. In all such cases the law, in strict conformity to the principles already advanced, uniformly adopts that mode of estimating the damages which is most definite and certain. The case of *Freeman v. Clute*, 3 Barb. 424, is a case of this class, and affords an apt illustration of the rule. That case was identical in many of its features with the present. The contract there was to construct a steam engine to be used in the process of manufacturing oil, and damages were claimed for delay in furnishing it. It was insisted in that case, as in this, that the damages were

to be estimated by ascertaining the amount of business which could have been done by the use of the engine, and the profits that would have thence accrued. This claim was rejected by Mr. Justice Harris, before whom the cause was tried, upon the precise ground taken here. But he, nevertheless, held that compensation was to be allowed for the "loss of the use of the plaintiff's mill and other machinery." He did not, it is true, specify in terms the mode in which the value of such use was to be estimated; but as he had previously rejected the probable profits of the business as the measure of such value, no other appropriate data would seem to have remained but the fair rent or hire of the mill and machinery; and such I have no doubt was the meaning of the judge. Thus understood, the decision in that case, and the reasoning upon which it was based, were, I think, entirely accurate.

Had the defendants in the case of *Blanchard v. Ely*, supra, taken the ground that they were entitled to recoup, not the uncertain and contingent profits of the trips lost, but such sum as they could have realized by chartering the boat for those trips, I think their claim must have been sustained. The loss of the trips, which had certainly occurred, was not only the direct but the immediate and necessary result of the breach of the plaintiffs' contract.

The rent of a mill or other similar property, the price which should be paid for the charter of a steamboat, or the use of machinery, etc., are not only susceptible of

more exact and definite proof, but, in a majority of cases would, I think, be found to be a more accurate measure of the damages actually sustained in the class of cases referred to, considering the contingencies and hazards attending the prosecution of most kinds of business, than any estimate of anticipated profits; just as the ordinary rate of interest is, upon the whole, a more accurate measure of the damages sustained in consequence of the non-payment of a debt than any speculative profit which the creditor might expect to realize from the use of the money. It is no answer to this to say that, in estimating what would be the fair rent of a mill, we must take into consideration all the risks of the business in which it is to be used. Rents are graduated according to the value of the property and to an average of profits arrived at by very extended observation; and so accurate are the results of experience in this respect that rents are rendered nearly if not quite as certain as the market value of commodities at a particular time and place.

The proper rule for estimating this portion of the damages in the present case was, to ascertain what would have been a fair price to pay for the use of the engine and machinery, in view of all the hazards and chances of the business; and this is the rule which I understand the referee to have adopted. There is no error in the other allowances made by the referee. The judgment should, therefore, be affirmed.

Judgment affirmed.

BOOTH v. SPUYTEN DUYVIL ROLLING
MILL CO.

(60 N. Y. 487.)

Court of Appeals of New York. 1875.

Action against the Spuyten Duyvil Rolling Mill Company for breach of a contract to make and deliver by a certain date a quantity of steel caps for rails. At the time of making the contract, defendant was informed that the caps were to be used in making rails to fill a contract which plaintiff had made with the New York Central Railroad Company, but defendant was not informed as to what price plaintiff was to receive for the rails. Both parties knew that the caps could not be procured elsewhere in time to fill the sub-contract. The caps alone had no market value. Defendant's mill was burned before the time for furnishing the caps had expired, and they were never furnished. There was a judgment for plaintiff, from which defendant appealed.

CHURCH, C. J. The point made, that the destruction of the mill by fire was an excuse for the non-performance of the contract by the defendant, is not tenable. In the first place it does not appear nor is it found as a fact, that the burning of the mill prevented such performance. The contract was made December 27th, and the steel caps were to be delivered on the 1st of April thereafter. The mill burned on the 10th of March; and the proper construction of the finding is, that the defendant was prevented after that time from completing the contract, but there was ample time prior to that event to have manufactured the caps. A party cannot postpone the performance of such a contract to the last moment and then interpose an accident to excuse it. The defendant took the responsibility of the delay. But the case is not within the principle decided in *Dexter v. Norton*, 47 N. Y. 62, and the authorities upon which it was based. That principle applies when it is apparent that the parties contemplated the continued existence of a particular person or thing which is the subject of the contract, as in the case of the Musical Hall destroyed by fire (*Taylor v. Caldwell*, 3 Best & S. 826); in the case of an apprentice who became permanently ill (*Boast v. Frith*, L. R. 4 C. P. 1); and of a woman who, from illness, was unable to perform as a pianist (*Robinson v. Davison*, L. R. 6 Exch. 269). In these and analogous cases a condition is implied that the person or thing shall continue to exist. In *Dexter v. Norton*, supra, this principle was applied to relieve a party from damages for a failure to deliver property which was burned without his fault, but it has no application to a case of this character. There was no physical or natural impossibility, inherent in the nature of the thing to be performed, upon which a condition that the mill should continue can be predicated. The article was to be manu-

factured and delivered, and whether by that particular machinery or in that mill would not be deemed material. True, the contract specifies the mill as the place, but it necessarily has no importance, except as designating the place of delivery. For aught that appears, other machinery could have been substituted. The defendant agreed to furnish a certain manufactured article by a specified day, and it cannot be excused by an accident, even if it prevented performance. If it sought protection against such a contingency it should have been provided for in the contract. *Harmony v. Bingham*, 12 N. Y. 99; *Tompkins v. Dudley*, 25 N. Y. 272; *School Dist. v. Dauchy*, 25 Conn. 530. This case belongs to a class clearly distinguishable from those before referred to.

The more important question relates to the proper rule of damages. The referee finds, that prior to the contract with the defendant, the plaintiff had contracted with the New York Central Railroad Company to sell and deliver to it by the 1st of June, four hundred tons of rails to be composed of an iron foundation and steel caps, for the invention of which the plaintiff had obtained a patent; and that when the contract was made with the defendant he informed it that he wanted the caps to perform the contract; that if they had been delivered by the 1st of April the plaintiff could have performed his contract; and he finds, also, facts showing that the plaintiff would have realized the amount of profits for which the recovery was ordered.

The damages for which a party may recover for a breach of contract are such as ordinarily and naturally flow from the non-performance. They must be proximate and certain, or capable of certain ascertainment, and not remote, speculative or contingent. It is presumed that the parties contemplate the usual and natural consequences of a breach when the contract is made; and if the contract is made with reference to special circumstances, fixing or affecting the amount of damages, such special circumstances are regarded within the contemplation of the parties, and damages may be assessed accordingly. For a breach of an executory contract to sell and deliver personal property the measure of damages is, ordinarily, the difference between the contract-price and the market-value of the article at the time and place of delivery; but if the contract is made to enable the plaintiff to perform a sub-contract, the terms of which the defendant knows, he may be held liable for the difference between the sub-contract-price and the principal contract-price, and this is upon the ground that the parties have impliedly fixed the measure of damages themselves, or rather made the contract upon the basis of a fixed rule by which they may be assessed. The authorities cited on both sides recognize these general rules. *Griffin v. Colver*, 16 N. Y. 489; *Borries v. Hutchinson*, 114 E. C. L. 445; *Horner v. Railroad Co.*, L. R. 7 C. P.

587; *Hadley v. Baxendale*, 26 Law & Eq. 308; *Stockwell v. Phelps*, 34 N. Y. 364; *Messmore v. Lead Co.*, 40 N. Y. 422; *Randall v. Raper*, 96 E. C. L. 82; *Parks v. Tool Co.*, 54 N. Y. 586; *Cary v. Iron Works Co.*, L. R. 3 Q. B. 181; *Smeed v. Foord*, 1 El. & El. 602; *British Col. Co. v. Nettleship*, L. R. 3 C. P. 499; *Horner v. Railroad Co.*, L. R. 8 Exch. 131. The difficulty is in properly applying general rules to the facts of each particular case. Here it is found in substance that the contract was made to enable the plaintiff to perform his contract with the railroad company, and that this was known to the defendant. It is insisted however that as the price which the railroad company was to pay the plaintiff for the rails was not communicated to the defendant it cannot be said that it made the contract with reference to such price. It is expressly found that there was no market-price for the steel caps, and it does not appear that there was any market-price for the completed rail. The presumption is, from the facts proved, that there was not. It was a new article, and the contract was made to bring it into use. The result of the able and elaborate argument of the learned counsel for the defendant is, that in such a case, that is when, although the contract is made with reference to and to enable the plaintiff to perform a sub-contract, yet if the terms of the sub-contract, as to price, are unknown to the vendor, and there is no market-price for the article, the latter is not liable for any damages, or what is the same thing, for only nominal damages. I have examined all the authorities referred to, and I do not find any which countenances such a position, and there is no reason for exempting a vendor from all damages in such a case. It is not because the vendee has not suffered loss, as he has lost the profits of his sub-contract; it is not because such profits are uncertain, as they are fixed and definite, and capable of being ascertained with certainty; it is not because the parties did not contract with reference to the sub-contract, when it appears that the contract was made for the purpose of enabling the vendee to perform it. If the article is one which has a market-price, although the sub-contract is contemplated, there is some reason for only imputing to the vendor the contemplation of a sub-contract at that price, and that he should not be held for extravagant or exceptional damages provided for in the sub-contract. But the mere circumstance that the vendor does not know the precise price specified in the contract will not exonerate him entirely. He cannot in any case know the precise market-price at the time for performance. Knowledge of the amount of damages is impracticable, and is not requisite. It is only requisite that the parties should have such a knowledge of special circumstances, affecting the question of damages, as that it may be fairly inferred that they contemplated a particular rule or standard

for estimating them, and entered into the contract upon that basis. In *Hadley v. Baxendale*, 9 Exch. 341, which is a leading case on the subject in the English courts, the court after speaking of the general rule, says: "If the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of the contract under the special circumstances, so known and communicated."

This case has been frequently referred to, and the rule as laid down somewhat criticised; but the criticism is confined to the character of the notice, or communication of the special circumstances. Some of the judges, in commenting upon it, have held that a bare notice of special consequences which might result from a breach of the contract, unless under such circumstances as to imply that it formed the basis of the agreement, would not be sufficient. I concur with the views expressed in these cases; and I do not think the court in *Hadley v. Baxendale*, intended to lay down any different doctrine. See authorities before cited. Upon the point involved here, whether the defendant is exempted from the payment of any damages when there is no market-price, and the price in the sub-contract is not known, there is no conflict of authority that I have been able to discover. In the first place, there is considerable reason for the position that where the vendor is distinctly informed that the purchase is made to enable the vendee to fulfill a sub-contract, and knows that there is no market-price for the article, he assumes the risk of being bound by the price named in the sub-contract, whatever that may be, but it is unnecessary to go to that extent. It is sufficient to hold, what appears to me to be clearly just, that he is bound by the price, unless it is shown that such price is extravagant, or of an unusual and exceptional character. The presumption is, that the price at which the property was sold was its fair value, and that is to be taken as the market-price for the purpose of adjusting the damages in the particular case. This presumption arises here. The profits were not unreasonable, certainly not extravagant. About fifteen per cent was allowed for profits, including the use of the patent, and no evidence was offered, or claim made, that the price was not the fair value of the article. We must assume that it was, and hence within the contemplation of the parties. The case of *Borries v. Hutchinson*, 114 E. C. L. 443, is quite analogous to this. The article, caustic soda, was purchased to be sold to a foreign correspondent, which the defendant knew. There were several items of damage claimed. The profits on the sub-contract were conceded, and the money paid into court,

but the court held, in passing judgment, that the plaintiff was entitled to recover such profits. Erle, C. J., said: "Here the vendor had notice that the vendee was buying the caustic soda, an article not ordinarily procurable in the market, for the purpose of resale to a sub-vendee, on the continent. He made the contract, therefore, with the knowledge that the buyers were buying for the purpose of fulfilling a contract which they had made with a merchant abroad."

The case of *Elbidger v. Armstrong*, L. R. 9 Q. B. 473, also illustrates the rule. That was a contract for the purchase of six hundred and sixty-six sets of wheels and axles, which the plaintiff designed to use in the manufacture of wagons; and which he had contracted to sell and deliver to a Russian company by a certain day, or forfeit two roubles a day. The defendant was informed of the contract, but not of the amount of penalties. Some delay occurred in the delivery, in consequence of which the plaintiff had to pay £100 in penalties, and the action was brought to recover that sum. There was no market in which the goods could be obtained, and the same point was made there as here, that the plaintiff was only entitled to nominal damages; but the court says: "When from the nature of the article, there is no market in which it can be obtained, this rule (the difference between the contract and market value) is not applicable, but it would be very unjust if, in such cases, the damages must be nominal."

It is true that the court held that the plaintiff could not recover the penalties as a matter of right, mainly upon the ground that such a consequence was not, from the nature of the notice, contemplated by the parties; and yet the judgment, directing the amount of the penalties paid, was allowed to stand, as being a sum which the jury might reasonably find. *Cary v. Iron Works Co.*, L. R. 3 Q. B. 181, decided that when the article purchased was designed by the purchaser for a peculiar and exceptional purpose unknown to the seller, the latter was nevertheless liable for the damages which would have been incurred if used for the purpose which the seller supposed it would be used for.

The case of *Horner v. Railway Co.*, L. R. 8 C. P. 134, is not in conflict with the position of the plaintiff. In that case the article had a well-known market-value. The sub-

contract was at an unusual and extravagant price, of which the defendant was not informed. Besides, the defendant was a carrier, and it was seriously doubted by some of the judges whether the same rule would apply to a carrier as to a vendor. The question in all these cases is, what was the contract? and a carrier who is bound to take property offered at current rates would not, perhaps, be brought within the principle by a notice of ulterior consequences, unless such responsibility was sought to be imposed as a condition, and he have an opportunity to refuse the goods; or unless a special contract at increased rates was shown. The decision was placed upon the ground that the exceptional price was not within the contemplation of the parties. The authorities in this state support the doctrine of liability in a case like this. The cases of *Griffin v. Colver* and *Messmore v. Lead Co.*, supra, especially the latter, decide the same principle. The defendant in that case was informed of the price of the sub-contract, but the decision was not put upon that ground. This case presents all the elements which have been recognized for the application of the rule of liability. The plaintiff contracted with the defendant expressly to enable him to perform his contract with the railroad company, which the defendant knew. The goods could not have been obtained elsewhere in time; and in consequence of the failure of the defendant to perform his contract, the plaintiff lost the benefit of his sub-contract. It is not claimed that the price at which the completed rails were agreed to be sold was extravagant or above their value; and as there was no market-price for the article, the fact that the defendant was not informed of the precise price in the sub-contract does not affect its liability. Nor does the fact that the defendant's contract does not embrace the entire article resold, relieve it from the consequences of non-performance. It was a material portion of the rail, without which it could not be made; and solely by reason of the failure of the defendant, the plaintiff failed to perform his contract, and thereby lost the amount for which he has recovered. We concur with the opinion of the referee and court below, in their views, holding the defendant liable. The judgment must be affirmed. All concur.

Judgment affirmed.

MATHER v. AMERICAN EXP. CO.

(138 Mass. 55.)

Supreme Judicial Court of Massachusetts.
Hampshire. Nov. 1, 1884.

Action against the American Express Company for breach of a contract to transport a package containing an architect's plans for a house. There was a finding for plaintiff, and defendant excepted.

J. C. Hammond, for plaintiff. D. W. Bond, for defendant.

FIELD, J. It is not denied that the defendant is liable in damages for the reasonable cost of the new plans, and for other expenses, if there were any reasonably incurred in procuring the new plans; but it is denied that the defendant is liable in damages for the delay in constructing the house occasioned by the loss of the plans. It is assumed that the plans had no market value, and were only useful to the plaintiff. The rule of damages then is their value to the plaintiff. As new plans could not be bought in the market ready made, some time necessarily must be consumed in making them, and the plaintiff contends that the value of the plans for immediate use, or for use at the time he would have received them from Boston, is their value to him, and that this value is made up of the cost of procuring the new plans and the damages occasioned by the delay. Whatever he calls it, it is damages for the delay in constructing the house, caused by the loss of the original plans, that he seeks to recover. It does not appear that the defendant had notice of the contents of the package at the time it was delivered for transportation, or any notice or knowledge

that the plaintiff needed the plans for the construction of a house which he had begun to build. The damages caused by the delay are not such as usually and naturally arise solely from a breach of the contract of the defendant to carry the package safely to its destination, nor were they within the reasonable contemplation of both parties to this contract, as likely to arise from such a breach. The fact that the plans had a special value to the plaintiff, and could not be purchased, does not touch the question of including in the damages the injury to the plaintiff occasioned by reason of other contracts which he had made, and of work which he had undertaken in expectation of having the plans for use immediately, or after the usual delay involved in sending the plans to Boston, and in having them traced and returned to him. Damages for such injury are not given unless the circumstances are such as to show that the defendant ought fairly to be held to have assumed a liability therefor when it made the contract.

We think that *Hadley v. Baxendale*, 9 Exch. 341, which has been cited with approval by this court, governs this case.

The case of *Green v. Railroad Co.*, 128 Mass. 221, on which the plaintiff relies, was an action to recover the value of an "oil painting, the portrait of the plaintiff's father." The opinion attempts to lay down a rule for determining the value of such a painting when the plaintiff had no other portrait of his father, and when, so far as appears, it had no market value; but the opinion does not discuss any question of damages not involved in determining the value of the portrait to the plaintiff. The plaintiff in that case made no claim for damages occasioned by a loss of a profitable use of the portrait.

Exceptions sustained.

ABBOTT et al. v. HAPGOOD et al.

(22 N. E. 907, 150 Mass. 248.)

Supreme Judicial Court of Massachusetts.
Worcester. Nov. 29, 1889.

Report from superior court, Worcester county; HAMMOND, Judge.

This is an action brought to recover damages for breach of contracts made by the defendants to furnish the Penn Match Company, Limited, of Philadelphia, certain machines used in the manufacture of matches, and certain match splints for the manufacture of matches. The said contracts are the same which were before the supreme judicial court in the case of *Match Co. v. Hapgood*, 141 Mass. 145, 7 N. E. Rep. 22. The plaintiffs in this writ are described as "Francis R. Abbott, Charles Kee, and Win. B. Kempton, all of Philadelphia, in the state of Pennsylvania, as they are copartners and associated together in business under the firm name and style of the 'Penn Match Company, Limited.'" The defendants did not call attention at the trial to the specific fact that they made any point in defense that the use in the writ of the present tense of the verb in "as they are copartners" described this firm as it existed at the date of the writ, viz., May 12, 1888. It had in fact appeared in the plaintiffs' testimony that Kempton had been in the business only a year or two, and was not connected with it at all when this suit was brought. It being agreed that the questions raised by the demurrer might be raised at the trial with the other questions, the following evidence material to the questions raised by the report was put in: The plaintiffs Abbott and Kee, with one William Brown, entered into a contract under the act of assembly of Pennsylvania approved June 2, 1874. Brown died about January 13, 1882, and the affairs of that concern were wound up, and a release from the administrator of Brown's estate was given February 7, 1882. The defendants had sold match splints to said concern, and had received a letter dated January 23, 1882, signed "PENN MATCH CO., LIMITED, FRANCIS R. ABBOTT, Tr.," ordering one each of defendants' "setting" and "rolling-off" machines, and at the time of the contracts sued on were making said machines. About the middle of February, 1882, the plaintiff Kempton agreed verbally to join them in forming a company, under the said statute of Pennsylvania, of the same name as the former, to prosecute the same business of manufacturing matches, in Philadelphia. The plaintiffs together agreed that they would organize said company under said statute, and would build a factory for the purpose of such manufactory, provided they could get the machinery, such as is mentioned in the contracts sued on. Thereupon, for the purpose of carrying out said agreement, and in the name of and for the benefit of the projected company, the plaintiffs applied to the defendants, who made the contracts in question, the plain-

tiffs made known to the defendants that the projected company would proceed with its organization, and would cause a factory to be built for it only in case they could make a contract with the defendants to furnish the machines. The plaintiffs told the defendants they would like them to give a written contract for the machines already ordered,—that is, one rolling-off machine and one setting machine,—and also attach to it an additional order for four more setting machines and one rolling-off machine. After some conversation, the defendants signed and delivered the contracts sued on. After the contracts were made, the plaintiffs gave up the idea of building the factory jointly, and Abbott and Kempton proceeded to build the factory for the use of the firm, with the arrangement that it should be verbally leased to the Penn Match Company, Limited, for the purpose of transacting its business, to-wit, the match business the plaintiffs had agreed to go into. The factory was completed about July 15, 1882, and the Penn Match Company paid rent from that time. On October 3, 1882, the plaintiffs made an agreement to carry out the arrangement entered into in February, 1882, and no business was done until after July 15th, when the factory was finished, except that the plaintiffs made some match-boxes, with a view preparatory to this company (the Penn Match Company) being organized, and so as to have them on hand. The records required by the statutes of Pennsylvania, as to limited partnerships, were duly made. Evidence was offered that in May, 1882, the defendants, after some letters stating that the machines would soon be made, refused to perform said contracts. The plaintiffs offered evidence of damage to them, as individuals, independent of their membership of their association. They likewise offered evidence of expenses incurred and damages suffered by the association in consequence of the defendants' refusal to deliver the machines and the match splints. The defendants put in the judgment for the defendants, which was rendered on the demurrer after the decision of the supreme judicial court in *Match Co. v. Hapgood*, 141 Mass. 146, 7 N. E. Rep. 22.

The defendants asked the court to rule: (1) There is no evidence to warrant a verdict for the plaintiffs. (2) The contracts are in terms with the Penn Match Company, Limited, and that company was not organized at the time of the contracts, and there never was any contract which would bind that company, and the plaintiffs cannot recover. (3) The judgment in the case of *Penn Match Company, Limited, v. Hapgood* and another is a bar to this action. (4) If, after the death of Brown, the present plaintiffs agreed together to form a limited partnership, under the statute of Pennsylvania, which has been put into the case, for the manufacture of matches, under the name of the "Penn Match Company, Limited," and with the purpose and to the end of doing so, and in the name

of and for the benefit of the projected limited partnership procured these contracts, the aforesaid judgment is a bar to recovery in this case. The court declined to rule as requested by the defendants, and ruled that the association, by the agreement of October 3, 1882, is so far different from the organization of the plaintiffs, as general partners, that in this case no damages suffered by the association can be assessed, and the only damages which can be recovered are such as the plaintiffs themselves have suffered independently of their membership of the association. The plaintiffs objected and excepted to this ruling, so far as it limited damages. The court overruled the defendants' demurrer, and they appealed; the ruling being that the plaintiffs could recover such damages as they suffered independently of the association formed under the statute, by reason of the non-performance of the contracts. A verdict was directed for the plaintiffs, with the understanding that the case should be reported, and the same is now reported, for the determination of the supreme judicial court. If the rulings are correct, the parties agree that the case shall be sent to an assessor to assess the damages. If the demurrer should have been sustained, or if, upon the evidence, a verdict should have been ordered for the defendants, the verdict is to be set aside, and judgment for the defendants entered; unless the ground for ordering judgment is such that it could have been cured by amendment, if it had been pointed out at the trial, in which case the court shall enter such judgment or order as shall seem just. If the plaintiffs are entitled to recover such damages as were suffered by the association organized under the agreement of October 3, 1882, the verdict is to be set aside, and a new trial ordered.

W. S. B. Hopkins, for plaintiffs. *F. P. Goulding*, for defendants.

KNOWLTON, J. According to the terms of the report in this case, if the demurrer should have been sustained, on grounds which could have been removed by amendment, the plaintiffs are to be permitted to amend. The defendants have made no point upon the use of the present tense instead of the past tense in the allegation in the writ as to the partnership of the plaintiffs, and, if that is material, it may be corrected by amendment. In each count of the declaration, after alleging that there was a valuable consideration for the defendants' contract, the plaintiffs aver that the contract was reduced to writing, and set out as the contract a writing which shows no consideration nor mutuality, but merely an undertaking on one side. To state the contract truly, they should set out in each count their own agreement which constituted the consideration for the agreement made by the defendants. The substantive grounds of defense rest upon the rulings, and refusals to rule, in regard to the effect of the evidence. There

was an attempt to recover under the contracts now before us, by a suit brought in the name of the Penn Match Company, Limited, against these defendants. In that case the plaintiff was alleged to be a corporation, and the hearing and decision were upon a demurrer which admitted that allegation to be true. If we assume that the limited partnership organized under the laws of Pennsylvania was so far an entity, separate from the persons who were members of it, that it could sue and be sued in this commonwealth as a corporation can, it is quite clear that it was not a party to the contracts declared on. *Match Co. v. Hapgood*, 141 Mass. 145, 7 N. E. Rep. 22. If a contract is made in the name and for the benefit of a projected corporation, the corporation, after its organization, cannot become a party to the contract, even by adoption or ratification of it. *Kelner v. Baxter*, L. R. 2 C. P. 174; *Gunn v. Insurance Co.*, 12 C. B. (N. S.) 694; *Melhado v. Railway Co.*, L. R. 9 C. P. 503; *In re Engineering Co.*, L. R. 16 Ch. Div. 125. Upon the facts reported in the present case, the defendants, as well as the plaintiffs, must have understood that the limited partnership was only projected, and that the plaintiffs, acting jointly as individuals, or as general partners, constituted the only party who could contract with the defendants in the manner proposed. It is evident that both parties intended to enter into binding contracts. As recited in the report, for the purpose of carrying out their agreement to form a limited partnership, "and in the name of and for the benefit of the projected company, the plaintiffs applied to the defendants who made the contracts in question, and the plaintiffs made known to the defendants that the projected company would proceed with its organization and would cause a factory to be built for it, only in case they could make a contract with the defendants to furnish the machines."

We are of opinion, in view of the facts known to both parties, that the plaintiffs must be deemed to have been jointly contracting in the only way in which they could lawfully contract, and that they assumed the name "Penn Match Company, Limited," as that in which they chose to do business, in reference to the projected limited partnership, until their organization should be completed, and they should turn over the business to the new company, which would be composed of themselves in a new relation. This seems to be warranted by the language of the report and entirely consistent with their purpose made known to the defendants, and in that way only can effect be given to their act. The judgment in the former suit is no bar to this action, for that suit was brought by different plaintiff.

On the subject of damages, the report did not sufficiently state the evidence to enable us fully to determine the rights of the parties. As we understand the rule laid down by presiding justice, that "the only dama

which can be recovered are such as the plaintiffs themselves have suffered independently of their membership of the association," we are of opinion that it is too narrow. In the view which we take of the agreement, the plaintiffs contracted for articles to be delivered to themselves. They informed the defendants that they had agreed to organize a limited partnership, of which they were to be the sole members, and that they made the contracts to enable them profitably to carry on business in their new organization. By reason of the defendants' breach of contract, the plaintiffs were unable to turn over to the new company the property which they should have received for that purpose, and they have been unable to establish that company, and start it in its work under such favorable auspices, and with such an equipment for the transaction of a profitable business, as if the defendants had performed their contracts. The only damages for which the defendants are liable to any one must be recovered in this action, and, inasmuch as the machines could not be procured in the market, we are of opinion that the parties must be presumed to have contracted in reference to the declared purpose for which they were to be furnished,

and that that purpose may be considered in assessing the damages. *Machine Co. v. Ryder*, 139 Mass. 366; *Manning v. Fitch*, 138 Mass. 273; *Townsend v. Wharf Co.*, 117 Mass. 501; *Somers v. Wright*, 115 Mass. 292; *Cory v. Iron-Works*, L. R. 3 Q. B. 181; *Portman v. Middleton*, 4 C. B. (N. S.) 322; *McHose v. Fulmer*, 73 Pa. St. 365.

We do not intimate that the plaintiffs are to receive any damages as members of the limited partnership, but only that the damages which they suffered, if any, by reason of the defendants' preventing them from successfully establishing and fitting out a business to be conducted by them as a limited partnership, may be recovered. The mere fact that they arranged to conduct their business by a limited partnership, under the statute of Pennsylvania, does not deprive them of the rights which they then had in the business, nor of the advantages which properly belonged to it. The value of the articles contracted for may be estimated in reference to their intended use in the business for which the defendants were to furnish them. The plaintiffs are to have leave to amend their writ and declaration as they shall be advised, and the case is to stand for trial. So ordered.

BROWNELL et al. v. CHAPMAN.

(51 N. W. 249, 84 Iowa, 504.)

Supreme Court of Iowa. Feb. 2, 1892.

Appeal from superior court of Council Bluffs; J. E. F. McGee, Judge.

Action on a contract, in substance as follows: "April 12th, 1889. D. Chapman, Esq., Council Bluffs, Iowa—Dear Sir: We will furnish you one of our Scotch marine boilers, 54 dia., 84 long, made of 60,000 T. S. marine steel shells, 5-16; * * * all the above delivered and set up, (you to do all wood-work,)—for the sum of ten hundred and twenty-three dollars, (\$1,023.00.) We will allow you three hundred and sixty dollars (\$360.00) for your two engines, boiler, heater, and inspirator, wheels, shafting, and couplings. Hoping to receive your order, we are, yours truly, Brownell & Co. P. S. We guaranty to deliver above in thirty days from April 13th. It is understood you are to have 90 days' option on sale of engine and boiler you have." "Accepted. D. Chapman." This action is to recover the balance of the contract price, after deducting the \$360 for the defendant's engines, etc. There was a failure to deliver the boilers, etc., on the part of the plaintiffs for some 18 days after the time specified in the contract; and the defendant presents a counter-claim because of the failure and for defective workmanship in putting in the boilers. A reply put in issue certain allegations of the counter-claim, and a trial by jury, resulting in a verdict and judgment for the defendant for \$31.25. The plaintiffs appeal.

Isaac Adams, for appellants. D. B. Dally, Emmet Finley, and Ambrose Burke, for appellee.

GRANGER, J. 1. Lake Manana is a small lake in the vicinity of Council Bluffs, in Pottawattamie county, and is a summer and pleasure resort. Boats are used on the lake for the accommodation of visitors, and among them was one known as the "M. F. Rohrer," belonging to the defendant. The boat was operated on the lake in the season of 1888, and the boilers and machinery contracted for, as known to the parties, were to refit the boat for use in the season of 1889. A breach of the contract on the part of plaintiff by a failure to deliver within the time is not questioned, and the important question on this appeal is as to the proper measure of damage. The superior court admitted evidence to show, and instructed the jury on the theory, that the measure of damage was the rental value of the boat during the time the defendant was deprived of its use in consequence of the breach. The appellants' thought is that the measure of damage is the "interest of the capital invested in the boat." This latter rule has something of support in authority, but it is far outweighed by the number of cases and the rea-

soning supporting the rule adopted by the court. In considering the question we must keep in view the rule, universally recognized, that the damage for breach of contract must be limited to such as would naturally come within the contemplation of the parties at the time the contract was made. The plaintiff, when it agreed to furnish and set the boilers, knew they were to be used in operating the boat; that a breach on its part would deprive the plaintiff of its use; and it would naturally contemplate the value of such use as the injury that would be sustained; and such is, as a matter of fact, the actual damage. The appellants cite a number of cases, but all except two, we think, support the rule adopted by the court. *Brown v. Foster*, 51 Pa. St. 165, is a case quite similar to this. Repairs to a boat by putting in machinery were to be completed by October 1st. The work was not done until December 15th. The trial court gave, as the rule of damage, "that the measure in such a case is the ordinary hire of such a boat for the time in question, for the time plaintiff was in default." The complaint in that case of the rule as given was by the defendant, who was seeking damage, and the court said his complaint was without reason. The case cited is not authority for the appellants' position. In *Mining Syndicate v. Fraser*, 130 U. S. 611, 9 Sup. Ct. 665, the interest on the investment in a mill that had been delayed because of defective machinery was allowed as the measure of damage, but only in case the jury found there was no evidence of the rental value of the mill. The case clearly recognizes the rule as to rental value as a correct one. In *Griffin v. Colver*, 16 N. Y. 489, is the following syllabus, having full support in the opinion: "Upon a breach of a contract to deliver at a certain day a steam-engine built and purchased for the purpose of driving a planing-mill and other definite machinery, the ordinary rent or hire which could have been obtained for the use of the machinery whose operation was suspended for want of the steam-engine may be regarded as damages." In *Nye v. Alcohol Works*, 51 Iowa, 129, 50 N. W. 988, this general principle has support argumentatively, but another rule, because of distinguishing facts, is sustained. The cases of *Allis v. McLean*, 48 Mich. 428, 12 N. W. 640, and *Taylor v. Maguire*, 12 Mo. 313, are not in harmony with this view, but they are clearly overborne by the weight of the other cases and the current of authority. The latter case cites, as decisive of the point, *Blanchard v. Ely*, 21 Wend. 342. In *Griffin v. Colver*, supra, the *Blanchard* case is commented upon and explained, and, in effect, it is divested of the authority claimed for it in the Missouri case.

But it is said that the boat in question had no established rental value. By this it is meant that the boat had never been rented. But it will not do to say that because an ar-

article has never been rented it has no rental value, any more than it would to say that because an article had never been sold it has no market value. We should assume that an article suitable and adapted for use at a time and place has both a market and rental value, at least until the contrary appears. In *Jemmisson v. Gray*, 29 Iowa, 537, this court approved an instruction that "the fact, if proven, that 12,213 ties could not have been purchased for immediate delivery in the market at the places where said ties were to be delivered on the 1st day of October, 1869, would not, of itself, establish the fact that there was not a market price for such ties at such time and place." The holding affords a strong presumption in favor of a market price. A like presumption would prevail in favor of an article having a value for hire at a time and place where such articles are in demand for use. The testimony shows that boats varying in size were rented on the lake during the season, both by the day and for trips. This boat had perhaps twice the carrying capacity of any other boat on the lake, and in that respect formed an exception; but the rental value of boats depended on their size and adaptation for use, and it was competent for persons having knowledge of the business and prices paid for other boats to give an opinion as to the rental value of such a boat as the one in question. It is contended that the method of ascertaining the rental value involves the uncertainties and facts on which profits are excluded as a rule of damage; but we think not. It is true that rental values are generally fixed from a calculation of the profits to be derived from the use, but the rental is a fixed, definite value, agreed to be paid, and the bailee assumes the uncertainties as to the profits.

The appellants say: "For an analogous case to the one at bar, in there being an attempt to prove a rental value to property when the facts showed that the property in question had no rental value, the court is referred to *Coal Co. v. Foster*, 59 Pa. St. 365." The case, as we read it, is without a bearing on the question. The defendant agreed to furnish for the coal company an engine of a particular size and make. There was no other engine of the kind that the company could use. There was a delay in the delivery, and the company was compelled to transport its coal by horse-power, as it had before done. The trial court gave the rule "that the measure of damage for the delay was the ordinary hire of a locomotive during the period of delay." The reviewing court gave the rule as the difference between the cost of transporting the coal by horse and by locomotive power, but placed its ruling on the fact that the parties knew there was no other engine to be operated on the track of the company, and could not have had such

damage in view in making the contract. It will be seen that the cases are different. If in the case at bar the defendant's boat had been operated at an additional cost by doing the same amount of work during the delay, it would be reasonable to say the damage to him was the difference in the cost. But his is an entire loss of use, and the value of such use is the damage, where it is proximate, and not speculative or uncertain.

2. A part of the counter-claim is for loss of time by men kept in readiness by defendant to do the part of the work belonging to him in adjusting the boilers and machinery, as provided by the contract. On this branch of the case the court gave the following instruction: "(5) If you find from the evidence, and under the third and fourth instructions, that there was a contract, as set out, between plaintiffs and defendant, and that plaintiffs were in default in carrying out said contract; and if you find that, by reason of such default, defendant was damaged; and if you further find that defendant was in readiness to carry out his part of said contract at the time specified therein; and that at the time he was in readiness to run and operate his boat; and that the boat was necessarily idle during the period of plaintiffs' default, by reason of such default, —then the defendant would be entitled to recover the ordinary and reasonable rental value of said boat during the time of said default, and such reasonable and necessary amount (if there be any such amount) as he may have been required to pay to any men that he may have employed during said enforced idleness for the purpose of running said boat, if he had any such men in his employ who remained in his employ and idle by reason of such default; and if you find that the defendant had placed himself in readiness to work upon said boat himself at the time specified in the contract for the furnishing of said machinery, and that he necessarily remained idle during the time of such default, if any, of the plaintiffs, and used ordinary diligence to find other employment for that time, you will then further find the fair and reasonable value of his services during the period of such default as part of the damage, if any, which defendant sustained." Complaint is made of the instruction, as stating an erroneous rule of damages, but we discover no error. If, because of the breach, the defendant lost his or the time of his employees, for such time and expense he should be reimbursed. The rule is recognized in *Mining Syndicate v. Fraser*, supra. The instruction fairly protects the rights of the plaintiffs. A number of other questions are argued, all of which we have examined, and find no prejudicial error. It would serve no good purpose to extend the opinion to present them. The judgment is affirmed.

MASTERTON ET AL. v. MAYOR, ETC.,
OF CITY OF BROOKLYN.

(7 Hill, 61.)

Supreme Court of New York. Jan. Term,
1845.

This was an action of covenant commenced in 1840, and tried at the New York circuit in June, 1843, before Kent, C. J. The case was this: January 26, 1836, a covenant was entered into between the defendants and the plaintiffs, by which the latter agreed at their own risk, costs and charges, to furnish, cut, fit, and deliver (properly and sufficiently prepared for setting), at the site of the city hall in the city of Brooklyn, all the marble that might be required for building the said city hall, according to certain plans and specifications then exhibited and signed by the respective parties, and in conformity with such drawings, molds and patterns as should from time to time be furnished by the superintendent or architect of the said city hall; all of the said marble to be of the same quality as that used for the ornamental and best work on the new custom-house in the city of New York, and of the best kind of sound white marble from Kain & Morgan's quarry, in Eastchester, free from spalls, cracks, and blemishes, and wrought in the best manner of workmanship, and tooled and rubbed, etc., as should be ordered by the superintendent. It was further agreed by the plaintiffs that they would proceed forthwith to the execution of the work with all diligence and with a sufficient force; and that they would commence the delivery of the marble as soon after the opening of navigation in the spring as might be required, and continue delivering the same in such order and at such times and as fast as the superintendent should direct. They also agreed that the marble thus delivered should be subject to inspection and rejection by the superintendent, and remain at the risk of the plaintiffs until the superintendent inspected and accepted it. And the defendants, in consideration of the above stipulations, agreed to pay the plaintiffs the sum of \$271,600, at the times and in the manner following, viz. the sum of \$10,000 when the basement of the said city hall was half up; the sum of \$15,000 when the whole of the basement was up; the sum of \$20,000 when the first story was half up; the sum of \$20,000 when the whole of the first story was up; the sum of \$20,000 when the second story was half up; the sum of \$20,000 when the whole of the second story was up; the sum of \$20,000 when one-half of the cornice of the superstructure was up; the sum of \$20,000 when the whole of the cornice was up; the sum of \$30,000 when the columns and capitals were up; the sum of \$25,000 when the entablature was complete; the further sum of \$20,000 when the interior work was done; and the remainder when the building was finished. The declaration alleged a

breach of this covenant in 1837, and claimed various items of special damage.

March 7, 1836, the plaintiffs entered into a covenant with Kain & Morgan. This covenant, after referring to the one entered into with the defendants, and reciting a part of the same, provided that Kain & Morgan should furnish from their quarry, in Eastchester, all the marble required for erecting, completing and finishing the city hall in the city of Brooklyn, in such blocks, pieces and proportions, and in such condition for working, as is usual and customary; and deliver the same to the plaintiffs, free of all expense, on a wharf in the city of Brooklyn, etc.; the blocks to be delivered so that there should be sufficient time to work and fit the same for the said superstructure, and equal in quality to that used for the superstructure and interior above the basement of the new custom house in the city of New York, etc. The remainder of the covenant was as follows: "And the said parties of the first part (the plaintiffs), in consideration, etc., do hereby covenant and agree to pay the said parties of the second part (Kain & Morgan) in the aggregate the sum of \$112,395, which amount shall be paid in different sums, from time to time, out of the sum of \$271,600 to be paid by the said mayor, etc. (the defendants), to the said parties of the first part, as the same from time to time may be paid to them, etc.; that is to say: The said parties of the first part shall and will make payment to the said parties of the second part at the same times that they, the said parties of the first part, receive their payments from the mayor, etc. (the defendants). And the several payments thus to be made to the said parties of the second part shall bear the same proportion, respectively, to the whole amount they are to receive from the said parties of the first part as the corresponding payment to the said parties of the first part by the mayor, etc., bear to the whole amount they are to receive under their contract from the said mayor, etc. And it is expressly understood and mutually covenanted and agreed that in no event shall the parties of the second part look to the said parties of the first part, or hold them responsible for any payments, until the said parties of the first part are first placed in sufficient funds by the mayor, etc. (the defendants), to enable them to make such payment according to the herein last before-mentioned provisions," etc.

The covenant with Kain & Morgan was read in evidence by the plaintiffs, subject to the right of the defendants to raise such objections to its admissibility, during the progress of the cause, as they might think proper. The plaintiffs also proved that they commenced the delivery of the marble in pursuance of the covenant between them and the defendants, and continued so to do until July, 1837, when the defendants suspended operations upon the building for want of

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funds, and refused to receive any more materials of the plaintiffs, though the latter were ready and offered to perform. The entire quantity of marble necessary to fulfill the contract on the part of the plaintiffs, according to the estimates made at the trial, was 88,819 feet. At the time the work was suspended, the plaintiffs had delivered 14,779 feet, for which they were paid the contract price. The plaintiffs then had on hand, at Kain & Morgan's quarry, about 3,308 feet, which was suitably fitted and prepared for delivery. A witness swore that this was not of much value for other buildings, and would not probably bring over two shillings per foot. Other witnesses swore that, had the work progressed with ordinary diligence, it would have taken about five years to complete the contract on the part of the plaintiffs. Considerable testimony was given tending to show the cost of marble in the quarry, and the expense of raising, dressing, and transporting it to the place of delivery. And the plaintiffs offered to show "what would be the difference between the cost to them of the marble in the contract, and the price that was to be paid for it by the contract," which evidence was objected to, but the circuit judge admitted it, and the defendants excepted. The witnesses answered that in 1836 the difference would be about 20 per cent.; in 1837, from 25 to 30 per cent.; in 1838, about 25 per cent.; in 1839, from 25 to 30 per cent.; and in 1840, from 30 to 40 per cent. The witnesses also testified that the ordinary profit calculated upon by master stone cutters was from 10 to 20 per cent., and that 15 per cent. was a fair living profit. All this testimony was objected to, but the circuit judge admitted it, and the defendants again excepted.

When the plaintiffs rested, the defendants moved that all the testimony in relation to the contract of Kain & Morgan with the plaintiffs, and the contract itself, be excluded from the consideration of the jury as irrelevant, but the circuit judge overruled the motion, and the defendants excepted.

The circuit judge charged the jury, among other things, that they were to allow the plaintiffs as much as the performance of the contract would have benefited them; that the plaintiffs were entitled to recover for the unfinished marble not accepted, subject to a deduction of what should be deemed its fair market value; that the jury should confine the damages to the loss of the plaintiffs; but that the benefit or profits which they would have received from the actual performance constituted such loss. The circuit judge also charged as follows: "The defendants ought to be allowed what the jury should think just as to interest on the outlays of the plaintiffs; also what the jury might think just for the risk of transportation, and the reasonable value of the marble unaccepted and unquarried. As to damages on the rough marble to be delivered by Kain

& Morgan, it appears by the contract with the defendants that the plaintiffs were obliged to procure it from this quarry. The plaintiffs' contract with Kain & Morgan, if made in good faith, was entered into as a reasonable part of the performance by the plaintiffs of their own contract; and if the defendants, by stopping the work, obliged the plaintiffs to break their contract with Kain & Morgan, then the damages on the latter ought to be allowed to the plaintiffs, who would be responsible to Kain & Morgan for the same. The jury, in respect to this contract, are to give the difference between the contract price and what it would cost Kain & Morgan to deliver the article, deducting the value of it to them, and making all proper allowances as in the case of the principal contract. In fixing the damages to be allowed the plaintiffs, the jury are to take things as they were at the time the work was suspended, and not allow for any increased benefits they would have received from the subsequent fall of wages or subsequent circumstances," etc.

The defendants excepted to the charge, and requested the circuit judge to instruct the jury, among other things, that no damages should be allowed on account of any supposed profits which the plaintiffs might have made out of the unfinished work; and that the damages allowed should be confined to the actual loss which the plaintiffs had sustained. The judge refused to charge further, and the defendants excepted. The jury found a verdict in favor of the plaintiffs for \$72,000, and the defendants now moved for a new trial on a bill of exceptions.

D. Lord and C. O'Connor, for plaintiffs. B. F. Butler and G. Wood, for defendants.

NELSON, C. J. The damages for the marble on hand, ready to be delivered, were not a matter in dispute on the argument. The true measure of allowance in respect to that item was conceded to be the difference between the contract price and the market value of the article at the place of delivery. This loss the plaintiffs had actually sustained, regard being had to their rights as acquired under contract.

The contest arises out of the claim for damages in respect to the remainder of the marble which the plaintiffs had agreed to furnish, but which they were prevented from furnishing by the suspension of the work in July, 1837. This portion was not ready to be delivered at the time the defendants broke up the contract, but the plaintiffs were then willing and offered to perform in all things on their part, and the case assumes that they were possessed of sufficient means and ability to have done so.

The plaintiffs insist that the gains they would have realized, over and above all expenses, in case they had been allowed to perform the contract, enter into and properly

constitute a part of the loss and damage occasioned by the breach; and they were accordingly permitted in the course of the trial to give evidence tending to show what amount of gains they would have realized if the contract had been carried into execution.

On the other hand, the defendants say that this claim exceeds the measure of damages allowed by the common law for the breach of an executory contract. They insist that it is simply a claim for the profits anticipated from a supposed good bargain, and that these are too uncertain, speculative, and remote to form the basis of a recovery.

It is not to be denied that there are profits or gains derivable from a contract which are uniformly rejected as too contingent and speculative in their nature, and too dependent upon the fluctuation of markets and the chances of business, to enter into a safe or reasonable estimate of damages. Thus any supposed successful operation the party might have made, if he had not been prevented from realizing the proceeds of the contract at the time stipulated, is a consideration not to be taken into the estimate. Besides the uncertain and contingent issue of such an operation in itself considered, it has no legal or necessary connection with the stipulations between the parties, and cannot, therefore, be presumed to have entered into their consideration at the time of contracting. It has accordingly been held that the loss of any speculation or enterprise in which a party may have embarked, relying on the proceeds to be derived from the fulfillment of an existing contract, constitutes no part of the damages to be recovered in case of breach. So a good bargain made by a vendor, in anticipation of the price of the article sold, or an advantageous contract of resale made by a vendee, confiding in the vendor's promise to deliver the article, are considerations always excluded as too remote and contingent to affect the question of damages. (*Clare v. Maynard*, 6 Adol. & E. 519, and *Cox v. Walker*, in the note to that case; *Walker v. Moore*, 10 Barn. & C. 416; *Cary v. Gruman*, 4 Hill, 627, 628; *Chit. Cont.* 438, 870.)

The civil law is in accordance with this rule. "In general," says Pothier, "the parties are deemed to have contemplated only the damages and interest which the creditor might suffer from the nonperformance of the obligation, in respect to the particular thing which is the object of it, and not such as may have been incidentally occasioned thereby in respect to his other affairs. The debtor is therefore not answerable for these, but only for such as are suffered with respect to the thing which is the object of the obligation, *'Damni et Interesse ipsam rem non habitam.'*" 1 Evans, Poth. 91. And see Dom. bk. 3, tit. 5, § 2, arts. 3-6.

When the books and cases speak of the profits anticipated from a good bargain as matters too remote and uncertain to be taken

into the account in ascertaining the true measure of damages, they usually have reference to dependent and collateral engagements entered into on the faith and in expectation of the performance of the principal contract. The performance or non-performance of the latter may and often does exert a material influence upon the collateral enterprises of the party; and the same may be said as to his general affairs and business transactions. But the influence is altogether too remote and subtle to be reached by legal proof or judicial investigation. And besides, the consequences, when injurious, are as often, perhaps, attributable to the indiscretion and fault of the party himself as to the conduct of the delinquent contractor. His condition, in respect to the measure of damages, ought not to be worse for having failed in his engagement to a person whose affairs were embarrassed than if it had been made with one in prosperous or affluent circumstances. Dom. bk. 3, tit. 5, § 2, art. 4.

But profits or advantages which are the direct and immediate fruits of the contract entered into between the parties stand upon a different footing. These are part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation. They are presumed to have been taken into consideration and deliberated upon before the contract was made and formed; perhaps the only inducement to the arrangement. The parties may, indeed, have entertained different opinions concerning the advantages of the bargain, each supposing and believing that he had the best of it; but this is mere matter of judgment going to the formation of the contract, for which each has shown himself willing to take the responsibility, and must, therefore, abide the hazard.

Such being the relative position of the contracting parties, it is difficult to comprehend why, in case one party has deprived the other of the gains or profits of the contract by refusing to perform it, this loss should not constitute a proper item in estimating the damages. To separate it from the general loss would seem to be doing violence to the intention and understanding of the parties, and severing the contract itself.

The civil law writers plainly include the loss of profits, in cases like the present, within the damages to which the complaining party is entitled. They hold that he is to be indemnified for "the loss which the non-performance of the obligation has occasioned him, and for the gain of which it has deprived him." 1 Evans, Poth. 90; Dom. bk. 3, tit. 5, § 2, arts. 6, 12. And upon looking into the common-law authorities bearing upon the question, especially the later ones, they will be found to come nearly, if not quite, up to the rule of the civil law.

In *Boorman v. Nash*, 9 Barn. & C. 145, it

appeared that the defendant contracted in November for a quantity of oil, one-half to be delivered to him in February following, and the rest in March; but he refused to receive any part of it. And the court held that the plaintiff was entitled to the difference between the contract price and that which might have been obtained in market on the days when the contract ought to have been completed. See *M'Lean v. Dunn*, 4 Bing. 722. The case of *Leigh v. Paterson*, 8 Taunt. 540, was one in which the vendor was sued for not delivering goods December 31st, according to his contract. It appeared that in the month of October preceding he had apprised the vendee that the goods would not be delivered, at which time the market value was considerably less than December 31st. The court held that the vendee had a right to regard the contract as subsisting until December 31st, if he chose and recover the difference between the contract price, and the market value on that day. See, also, *Gainsford v. Carroll*, 2 Barn. & C. 624.

The above are cases, it will be seen, in which the profits of a good bargain were regarded as a legitimate item of damages, and constituted almost the only ground of recovery. And it appears to me that we have only to apply the principle of these cases to the one in hand, in order to determine the measure of damages which must govern it. The contract here is for the delivery of marble, wrought in a particular manner, so as to be fitted for use in the erection of a certain building. The plaintiffs' claim is substantially one for not accepting goods bargained and sold; as much so as if the subject-matter of the contract had been bricks, rough stone, or any other article of commerce used in the process of building. The only difficulty or embarrassment in applying the general rule grows out of the fact that the article in question does not appear to have any well-ascertained market value. But this cannot change the principles which must govern, but only the mode of ascertaining the actual value of the article, or rather the cost to the party producing it. Where the article has no market value, an investigation into the constituent elements of the cost to the party who has contracted to furnish it becomes necessary; and that, compared with the contract price, will afford the measure of damages. The jury will be able to settle this upon evidence of the outlays, trouble, risk, etc., which enter into and make up the cost of the article in the condition required by the contract at the place of delivery. If the cost equals or exceeds the contract price, the recovery will of course be nominal, but, if the contract price exceeds the cost, the difference will constitute the measure of damages.

It has been argued that inasmuch as the furnishing of the marble would have run through a period of five years,—of which about one year and a half only had expired at the time of the suspension,—the benefits

which the party might have realized from the execution of the contract must necessarily be speculative and conjectural; the court and jury having no certain data upon which to make the estimate. If it were necessary to make the estimate upon any such basis, the argument would be decisive of the present claim. But, in my judgment, no such necessity exists. Where the contract, as in this case, is broken before the arrival of the time for full performance, and the opposite party elects to consider it in that light, the market price on the day of the breach is to govern in the assessment of damages. In other words, the damages are to be settled and ascertained according to the existing state of the market at the time the cause of action arose, and not at the time fixed for full performance. The basis upon which to estimate the damages, therefore, is just as fixed and easily ascertained in cases like the present, as in actions predicated upon a failure to perform at the day.

It will be seen that we have laid altogether out of view the subcontract of *Kain & Morgan*, and all others that may have been entered into by the plaintiffs as preparatory and subsidiary to the fulfillment of the principal one with the defendants. Indeed, I am unable to comprehend how these can be taken into the account, or become the subject-matter of consideration at all, in settling the amount of damages to be recovered for a breach of the principal contract. The defendants had no control over or participation in the making of the subcontracts, and are certainly not to be compelled to assume them if improvidently entered into. On the other hand, if they were made so as to secure great advantages to the plaintiffs, surely the defendants are not entitled to the gains which might be realized from them. In any aspect, therefore, these subcontracts present a most unfit as well as unsatisfactory basis upon which to estimate the real damages and loss occasioned by the default of the defendants. The idea of assuming that the plaintiffs were necessarily compelled to break all their subcontracts as a consequence of the breach of the principal one, and that the damages to which they may be thus subjected ought to enter into the estimate of the amount recoverable against the defendants, is too hypothetical and remote to lead to any safe or equitable result. And yet the fact that these subcontracts must ordinarily be entered into preparatory to the fulfillment of the principal one, shows the injustice of restricting the damages, in cases like the present, to compensation for the work actually done, and the item of materials on hand. We should thus throw the whole loss and damage that would or might arise out of contracts for further materials, etc., entirely upon the party not in fault.

If there was a market value of the article in this case, the question would be a simple one. As there is none, however, the parties

will be obliged to go into an inquiry as to the actual cost of furnishing the article at the place of delivery; and the court and jury should see that in estimating this amount it be made upon a substantial basis, and not be left to rest upon the loose and speculative opinions of witnesses. The constituent elements of the cost should be ascertained from sound and reliable sources; from practical men, having experience in the particular department of labor to which the contract relates. It is a very easy matter to figure out large profits upon paper; but it will be found that these, in a great majority of the cases, become seriously reduced when subjected to the contingencies and hazards incident to actual performance. A jury should scrutinize with care and watchfulness any speculative or conjectural account of the cost of furnishing the article that would result in a very unequal bargain between the parties, by which the gains and benefits, or, in other words, the measure of damages against the defendants, are unreasonably enhanced. They should not overlook the risks and contingencies which are almost inseparable from the execution of contracts like the one in question, and which increase the expense independently of the outlays in labor and capital.

These views, it will be seen, when contrasted with the law as expounded and applied by the circuit judge, necessarily lead to the granting of a new trial.

BEARDSLEY, J. The circuit judge clearly erred in that part of his charge to the jury which related to the contract of the plaintiffs with Kain & Morgan. No damages are allowable on account of this contract, nor am I able to see how it can be regarded as relevant evidence upon any disputed point connected with the amount for which the defendants are liable.

The main question in the case arises out of the claim of the plaintiffs in respect to that portion of their contract with the defendants which remained wholly unexecuted in July, 1837. I think the plaintiffs are entitled to recover the amount they would have realized as profits had they been allowed fully to execute their contract. The defendants are not to gain by their wrongful act, nor is that to deprive the plaintiffs of the advantages they had secured by the contract, and which would have resulted to them from its performance. The jury must, therefore, ascertain what it would probably have cost them to complete the contract, over and above the materials on hand, including the value of the marble required, the labor of quarrying and preparing it for use, the expense of transportation, superintendence, and insurance against all hazards, together with every other expense incident to the fulfillment of the undertaking. The aggregate of these expenditures is to be deducted from the amount which would be payable for the performance of this

part of the contract, according to the prices therein stipulated, and the balance will be the damages which the jury should allow for the item under consideration.

Remote and contingent damages, depending on the result of successive schemes or investments, are never allowed for the violation of any contract. But profits to be earned and made by the faithful execution of a fair contract are not of this description. A right to damages equivalent to such profits results directly and immediately from the act of the party who prevents the contract from being performed.

Where a vendor has agreed to sell and deliver personal property at a particular day, and fails to perform his contract, the vendee may recover in damages the difference between the contract price and the market value of the property at the time when it should have been delivered. *Chit. Cont.* (5th Am. Ed.) 445; *Dey v. Dox*, 9 Wend. 129; *Gainsford v. Carroll*, 2 Barn. & C. 624; *Shepherd v. Hampton*, 3 Wheat. 200; *Quarles v. George*, 23 Pick. 400; *Shaw v. Nudd*, 8 Pick. 9; 2 Phil. Ev. 104. So, if a person who has agreed to purchase goods at a certain price refuses to receive them, he must pay the difference between their market value and the enhanced price which he contracted to pay. 2 Starkie, Ev. (7th Am. Ed.) 1201; *Boorman v. Nash*, 9 Barn. & C. 145.

These principles are strictly applicable to the present case. In reason and justice there can be no difference between the damages which should be recovered for the breach of an ordinary agreement to buy or sell goods and one to procure building materials, fit them for use, and deliver them in a finished state, at a stipulated price. In neither case should the wrongdoer be allowed to profit by his wrongful act. The party who is ready to perform is entitled to a full indemnity for the loss of his contract. He should not be made to suffer by the delinquency of the other party, but ought to recover precisely what he would have made by performance. This is as sound in morals as it is in law. *Shannon v. Comstock*, 21 Wend. 461; *Miller v. Mariner's Church*, 7 Greenl. 51; *Shaw v. Nudd*, 8 Pick. 13; *Swift v. Barnes*, 16 Pick. 196; *Royalton v. Turnpike Co.*, 14 Vt. 311.

The plaintiffs were not bound to wait till the period had elapsed for the complete performance of the agreement, nor to make successive offers of performance, in order to recover all their damages. They might regard the contract as broken up, so far as to absolve them from making further efforts to perform and give them a right to recover full damages as for a total breach. I am not prepared to say that the plaintiffs might not have brought successive suits on this covenant, had they from time to time made repeated offers to perform on their part, which were refused by the defendants, but this the plaintiffs were not bound to do.

There can be no serious difficulty in as-

sessing damages according to the principles which have been stated. The contract was made in 1836; and, according to the testimony, about five years would have been a reasonable time for its execution. That time has gone by. The expense of executing the contract must necessarily depend upon the prices of labor and materials. If prices fluctuated during the period in question, that may be shown by testimony. In this respect there is no need of resorting to conjecture, for all the data necessary to form a correct estimate of the entire expenses of executing the contract can now be furnished by witnesses.

If the cause had been brought to trial before the time for completing the contract expired, it would have been impracticable to make an accurate assessment of the damages. This is no reason, however, why the injured party should not have his damages, although the difficulty in making a just assessment in such a case has been deemed a sufficient ground for decreeing specific performance. *Adderly v. Dixon*, 1 Sim. & S. 607, and cases there cited. In *Royalton v. Turnpike Co.*, 14 Vt. 311, 324, an action was brought on a contract which had about twelve years to run. And the court held, in granting a new trial, that the rule of damages "should have been to give the plaintiffs the difference between what they were to pay the defendants, and the probable expense of performing the contract; and thus assess the entire damages for the remaining twelve years." No rule which will be absolutely certain to do justice between the parties can be laid down for such a case. Some time must be taken arbitrarily at which prices are to be ascertained and estimated; and the

day of the breach of the contract, or of the commencement of the suit, should perhaps be adopted under such circumstances. But we need not, in the present case, express any opinion on that point. No conjectural estimate is required to ascertain what would have been the expense of a complete execution of this contract; but the state of the market in respect to prices is now susceptible of explicit and intelligible proof. And where that is so, it seems to me unsuitable to adopt an arbitrary period, especially as the estimate of damages must, in any event, be somewhat conjectural.

I think the defendants are entitled to a new trial, and that the damages should be assessed upon the principles stated.

BRONSON, J. As the marble had no market value, the question of profits involves an inquiry into the cost of the rough material in the quarry, and the expense of raising, dressing, and transporting it to the place of delivery. There may have been fluctuations in the prices of labor and materials between the day of the breach and the time when the contract was to have been fully performed; and this makes the question on which my brethren are not agreed. I concur in opinion with the chief justice, that such fluctuations in prices should not be taken into the account in ascertaining the amount of damages, but that the court and jury should be governed entirely by the state of things which existed at the time the contract was broken. This is the most plain and simple rule; it will best preserve the analogies of the law; and will be as likely as any other to do substantial justice to both parties.

New trial granted.

SHERMAN CENTER TOWN CO. v. LEONARD.

(26 Pac. 717, 46 Kan. 354.)

Supreme Court of Kansas. May 9, 1891.

Error from district court, Sherman county; LOUIS K. PRATT, Judge.

Hardy & Sterling, for plaintiff in error. Bagley & Andrews, for defendant in error.

JOHNSTON, J. Thomas P. Leonard recovered a judgment for \$600 against the Sherman Center Town Company as damage for the breach of a contract. Leonard owned a hotel in Itasca, and Sherman Center, which was three miles away, was a candidate for county-seat of Sherman county. The town company, desiring to increase the population and influence of Sherman Center and strengthen its candidacy, held out inducements to the citizens of the surrounding towns to remove their buildings and establish themselves in business in Sherman Center, and unite in an effort to make that town the county-seat of the county. Accordingly they entered into an agreement with Leonard by which Leonard was to join them in building up the town, and remove his hotel from Itasca, in consideration of which the company was to convey to him certain lots in Sherman Center, and provide at its own expense men and machinery to remove the hotel, and place it over a cellar of equal size, and on a foundation of a similar kind, as it was then resting upon in Itasca. The plaintiff alleged that the company had failed and refused to remove the hotel in accordance with the terms of the contract; that the other buildings which were then situated in Itasca have been removed to Sherman Center, and the town of Itasca has become depopulated, and the business of hotel keeping of no value; and that the hotel now stands alone, with no town nearer to it than Sherman Center, which is nearly three miles distant. He further alleged that it was a large and well-furnished hotel, and that the cost of its construction and the furniture contained therein was about \$4,500. It is alleged that the cost of removal would be about the sum of \$500, and that he suffered damages by the refusal of the company to comply with the contract in the sum of \$1,200. He therefore asked judgment for \$2,000. The company by its answer denies the execution of the contract, or that it is authorized by its charter to enter into the contract alleged to have been made.

There are several errors assigned by the company, but only one of them requires attention. It appears that the company has conveyed the lots to Leonard, as stipulated in the contract, but the hotel has not been removed, and, according to plaintiff's testimony, the non-removal is owing to the refusal of the company to furnish the men and machinery for that purpose, although frequent demands have been made upon them. In the course of the trial the plaintiff testified that, by reason of the removal of the people and their buildings from other towns, Sherman Center became a flourishing place of several hundred people, where he could

have profitably carried on the hotel business, but that the town of Itasca was practically abandoned, so that he is without business, and simply remains at the hotel to protect the goods and furniture therein. In order to prove the extent of his injury, the following question was asked and allowed by the court over the objection of the defendant: "State, as near as you can, what would have been your profits, or what your damages was, in other words, by reason of the non-fulfillment of this contract,—not moving your hotel and establishing your business at Sherman Center." Another question which was allowed, over objection, was: "State what the damage was by reason of them not moving your hotel to Sherman Center, as they agreed to, in money." He answered that the loss or profits would have been \$150 a month, and that the total damage sustained by reason of not having the hotel located at Sherman Center, besides the cost of moving the building, was from \$1,200 to \$1,500, and that it would cost about \$800 to move the building. The questions asked were objectionable, and the testimony given was inadmissible, upon two grounds: First, the questions were objectionable because they did not call for specific facts, but permitted the witness to state a mere opinion, giving in the lump the amount of damages thought to be sustained. It is the function of the court or jury trying the case to determine from evidence properly presented what the amount of damages sustained is, and, while it might be very convenient for the plaintiff to permit him and his witnesses to give the damages suffered in a lump, it would be a very unsafe practice to allow them to state the amount of damages supposed to be sustained, without regard to the facts or knowledge upon which their opinions were based. It is well settled that the practice is not permissible. *Roberts v. Commissioners*, 21 Kan. 248; *Railroad Co. v. Kuhn*, 38 Kan. 675, 17 Pac. Rep. 322; *Town Co. v. Morris*, 39 Kan. 377, 18 Pac. Rep. 230; *Railway Co. v. Neiman*, 45 Kan. 33, 25 Pac. 22. Then, again, the prospective profits that he lost by the breach of the contract are too remote, uncertain, and speculative to be recoverable. Who can tell what the future gains of the hotel business would have been in Sherman Center, if he had moved there? His past profits in Itasca were not shown, and there is no testimony of the gains of others established in the same business at Sherman Center. How, then, does Leonard know that the profits would have been \$150 per month? The gains to be derived from the business depended upon many contingencies other than the mere removal of his hotel to that place. The growth of the town; the location of the county-seat there or at another town near by; the immigration and travel; the competition in the hotel business; the price of provisions and the cost of help; the general reputation of the house; and the popularity of the landlord with the traveling public and the people of that community,—are suggested as some of the considerations that would affect the anticipated benefits. Where the breach of a

contract results in the loss of definite profits, which are ascertainable, and were within the contemplation of the contracting parties, they may generally be recovered; but the prospective profits do not furnish the correct measure of damages in the present case. Aside from the remote, conjectural, and speculative character of the anticipated benefits, it cannot be said that the loss of them is the direct and unavoidable consequence of the breach. The plaintiff could not sit idle an indefinite length of time and safely count on the recovery of \$150 per month as damages. If there was a breach of the contract, it was his duty, upon learning of it, to at once remove the building, or employ others to do so, and charge the cost of the removal to the town company. The law requires that the injured party shall do whatever he reasonably can, and improve all reasonable opportunities to lessen the injury. From the testimony it appears that Leonard could have procured others to move the hotel; and in such a case the ordinary measure of damages is the cost of removal, and the reasonable expenses of avoiding the consequence of the defendant's wrong. *Railway Co. v. Muhlman*, 17 Kan. 224; *Loker v. Damon*, 17 Pick. 284; 1 Sedg. Dam. 165, and cases cited. Counsel for plaintiff in error say

that no more than the cost of removal was allowed by the court; but the admission of the objectionable evidence, against the opposition of the plaintiff in error, would indicate that the court adopted an incorrect measure of damages, and did not limit the recovery to the expense of the removal. The liability of the plaintiff in error for any loss is not conceded. It is shown in the testimony that soon after the time for the removal of the building the people of Sherman Center abandoned the attempt to obtain the county-seat, and all or nearly all of them moved to another place. It is claimed by plaintiff in error that Leonard objected to the removal of his building until the question of the location of the county-seat was settled. He testified at the trial that he did not intend to move the building to Sherman Center, and that he would not move the building at all, until the county-seat was permanently located. If the non-removal of the building was due to the fault of Leonard, he is not entitled to recover anything. This is a disputed question of fact, which must be settled on another trial. For the error of the court in admitting testimony the judgment of the court below will be reversed, and cause remanded for a new trial. All the justices concurring.

THOMAS, BADGLEY & W. MANUF'G CO.
v. WABASH, ST. L. & P. RY. CO.

(22 N. W. 827, 62 Wis. 642.)

Supreme Court of Wisconsin. March 31, 1885.

Appeal from circuit court, Milwaukee county.

Chapin, Dey & Friend, for appellant. Van Dyke & Van Dyke, for respondent.

COLE, C. J. On the tenth of November, 1882, the plaintiff, as consignee, caused to be delivered to the defendant, a common carrier, at St. Louis, a pipe-machine, circular shaft, box of dies, and wrenches accompanying, and being a part of the pipe-machine, to be transported over its road and connecting lines to Milwaukee. The machine and its attachments were badly broken and destroyed while in the custody of the defendant through the negligence of its servants. The machine was a patented one, and the right to make and sell it was vested in the manufacturer at St. Louis, of whom it was purchased by the plaintiff. The machine was devised for cutting pipe and making nipples, and was ordered by the plaintiff to be used in its business in Milwaukee, of fitting pipe and manufacturing brass goods, etc. The plaintiff sues to recover damages for the loss of the machine, and the loss of its use in its business while another was being procured. The case was tried by a jury, which found a special verdict. The plaintiff had judgment for the value of the machine, which was proven to be \$275, and for the loss of its use for 85 days, at the rate of \$1.50 per day, and interest thereon from the commencement of the action.

The questions presented on the appeal are as to the proper rule of damages. There was evidence which tended to show that the machine, though badly broken and some of its parts destroyed, might have been repaired by the patentee at St. Louis, who was the manufacturer. The plaintiff refused to accept the machine at Milwaukee, but left it in the possession of the carrier, and ordered a new machine of the manufacturer. One question arising in the record is whether it was the duty of the plaintiff, under the circumstances, to have received the machine in its damaged condition, and to have made proper and reasonable exertions to have it repaired, so as to render the loss to the carrier as light as possible. There is a class of cases which decide that it is not only the moral but the legal duty of a party who seeks redress for another's wrong, to make use of his opportunities of lessening the damage caused by the other's default. If it had been within the power of the plaintiff to have supplied the broken parts of the machine, or to have repaired it with reasonable labor and expense, it might have been its duty to have done so within this rule of law. But the jury found that the machine when

delivered was useless; that the cost and expense to the plaintiff to repair it would have amounted to the price of a new machine. This finding is criticised by the counsel for the defendant, but we are not inclined to disturb it.

As we have said, the machine was a patented one; its parts were not kept for sale in the open market; and there was evidence that it would cost any one but the manufacturer more to make the patterns for the castings than the price of a new machine. The plaintiff, therefore, could not have had the machine repaired in Milwaukee at any saving to the carrier. But it is said it might have returned the machine to the manufacturer in St. Louis, who testified that it could have been repaired for \$75. True, the manufacturer, in answer to this hypothetical question, namely, "Supposing the bottom part of the machine was broken in two pieces, the attachments consisting of a box of dies broken open and contents scattered in the car, oil-cup on the machine burst, skids on which machine and attachments were originally placed broken, legs on standard of machine broken, and rods connected with them bent, what was the damage, in your estimation, to the machine?"—the witness said the question was a difficult one to answer, but added, as we understand him, that if the damages supposed included all that was done to the machine, and none of the parts were missing, and no other injury was done to it, then it would cost about \$75 to repair it. But the witness subsequently modified his statements upon this point by saying that with the fragments of the machine which he received from the defendant, it would cost not less than \$250 to repair it. It appeared that some of the most expensive parts were missing, and in the state of the proof the jury might well find, as they did, that the cost and expense to the plaintiff at the time to have the machine repaired by the manufacturer, and the broken parts replaced, would be as much as the price of a new machine. It is very clear that the machine in its damaged condition was of no value to the plaintiff. It was not a case of a partial but of a total loss, so far as plaintiff was concerned. The general rule of damages for the loss of goods by a carrier, where it is liable for such loss, is the value of the goods at the destination to which it undertook to carry them, with interest on such value from the time when the goods should have been delivered. *Nudd v. Wells*, 11 Wis. 408; 2 Sedg. Dam. 94, note b; *Hutch. Carr.* § 769.

The plaintiff did not claim to recover more for the machine than it had paid for it at St. Louis, to-wit, \$275. It appeared that it had paid the freight, \$3.85, which of course should be added to the recovery. So our conclusion upon this branch of the case is that the court below was right in allowing the plaintiff to recover upon the verdict the cost of the machine. There was a stipulation in

the bill of lading that in case of loss or damage to goods during transportation, whereby the defendant incurred a responsibility, that then it should only be liable for the value of the property computed at the place and time of shipment. This was precisely the extent of the recovery on this item of damages.

The next question is, was the plaintiff entitled to recover for the loss of the use of the machine while another was being procured to supply the place of the one destroyed? This question, upon the circumstances of this case, we think must be answered in the negative. In the first place, it is to be observed that there is no allegation in the complaint, and no proof was given on the part of the plaintiff, which tended to show that the defendant had notice of the use to which the machine was to be put, or even knew that the plaintiff intended to use it in its business. On the contrary, the agent of the defendant who made the contract of shipment says he had no notice of the purpose for which the machinery was to be used. He said he was applied to by the manufacturer in St. Louis about this particular shipment, and gave special rates, less than the regular tariff, on representation made by the manufacturer that the goods were not liable to injury, and that he wanted to introduce the machine, which was a new one, through the west, and wished the assistance of the witness in doing so. This is all the knowledge the defendant had about the property, or the use to which it was to be put. It is said the fact that the consignee in the bill of lading was a manufacturing company was sufficient notice that the machine was intended to be used by it in its business. We do not think so. The defendant certainly had no notice of the business in which the plaintiff was engaged, and did not know that this machine had been procured for fitting pipe and making nipples. Should we presume—as we have no right to do—that the defendant had knowledge of plaintiff's business, surely we could not presume that this machine was ordered by it for immediate use.

This being the state of the evidence, on what ground can the plaintiff claim damages for loss in the use of the machine? The president of the plaintiff testified that his company was doing business of steam-fitting and selling pipe at wholesale, and in the fall of 1882 he was told he would need a machine to cut the pipe. This was the reason for buying the machine. He says: "We were, besides, doing some steam-fitting ourselves, and, of course, we have to cut pipe all the time to get special lengths, and instead of using men we paid a man to do it with the machine. The machine would do the work of one man." This is really all there is in the case to base a claim for loss in the use of the machine upon. The defendant did not know what the machine was designed for; did not know the use to which it was to be put; did not even know the

plaintiff would use it; and, of course, did not know that the plaintiff would sustain any special damage if the property failed to be delivered promptly, in good order. From the nature of the subject it is difficult to state an inflexible rule of damages which will apply to all contracts. This court has often referred to, and has practically acted upon, the rule laid down in the leading case of *Hadley v. Baxendale*, 9 Exch. 341. In that case the plaintiffs, who were owners of a flour-mill, sent a broken iron shaft to an office of the defendant, a common carrier, to be conveyed to the consignee, to have a new shaft made. The defendant's clerk was told that plaintiff's mill was stopped, and that the broken shaft must be delivered immediately to the consignee, but it was delayed for an unreasonable time. In consequence of the delay the plaintiffs did not receive the new shaft for some days after the time they ought to have received it, and they were unable to work their mill for want of the new shaft, and thereby incurred a loss of profits. The court held that under the circumstances such loss could not be recovered in an action against the common carrier, because the special circumstances were never communicated to it by the plaintiffs. Alderson, B., in giving the decision, states the rule of damages as follows:

"Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i. e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from the breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and, in the great multitude of cases, not affected by any special circumstances from such a breach of contract."

This rule has been sometimes criticised, and it has been said that, generally, when parties enter into a contract, they do not contemplate its breach or the probable result of a breach, and that the rule might be more accurately expressed. See *Palles, C. B.*, in *Hamilton v. McGill*, 12 Ir. Law, 202. But,

without refining on the rule, its application to the question we are considering is obvious and decisive; for here the defendant was not informed by the plaintiff that the machine was one which it needed for use in its business of cutting and fitting pipe, and that it was procured for that purpose. If one desires to trace the judicial discussion of the rule in *Hadley v. Baxendale*, he will find a most excellent and accurate analysis of the English and American decisions in note a, 1 Sedg. Dam. (7th Ed.) top p. 218. Also see note 2 to section 772, Hutch. Carr. p. 597.

In *Brayton v. Chase*, 3 Wis. 456, which was an action by the vendee against the vendor for failure to deliver a reaper which the plaintiff purchased to harvest his crops, the plaintiff sought to prove that he suffered great loss and damage in his crops, and in the extra expense of hiring hands, by reason of the non-fulfillment of the contract to deliver. The evidence was excluded, and this court affirmed the ruling, holding that such damages did not result naturally and directly from the injury complained of. It may be doubtful whether this decision is entirely consistent with *Richardson v. Chynoweth*, 26 Wis. 656; *Smeed v. Foord*, 1 El. & El. 602; *Gee v. Railway Co.* 6 Hurl. & N. 211; *Collard v. Railway Co.* 7 Hurl. & N. 79; *Elbinger Actien-Gesellschaft v. Armstrong*, L. R. 9 Q. B. 473; *Wilson v. Railway Co.* 9 C. B. (N. S.) 632; *Griffin v. Colver*, 16 N. Y. 490; *Vicksburg & M. R. Co. v. Ragsdale*, 46 Miss. 458; and cases of that class. For, as we understand the *Brayton* Case, the vendor knew that the reaper was wanted for the purpose of harvesting the plaintiff's crop that season. If it were not delivered in time for that purpose the parties might well be presumed to have known that the vendee would be put to additional expense in securing his crops. But still the case is fully supported by *British Columbia Saw-mill Co. v. Nettleship*, L. R. 3 C. P. 499. In this case

servants, on a quay at Glasgow, for shipment on board the defendant's vessel, which lay along-side, several cases containing machinery, which was intended for the erection of a saw-mill at Vancouver's Island. The master gave a bill of lading for them, describing the cases as containing "merchandise." The defendant knew generally of what the shipment consisted. On the arrival of the vessel at her destination, one of the cases, which contained machinery without which the mill could not be erected, could not be found on board, and the plaintiffs were obliged to send to England to replace the lost article. Held, that the defendant was liable for the loss of the machinery, as delivery to the defendant's servants along-side the vessel was equivalent to a delivery on board. Held, also, that the measure of damages for the breach of the contract was the cost of replacing the lost articles in Vancouver's Island, with interest at 5 per cent. upon the amount until judgment, by way of compensation for the delay."

But we deem it unnecessary to pursue this discussion further. The case of *Brown v. Railway Co.* 54 Wis. 342, S. C. 11 N. W. 356, 911, is referred to by plaintiff's counsel to sustain the claim for damages for loss of the use of the machine; but that was a case for a personal injury and has no application to this case. We have already said that the jury found that the machine was so damaged, while in the custody of the defendant as carrier, as to be entirely useless to the plaintiff. The plaintiff is therefore entitled to recover the value of the machine, found to be \$275, including the freight paid by plaintiff of \$3.85, and interest on this amount from November 22, 1882, the time the property reached its destination.

BY THE COURT. The judgment of the circuit court is reversed, and the cause is remanded, with directions to enter judgment on the verdict in accordance with this opinion.

BRIGHAM et al. v. CARLISLE.

(78 Ala. 243.)

Supreme Court of Alabama. Dec. Term, 1884.

Appeal from circuit court, Lee county; Henry D. Clayton, Judge.

Action against Brigham & Co. for breach of a contract employing plaintiff as a travelling salesman to sell goods on commission. There was a judgment for plaintiff, from which defendants appealed.

J. M. Chilton, for appellants. W. H. Barnes, contra.

CLOPTON, J. It may be conceded that at common law a defendant can insist upon the benefit of the statute of frauds by plea of the general issue. Under our statute, which provides that "in all suits where the defendant relies on a denial of the cause of action as set forth by the plaintiff he may plead the general issue, and in all other cases the defendant must briefly plead specially the matter of defense." The statute of frauds must be pleaded, or it will be considered as waived. *Ritch v. Thornton*, 65 Ala. 300; *Petty v. Dill*, 53 Ala. 641. No plea of the statute of frauds having been interposed, the validity of the contract, because not in writing, cannot be raised by a charge.

If the statute had been pleaded, the contract, as set out in the bill of exceptions, does not come within its inhibition. It was made in September, 1881, and, as testified by the plaintiff, was to commence on the 1st of October, and continue at least eight months, and longer if mutually desirable at the end of that time. By its terms it was capable of performance within a year. The statute applies to contracts which, by express stipulation, are not to be performed within one year from the making thereof, and not to contracts which by their terms are determinate within that period, but may be continued longer at the option of the parties. *Heflin v. Milton*, 69 Ala. 354.

The third charge requested by the defendants based their right to abandon the contract on the naked fact, unexplained, that the plaintiff did not commence the performance of the contract until January 1, 1882. The violation of a contract by one of the parties, or when he is unable to perform the acts or services stipulated, may be sufficient to authorize the other party to abandon it. Sickness of the plaintiff for a protracted period, such as would probably have disabled him from making sales during the appropriate season, as contemplated and intended by the contract, might perhaps have authorized the defendants to abandon the contract; but there was no implied condition that the plaintiff would continue in health. Its abandonment in such case is at the election of the defendants; and they will be held to have waived their right to renounce the contract when, after the delay has terminated,

they regard and treat it as continuing and in force. *Stewart v. Cross*, 66 Ala. 22. The charge requested by the defendants ignored the material facts: the detention of the plaintiff by sickness in New York until near the end of November; the letter of the defendants of December 12th, in reply to one from the plaintiff, in which they stated samples would be furnished him during the week, and cautioning him as to the credit of certain firms, and samples having been actually sent to him late in December; which facts there was evidence tending to prove. Whilst a party has the right to require an instruction as to the legal effect of the evidence, when, conceding all adverse inferences from the conflicting evidence, the undisputed facts establish a legal conclusion in his favor, a charge is properly refused which asserts a legal proposition, based on certain specified facts, but ignores other facts, which there is evidence tending to prove, showing the incorrectness of the legal conclusion asserted in the charge.

The burden of proof is on the party having the affirmative of the particular issue. Pleas of payment and set-off were filed by defendants, and the onus of establishing their truth was on them. The legal effect of the second charge requested by the defendants is to instruct the jury, if they found the evidence in equilibrium on any or all the issues presented, which includes the issues of payment and set-off, to find for the defendants. Being calculated to mislead, it was properly refused.

The material question is the measure of damages. The primary purpose of awarding damages is actual compensation to the party injured, whether by a tort or by breach of a contract; though there are exceptional cases in which exemplary or punitive damages are allowed. Owing to the ever-occurring differences in the circumstances, and in the special conditions of the contracting parties, it has been found difficult, if not impossible, to lay down general and definite rules as to the measure of damages, applicable to all cases of a class. From a misconstruction of expressions of eminent jurists, not sufficiently guarded for general use, but adapted to the case in hand, the applications of rules commonly recognized have been as various as the cases. (The proposition that all damages are recoverable which are in the contemplation of the parties, is not strictly correct.) The primary rules are, the damages must be the natural and proximate results of the wrong complained of, and must not be merely speculative or conjectural. These must concur, though founded on different principles, and are distinct and independent of each other. The law presumes that a party foresees the natural and proximate results of a breach of his contract or tort, and hence these are presumed to be in his legal contemplation. For such damages, as a general rule, the party at fault is liable.

But there are damages, which are in the contemplation of the parties at the time of making the contract, and are the natural and proximate results of its breach which are not recoverable. The parties must necessarily contemplate the loss of profits as the direct and necessary consequence of the breach of a contract, and yet all profits are not within the scope of recoverable damages. There are numerous cases, however, in which profits constitute, not only an element, but the measure, of damage. While the line of demarcation is often dim and shadowy, the distinctive features consist in the nature and character of the profits. When they form an elemental constituent of the contract, their loss the natural result of its breach, and the amount can be estimated with reasonable certainty,—such certainty as satisfies the mind of a prudent and impartial person,—they are allowed. The requisite to their allowance is some standard, as regular market values, or other established data, by reference to which the amount may be satisfactorily ascertained. Illustrations of profits recoverable are found in cases of sales of personal property at a fixed price, evictions of tenants by landlords, articles of partnership, and many commercial contracts.

On the other hand, "mere speculative profits, such as might be conjectured would be the probable result of an adventure, defeated by the breach of a contract, the gains from which are entirely conjectural, and with respect to which no means exist of ascertaining even approximately the probable results, cannot, under any circumstances, be brought within the range of recoverable damages." 1 *Suth. Dam.* 141. Profits speculative, conjectural or remote are not, generally, regarded as an element in estimating the damages. In *Pollock v. Gantt*, 69 Ala. 373, it is said: "What are termed 'speculative damages'—that is, possible, or even probable, gains, that it is claimed would have been realized but for the tortious act or breach of contract charged against a defendant—are too remote, and cannot be recovered." The same rule has been repeatedly asserted by this court. *Culver v. Hill*, 68 Ala. 66; *Higgins v. Mansfield*, 62 Ala. 267; *Burton v. Holley*, 29 Ala. 318; *White v. Miller*, 71 N. Y. 118; *French v. Range*, 2 Neb. 254; 2 *Smith, Lead. Cas.* 574; *Olmstead v. Burke*, 25 Ill. 86. The two following cases may serve to illustrate the difference between profits recoverable and not recoverable. In *Insurance Co. v. Noxson*, 84 Ind. 347, an insurance agent, who had been discharged without cause before the expiration of his contract, was allowed to include in his recovery the probable value of renewals on policies previously obtained by him, upon which future premiums would, in the usual course of business, be received by the company, on the ground that the amount of compensation due on such renewals can be ascertained with requisite certainty by the use of actuary's life tables and comparisons, and that the basis of the right to dam-

ages existed, and was not to be built in the future. In *Lewis v. Insurance Co.*, 61 Mo. 534, which is cited with approval in the other case, the same rule as to the probable value of renewals was held; but it was also held that an estimate of the probable earnings of the agent thereafter, derived from proof of the amount of his collections and commissions before the breach of the contract, in the absence of other proof, is too speculative to be admissible.

Profits are not excluded from recovery because they are profits; but, when excluded, it is on the ground that there are no criteria by which to estimate the amount with the certainty on which the adjudications of courts and the findings of juries should be based. The amount is not susceptible of proof. In 3 *Suth. Dam.* 157, the author discriminatingly observes: "When it is advisedly said that profits are uncertain and speculative, and cannot be recovered, when there is an alleged loss of them, it is not meant that profits are not recoverable merely because they are such, nor because profits are necessarily speculative, contingent, and too uncertain to be proved; but they are rejected when they are so; and it is probable that the inquiry for them has been generally proposed when it must end in fruitless uncertainty; and therefore it is more a general truth than a general principle that a loss of profits is no ground on which damages can be given." When not allowed because speculative, contingent, and uncertain, their exclusion is founded by some on the ground of remoteness, and by others on the presumption that they are not in the legal contemplation of the parties.

The plaintiff, by the contract, undertook the business of traveling salesman for the defendants. The amount of his commissions depended, not merely on the number and amounts of sales he might make, but also on the proportional quantity of the two classes of goods sold, his commissions being different on each. The number and amounts of sales depended on many contingencies,—the state of trade, the demand for such goods, their suitability to the different markets, the fluctuations of business, the skill, energy, and industry with which he prosecuted the business, the time employed in effecting different sales, and upon the acceptance of his sales by the defendants. There are no criteria, no established data, by reference to which the profits are capable of any estimate. They are purely speculative and conjectural. Besides, the evidence is the mere opinion and conjecture of the plaintiff, without giving any facts on which it was based. The bare statement, uncorroborated by any facts, and without a basis, that "the reasonable sales would have been fifteen thousand dollars, and that the net profits on that amount of sales would have been four hundred and fifty dollars," is too conjectural to be admissible. *Washburn v. Hubbard*, 10 *Ians.* 11.

Reversed and remanded.

ALLISON v. WALKER.

(11 Mich. 460.)

Supreme Court of Michigan. Oct. 20, 1863.

Error to circuit court, Wayne county.

C. I. Walker, for plaintiff in error. Jerome & Swift and A. B. Maynard, for defendant in error.

CHRISTIANCY, J. When this cause was formerly before us (*Chandler v. Allison*, 10 Mich. 460), one of the questions involved was whether Allison, the plaintiff, was rightfully in possession of the store at the time the trespass was committed, or whether his right of possession was dependent upon Chandler's election to rebuild, and ceased when that election was made; and one of the grounds upon which the judgment in that case was reversed was the rejection of evidence tending to show that Allison's right of possession was thus qualified. But as the case now appears before us upon exceptions taken on the new trial, the finding of the jury, whether right or wrong,—no exception having been taken to the evidence or the charge upon this point,—requires us to treat this question, so far as we are now to consider the case, as settled in favor of the plaintiff; and the defendant must be considered as a trespasser, entering upon the premises and tearing down the store while in the rightful possession of the plaintiff, under a lease for a term which would not expire till the 1st day of May following.

The only question presented by the present bill of exceptions, and not already disposed of by our former decision, is the question of damages; and in this action of trespass (as parties are under no necessity of protecting themselves by contract against trespasses) the question of damages is to be treated in all respects as it would have been had the trespass been committed by a party between whom and the plaintiff the relation of landlord and tenant did not exist, except so far as the good faith of the defendant, and the absence of malice on his part, might preclude the plaintiff from the recovery of damages of a punitive and exemplary character, beyond the amount which would compensate the actual loss. Upon this point (the question of exemplary damages) we think the court below was right in instructing the jury that, if they should find the defendant, in tearing down the store, acted in good faith, and under an honest belief that he had a legal right to do so, then the plaintiff could only recover his actual damages. This qualification of the right of a jury to give punitive or exemplary damages in actions of trespass is, we think, in accordance with the principle upon which such damages are sometimes allowed to be given. But whether the rulings of the court upon the admission of evidence, and in the charge to the jury, did not lay

down too narrow a rule for the estimation of actual damages, is the main question for our consideration.

While in many cases the rule of damages is plain and easy of application, there are many others in which, from the nature of the subject-matter, and the peculiar circumstances, it is very difficult—and in some cases impossible—to lay down any definite, fixed rule of law by which the damages actually sustained can be estimated with a reasonable degree of accuracy, or even a probable approximation to justice; and the injury must be left wholly, or in great part, unredressed, or the question must be left to the good sense of the jury upon all the facts and circumstances of the case, aided by such advice and instructions from the court as the peculiar facts and circumstances of the case may seem to require. But the strong inclination of the courts to administer legal redress upon fixed and certain rules has sometimes led to the adoption of such rules in cases to which they could not be consistently or justly applied. Hence there is, perhaps, no branch of the law upon which there is a greater conflict of judicial decisions, and none in which so many merely arbitrary rules have been adopted. We have carefully examined all the cases cited in the very elaborate briefs of the respective counsel, and the most approved elementary treatises upon the subject, and, without attempting here to compare and analyze them (which would require a treatise), we are compelled to say that the line of mere authority upon questions of damages like that here presented, if any such line can be traced through the conflict of hostile decisions, is too confused and tortuous to guide us to a safe or satisfactory result, without resort to the principles of natural justice and sound policy which underlie these questions, and which have sometimes been overlooked, or obscured by artificial distinctions and arbitrary rules.

The principle of compensation for the loss or injury sustained is, we think, that which lies at the basis of the whole question of damages in most actions at common law, whether of contract or tort. We do not here speak of those actions in which punitive or exemplary damages may be given, nor of those whose principal object is the establishment of a right, where merely nominal damages are proper. But, with these exceptions, the only just theory of an action for damages, and its primary object, would seem to be that the damages to be recovered should compensate the loss or injury sustained. We concur entirely with the court of appeals in *New York in Griffin v. Colver*, 10 N. Y. 492, in repudiating the doctrine adopted by Mr. Sedgwick from *Domat* (*Sedgw. Dam.* 3, 37, 38, etc.), that "the law aims not at the satisfaction, but the division of the loss." Such, it is true, is often the result of an action, but never the object

of the law. The law may, and often does, fail of doing complete justice, from the imperfection of its means of ascertaining truth, and tracing and apportioning effects to their various causes; but it is not liable to the reproach of doing positive injustice by design. Such a doctrine would tend not only to make the law itself odious, but to corrupt its administration, by fostering a disregard of the just rights of parties. In actions upon contract, especially, and those nominally in tort, but substantially upon contract, courts have thought it generally safer, upon the whole, to adopt certain definite rules for the government of the jury by which the damages could be estimated, at the risk of falling somewhat short of the actual damages, by rejecting such as could not be estimated by a fixed rule, than to leave the whole matter entirely at large with the jury, without any rule to govern their discretion, or to detect or correct errors or corruption in the verdict. In such cases, therefore, there has been a strong inclination to seize upon such elements of certainty as the case might happen to present, and as might approximate compensation, and to frame thereon rules of law for the measurement of damages, though it might be evident that further damages must have been suffered, which however, could only be estimated as matter of opinion, and must therefore be excluded under the rules thus adopted. And it is not to be denied that this course of decision has sometimes been extended to actions purely of tort.

But whatever plausibility there may be in the theory of Mr. Sedgwick when applied to actions upon contract,—a plausibility which arises from mistaking the result for the object,—the injustice of such a principle, when applied to cases of actual, positive tort, like that here in question, would be so gross as to shock all sense of justice.

It has been frequently said that the rule of damages, where there is no fraud, willful negligence, malice, oppression, etc., is the same in actions of tort as in those upon contract. But though the remark is doubtless true in its application to those cases of tort where, from the nature of the case, elements of certainty exist, by which substantial compensation may be readily estimated, and other cases which are but nominally in tort, we do not think it can be accepted as a principle of universal application; nor, in our opinion, can it be justly applied to any case of actual, aggressive tort, where, from the nature and circumstances of the case itself, no such elements of certainty are found to exist, or none which will apply substantially to the whole case; nor to any case where the rule applicable to breaches of contract would exclude a material portion of the damages the injured party may have suffered, though the amount of the latter may not be capable of accurate calculation by any fixed and definite rule.

There are some important considerations

which tend to limit damages in an action upon contract, which have no application to those purely of tort. Contracts are made only by the mutual consent of the respective parties; and each party, for a consideration, thereby consents that the other shall have certain rights as against him, which he would not otherwise possess. In entering into the contract the parties are supposed to understand its legal effect, and, consequently, the limitations which the law, for the sake of certainty, has fixed for the recovery of damages for its breach. If not satisfied with the risk which these rules impose, the parties may decline to enter into the contract, or may fix their own rule of damages when, in their nature, the amount must be uncertain. Hence, when suit is brought upon such contract, and it is found that the entire damages actually sustained can not be recovered without a violation of such rules, the deficiency is a loss, the risk of which the party voluntarily assumed on entering into the contract, for the chance of benefit or advantage which the contract would have given him in case of performance. His position is one in which he has voluntarily contributed to place himself, and in which, but for his own consent, he could not have been placed by the wrongful act of the opposite party alone.

Again, in the majority of cases upon contract, there is little difficulty, from the nature of the subject, in finding a rule by which substantial compensation may be readily estimated; and it is only in those cases where this cannot be done, and where, from the nature of the stipulation, or the subject-matter, the actual damages resulting from a breach, are more or less uncertain in their nature, or difficult to be shown with accuracy by the evidence, under any definite rule, that there can be any great failure of justice by adhering to such rule as will most nearly approximate the desired result. And it is precisely in these classes of cases that the parties have it in their power to protect themselves against any loss to arise from such uncertainty, by estimating their own damages in the contract itself, and providing for themselves the rules by which the amount shall be measured, in case of a breach; and if they neglect this, they may be presumed to have assented to such damages as may be measured by the rules which the law, for the sake of certainty, has adopted.

Again, in analogy to the rule that contracts should be construed as understood and assented to by the parties,—if not as a part of that rule,—damages which are the natural, and, under the circumstances, the direct and necessary result of the breach, are often very properly rejected, because they cannot fairly be considered as having been within the contemplation of the respective parties at the time of entering into the contract.

None of these several considerations have any bearing in an action purely of tort. The injured party has consented to enter into no relation with the wrongdoer by which any hazard of loss should be incurred; nor has he re-

ceived any consideration, or chance of benefit or advantage, for the assumption of such hazard; nor has the wrongdoer given any consideration, nor assumed any risk, in consequence of any act or consent of his. The injured party has had no opportunity to protect himself by contract against any uncertainty in the estimate of damages; no act of his has contributed to the injury; he has yielded nothing by consent; and, least of all, has he consented that the wrongdoer might take or injure his property or deprive him of his rights, for such sum as, by the strict rules which the law has established for the measurement of damages in actions upon contract, he may be able to show, with certainty, he has sustained by such taking or injury. Especially would it be unjust to presume such consent, and to hold him to the recovery of such damages only as may be measured with certainty by fixed and definite rules, when the case is one which, from its very nature, affords no elements of certainty by which the loss he has actually suffered can be shown with accuracy by any evidence of which the case is susceptible. Is he to blame because the case happens to be one of this character? He has had no choice, no selection. The nature of the case is such that the wrongdoer has chosen to make it, and upon every principle of justice he is the party who should be made to sustain all the risk of loss which may arise from the uncertainty pertaining to the nature of the case, and the difficulty of accurately estimating the results of his own wrongful act. Upon what principle of right can courts of justice assume, not simply to divide this risk, which would be thus far unjust, but to relieve the wrongdoer from it entirely, and throw the whole upon the innocent and injured party? Must not such a course of decision tend to encourage trespasses, and operate as an inducement for parties to right themselves by violence, in cases like the present?

Since, from the nature of the case, the damages cannot be estimated with certainty, and there is a risk of giving by one course of trial less, and by the other more than a fair compensation,—to say nothing of justice,—does not sound policy require that the risk should be thrown upon the wrongdoer instead of the injured party? However this question may be answered, we cannot resist the conclusion that it is better to run a slight risk of giving somewhat more than actual compensation, than to adopt a rule which, under the circumstances of the case, will, in all reasonable probability, preclude the injured party from the recovery of a large proportion of the damages he has actually sustained from the injury, though the amount thus excluded cannot be estimated with accuracy by a fixed and certain rule. Certainty is doubtless very desirable in estimating damages in all cases; and where, from the nature and circumstances of the case, a rule can be discovered by which adequate compensation can be accurately measured, the rule should be applied in actions of tort, as well as

in those upon contract. Such is quite generally the case in trespass and trover for the taking or conversion of personal property, if the property (as it generally is) be such as can be readily obtained in the market and has a market value. But shall the injured party in an action of tort, which may happen to furnish no element of certainty, be allowed to recover no damages (or merely nominal) because he cannot show the exact amount with certainty, though he is ready to show, to the satisfaction of the jury, that he has suffered large damages by the injury? Certainty, it is true, would thus be attained; but it would be the certainty of injustice. And, though a rule of certainty may be found which will measure a portion, and only a portion, of the damages, and exclude a very material portion, which it can be rendered morally certain the injured party has sustained, though its exact amount cannot be measured by a fixed rule; here to apply any such rule to the whole case, is to misapply it; and so far as it excludes all damages which cannot be measured by it perpetrates positive injustice under the pretense of administering justice.

The law does not require impossibilities, and cannot, therefore, require a higher degree of certainty than the nature of the case admits. And we can see no good reason for requiring any higher degree of certainty in respect to the amount of damages than in respect to any other branch of the cause. Juries are allowed to act upon probable and inferential, as well as direct and positive proof. And when, from the nature of the case, the amount of the damages cannot be estimated with certainty, or only a part of them can be so estimated, we can see no objection to placing before the jury all the facts and circumstances of the case, having any tendency to show damages, or their probable amount; so as to enable them to make the most intelligible and probable estimate which the nature of the case will permit. This should, of course, be done with such instructions and advice from the court as the circumstances of the case may require, and as may tend to prevent the allowance of such as may be merely possible, or too remote or fanciful in their character to be safely considered as the result of the injury.

In the adoption of this course it will seldom happen that the court, hearing the evidence, will not thereby possess the means of forming a satisfactory judgment whether the damages are unreasonable or exorbitant; and, if satisfied they are so, the court have always the power to set aside the verdict and grant a new trial.

The justice of the principles we have endeavored to explain will, we think, be sufficiently manifest in their application to the present case. The evidence strongly tended to show an ouster of the plaintiff for the balance of the term by the defendant's act. This term was the property of the plaintiff; and, as proprietor, he was entitled to all the

benefits he could derive from it. He could not by law be compelled to sell it for such sum as it might be worth to others; and, when tortiously taken from him against his will, he cannot justly be limited to such sum—or the difference between the rent he was paying and the fair rental value of the premises—if the premises were of much greater and peculiar value to him, on account of the business he had established in the store, and the resort of customers to that particular place, or the good will of the place, in his trade or business. His right to the full enjoyment of the use of the premises, in any manner not forbidden by the lease, was as clear as that to sell or dispose of it, and was as much his property as the term itself, and entitled to the same protection from the laws. He had used the premises as a jewelry store, and place of business for the repairing of watches, making gold pens, etc. This business must be broken up by the ouster, unless the plaintiff could obtain another fit place for it; and if the only place he could obtain was less fitted and less valuable to him for that purpose, then such business would be injured to the extent of this difference; and this would be the natural, direct, and immediate consequence of the injury. To confine the plaintiff to the difference between the rent paid and the fair rental value of the premises to others for the balance of the term would be but a mockery of justice. To test this, suppose the plaintiff is actually paying that full rental value, and has established a business upon the premises, the clear gains or profits of which have been an average of one thousand dollars per year, and he is ousted from the premises, and this business entirely broken up for the balance of the term, can he be allowed to recover nothing but six cents damages for his loss? To ask such a question is to answer it. The rule which would confine the plaintiff to the difference between such rental value and the stipulated rent can rest only upon the assumption that the plaintiff might (as in case of personal property) go at once into the market and obtain another building equally well fitted for the business, and that for the same rent; and to justify such a rule of damages this assumption must be taken as a conclusive presumption of law. However such a presumption might be likely to accord with the fact in the city of New York, in most western cities and towns it would be so obviously contrary to the common experience of the facts as to make the injustice of the rule gross and palpable. But we need not further discuss this point, as a denial of any such presumption was clearly involved in our former decision.

The plaintiff in this case did hire another store, "the best he could obtain, but not nearly so good for his business"; "his customers did not come to the new store, and there was not so much of a thoroughfare by it,—not one-quarter of the travel; and he

relied much upon chance custom, especially in the watch-repairing and other mechanical business." This injury to the plaintiff's business was as clearly a part of his damages as the loss of the term itself. This point, also, was decided in the former case, and we there further held that the declaration was sufficient to admit the proof of this species of loss.

Now, if the plaintiff is to be allowed to recover for this injury to his business, it would seem to follow, as a necessary consequence, that the value of that business before the injury, as well as after, not only might, but should be shown, as an indispensable means of showing the amount of loss from the injury. If the business were a losing one to the plaintiff before, his loss from its being broken up or diminished (if anything) would certainly be less than if it were a profitable one. It is not the amount of business done, but the gain or profit arising from it, which constitutes its value.

But it is insisted that loss of profits constitutes no proper ground or element of damages. If there be any such rule of law it is certainly not a universal, and can hardly be called a general, rule. Decisions, it is true, may be found which seem to take it for granted that the rule is universal. But there are numerous cases, even for breach of contract, in which profits have been properly held to constitute not only an element, but a measure (and sometimes the only measure), of damages, as in *Masterton v. Mayor*, 7 Hill, 61; *Railroad Co. v. Howard*, 13 How. 344. And in actions for breach of contract in not delivering goods (as wheat or other articles) having a marketable value, as well as in most actions of trespass or trover for the taking or conversion of such property,—wherever the difference between the contract price, or the market value at the time of taking or conversion, and the higher market value at any subsequent period, is held to constitute the damages,—in all such cases this difference of price is but another name for profits, and is yet very properly held to be a measure of damages. There is nothing, therefore, in the nature of profits, as such, which prevents their allowance as damages. But in many, and perhaps the majority, of cases upon contract in which the question has arisen, they have been held to be too remote or dependent upon too many contingencies to be calculated with reasonable certainty, or to have been within the contemplation of the parties at the time of entering into the contract.

But there are also cases for breach of contract where, though the profits were in their nature somewhat uncertain and contingent (and in most of them quite as much so as in the present case), they were yet held to constitute, not strictly a measure, but an element of damages proper for the consideration of a jury to enable them to form a judgment or probable estimate of the damages;

as in *McNeill v. Reid*, 9 Bing. 68; *Bagley v. Smith*, 10 N. Y. 489; *Gale v. Leckie*, 2 Starkie, 107; *Ward v. Smith*, 11 Price, 19; *Driggs v. Dwight*, 17 Wend. 71. And see *Passenger v. Thorburn*, 35 Barb. 17. And in *Waters v. Towers*, 20 Eng. Law & Eq. 410, the jury were allowed to take into consideration the profits which might have been made upon a collateral contract, though void by the statute of frauds (and see *McNeill v. Reid*, supra), while by the American authorities profits of this description have been almost uniformly rejected. But whatever may be the rule in actions upon contract, we think a more liberal rule in regard to damages for profits lost should prevail in actions purely of tort (excepting perhaps the action of trover). Not that they should be allowed in all cases without distinction, for there are some cases where they might, in their nature, be too entirely remote, speculative, or contingent to form any reliable basis for a probable opinion. And perhaps the decisions which have excluded the anticipated profits of a voyage broken up by illegal capture or collision may be properly justified upon this ground. Upon this, however, we express no opinion. But generally, in an action purely of tort, where the amount of profits lost by the injury can be shown with reasonable certainty, we think they are not only admissible in evidence, but that they constitute, thus far, a safe measure of damages; as when they are but another name for the use of a mill (for example), as in *White v. Moseley*, 8 Pick. 356; or for the use of any other property where the value or profit of the use can be made to appear with reasonable certainty by the light of past experience, as might often be done where such profits had been for a considerable time uniform at the same season of the year, and there are no circumstances tending to show a probable diminution, had the injury not occurred. And possibly the same view, subject to the like qualifications, might have been taken of the profits of the plaintiff's business had it been confined to the mechanical trade of repairing watches and making gold pens, particularly if done purely as a cash business. But this business seems to have been carried on with that of the sale of jewelry. He kept a jewelry store, and the profits of so much of his business as may be regarded as mercantile business are dependent upon many more contingencies, and therefore more uncertain, especially if sales are made upon credit. Past profits, therefore, could not safely be taken as the exact measure of future profits; but all the various contingencies by which such profits would probably be affected should be taken into consideration by the jury, and allowed such weight as they, in the exercise of good sense and sound discretion, should think them entitled to. Past profits in such cases, where the business has been continued for some length of time, would constitute a very

aid to the jury in arriving at a fair estimate of the future profits, had the business still continued without interruption.

Accordingly such past profits have been allowed for this purpose, both in actions ex contractu and ex delicto, though more frequently in the latter, where from the nature of the case no element of greater certainty appeared, and the actual damages must be more or less a matter of opinion; and where, as in the present case, though somewhat inconclusive, it was the best evidence the nature of the case admitted. See *Wilkes v. Hungerford*, 2 Bing. N. C. 281; *Ingram v. Lawson*, 6 Bing. N. C. 212; *Lacour v. Mayor*, 4 Duer, 406; and the following in actions upon contract: *Driggs v. Dwight*, 17 Wend. 71; *Bagley v. Smith*, 10 N. Y. 489.

But it is urged by the counsel for the defendant that damages for the loss of profits ought not to be allowed, because they could not have been within the contemplation of the defendant. Whether, as matter of fact, this is likely to have been true, we do not deem it important to inquire. It is wholly immaterial whether the defendant, in committing the trespass, actually contemplated this or any other species of damage to the plaintiff. This is a consideration which is confined entirely to cases of contracts, where the question is, what was the extent of obligation, in this respect, which both parties understood to be created by the contract? But where a party commits a trespass he must be held to contemplate all the damages which may legitimately follow from his illegal act. And where a party, though acting in good faith, yet knowing his right to be disputed by a party in possession, instead of resorting to a judicial trial of his right, assumes to take the law into his own hands, and by violence to seize the property or right in dispute, he must be held thereby to assume, on the one hand, the risk of being able to show, when the other party brings him into court, that the property or right was his, or that his act was legal; or, on the other, of paying all the damages the injured party may have suffered from the injury; and, if those damages are in their nature uncertain, then such as, from all the circumstances, or the best light the nature of the case affords, a jury, in the exercise of good sense and sound discretion, may find to be a full compensation.

We are therefore entirely satisfied that all the questions put to the witness Allison touched the nature, extent, and profits of the business before and after the trespass were competent, and improperly overruled; and that the charge of the court, so far as it excluded all consideration of the good will of the place, its peculiar value to the plaintiff, and his probable profits, was erroneous.

The judgment must be reversed, with costs to the plaintiff, and a new trial granted.

The other justices concurred.

SCHUMAKER v. ST. PAUL & D. R. CO.

(48 N. W. 559, 46 Minn. 39.)

Supreme Court of Minnesota. April 8, 1891.

Appeal from district court, Ramsey county; KELLY, Judge.

Wm. H. Bliss, for appellant. Erwin & Wellington, for respondent.

COLLINS, J. To plaintiff's complaint herein the defendant corporation interposed a demurrer, upon the ground that it failed to state facts sufficient to constitute a cause of action. Upon the argument of this appeal defendant contended that its negligence in the premises was insufficiently pleaded; that the injury complained of, provided the same could be said to have been the result of defendant's act, was not proximate, but was too remote a consequence to be chargeable to it; and, further, that from the allegations of the complaint it was manifest that plaintiff himself was guilty of contributory negligence. Very little need be said on any of these points, for none are well taken. The complaint contains much that is superfluous, but in respect to negligence it avers the defendant's duty to have been to furnish transportation to plaintiff, a car-repairer in its employ, from the wrecked caboose, which he had been sent out to repair by the foreman, back to St. Paul, when he had completed his work, and that it wrongfully, unlawfully, and negligently failed and omitted so to do, or to furnish plaintiff with transportation to any other place where shelter or food could be obtained, and that by reason of such negligent failure and omission plaintiff was compelled to and did walk to the village of White Bear, a distance of nine miles, in the night-time, in extremely cold and dangerous weather, that being the nearest point at which the necessary shelter and food could be had; that placing reliance upon defendant's performance of its duty towards plaintiff when he had completed his work, by furnishing transportation back to St. Paul from the place on its line of road where he had been taken to repair the caboose, plaintiff was wholly unprepared with means for properly sheltering or clothing himself. It was also averred that the facts and circumstances with reference to the location of the caboose, the inclemency of the weather, the distance to shelter or food, and that plaintiff, by reason of his reliance upon being transported back to St. Paul when through with his work, had not provided himself with proper clothing for such weather, were then well known to the defendant. The negligence of the defendant might have been specified with greater certainty, but from an inspection of the pleading it appears that defendant is charged with having unnecessarily and unreasonably placed its servant, the plaintiff, in serious danger, from which injury resulted, by carelessly and negligently omitting to perform a duty immediately connected with his work, on the performance of which he had a right to and did rely. With full knowledge of the situation as to weather and the locality, consequently of the danger to be apprehended, it neglected and aban-

doned the plaintiff under circumstances which he alleges resulted in personal injury to him. It had no more right to unnecessarily and unreasonably leave him in a dangerous place, to expose him to an unnecessary and unreasonable risk from the elements, by failing to furnish transportation from the place where he had been put at work, when that work was completed, it being its duty so to do, according to the complaint, than it had to unnecessarily and unreasonably expose him to risks and dangers while he was at work,—such risks and dangers as were discoverable by the use of ordinary precaution and diligence. The defendant should have been reasonably diligent, and could not, without incurring liability, desert the plaintiff in the manner and under the circumstances set forth in the complaint.

The important question in this case, however, is whether, from the complaint, it appears that defendant is liable for the injuries which resulted from plaintiff's efforts to obtain shelter and food on the occasion referred to; the former, as before stated, arguing that, as alleged, they are too remote, and are not the proximate results of its act. It is averred that, by reason of the unavoidable exposure of the plaintiff, he was made sick, contracted rheumatism, has ever since suffered great pain and agony, and has been permanently injured. It must not be forgotten that the *gravamen* of the action is the negligence and carelessness of the defendant in leaving plaintiff at a place where he could not procure either shelter or food. It is an action in tort, and not for a breach of contract. It is the negligence of the defendant which is complained of, and not the breach of contract to return the plaintiff to St. Paul when he had performed his labor. It was, of course, essential that the plaintiff's relation with the defendant be made to appear, for, unless he was a servant to whom the defendant owed a duty, there could arise no liability by reason of its neglect to perform that duty. The relation of master and servant first having been shown to exist, the law fixes the duty of the former towards the latter, and a violation of this duty is a wrong, not a breach of the contract. This, then, is an action in which the wrong-doer is liable for the natural and probable consequences of its negligent act or omission; the general rules which limit the damages in actions of tort being, in many respects, different from those in actions on contracts. The injury must be the direct result of the misconduct attributed, and the general rule in respect to damages is that whoever commits a trespass or other wrongful act is liable for all the direct injury resulting therefrom, although such resulting injury could not have been contemplated as a probable result of the act done. 1 Sedg. Dam. 130, note, and cases cited; Clifford v. Railroad Co., 9 Colo. 333, 12 Pac. Rep. 219, a case much like this. He who commits a trespass must be held to contemplate all the damages which may legitimately flow from his illegal act, whether he may have foreseen them or not; and, so far as it is plainly traceable, he must make compensation for the wrong.

The damages cannot be considered too remote if, according to the usual experience of mankind, injurious results ought to have been apprehended. It is not necessary that the injury in the precise form in which it, in fact, resulted, should have been foreseen. It is enough that it now appears to have been a natural and probable consequence. *Hill v. Winsor*, 118 Mass. 251. The question is whether the negligent act complained of—leaving the plaintiff in the open country in the nighttime, in extremely cold and dangerous weather, a long distance from shelter or food—was the direct cause of the injuries mentioned in the complaint, or whether it was a remote cause, for which an action will not lie, and it must be taken for granted that the walk of nine miles and incident exposure brought about the alleged sickness, pain, and disability. There was no intervening independent cause of the injury, for all of the acts done by the plaintiff, his effort to seek protection from the inclement and dangerous weather, were legitimate, and compelled by defendant's failure to reconvey him to the city. Had he remained at the caboose, and lost his hands, or his feet, or perhaps his life, by freezing, no doubt could exist of the defendant's liability. It must not be permitted to escape the consequences of its wrong because the injuries were received in an effort to avoid the threatened danger, or because they differ in form or seriousness from those which might have resulted had the plaintiff made no such effort. An efficient, adequate cause being found for the injuries received by plaintiff, it must be considered as the true cause, another, not incident to it, but independent of it, is shown to have intervened between it and the result. This is the substance of very clear statements of law found in *Kellogg v. Railway Co.*,

Wis. 223, and in *Railway Co. v. Kellogg*, 94 U. S. 469. And upon the point now under consideration we fail to distinguish between the case at bar and *Brown v. Railway Co.*, 54 Wis. 342, 11 N. W. Rep. 356, 911,—an action brought to recover for like damages said to have been caused by directing passengers to alight from a train at a place about three miles distant from their destination. At all events, the question as to what was the proximate cause of a plaintiff's injuries is usually one to be determined by a jury. As was said in *Railway Co. v. Kellogg*, supra, the true rule is that what is the proximate cause of an injury is ordinarily one for a jury. It is not a question of science or legal knowledge. It is to be determined as a fact, in view of the circumstances attending it.

Finally, the defendant insists that plaintiff was guilty of contributory negligence, because, from the complaint, it appears that he was wholly unprepared with clothing sufficient for the occasion, and because he left the shelter of the caboose when he undertook his journey upon foot to the village of White Bear. The plaintiff, undoubtedly, went prepared with such clothing as he would ordinarily and naturally need for the occasion, had the defendant performed its alleged duty, and this was all that was required of him. He was not obliged to anticipate the defendant's negligence or omission, and prepare for it, nor does it follow that, because there was a caboose at the place where he worked, it afforded him adequate and proper shelter for the night. If this was the fact, it can quite properly be shown as a defense upon the trial of the case. But the complaint negatives such a conclusion. Order affirmed.

MITCHELL, J., did not participate in making and filing of this decision.

VOSBURG v. PUTNEY.

(50 N. W. 403, 80 Wis. 523.)

Supreme Court of Wisconsin. Nov. 17, 1891.

Appeal from circuit court, Waukesha county; A. SCOTT SLOAN, Judge. Reversed.

Action by Andrew Vosburg against George Putney for personal injuries. From a judgment for plaintiff, defendant appeals.

The other facts fully appear in the following statement by LYON, J.:

The action was brought to recover damages for an assault and battery, alleged to have been committed by the defendant upon the plaintiff on February 20, 1889. The answer is a general denial. At the date of the alleged assault the plaintiff was a little more than 14 years of age, and the defendant a little less than 12 years of age. The injury complained of was caused by a kick inflicted by defendant upon the leg of the plaintiff, a little below the knee. The transaction occurred in a school-room in Waukesha, during school hours, both parties being pupils in the school. A former trial of the cause resulted in a verdict and judgment for the plaintiff for \$2,800. The defendant appealed from such judgment to this court, and the same was reversed for error, and a new trial awarded. 78 Wis. 84, 47 N. W. Rep. 99. The case has been again tried in the circuit court, and the trial resulted in a verdict for plaintiff for \$2,500. The facts of the case, as they appeared on both trials, are sufficiently stated in the opinion by Mr. Justice ORTON on the former appeal, and require no repetition. On the last trial the jury found a special verdict, as follows:

"(1) Had the plaintiff during the month of January, 1889, received an injury just above the knee, which became inflamed, and produced pus? Answer. Yes. (2) Had such injury on the 20th day of February, 1889, nearly healed at the point of the injury? A. Yes. (3) Was the plaintiff, before said 20th of February, lame, as the result of such injury? A. No. (4) Had the *tibia* in the plaintiff's right leg become inflamed or diseased to some extent before he received the blow or kick from the defendant? A. No. (5) What was the exciting cause of the injury to the plaintiff's leg? A. Kick. (6) Did the defendant, in touching the plaintiff with his foot, intend to do him any harm? A. No. (7) At what sum do you assess the damages of the plaintiff? A. Twenty-five hundred dollars." The defendant moved for judgment in his favor on the verdict, and also for a new trial. The plaintiff moved for judgment on the verdict in his favor. The motions of defendant were overruled, and that of the plaintiff granted. Thereupon judgment for plaintiff, for \$2,500 damages and costs of suit, was duly entered. The defendant appeals from the judgment.

T. W. Haight (J. V. Quarles, of counsel), for appellant, to sustain the proposition that where there is no evil intent there can be no recovery, cited: 2 Greenl. Ev. §§ 82-85; 2 Add. Torts, § 790; Cooley, Torts, p. 162; Coward v. Baddeley, 4 Hurl. & N. 478;

Christopherson v. Bare, 11 Q. B. 473; Hollman v. Eppers, 41 Wis. 251; Krall v. Lull, 49 Wis. 405, 5 N. W. Rep. 874; Crindall v. Transportation Co., 16 Fed. Rep. 75; Brown v. Kendall, 6 Cush. 292.

Ryan & Merton, for respondent.

LYON, J. (after stating the facts). Several errors are assigned, only three of which will be considered.

I. The jury having found that the defendant, in touching the plaintiff with his foot, did not intend to do him any harm, counsel for defendant maintain that the plaintiff has no cause of action, and that defendant's motion for judgment on the special verdict should have been granted. In support of this proposition counsel quote from 2 Greenl. Ev. § 83, the rule that "the intention to do harm is of the essence of an assault." Such is the rule, no doubt, in actions or prosecutions for mere assaults. But this is an action to recover damages for an alleged assault and battery. In such case the rule is correctly stated, in many of the authorities cited by counsel, that plaintiff must show either that the intention was unlawful, or that the defendant is in fault. If the intended act is unlawful, the intention to commit it must necessarily be unlawful. Hence, as applied to this case, if the kicking of the plaintiff by the defendant was an unlawful act, the intention of defendant to kick him was also unlawful. Had the parties been upon the play-grounds of the school, engaged in the usual boyish sports, the defendant being free from malice, wantonness or negligence, and intending no harm to plaintiff in what he did, we should hesitate to hold the act of the defendant unlawful, or that he could be held liable in this action. Some consideration is due to the implied license of the play-grounds. But it appears that the injury was inflicted in the school, after it had been called to order by the teacher, and after the regular exercises of the school had commenced. Under these circumstances, no implied license to do the act complained of existed, and such act was a violation of the order and decorum of the school, and necessarily unlawful. Hence we are of the opinion that, under the evidence and verdict, the action may be sustained.

II. The plaintiff testified, as a witness in his own behalf, as to the circumstances of the alleged injury inflicted upon him by the defendant, and also in regard to the wound he received in January, near the same knee, mentioned in the special verdict. The defendant claimed that such wound was the proximate cause of the injury to plaintiff's leg, in that it produced a diseased condition of the bone, which disease was in active progress when he received the kick, and that such kick did nothing more than to change the location, and perhaps somewhat hasten the progress, of the disease. The testimony of Dr. Bacon, a witness for plaintiff, (who was plaintiff's attending physician,) elicited on cross-examination, tends to some extent to establish such claim. Dr. Bacon first saw the injured leg on February 25th, and Dr. Philler, also one of plaintiff's witnesses, first saw it

March 8th. Dr. Philler was called as a witness after the examination of the plaintiff and Dr. Baron. On his direct examination he testified as follows: "I heard the testimony of Andrew Vosburg in regard to how he received the kick, February 20th, from his playmate. I heard read the testimony of Miss More, and heard where he said he received this kick on that day." (Miss More had already testified that she was the teacher of the school, and saw defendant standing in the aisle by his seat, and kicking across the aisle, hitting the plaintiff.) The following question was then propounded to Dr. Philler: "After hearing that testimony, and what you know of the case of the boy, seeing it on the 8th day of March, what, in your opinion, was the exciting cause that produced the inflammation that you saw in that boy's leg on that day?" An objection to this question was overruled, and the witness answered: "The exciting cause was the injury received at that day by the kick on the shin-bone." It will be observed that the above question to Dr. Philler calls for his opinion as a medical expert, based in part upon the testimony of the plaintiff, as to what was the proximate cause of the injury to plaintiff's leg. The plaintiff testified to two wounds upon his leg, either of which might have been such proximate cause. Without taking both of these wounds into consideration, the expert could give no intelligent or reliable opinion as to which of them caused the injury complained of; yet, in the hypothetical question propounded to him, one of these probable causes was excluded from the consideration of the witness, and he was required to give his opinion upon an imperfect and insufficient hypothesis,—one which excluded from his consideration a material fact essential to an intelligent opinion. A consideration by the witness of the wound received by the plaintiff in January being thus prevented, the witness had but one fact upon which to base his opinion, to-wit, the fact that defendant kicked plaintiff on the shin-bone. Based, as it necessarily was, on that fact alone, the opinion of Dr. Philler that the kick caused the injury was inevitable, when, had the proper hypothesis been submitted to him, his opinion might have

been different. The answer of Dr. Philler to the hypothetical question put to him may have had, probably did have, a controlling influence with the jury, for they found by their verdict that his opinion was correct. Surely there can be no rule of evidence which will tolerate a hypothetical question to an expert, calling for his opinion in a matter vital to the case, which excludes from his consideration facts already proved by a witness upon whose testimony such hypothetical question is based, when a consideration of such facts by the expert is absolutely essential to enable him to form an intelligent opinion concerning such matter. The objection to the question put to Dr. Philler should have been sustained. The error in permitting the witness to answer the question is material, and necessarily fatal to the judgment.

III. Certain questions were proposed on behalf of defendant to be submitted to the jury, founded upon the theory that only such damages could be recovered as the defendant might reasonably be supposed to have contemplated as likely to result from his kicking the plaintiff. The court refused to submit such questions to the jury. The ruling was correct. The rule of damages in actions for torts was held in *Brown v. Railway Co.*, 54 Wis. 342, 11 N. W. Rep. 356, 911, to be that the wrongdoer is liable for all injuries resulting directly from the wrongful act, whether they could or could not have been foreseen by him. The chief justice and the writer of this opinion dissented from the judgment in that case, chiefly because we were of the opinion that the complaint stated a cause of action *ex contractu*, and not *ex delicto*, and hence that a different rule of damages—the rule here contended for—was applicable. We did not question that the rule in actions for tort was correctly stated. That case rules this on the question of damages. The remaining errors assigned are upon the rulings of the court on objections to testimony. These rulings are not very likely to be repeated on another trial, and are not of sufficient importance to require a review of them on this appeal. The judgment of the circuit court must be reversed, and the cause will be remanded for a new trial.

BALTIMORE CITY PASSENGER RY. CO.
v. KEMP et ux.

(61 Md. 619.)

Court of Appeals of Maryland. July 3, 1884.

Bernard Carter and Arthur W. Machen, for the motion.

ALVEY, C. J. There has been a motion made in this case for reargument, based largely upon authorities that were not brought to the attention of the court on the former hearing; and hence we depart from the general practice of disposing of such motions without the formal assignment of reasons for the action of the court thereon.

Upon the question whether the jury should have been allowed to infer, upon the evidence before them, that the cancer was the result of the injury received by plaintiff, the defendant cites and relies upon the case of *Jewell v. Railway Co.*, 55 N. H. 84, a case not referred to on the former argument. But the facts of that case are so entirely different from those of the case before us that the analogy between the two cases is but slight. In the first place, the party whose negligence caused the injury in that case was not, according to the decision of the court, the servant or employee of the defendant, and therefore the defendant was not liable for his acts. In the second place, there was a considerable length of time intervening between the time of the accident and the death of the party, the latter in the meantime being engaged in hard work, and subjected to much exposure; and all the circumstances of the case rendered it exceedingly doubtful whether there could be any connection between the injury received by a blow on the right shoulder, and a cancer that was found to exist, by post mortem examination, in the left lung of the party a year and a half after the injury received. And the physicians all testified that in their opinion neither the last sickness of the party nor the cancer was in any way attributable to the injury previously received. The court, moreover, considered and determined the case upon the weight of evidence, as upon motion for a new trial, and not as upon a demurrer to the legal sufficiency of the evidence to be submitted to the jury as in the case before us. The other cases cited upon this question have only a remote or indirect bearing, and we do not perceive that they are at all in conflict with the opinion that has been delivered in this case.

Since the opinion in this case was delivered, 50 Mich. has been published, and that volume contains the case of *Beauchamp v. Saginaw Min. Co.*, at page 163 (15 N. W. 65). In that case, a boy, while passing on a highway, was injured by being struck on the side of his head by a stone from a blast fired by the mining company, and, having died some five or six months thereafter, an action was brought to recover damages for his death,

caused, as it was alleged, by the negligence of the defendant. Among other defenses, it was alleged, and evidence was given to show, that death was not caused by the injury, but by a specific or typical pneumonia, and the case was sought to be taken from the jury upon the ground that pneumonia, and not the injury received from the stone, was the direct and proximate cause of the death. The physician who attended the boy in his sickness testified that he died of pneumonia, though he had been very seriously injured, and was paralyzed on one side, and the chances of recovery were against him. The doctor said in his testimony: "I am unprepared to say what caused pneumonia in this case. In my opinion, it was a specific or typical pneumonia. The relation between it and the injured head was not close." It was contended, however, for the plaintiff, that owing to the broken and shattered condition of the boy's system, caused by the injury received, and his increased susceptibility to cold, pneumonia was superinduced and developed as a natural result of the injury; and that question was submitted to the jury upon the evidence, and they found for the plaintiff. The case was taken to the supreme court of Michigan, and the error assigned was the submission of the question to and allowing the jury to conclude as to whether pneumonia did in fact result from, and was a consequence of, the injury received by the boy. The supreme court affirmed the ruling of the court below, and held that, "if the injury received and sickness following concurred in and contributed to the attack of pneumonia, the defendant must be held responsible therefor." And so in this case, if the injury received by Mrs. Kemp, by the negligence of the defendant, superinduced and contributed to the production or development of cancer, the defendant is responsible therefor; and the cancer is not to be treated as an independent cause of injury or suffering, any more than pneumonia, resulting from an injury that rendered the system susceptible of and liable to the attack, as a natural consequence of such injury is to be regarded as an independent cause of death. In both cases the original injury was the prime cause that opened the way to and set other causes in motion which led to the fatal results. And the wrongdoer cannot be allowed to apportion the measure of his responsibility to the initial cause. Whether the direct casual connections exist, is a question, in all cases, for the jury, upon the facts in proof.

There is another ground upon which reargument of the case is asked, and that is with respect to the nature of the action, and for what nature and extent of injury damages may be allowed to be recovered therein. The defendant insists that while the form of action is as for a tort, yet the real ground of the right to recover in this case is simply for breach of the contract to carry safely, and to put the party down safely. And, that being

so, according to the contention, it is insisted that to entitle the plaintiff to damages by reason of a breach of the contract the injury for which compensation is asked should be shown to be such that it may fairly be taken to have been contemplated by the parties as the possible result of the breach of the contract; and that in this case, no such consequence as the production of cancer in the plaintiff could have been anticipated as the probable result of the negligent act of the defendant. But to this proposition we cannot agree, and in our opinion it is not supported by authority.

A common carrier of passengers, who accepts a party to be carried, owes to that party a duty to be careful, irrespective of contract; and the gravamen of an action like the present is the negligence of the defendant. The right to maintain the action does not depend upon contract, but the action is founded upon the common-law duty to carry safely; and the negligent violation of that duty to the damage of the plaintiff is a tort or wrong which gives rise to the right of action. *Bretherton v. Wood*, 3 Brod. & B. 54. If this were not so, the passenger would occupy a more unfavorable position in reference to the extent of his right to recover for injuries than a stranger; for the latter, for any negligent injury or wrong committed, can only sue as for a tort, and the measure of the recovery is not only for the actual suffering endured, but for all aggravation that may attend the commission of the wrong; whereas in the case of a passenger, if the contention of the defendant be supported, for the same character of injury, the right of recovery would be more restricted. The principle of these actions against common carriers of passengers is well illustrated by the case of a servant whose fare has been paid by the master, or the case of a child for whom no fare is charged. In both of the cases mentioned, though there is no contract as between the carrier and the servant, or as between the carrier and the child, yet both servant and the child are passengers, and for any personal injuries suffered by them through the negligence of the carrier it is clear they could sue and recover; but they could only sue as for a tort. The authorities would seem to be clear upon the subject, and leave no room for doubt or question.

In the case of *Marshall v. Railroad Co.*, 11 C. B. 655, in discussing the ground of action against a common carrier, Jervis, C. J., said: "But upon what principle does the action lie at the suit of the servant for his personal suffering? Not by reason of any contract be-

tween him and the company, but by reason of a duty implied by law to carry him safely." And in the same case Mr. Justice Williams said: "The case was, I think, put upon the right footing by Mr. Hill, when he said that the question turned upon the inquiry whether it was necessary to show a contract between the plaintiff and the railroad company. His proposition was that this declaration could only be sustained by proof of a contract to carry the plaintiff and his luggage for hire and reward to be paid by the plaintiff and that the traverse of that part of the declaration involves a traverse of the payment by the plaintiff. I am of opinion that there is no foundation for that proposition. It seems to me that the whole current of authorities, beginning with *Govett v. Radnidge*, 3 East, 62, and ending with *Pozzi v. Shipton*, 8 Adol. & E. 963, establishes that an action of this sort is, in substance, not an action of contract, but an action of tort against the company as carrier." And in the subsequent case of *Austin v. Railroad Co.*, L. R. 2 Q. B. 442, Mr. Justice Blackburn, now Lord Blackburn, in delivering his judgment in that case, said: "I think that what was said in the case of *Marshall v. Railroad Co.*, 11 C. B. 655, was quite correct. It was there laid down that the right which a passenger by railway has to be carried safely does not depend on his having made a contract, but that the fact of his being a passenger casts a duty on the company to carry him safely." And to the same effect, and with full approval of the authorities just cited, are the cases of *Foulkes v. Railroad Co.*, 4 C. P. Div. 267, 30 Eng. R. 536, and the same case on appeal, 5 C. P. Div. 157, 30 Eng. R. 740; and *Fleming v. Railway Co.*, 4 Q. B. Div. 81. The case of *Bretherton v. Wood*, 3 Brod. & B. 54, is a direct authority upon the question.

A passenger may, without doubt, declare for a breach of contract where there is one; but it is at his election to proceed as for a tort where there has been personal injury suffered by the negligence or wrongful act of the carrier, or the agents of the company; and in such action the plaintiff is entitled to recover according to the principles pertaining to that class of actions, as distinguished from actions on contract. And this is the settled doctrine and practice in this state. *Stockton v. Frey*, 4 Gill, 406; *Railroad Co. v. Blocher*, 27 Md. 277, 287; *Turnpike Co. v. Boone*, 45 Md. 344; *Stokes v. Saltonstall*, 13 Pet. 181. The motion for reargument must be overruled.

STONE, J., dissented.

31 WESTERN RAILWAY OF ALABAMA v. MUTCH.

(11 South. 894; 97 Ala. 194.)

Supreme Court of Alabama. Dec. 1, 1892.

Appeal from circuit court, Lee county; J. M. Carmichael, Judge.

Action by George Mutch, administrator of James Thomas Mutch, against the Western Railway of Alabama, to recover for the alleged negligent killing of his intestate by defendant. Judgment for plaintiff. Defendant appeals. Reversed.

After the rendition of the judgment for plaintiff, defendant moved the court for a new trial on the following grounds: (1) Because the jury found contrary to the evidence; (2) because the evidence did not authorize a verdict against the defendant; (3) because Mr. Augustus Barnes, one of plaintiff's attorneys, in his argument to the jury, in speaking of defendant's employees who were witnesses in this case, said "that he would not say, as a north Alabama attorney had said, that they 'testified with halters around their necks;' but he would say that they testified with a conscious regard to their position." The court overruled the motion for a new trial, and the defendant duly excepted. On this appeal, prosecuted by the defendant, there are many assignments of error, in which were included the overruling of defendant's motions for a new trial, but under the opinion it is deemed unnecessary to notice them in detail.

Geo. P. Harrison and R. F. Ligon, Jr., for appellant. A. & R. B. Barnes, W. J. Sanford, and J. M. Chilton, for appellee.

STONE, C. J. The plaintiff, George Mutch, was a resident of Opelika. His son, James Mutch, was 9½ years old, well grown and developed for his age, and, in intelligence and brightness, was above the average of boys of his age. He went at large without being attended by a nurse or protector, and was attending school. The Western Railway of Alabama runs through Opelika, and has a station and depot in that city or town. There was an ordinance of force in Opelika which made it unlawful to run a train of cars within the corporate limits at a higher rate of speed than four miles an hour, and imposing a penalty for its violation. A freight train of the railroad was coming into Opelika on an afternoon in March, 1889. It had box cars, and attached to the side of one of them was a ladder, placed there to enable brakemen to reach the top of the car. The little boy, James, having placed himself at the side of the track, attempted to seize the ladder as it passed him, that he might climb up on it, and thus enjoy a ride. He did succeed in catching a round of the ladder, but, in attempting to ascend, he missed his footing, fell under the train, and was so injured and crushed that he died of the wounds. Up to this point there is no conflict or uncertainty

in the testimony. The present suit was brought against the railroad, and seeks to recover damages from it for this alleged negligent killing of plaintiff's intestate. The negligence charged (and there is no other pretended, or attempted to be shown) is that the train was being moved at a greater rate of speed than four miles an hour. Some of plaintiff's witnesses testified that it was moving at the rate of six or seven miles an hour. On the other hand, defendant's witnesses placed the speed, some as low as three, and none above four, miles an hour. This was not the first time intestate had attempted to spring on moving trains, and he had been more than once cautioned against such attempts. Assuming that the speed of the train was in excess of four miles an hour, was there a causal connection between such breach of duty on the part of the railroad company and the injury done to plaintiff's intestate?

Persons who perpetrate torts are, as a rule, responsible, and only responsible, for the proximate consequences of the wrongs they commit. In other words, unless the tort be the proximate cause of the injury complained of, there is no legal accountability. In that able and valuable work, 16 Am. & Eng. Enc. Law, 436, is this language: "A 'proximate cause' may be defined as that cause which in natural and continuous sequence, unbroken by any efficient intervening cause, producing the result complained of, and without which that result would not have occurred; and it is laid down in many cases, and by leading text writers, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it was such as might or ought to have been foreseen, in the light of the attending circumstances." On page 431 of the same volume it is said: "To constitute actionable negligence, there must be not only a causal connection between the negligence complained of and the injury suffered, but the connection must be by a natural and unbroken sequence, without intervening efficient causes; so that, but for the negligence of the defendant, the injury would not have occurred. It must not only be a cause, but it must be the proximate—that is, the direct and immediate, efficient—cause of the injury." That philosophic law writer Dr. Wharton, (Law of Negligence, § 75.) expresses the principle as follows: "If the consequence flows from any particular negligence, according to ordinary natural sequence, without the intervention of any human agency, then such sequence, whether foreseen as probable, or unforeseen, is imputable to the negligence." Quoting from Chief Baron Pollock with apparent approval, he (in section 78) says: "I entertain considerable doubt whether a person who has been guilty of negligence is responsible for all the

consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person could have anticipated. I am inclined to consider the rule of law to be this: That a person is expected to anticipate and guard against all reasonable consequences, but that he is not by the law of England expected to anticipate and guard against that which no reasonable man would expect to occur." In the same section he quotes approvingly the following language from Lord Campbell: "If the wrong and the legal damage are not known by common experience to be usually in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, the wrong and the damage are not sufficiently conjoined or concatenated, as cause and effect, to support an action." In *Shearman & Redfield's Law of Negligence* (section 26) the principle is thus stated: "The proximate cause of an event must be understood to be that which, in a natural and continuous sequence, unbroken by any new cause, produces that event, and without which that event would not have occurred." The authorities from which we have quoted are everywhere regarded as standard. What they assert is but the condensation of the utterances of a very great number of the highest judicial tribunals, wherever the principles of the common law prevail. See 16 Am. & Eng. Enc. Law, 428, 429; *Railway Co. v. Kellogg*, 94 U. S. 469; *Herring v. Skaggs*, 62 Ala. 180; *Daughtery v. Telegraph Co.*, 75 Ala. 168; *Lynch v. Nurdin*, 1 Q. B. (N. S.) 29, 41 E. C. L. 422, is the strongest of the cases relied on in support of the present action. The injury in that case occurred in a city. The headnote contains a summation of the facts as follows: "Defendant (a cart man) negligently left his horse and cart unattended in the street. Plaintiff, a child seven years old, got upon the cart in play. Another child incautiously led the horse on, and plaintiff was thereby thrown down, and hurt." It was held that the action was maintainable for the recovery of damages, "and that it was properly left to the jury whether defendant's conduct was negligent, and the negligence caused the injury." In delivering his opinion, Lord Denman used the following language: "If I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion, to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first. * * * Can the plaintiff, then, consistently with the authorities, maintain his action, having been at least equally in fault? The answer is that, supposing that fact ascertained by the jury, but to this extent: that he merely indulged the natural instinct of a child in amusing himself with the empty cart

and deserted horse, then we think that the defendant cannot be permitted to avail himself of that fact. The most blamable carelessness of his servant having tempted the child, he ought not to reproach the child with yielding to that temptation." Reading the case of *Lynch v. Nurdin* in the light shed upon it by Lord Denman's reasoning, no one can fail to note the marked difference between that case and the one we have in hand. The argument by which the learned lord chief justice supported the judgment he announced has no application to the present one. That case was manifestly decided on the well-recognized principle that if one leave dangerous machinery, or any other thing of similar nature, unattended, and in an exposed place, and another be injured thereby, an action on the case may be maintained for such injury, unless plaintiff was guilty of contributory negligence. *Clark v. Chambers*, 3 Q. B. Div. 327; *Kunz v. City of Troy* (N. Y. App.) 10 N. E. 442; *Stout v. Railroad Co.*, 2 Dill. 294, Fed. Cas. No. 13,504; *Beach, Contrib. Neg.* §§ 140, 206. Infants of tender years, and wanting in discretion, are not amenable to the disabling effects of contributory negligence. In the opinion of the court in the case of *Lynch v. Nurdin* the causal connection between the negligence and the injury was so direct and patent that the driver, exercising ordinary care and prudence, should have anticipated and guarded against it. The implication from Lord Denman's language is very strong that he regarded the cart man's conduct as grossly negligent. Contributory negligence is no defense to injuries which result from gross negligence. But the principle declared in *Lynch v. Nurdin* was, if not materially shaken, at least shown to be inapplicable to a case like the present one, in the two later English cases of *Hughes v. Macfie*, 2 Hurl. & C. 744, and *Mangan v. Atterton*, L. R. 1 Exch. 239. See, also, *McAlpin v. Powell*, 70 N. Y. 126; *Wendell v. Railroad Co.*, 91 N. Y. 420; *Railroad Co. v. Bell*, 81 Ill. 76. The case of *Messenger v. Dennie*, 137 Mass. 197, is a strong authority against the right to maintain the present action. Another case relied on in support of the present action is *Railroad Co. v. Gladmon*, 15 Wall. 401. That case is wholly unlike the present one, and rests on a different principle. The negligence of defendant's agent was manifest, and the injury was the natural consequence of the negligence. Had the driver been looking ahead, as he should have been, he would have seen the child's danger, and could and would have stopped his car before his horses did the injury. The causal connection in that case was complete, because the injury resulted so naturally from the driver's inattention that the law regards it as the probable consequence of his negligence. None of the cases cited support the contention of appellee.

The ordinance of Opelika, restricting the speed of trains within the corporate limits to

four miles an hour, had one purpose,—one policy. Opelika is a town probably of four or more thousand inhabitants. The railroad antedated the town, and caused its location there. It runs centrally through the business portions of the place. In such conditions, men pursuing business avocations, as well as idlers and curiosity seekers, will congregate about the depot and track of the railroad, and will be constantly crossing, if not standing on, the track. They do both. Knowing this habit of men, most towns located on railroads have ordinances requiring trains passing through them to move at a low rate of speed. Why? Not because they apprehend that reckless persons will attempt to board the train while in motion. The wildest conjecture would scarcely take in an adventure so fraught with peril. The policy was to enable persons who might be standing on the track, or whose business pursuits required them to cross it, to get off the track, and thus escape the danger of a collision. The ordinance had no other aim.

We hold as matter of law that there was no proof whatever in this case tending to show a causal connection between the negligence charged and the injury suffered. To illustrate our views: Let us suppose that the negligence charged against the railroad company had been, not the too rapid movement of the train, but some imperfection, decay, or derangement of the ascending ladder which caused plaintiff's intestate to fall and lose his life. Would any one contend the railroad company would be liable for such accident? And is there a difference in principle between the case supposed and the one we have in hand? Charge No. 21, the general charge in favor of the defendant, ought to have been given. The great English commentator said, "Law is the perfection of human reason." This, in a sense, is true. It is the expression of the combined wisdom of the legislative body. It is the creature, however, of human thought, and nothing human is perfect. Nor is it true that legislative policy is unchanging. Conditions change, and the law which should adapt itself to human wants must change with them. Still, while the law stands on the statute book, it

should be obeyed and conformed to as a rule of action. If we cut loose from its restraints, we expose ourselves to the tempests of human passion and human prejudice, and, like a ship at sea without rudder or compass, will surely be dashed on some of the many shoals which are found all along the voyage of life.

Trial by jury is a bulwark of American, as it has long been of English, freedom. It wisely divides the responsibility of determinative adjudication, of punitive administration, between the judge, trained in the wisdom and intricacies of the law, and 12 men chosen from the common walks of nonprofessional life; chosen for their sound judgment and stern impartiality. The one declares the rules of law applicable to the issue or issues formed, in the light of the testimony adduced; the other weighs the testimony, determines what facts it proves, and, molded by the law as declared by the court, renders its verdict. In the jury box, and under the oath the jurors have solemnly sworn on the holy evangelists of Almighty God, there is no room for friendship, partiality, or prejudice; no permissible discrimination between friends and enemies, between the rich and the poor, between corporations and natural persons. The ancients painted the Goddess of Justice as blindfolded, and jurors must be blind to the personal consequences of the verdicts they render. If the testimony convinces their judgments of the existence of certain facts, they must be blind to the consequences which result from those facts. A wish that it were otherwise furnishes no excuse for deciding against their convictions. Justice thus administered commands the approbation of heaven and earth alike; and a verdict thus rendered meets all the requirements of the juror's oath, in the fullest sense of the word,—a true expression of the convictions fixed on the minds of the jury by the testimony. Independent of the legal question considered above, and which we have declared to be determinative of this case, the verdict of the jury was so palpably against the evidence that a new trial ought to have been granted on that account.

Reversed and remanded.

CHAMBERLAIN v. CITY OF OSHKOSH.
(54 N. W. 618, 84 Wis. 289.)

Supreme Court of Wisconsin. Feb. 21, 1893.

Appeal from circuit court, Winnebago county; George W. Burnell, Judge.

Action by Anna Chamberlain against the city of Oshkosh to recover for personal injuries caused by defendant's alleged negligence. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed.

H. I. Weed, for appellant.

Finch & Barber, for respondent.

For an ordinary, general, and transient slipperiness, due to the ordinary action of the elements only, and capable of being removed by such ordinary action of the elements, there is no liability, but for a local, unusual, and permanent slipperiness, caused by a defect in the street, and which the ordinary action of the elements would not remove, the city is liable. *Cook v. City of Milwaukee*, 24 Wis. 170, 27 Wis. 191; *Perkins v. City of Fond du Lac*, 34 Wis. 435; *Hill v. City of Fond du Lac*, 56 Wis. 242, 14 N. W. Rep. 25; *Stilling v. Town of Thorp*, 54 Wis. 528, 11 N. W. Rep. 906; *Grossenbach v. City of Milwaukee*, 65 Wis. 31, 26 N. W. Rep. 182; *Paulson v. Town of Pelican*, 79 Wis. 445, 48 N. W. Rep. 715; *McDonald v. City of Ashland*, 78 Wis. 251, 47 N. W. Rep. 434; *Cromarty v. City of Boston*, 127 Mass. 329; *Taylor v. City of Yonkers*, 105 N. Y. 202, 11 N. E. Rep. 642; *Todd v. City of Troy*, 61 N. Y. 506; *Pomfrey v. Village of Saratoga Springs*, 104 N. Y. 459, 11 N. E. Rep. 43; *Kinney v. City of Troy*, 108 N. Y. 567, 15 N. E. Rep. 728; *Kenney v. City of Cohoes*, (N. Y. App.) 3 N. E. Rep. 189; *Spellman v. Inhabitants of Chicopee*, 131 Mass. 443; *Keith v. City of Brockton*, 136 Mass. 119; *Cloughessey v. City of Waterbury*, 51 Conn. 405; *Congdon v. City of Norwich*, 37 Conn. 414; *Burr v. Town of Plymouth*, 48 Conn. 460; *Landolt v. City of Norwich*, 37 Conn. 615; *Dooley v. City of Meriden*, 44 Conn. 117; *Hubbard v. City of Concord*, 35 N. H. 52; *Darling v. Town of Westmoreland*, 52 N. H. 401; *Clark v. City of Chicago*, 4 Biss. 486; *Mosey v. City of Troy*, 61 Barb. 580; *Mayor, etc., v. Marriott*, 9 Md. 160; *City of Providence v. Clapp*, 17 How. 161; *Evans v. City of Utica*, 60 N. Y. 166; *Darling v. Mayor, etc.*, 18 Hun, 340; *Evers v. Bridge Co.*, Id. 144; *Blakeley v. City of Troy*, Id. 167; *Thomas v. Mayor, etc.*, 28 Hun, 110. In all these cases the test of liability is whether the city is responsible for the slipperiness, either in its formation by a structural defect in the sidewalk, or by allowing it to remain too long after it is formed. Smooth and level ice may be dangerous as well as rough ice, and the question simply is, was any negligence of the city the cause of its formation or retention? The following cases are a direct authority on this point: *Cromarty*

v. City of Boston, 127 Mass. 329; *Spellman v. Inhabitants of Chicopee*, 131 Mass. 443; *Cloughessey v. City of Waterbury*, 51 Conn. 405; *Paulson v. Town of Pelican*, 79 Wis. 445, 48 N. W. Rep. 715. If the condition is artificial, instead of natural, and is caused by the negligence of the city, the city is liable. The case of *Spellman v. Inhabitants of Chicopee*, supra, is almost identical in the facts with the case at bar.

ORTON, J. This action is to recover damages for a personal injury to the plaintiff, occasioned by the want of repair and defective condition of a walk in Merritt street, in the city of Oshkosh. The defect is thus described in the complaint: "The said street, known as 'Merritt Street,' at a certain place in said street to wit, on the south side of said Merritt street, on the southeast corner thereof where said Merritt street intersects with Ford street of said city, was, (on the 21st day of February, 1889,) and for a period of four weeks or more had been, unsafe, insufficient, defective, and badly out of repair, in this, to wit, that at the point of junction between the stone crossing on the south side of said Merritt street, where said Merritt street intersects with Ford street, and the sidewalk on the south side of said Merritt street, where said stone crossing ends, the authorities of the city of Oshkosh, to wit, this defendant, negligently permitted a large hole to exist within the usual line and course of travel over said stone crossing and sidewalk, and negligently permitted and allowed said hole to exist and remain without placing any guard over or around the same, and negligently allowed said hole to become filled with water, and to become frozen over with a large surface of smooth ice, and negligently failed to place any protection, guard, or cover over or around said surface of ice, and failed to take any precaution to prevent or warn travelers over said crossing or sidewalk from walking upon and over said surface of ice. That persons traveling over and upon said crossing and sidewalk were compelled to walk upon and over said surface of ice, and that the aforesaid city authorities, to wit, the defendant, negligently failed to provide a safe and sufficient crossing or passage over or around said large surface of smooth ice." The plaintiff's injury, and the manner of it, are substantially described as follows: The plaintiff, while traveling upon said Merritt street and over the said stone crossing, "did by necessity and in the ordinary course of travel, walk upon and over said large surface of ice, and without any fault on her part she fell upon said surface of ice with great force," and received great bodily injuries therefrom. After the plaintiff was sworn as a witness in her own behalf, the defendant city interposed a demurrer *ore tenus* on the ground that the complaint did not state a cause of action, and the objection to any evidence under it was overruled, and exception taken. The plaintiff tes-

tified that when she came to that point "her feet came from under her, and she came down on her back. She did not notice any barriers or guards around this place, or any ashes upon the sidewalk where she slipped." According to the evidence, the depression in the street, where the water had accumulated which made the ice on which the plaintiff slipped down and was injured, was made by the junction of a sidewalk coming down Ford street with the stone cross walk over Merritt street. It would seem that the slight difference of the grade of the two streets made the depression. The slope of the plank sidewalk down to its junction with the stone cross walk was only four inches, and the depression in the stone cross walk where the ice accumulated was from an inch to an inch and a half. The plank walk was over the gutter on Merritt street. This defect, if any, appears to have been in the plan of the work and its construction. At the conclusion of the testimony the defendant's motion for a nonsuit was overruled. The jury found a special verdict "that the cross walk was in a defective and dangerous condition," and "that such condition caused the plaintiff's injury," and assessed her damages at \$1,100. It will be observed that the complaint does not charge that the plaintiff's injury was caused by a hole or depression in the cross walk, but that it was caused wholly by the smooth surface of the ice at that place, and such was the evidence. The plaintiff slipped and fell on the smooth surface of the ice. The ice was the proximate cause of the injury. The depression in the walk where the ice formed, if a defect, and a cause of the injury in any sense, was a remote, and not the proximate, cause of the injury. But at this time there was no hole, or even depression, at that place. It was filled up by the ice. It is too plain for argument that the cause of the plaintiff's injury, both by the complaint and testimony, was the smooth surface of the ice on the cross walk. The special verdict is careful not to state the defect or dangerous condition. It will be observed, also, that the negligence of the city consists "in failing to provide a safe crossing or passage over and around said large surface of smooth ice, and allowed and permitted said crossing to remain in such insufficient, unsafe, and defective condition for a period of four weeks, and failed to take any precaution to prevent or warn travelers over said crossing or sidewalk from walking upon and over said surface of ice." The existence and continuance of said ice for four weeks was the presumptive notice to the city of the defect complained of. The plaintiff does not complain of being injured by the hole or depression, but by the "large surface of smooth ice." The depression was the cause of the water accumulating there, and the water, combined with a low temperature, caused the ice to form which injured the plaintiff. The depression was a remote cause or cause of causes. The proximate or direct cause was

the ice, and this must be the cause of action. "*Causa proxima, non remota, spectatur*,"—the proximate, and not the remote, cause, must be considered. The cause nearest in order of causation, which is adequate to produce the result, is the direct cause. In law, only the direct cause is considered. These are familiar maxims. "The proximate cause is the cause which leads to, and is instrumental in producing, the result." 3 Amer. & Eng. Enc. Law, 45; *State v. Railroad Co.*, 52 N. H. 528. In this case the hole or depression is not the cause of the injury for which an action may be brought. It is too remote. There is a direct cause of the injury, and that is the ice on which she slipped down, and that is the only one which can be considered. The defect in the street or walk is the ice, and the negligence of the city consists in allowing it to remain. This was dangerous to the traveling public, and the cause of the plaintiff's injury in the law and by the complaint and testimony. This ice was smooth and level, and accumulated through the sole agency of the elements and in the order of nature. No argument, speculation, or casuistry can make this case any different from this. The main and important question which first presents itself on the demurrer to the complaint, and again on the motion for a nonsuit, is, is such a condition of the walk an actionable defect? This question is settled by this court in the negative in many cases, after a very full examination of the authorities elsewhere, which we need not cite. "When the walk is slippery because of the smooth surface of the snow and ice which had accumulated upon it," such a defect is not actionable. *Cook v. City of Milwaukee*, 24 Wis. 270, 27 Wis. 191. In *Perkins v. City of Fond du Lac*, 34 Wis. 435, "the walk was entirely covered with packed snow and ice, and the whole surface of the walk was very smooth and slippery." It was held that such a condition of the walk did not alone constitute an actionable defect; and so in *Grossenbach v. City of Milwaukee*, 65 Wis. 31, 26 N. W. Rep. 182. This holding is most reasonable. Such a defect in a walk or street is common and natural everywhere in the winter season, and such actions would be numberless, unreasonable, and oppressive. The municipalities are powerless to prevent or remove such a common and natural condition. The authorities cited by the learned counsel of the respondent are not applicable to this case. They are cases where other defects combine with the ice to cause the injury. Such defects must be present with the ice, and they together constitute a cause of action; as, where the ice is formed on a steep declivity or descending grade, or there is some other condition of the walk, which, together with the ice, makes the walk dangerous, as in *Grossenbach v. City of Milwaukee* and *Perkins v. City of Fond du Lac*, supra, and other cases in this court. But here the hole or depression does not com-

bine with the ice, and is not present with it. There is no hole at the time, as it is filled with ice, and the surface is made level as ice can be anywhere. The plaintiff was not injured by stepping into the hole, but by slipping on the ice. But I have said enough of this. The hole was only the remote cause, or cause of causes, which

produced the result, and was not the direct, efficient, or adequate cause, which alone is actionable. The court should have sustained the demurrer ore tenus, or, failing in that, ought to have ordered a nonsuit on the evidence. The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

BLYTHE et al. v. DENVER & R. G. RY. CO.

(25 Pac. 702, 15 Colo. 333.)

Supreme Court of Colorado. Jan. 10, 1891.

Commissioners' decision. Error to district court, Arapahoe county.

Plaintiffs in error brought suit against the defendant as a common carrier for the loss of a package of merchandise consisting of gold and silver watches, watch-cases and movements, of the alleged value of \$726.95, delivered to defendant at Alamosa by one J. B. Moomaw, to be carried as an express package, directed to and to be delivered to plaintiffs at Denver. The package was not valued, and was accepted and receipted for as an ordinary package at a nominal valuation of \$50, upon which charges of 65 cents were paid in advance for its transportation. The defendant, after denying the material allegations of the complaint, admitted the receipt of the package, the payment of the money for its transportation, the execution and delivery of its receipt for the same, and specially alleged as defenses: *First*, that the car in which such package was being transported was blown from the track by a furious wind, and the car and contents destroyed by fire, and that the loss was by inevitable accident and "the act of God;" *second*, that the shipper fraudulently concealed the value of the package, and it was received as being only of the value of \$50; that it was placed in the body of the car, where ordinary packages were usually carried; that defendant had a fire-proof safe in the car, and had the shipper given the true value, and paid transportation for such value, the goods would have been placed in the safe, and would not have been lost; that, by the terms of the receipt given, defendant was exempted from any liability exceeding \$50. A replication was filed putting in issue the special matters pleaded in defense, and averring negligence in not securing the package in the safe, and in not making proper efforts to save the property at the time of the disaster. The case was tried to a jury, resulting in a verdict for the defendant, and judgment upon the verdict.

Lucius P. Marsh, for plaintiffs in error.
Wolcott & Valle, for defendant in error.

REED, C., (after stating the facts as above.) It is conceded that the wrecking of a portion of the train, such portion consisting of one engine and four cars, one being the express-car in which the goods were being carried, was by "the act of God," and inevitable. It is also conceded in argument that having a coal fire burning in a stove, and a lighted lamp in the compartment, as testified to, was not negligence on the part of the carrier. Counsel for plaintiffs in error in reply say: "In the brief of defendant in error, counsel have assumed for us a claim which we have not made, and they then proceed to demolish such assumed claim. They assume for us that we claim there was negligence in carrying in the car a stove with fire in it. * * * There was negligence,—we may call it by that name,—but such negli-

gence was in not making the requisite efforts to save the goods after the peril had been incurred. We make no claim that there was negligence in carrying a stove in the car." By these concessions, two important questions are eliminated, and the issues are narrowed, the only questions remaining being: *First*. Was "the act of God" the proximate and direct cause of the loss sustained, so as to exonerate the carrier from liability, or was it the remote cause, and the fire against which the carrier is supposed to be an insurer the proximate and direct cause? *Second*. After the wrecking and overturning of the train by "the act of God," was the carrier guilty of negligence in failing to protect and secure the goods in the burning car?

Great ability and research have been expended in attempting to arrive at and determine upon some general definition of the terms "proximate" and "remote" causes and establish a rule and a line of demarkation between the two. Such efforts appear to have been but partially successful. Both have received various definitions, though differently worded, amounting to practically the same thing. But, in almost every instance where they have been attempted to be applied, their applicability seems to have been determined by the peculiar circumstances of the case under consideration. Webster defines "proximate cause," "that which immediately precedes and produces the effect, as distinguished from the remote, mediate, or predisposing cause." And. Dict. Law: "The nearest, the immediate, the direct cause; the efficient cause; the cause that sets another or other causes in operation, or dominant cause." But with these definitions in view, when two causes unite to produce the loss, the question still remains, which was the proximate cause? In *Insurance Co. v. Tweed*, 7 Wall. 52, the late lamented Mr. Justice MILLER said: "We have had cited to us a general review of the doctrine of proximate and remote causes, as it has arisen and been decided in the courts in a great variety of cases. It would be an unprofitable labor to enter into an examination of these cases. If we could deduce from them the best possible expression of the rule, it would remain after all to decide each case largely upon the special facts belonging to it, and often upon the very nicest discriminations." In *Howard Fire Ins. Co. v. Norwich & N. Y. Transp. Co.*, 12 Wall. 199, in delivering the opinion of the court, Mr. Justice STRONG said: "And certainly, that cause which set the other in motion, and gave to it its efficiency to do harm at the time of the disaster, must rank as predominant." In *Railroad Co. v. Kellogg*, 94 U. S. 475, it is said: "The inquiry must therefore always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury." In *Insurance Co. v. Boon*, 95 U. S. 130, it is said: "The proximate cause is the efficient cause; the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though

they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster."

Leaving out of consideration, as we must, by concession of counsel, all question of negligence in regard to the burning fire in the stove, a lighted kerosene lamp, and regarding each of them as securely protected against damage as prudence would require, and applying the rules above laid down, it becomes apparent that the overturning and wrecking of the car by the violence of the wind was the proximate, direct, and efficient cause of the loss, and the fire following, if not instantaneously, immediately after, without negligence or any wrongful act of the carrier intervening to produce it, must be regarded as resulting and incidental. It is ably contended in argument, and many supposed authorities in support of the position are cited, that the negligence of the carrier in failing to use proper exertion to save the contents of the car, after it was overturned, rendered the defendant liable for the loss. If, by proper diligence and attention the goods could have been rescued, a failure to secure them would have fixed the liability of the carrier. There can be no doubt of the correctness of this conclusion. The questions, what was the proximate cause of the loss, and of negligence, were questions of fact to be determined by the jury from the evidence, under proper instructions from the court. There was not much conflict of testimony. In *Railroad Co. v. Kellogg*, supra, it is said: "In the nature of things, there is in every transaction a succession of events, more or less dependent upon those preceding, and it is the province of the jury to look at this succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dis severed by new and independent agencies; and this must be determined in view of the circumstances existing at the time." The jury found as a fact that the "act of God" was the proximate cause, and also found as a fact that there was no negligence. Viewed in the light of all the evidence, and of attendant circumstances, the finding of the jury was fully warranted. The force of the gale was such as to blow the cars from the track over the embankment. It was shown to be almost impossible for men to stand or walk, and they were compelled to prostrate themselves under the lee of the track or bank to escape its fury. The air was so full of

dust and flying material that scarcely anything could be seen. The car contained inflammable material, and the fire succeeded the overturning almost instantaneously. The messenger escaped with great difficulty, and not without injury from the flames. The position of the car was such that all movable goods must have been hurled into the corner of the top of the car. From the force of the wind, and combustible material of the car, it is obvious that the destruction of the car and contents was inevitable in a very brief space of time, and that any attempt to rescue the goods would have been unavailing.

Considerable criticism is directed to the instructions of the court. Some of those criticised, and upon which errors are assigned, are in regard to negligence in the use of the stove and lamp. As counsel concedes in his final argument that there was no negligence in that respect, a review of them becomes unnecessary. Considerable attention is given to the eighth instruction, in which the learned judge charged: "Where one is pursuing a lawful avocation, in a lawful manner, and something occurs which no human skill or precaution could foresee or prevent, and as a consequence the accident takes place, this is called 'inevitable accident' or the 'act of God.'" The objection urged is more technical than substantial. While it is, possibly, not technically correct, and while there is a legal distinction between "inevitable accident" and the "act of God," we can see nothing in it to the prejudice of the plaintiff, or that could have misled the jury. The immediate resulting cause producing the loss was the fire, which might properly be termed an "inevitable accident" growing out of the former disaster; while the direct cause of the agency that worked the destruction was the "act of God," putting the resulting agent at work. We think the charge, taken as a whole, was a fair and impartial statement of the law, and should be sustained. We advise that the judgment be affirmed.

RICHMOND and BISSELL, CC., concurring.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment of the court below is affirmed.

ELLIOTT, J., having tried this cause below, did not participate in this decision.

HAVERLY v. STATE LINE & S. R. CO.

(19 Atl. 1013, 135 Pa. 50.)

Supreme Court of Pennsylvania. May 19, 1890.

Appeal from court of common pleas, Bradford county.

Action by Leroy Haverly against the State Line & Sullivan Railroad Company for damage caused by fire. The testimony showed that on May 11, 1880, about 4 or 5 o'clock p. m. a train of defendant's passed over its road, and near the tract of land where plaintiff was lumbering; that soon afterwards smoke was seen issuing from a stump in the line of the defendant's right of way; that one of plaintiff's agents was sent to put out this fire, who, returning, reported he had done so; that no further smoke was seen in or around the stump until about 10 o'clock a. m. of the following day, when the plaintiff himself sent a servant, who, finding the stump on fire, poured water thereon until he supposed it was entirely extinguished, and he remained there half or three-quarters of an hour, until he satisfied himself that no fire remained; that about noon of the same day, the wind coming up and blowing lively, a fire broke out on said tract in the vicinity of said stump, which could not, on account of the wind, be controlled by the plaintiff or his agents, and destroyed a quantity of logs in which the plaintiff had an interest. Plaintiff obtained judgment. Defendant appeals.

Edward Overton, John F. Sanderson, and Rodney A. Mercur, for appellant. H. N. Williams, I. McPherson, E. J. Angle, and R. H. Williams, for appellee.

MITCHELL, J. The test by which the line is to be drawn between proximate and remote cause, in reference to liability for the consequences of negligence, has been firmly established by the three cases of Railroad Co. v. Kerr, 62 Pa. St. 353; Railroad Co. v. Hope, 80 Pa. St. 373; and Hoag v. Railroad Co., 85 Pa. St. 293. It is most elaborately expressed by Chief Justice AGNEW in Railroad Co. v. Hope, in the following language: "The jury must determine, therefore, whether the facts constitute a continuous succession of events, so linked together that they become a natural whole, or whether the chain of events is so broken that they become independent, and the final result cannot be said to be the natural and probable consequence of the primary cause,—the negligence of the defendants." And the rule is again put somewhat more tersely by the present chief justice in Hoag v. Railroad Co., as follows: "The injury must be the natural and probable consequence of the negligence,—such a consequence as * * * might and ought to have been foreseen by the wrong-doer as likely to flow from his act." The three leading cases above referred to, though frequently cited on opposite sides of the same argument, are not at all in conflict in principle. The different results which were reached in them depended not on any different view of

the law, but of the facts, and on the application of the familiar doctrine that, where a plain inference is to be drawn from undisputed facts, the court will decide it as a matter of law. In Railroad Co. v. Kerr the negligence had been held by the court below to be the proximate cause of the plaintiff's loss. This court held that it was remote, and did not award a new venire, but said that it would do so if plaintiff should desire it upon grounds shown. The question was then new; and, from what was said about the venire, the court itself does not seem to have been entirely clear that it should be decided as matter of law. It may be doubted whether, on the same facts, the court would now send it to a jury. Certainly no subsequent case has assumed to decide where the facts were so near the line. Hoag v. Railroad Co. was a much clearer case, and so were Railway Co. v. Taylor, 104 Pa. St. 306; West Mahonoy Tp. v. Watson, 116 Pa. St. 344, 9 Atl. Rep. 430; Railway Co. v. Trich, 117 Pa. St. 390, 11 Atl. Rep. 627; and the other cases where the court has pronounced the negligence to be remote as matter of law. But, whatever the result of the views taken of the facts in these cases, the principles of decision are the same in all.

In the present case the learned judge left the question of proximate or remote cause to the jury, in substantial conformity with the doctrine of Railroad Co. v. Hope. Appellant, however, claims that the succession of events was so broken as to bring the case under Hoag v. Railroad Co., and require the judge to direct the jury in its favor. The break in the chain of events was merely a gap in the time. Had the fire extended from the stump to plaintiff's lumber without interval, on the same afternoon, this case would have been exactly parallel with Railroad Co. v. Hope. But the fact that the fire smouldered awhile in the stump, and, after it was supposed to have been extinguished, broke out again the next day, while it makes the conclusion less obvious that the damage was done by the same fire, does not interpose any new cause, or enable the court to say as matter of law that the casual connection was broken. The sequence from the original fire to the burning of plaintiff's logs was interrupted by two apparent cessations of the fire, but the jury have found that the cessations were only apparent, leaving intervals of time in the visible progress of the fire, but making no real break at all in the actual connection. In Railroad Co. v. Kerr, (page 366,) it is said by THOMPSON, C. J., that the rule "is not to be controlled by time or distance, but by the succession of events;" and in Hoag v. Railroad Co., TRUNKEY, P. J., in charging the jury, had quoted the foregoing, and added: "Whether the fire communicated to the plaintiff's property within a few minutes, or after the lapse of hours, from the negligent act, may be immaterial." It is said in this case that the agents of plaintiff on the ground did not anticipate a further spread of the fire af-

er the interval of time, and therefore it cannot be assumed that the defendant should have anticipated it. But the agents of plaintiff did not expect it because they thought the fire had been put out, not because they did not see the danger of its spreading while it was burning; and this was the danger that appellant was bound to contemplate, to-wit, the natural and probable consequence of the original act, not the effect of the supposed extinguishment subsequently. The pauses in the progress of the fire, therefore, and the lapse of time, while matter for the consideration of the jury in determining the continuity of effect, do not of themselves make such a change as requires the court to say that they break the connection.

But it is argued that it was not until the next morning after the fire started in the stump, and during the time when it was apparently extinguished, that the wind rose, and became a new cause of the spread of the fire to plaintiff's lumber. This, however, was, like the point already considered, dependent on the circumstances. In *Railroad Co. v. Hope*, one of the facts was a strong wind which carried the fire, and so, also, it was in *Railroad Co. v. Lacey*, 89 Pa. St. 458, and in *Railroad Co. v. McKeen*, 90 Pa. St. 129; and in this last case, TRUNKEY, J., says the jury "could also determine whether dry weather and high winds in the spring-time are extraordinary, and whether, under these conditions, * * * the injury was within the probable foresight of him whose negligence ran through from the beginning to the end." No doubt a hurricane or a gale may be

such as to be plainly out of the usual course of nature, and therefore to be pronounced by the court as the intervention of a new cause. Such a wind would be like the flood in *Morrison v. Davis*, 20 Pa. St. 171. But the ordinary danger of wind helping a fire to spread is one of the things to be naturally anticipated. The lapse of time before the wind rose, in this case, was therefore not clearly a new cause to be so pronounced by the court, but a circumstance to be considered, with the others, by the jury. On this branch of the case, generally, the injury was not more remote from the alleged cause than in *Railroad Co. v. Hope*, supra, *Railroad Co. v. Lacey*, 89 Pa. St. 458, and *Railroad Co. v. McKeen*, 90 Pa. St. 129, and not so much so as in *Fairbanks v. Kerr*, 70 Pa. St. 86, and *Railroad Co. v. Keighron*, 74 Pa. St. 316, in all of which the question was held to have been properly submitted to the jury.

There remains only the question of contributory negligence, and we do not find any evidence that would have justified taking this from the jury. If plaintiff had not known of the fire in the stump, he would have had no duty in regard to it; but, knowing of it, he was bound to take all reasonable and practicable measures to prevent its spreading to his lumber. He was not an insurer. The measure of his duty in this regard was reasonable care and diligence, and whether he used these was fairly and accurately submitted to the jury. That they found against the defendant's view was no fault of their instruction as to the law. Judgment affirmed.

35 LEWIS v. FLINT & P. M. RY. CO.

(19 N. W. 744, 54 Mich. 55.)

Supreme Court of Michigan. June 11, 1884.

Error to Wayne. Plaintiff brings error.

Blodget & Patchin and C. I. Walker, for appellant. W. L. Webber and O. F. Wisner, for appellee.

COOLEY, C. J. Action to recover damages for a personal injury. The facts as they appeared on the trial were as follows:

The plaintiff resides in the township of Huron, a few miles east of Belden station, on the road of defendant. He was at Wayne station on the evening of January 12, 1883, awaiting the train which was to go south past Belden in the night. The train left Wayne at 3:05 in the morning of the 13th, and he procured his ticket and took passage for Belden, where the train was due at 3:30. The night was dark, cold, and wet. The train stopped when "Belden" was called, and plaintiff got off. Belden was only a flag station for this train, and there was no one in charge of the station-house, and no light there. When plaintiff got off the train he was told by the brakeman or conductor that they had run by the station about two car lengths, and he replied that if that was all, it was no matter, as he had to go that way. An east and west highway crosses the railroad about 24 rods south of the station-house, which the plaintiff would take in going to his home. If he was two car lengths beyond the station-house, he would still be north of the highway; and, supposing that to be the case, he followed the track along south, in preference to going back to the station-house, from which a passage east of the track would have led him to the highway. The plaintiff knew the place well, and knew that on the track he must cross an open cattle-guard to reach the highway. He had crossed this before, and sometimes found a plank laid over it. Passing on he soon came to trees which he knew were some distance south of the highway, and he then knew the information given him as to where he was when he alighted from the train was erroneous. He turned about to retrace his steps, and followed the track in the direction of the highway. This he did carefully, because it was very dark, and he knew there was an open cattle-guard on the south side of the highway, as well as on the north side. He was looking for this cattle-guard constantly and carefully. There were burning kilns near the track on his right, and the smoke from these affected his eyes, but he saw a switch light, which he knew was near the crossing, but which at the time was too dim to aid him. He continued to approach the cattle-guard carefully, intending, if there was a timber or plank over it, to cross upon that; and if not, then to pass down into it and climb out. In the dim

light he saw what he believed to be the cattle-guard, which seemed to be several paces off, but at the very next step one foot slipped, and as he attempted to save himself by springing upon the other, the other foot caught, and he was precipitated into the cattle-guard, and he received an injury of a very serious and permanent nature. He was for a time senseless, but then succeeded in drawing himself out by his elbows,—not being able to use his lower limbs,—and with great difficulty he reached a neighboring tavern, where he was cared for.

On the trial a claim was made on the part of the defense that the plaintiff was negligent in following the railroad track back to the cattle-guard, and in attempting to cross it, when he might have left the track to the right and passed along the field until he came to the highway; and evidence was given to show that he would have encountered no impediments. But, in such a night as this was, it is not clear that the field would have afforded a safer passage than the highway, and his failure to take it would at most only raise a question of negligence on his part which would necessarily go to the jury. *Railroad Co. v. Van Steinburg*, 17 Mich. 118; *Billings v. Breinig*, 45 Mich. 72, 7 N. W. 722; *Railroad Co. v. Miller*, 46 Mich. 537, 9 N. W. 841; *Marcott v. Railroad Co.*, 47 Mich. 7, 10 N. W. 3. In this case the court took the case from the jury, and directed a verdict for the defendant. This direction is understood to have been given on the ground that the injury which the plaintiff suffered was not proximate to the wrong attributable to the defendant, and for that reason would not support an action. The wrong of the defendant consisted in carrying the plaintiff past the station, and then giving him erroneous information as to where he was. If the injury suffered was not a proximate consequence of this wrong, the instruction of the court was right; otherwise, not. The difficulty here is in determining what is and what is not a proximate consequence in contemplation of law.

For the plaintiff, the cases are cited in which it has been held that one whose negligence causes a fire by the spreading of which the property of another is destroyed, is liable for the damages, though the property for which the compensation was claimed was only reached by the fire after it had passed through intervening fields or buildings. *Kellogg v. Railroad Co.*, 26 Wis. 223; *Fent v. Railroad Co.*, 59 Ill. 349; *Wiley v. Railroad Co.*, 44 N. J. Law, 248; *Railroad Co. v. Kellogg*, 94 U. S. 469. But these cases, we think, are not analogous to the one before us. The negligent fire was the direct and sole cause of the injury in each instance, and there was no intervening cause whatever. The cases are in harmony with *Hoyt v. Jeffers*, 30 Mich. 181. The case of *Pennsylvania Co. v. Hoagland*, 78 Ind. 203,

seems, at first view, to be more in point. The action in that case was brought by a woman, who, in consequence of misinformation on the part of the person in charge of a railroad train, left the car in the nighttime at the wrong stopping place, and wandered about for an hour or more before she could find shelter, taking cold from exposure. But here, as in the other cases cited, there was no cause intervening the wrong complained of and the resulting injury, and the question of proximate cause does not appear to have been raised in the case. *Smith v. Packet Co.*, 86 N. Y. 408, is also relied upon, but it is unlike this in the important particular that the intervening cause, which, after the first wrong on the part of the defendant, operated to bring injury to the plaintiff, was a neglect of proper care, which the court held was due from the defendant to the plaintiff under the circumstances, so that all the injury received was a proximate result of the defendant's neglect of duty.

The case of *Brown v. Chicago, etc., R. Co.*, 54 Wis. 342, 11 N. W. 356, more nearly resembles the present case than any other to which our attention has been called by counsel for the plaintiff. The facts, as stated in the prevailing opinion, are the following: The plaintiffs, with their child, 7 years old, were being carried on defendant's cars, with Mauston for their destination, and when they arrived at a station three miles east of Mauston they left the train, under the direction of the brakeman, who told them they were at Mauston. It was in the night; it was cloudy and wet; there was a freight train standing on a side track where they were put off the train; there was no platform, and no lights visible, except on the freight train. Plaintiffs soon ascertained they were not at Mauston, but did not know where they were. They did not see the station-house, though there was one, hidden from their view by the freight train. They supposed they were at a place two miles east, where the train sometimes stopped, but where there was no station-house. They started west on the track towards Mauston, expecting to find a house where they might stop, but did not find one until they came to a bridge, within a mile of Mauston, and then they thought it easier to go on to that place than to seek shelter at the house, which was a considerable distance from the track. Mrs. Brown was pregnant at the time, and when she arrived at Mauston was quite exhausted. She had, during the night, severe pains, which continued from time to time, and were followed by flowing, and at length by a miscarriage, inflammation, and serious illness. The plaintiffs claimed that the miscarriage and subsequent sickness were all caused by the walk Mrs. Brown was compelled to take to get from the place where they were left by the train to Mauston, and the question in the case was whether the defendant was

liable for the injury to Mrs. Brown, admitting it to have been caused by her walk. The majority of the court finding that "there was no intervening independent cause of the injury other than the act of the defendant," and that "all the acts done by the plaintiffs, and from which the injury flowed, were rightful on their part, and compelled by the act of the defendant," held that "the injury to Mrs. Brown was the direct result of the defendant's negligence, and that such negligence was the proximate, and not the remote, cause of the injury," quoting Lord Ellenborough in *Jones v. Boyce*, 1 Starkie, 493, that "if I place a man in such a situation that he must adopt a perilous alternative, I am responsible for the consequences."

The case of *Car Co. v. Barker*, 4 Colo. 344, is opposed to the case in Wisconsin, as are also *Hobbs v. Railroad Co.*, L. R. 10 Q. B. 111, and *Francis v. Transfer Co.*, 5 Mo. App. 7. But it is not necessary to express any opinion upon the conflict which these cases disclose, because in the case before us there was an independent cause intervening the fault of the defendant and the injury the plaintiff sustained, and from which the injury resulted as a direct and immediate consequence. To show what is understood by intervening cause, it may be useful to refer to a few cases:

Livie v. Janson, 12 East, 648, was a case of insurance on a ship warranted free of American condemnation. In sailing out of New York she was damaged by perils of the sea, stranded, and wrecked on Governor's island, and then seized and condemned. It was the peril of the sea that caused the vessel to be seized and condemned; but as the condemnation was the proximate cause of the loss, the insurers were held not liable. A similar case is *Delano v. Insurance Co.*, 10 Mass. 854, where a like result was reached.

In *Tisdale v. Norton*, 8 Metc. (Mass.) 388, the facts were that a highway was defective and the plaintiff, who was using it, went out of it into the adjoining field, where he sustained an injury. He brought suit against the town, whose duty it was to keep the highway in repair. But the court held that only as a remote cause could the injury of the plaintiff be said to be due to the defect in the highway. The proximate, not the remote, cause is that which is referred to in the statute which gives an action against the town; and the proximate cause in this case was outside the highway, not within it.

In *Anthony v. Slaid*, 11 Metc. (Mass.) 290, the plaintiff, who was contractor with a town to support for a specified time and for a fixed sum all the town paupers in sickness and in health, brought suit against one who, it was alleged, had assaulted and beaten one of the paupers, as a consequence of which the plaintiff was put to increased expense

for care and support, but the action was held not maintainable.

In *Silver v. Frazier*, 3 Allen, 382, it was decided that a principal whose agent has disobeyed his instructions, induced to do so by the false representations of a third party, cannot maintain an action against such third party for the damage sustained. Said Bigelow, C. J.: "The alleged loss or injury suffered by the plaintiff is not the direct and immediate result of the defendant's wrongful act. Stripped of its technical language, the declaration charges only that the agent employed by the plaintiff to do a certain piece of work disobeyed the orders of his principal, and was induced to do so by the false statement of the defendant. In other words, the plaintiff alleges that his agent violated his duty, and thereby did him an injury, and seeks to recover damages therefor by an action against a third person, on the ground that he induced the agent, by false statements, to go contrary to the orders of his principal. Such an action is, we believe, without precedent. The immediate cause of injury and loss to the plaintiff is the breach of duty of his agent. This is the proximate cause of damage. The motives or inducements which operated to cause the agent to do an unauthorized act are too remote to furnish a good cause of action to the plaintiff."

In *Dubuque Wood & Coal Ass'n v. Dubuque*, 30 Iowa, 176, the facts were that the plaintiff had a quantity of wood deposited at one end of a bridge, which was to be taken over the bridge into the city of Dubuque. The bridge was out of repair, and, while awaiting repair by the city, whose duty it was, the wood was carried away by a flood. The plaintiff sued the city for the value of his wood; but it was held he could not recover. Beck, J., in deciding the case, illustrates the principle as follows: "An owner of lumber deposited upon the levee of the city of Dubuque, exposed to the floods of the river, starts with his team to remove it. A bridge built by the city, which he attempts to cross, from defects therein, falls, and his horses are killed. By the breaking of the bridge and the loss of his team he is delayed in removing his property. On account of this delay his lumber is carried away by the flood and lost. The proximate consequence of the negligence of the city is the loss of his horses; the secondary consequence, resulting from the first consequence, is the delay in removing the lumber, which finally caused its loss. Damage on account of the first is recoverable, but for the second is denied." Similar to this are *Daniels v. Ballantine*, 23 Ohio St. 532; and *McClary v. Railroad Co.*, 3 Neb. 44. In each of these cases the negligence of the defendant left the property of the plaintiff where, by an act of God,—in one case a flood, and in the other a tornado,—it was lost or injured, and in each the act of God, and not the negligence,

was held to be the proximate cause of injury.

In *Scheffer v. Railroad Co.*, 105 U. S. 249, it appeared that, by a collision of railroad trains, a passenger was injured, and, becoming thereby disordered in mind and body, he, some eight months thereafter, committed suicide. Action was brought against the railroad company as the negligent cause of his death. Miller, J., speaking for the court, and referring to *Insurance Co. v. Tweed*, 7 Wall. 44, and *Railroad Co. v. Kellogg*, 94 U. S. 469, said: "The proximate cause of the death of Scheffer was his own act of self-destruction. It was, within the rule in both these cases, a new cause, and a sufficient cause of death. The argument is not sound which seeks to trace this immediate cause of the death through the previous stages of mental aberration, physical suffering, and eight months' disease and medical treatment, to the original accident on the railroad."

In *Bosch v. Railroad Co.*, 44 Iowa, 402, the plaintiff's house took fire, and the fire department, because, as was alleged, of the wrongful occupation and expansion of the river bank, were unable to get to the river to obtain water for putting out the fire. Plaintiff sued the defendant for the loss of his property, but the court said the acts of defendant complained of "have no connection with the fire, nor with the hose or other apparatus of the fire companies. They are independent acts, and their influence in the destruction of plaintiff's property is too remote to be made the basis of recovery."

In this last case, *Metallic Compression Co. v. Railroad Co.*, 109 Mass. 277, was referred to and distinguished. The facts there were that the plaintiff's building was on fire, and water was being thrown upon it through hose, when an engine of defendant was recklessly run upon the hose and severed it, thereby defeating the efforts to distinguish the fire, which otherwise were likely to succeed. In that case the relation of the plaintiff's injury to the defendant's act was direct and immediate. So it was also in *Billman v. Railroad Co.*, 76 Ind. 166; *Lane v. Atlantic Works*, 111 Mass. 136; and *Ricker v. Freeman*, 50 N. H. 420,—all of which are ruled by the *Squib Case*, (*Scott v. Shepherd*, 2 W. Bl. 892;) and so, perhaps, are *Fairbanks v. Kerr*, 70 Pa. St. 90; and *Lake v. Milliken*, 62 Me. 240.

In *Henry v. Railroad Co.*, 76 Mo. 288, it appeared that the plaintiff was wrongfully commanded to get off a caboose of the defendant, where he had a right to be. He obeyed the command, and, while upon the ground, stepped upon a track, where he was run upon and injured by a train. Hough, J., speaking for the court, said: "It is perhaps probable that if the plaintiff had not been ordered out of the caboose he would not have been injured. But this hypothesis does not establish the legal relation of cause and effect between the expulsion and the

injury. If the plaintiff had not left home he certainly would not have been injured as he was, but his leaving home could not therefore be declared to be the cause of his injury. As the plaintiff's injury was neither the ordinary, natural, nor probable consequence of his expulsion from the caboose, such expulsion, however it might excite our indignation, in the absence of any regulation of defendant to justify it, cannot be considered in this action, and the legal aspect of the case is precisely the same that it would have been if no such expulsion had taken place. It is to be regarded as if the plaintiff had gone to the caboose and could not get in because it was locked, or, being able to get in, chose to remain outside."

Further reference to authorities is needless. The application of the rule that the proximate, not the remote cause is to be regarded, is obscure and difficult in many cases, but not in this. By the wrong of the defendant the plaintiff was carried past the station where he had a right to be left, and beyond where he had a right, from the information received from defendant's servants, to suppose he was when he left the car. (For any injury or inconvenience naturally resulting from the wrong, and traceable to it as the proximate cause, the defendant may be held responsible.) But before any injury had been sustained the plaintiff discovered where he was, and started back for the road which he had intended to take. Whatever danger there was to be encountered in the way was to be found in the cattle-guard, and this he understood and calculated upon. Evidently it did not appear to him of a formidable nature; for, on the supposition that he was north of the highway when he left the train, he had voluntarily started south with the expectation of crossing the cattle-guard on that side, over which he might or might not find a plank laid, when by stepping back a few rods, where he supposed the station-house to be, he might pass from thence out to the highway by the passage-way for persons and vehicles leading from the station-house to it, and thereby avoid the cattle-guard altogether. It is very clear that he did not anticipate danger. Neither, probably, would any other person have anticipated it. The crossing was a simple matter; it was only to ascertain first whether a plank or timber was laid across, and if so to cross upon it; and if not, to step down into the excavation and out on the other side. Where was he to look for danger? The night was dark, it is true, but even by the sense of feeling, when he knew he was within a few feet of the cattle-guard, one would expect him to be able to determine its exact location. But then something happened which it is evident that the plaintiff, with full knowledge of all the facts, did not at all expect and had not feared. Misled apparently by visual deception, he moved for-

ward under a supposition that the cattle-guard, upon the brink of which he already stood, was some paces off, and his deception, with the slipping of his foot, concurred to produce the injury. What was this but pure accident? It was an event which happened unexpectedly and without fault. The defendant or its agents had not produced the deception or caused the foot to slip; and such wrong as the defendant had been guilty of was in no manner connected with or related to the injury except as it was the occasion for bringing the plaintiff where the accident occurred. It was after the plaintiff had been brought there that the cause of injury unexpectedly arose. If lightning had chanced to strike the plaintiff at that place, the fault of the defendant and its relation to the injury would have been the same as now, and the injury could have been charged to the defendant with precisely the same reason as now. If the accidental discharge of a gun in the hands of some third person had wounded the plaintiff as he approached the cattle-guard, the connection of defendant's wrong with the injury would have been precisely the same which appears here. But the proximate cause of injury in the one case would have been the act of God; in the other, inevitable accident; but not more plainly accident than was the proximate cause here. Back of that cause in this case were many others, all conducing to bring the plaintiff to the place of the danger and the injury; the act of the defendant was the last of a long sequence; but, as between the causes which precede the proximate cause, the law cannot select one rather than any other as that to which the final consequence shall be attributed, and it stops at the proximate cause, because to go back of it would be to enter upon an investigation which would be both endless and useless.

The injury being the result of pure accident, the party upon whom it has chanced to fall is necessarily left to bear it. No compensation can be given by law in such cases. *Weaver v. Ward*, Hob. 134; *Gibbons v. Pepper*, 1 *Ld. Raym.* 38; *Loosee v. Buchanan*, 51 *N. Y.* 476; *Vincent v. Stinehour*, 7 *Vt.* 62; *Morris v. Platt*, 32 *Conn.* 75; *Brown v. Collins*, 53 *N. H.* 442; *Bizzell v. Booker*, 16 *Ark.* 306; *Marshall v. Welwood*, 38 *N. J. Law*, 339; *Paxton v. Beyer*, 67 *Ill.* 132; *Express Co. v. Smith*, 33 *Ohio St.* 511; *Plummer v. State*, 4 *Tex. App.* 310; *Parrot v. Wells*, 15 *Wall.* 524; *Holmes v. Mather*, L. R. 10 *Exch.* 261. A case like this appeals strongly to the sympathies, but sympathy cannot rule the decision.

Upon the undisputed facts of the case the plaintiff has no right of action for the injury which has befallen him, and the circuit court was correct in so holding. The question what judgment shall be rendered in the case is for the present reserved.

The other justices concurred.

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**MONMOUTH PARK ASS'N v. WALLIS
IRON WORKS.**

(26 Atl. 140; 55 N. J. Law, 132.)

Court of Errors and Appeals of New Jersey.
March 6, 1893.

Error to supreme court.

Action on a contract by the Monmouth Park Association against the Wallis Iron Works. Plaintiff had judgment, and defendant brings error. Reversed.

The other facts fully appear in the following statement by DIXON, J.:

The plaintiff brought an action in the supreme court against the defendant to recover \$6,384.66, and interest, as a final balance for work done, chiefly, under a sealed contract between them, providing for the construction of a grand stand at the Monmouth Park race course. The present writ of error is prosecuted by the defendant to review questions of law raised at the trial in the Hudson circuit. The following is a copy of the contract:

"Articles of agreement made and concluded this first day of October, A. D. 1889, by and between the Wallis Iron Works, a corporation of New Jersey, of the first part, and the Monmouth Park Association, of the second part, witnesseth, that for and in consideration of the covenants and payments hereinafter mentioned, to be made and performed by the said party of the second part, the said party of the first part doth hereby covenant and agree to furnish all the labor and materials, and perform the work, necessary to complete, in the most substantial and workmanlike manner, to the satisfaction and acceptance of the chief engineer of the said party of the second part, a grand stand at the race course of said party of the second part, at Monmouth Park, Monmouth Co., New Jersey, excepting the necessary excavation, incidental thereto; the said work to be finished as described in the approved plans and following specifications, and agreeably to the directions received from the said chief engineer, on or before the first day of March, 1890. In case the said party of the first part shall to fully and entirely, and in conformity to the provisions and conditions of this agreement, perform and complete the said work, and each and every part and appurtenance thereto, within the time hereinbefore limited for such performance and completion, or within such further time as, in accordance with the provisions of this agreement, shall be fixed or allowed for such performance and completion, the said party of the first part shall and will pay to the said party of the second part the sum of one hundred dollars for each and every day that they, the said party of the first part, shall be in default, which said sum of one hundred dollars per day is hereby agreed upon, fixed, and determined by the parties hereto as the damages which the party of the second part will suffer by reason of such default, and not by

way of penalty. And the said party of the second part may and shall deduct and retain the same out of any moneys which may be due or become due to the party of the first part under this agreement.

"Specification. The entire work to be constructed and finished, in every part, in a good, substantial, and workmanlike manner, according to the accompanying drawings and specifications, to the full extent and meaning of the same, and to the entire satisfaction, approval, and acceptance of the chief engineer and owners of the said party of the second part, and under the supervision and direction of such agent or agents as they may appoint. Additional detail and working drawings will be furnished, in exemplification of the foregoing, from time to time, as may be required; and it is distinctly understood, that all such additional drawings are to be considered as virtually embraced within, and forming a part of, these specifications. Figured dimensions shall in all cases be taken in preference to scale measurements. The said engineer shall have the right to make any alterations, additions, or omissions of work or materials herein specified, or shown on the drawings, during the progress of the structure, that he may find to be necessary, and the same shall be acceded to by the said party of the first part, and carried into effect, without in any way violating or violating the contract. If any additions, alterations, or omissions are made in the structure during the progress of the work, the value of such shall be decided by the said chief engineer, who shall make an equitable allowance for the same, and shall add the amount of said allowance to the contract price of the work, if the cost has been increased, or shall deduct the amount, if the cost has been lessened, as he, the said chief engineer, may deem just and equitable. The said party of the second part will pay for no extra work or material unless ordered in writing by them, through their treasurer. Any disagreement or difference between the parties to this contract, upon any matter or thing arising from these specifications, or the drawings to which they refer, or to the contract for the work, or the kind or quality of the work, required thereby, shall be decided by the said chief engineer of the party of the second part, whose decision and interpretation of the same shall be considered final, conclusive, and binding upon both parties. All materials and labor used throughout the structure must be of the best of their several kinds, and subject to the approval of the chief engineer. The said chief engineer shall have full power, at any time during the progress of the work, to reject any materials that he may deem unsuitable for the purpose for which they were intended, or which are not in strict conformity with the spirit of these specifications. He shall also have the power to cause any inferior or unsafe work to be taken down and altered at the cost

of the said party of the first part. Particular care must be taken of all the finished work, which work must be covered up and thoroughly protected from injury or defacement, during the erection and completion of the structure. All refuse material and rubbish that may accumulate during the progress of the work shall be removed from time to time as may be directed by the chief engineer, and, on the completion of the work, the structure, grounds, and streets be thoroughly cleaned up, and the surplus material and rubbish removed. The said party of the second part will not transport free any of the workmen or materials for this work, but all materials must be shipped in the name of the party of the first part, and in no case shall it be shipped in care of, or in the name of, the company, or any of its officers or employes, and said party of the first part must pay the regular freight rates arranged for with the freight department.

"And the said party of the second part doth promise and agree to pay to the said party of the first part, for the work to be done under this contract, the following prices, to wit: One hundred and thirty-three thousand (\$133,000) dollars. On or about the last day of each month, during the progress of this work, an estimate shall be made of the relative value of the work done and delivered, to be judged by the engineer; and ninety per cent. of the amount of said estimate shall be paid to the party of the first part on or about the fifteenth day of the following month. And when all the work embraced in this contract is completed, agreeably to the specifications, and in accordance with the directions, and to the satisfaction and acceptance, of the engineer, there shall be a final estimate made of said work according to the terms of this agreement, when the balance appearing due to the said party of the first part shall be paid to them, within thirty days thereafter, upon their giving a release, under seal, to the party of the second part, from all claims and demands whatsoever growing in any manner out of this agreement, and upon their procuring and delivering to the parties of the second part full releases, in proper form, and duly executed, from mechanics and material men, of all liens, claims, and demands for materials furnished and provided, and work and labor done and performed, upon or about the work herein contracted for under this contract. It is further covenanted and agreed between the said parties that the said party of the first part will at all times give personal attention, by competent representative, who shall superintend the work. It is further agreed that the contractors are not to interfere in any way with the construction of the bookmakers' stand, members' stand or the paddocks, or other work. It is further agreed and understood that the work embraced in this contract shall be commenced within ten days from this date, and prosecuted with such

force as the engineer shall deem adequate to its completion within the time specified; and if at any time the said party of the first part shall refuse or neglect to prosecute the work with a force sufficient, in the opinion of the said engineer, for its completion within the time specified in this agreement, then, in that case, the said engineer in charge, or such agents as the engineer shall designate, may proceed to employ such a number of workmen, laborers, and overseers as may, in the opinion of the said engineer, be necessary to insure the completion of the work within the time hereinbefore limited, at such wages as he may find necessary or expedient to give, pay all persons so employed, and charge over the amount so paid to the party of the first part as for so much money paid to them on said contract, or for the failure to prosecute the work with an adequate force, for noncompliance with his directions in regard to the manner of constructing it, or, for any other omission or neglect of the requirements of this agreement and specifications on the part of the party of the first part, the said engineer may, at his discretion, declare this contract, or any portion or section embraced in it, void. And the said party of the first part hath further covenanted and agreed to take, use, provide, and make all proper, necessary, and sufficient precautions, safeguards, and protections against the occurrence or happening of any accident, injuries, damages, or hurt to any person or property during the progress of the construction of the work herein contracted for, and to be responsible for, and to indemnify and save harmless, the said parties of the second part, and the said engineer, from the payments of all sums of money by reason of all or any such accidents, injuries, damages, or hurt that may happen or occur upon or about said work, and from all fines, penalties, and loss incurred for or by reason of the violation of any city or borough ordinance or regulation or law of the state, while the said work is in progress of construction. And it is mutually agreed and distinctly understood that the decision of the chief engineer shall be final and conclusive in any dispute which may arise between the parties to this agreement, relative to or touching the same.

"In witness whereof, the parties herein named have hereunto set their seals, and caused their presents to be signed by their secretary, the day and year herein first above named. As to Wallis Iron Works, James I. Taylor. Wallis Iron Works. [Seal.] Wm. T. Wallis, Sec'y. The Monmouth Park Ass'n. [Seal.] By A. J. Cassatt, President. Witness to signature of A. J. Cassatt: T. M. Croft.

"It is hereby further agreed that, in addition to the work hereinbefore described and provided for, the said party of the first part shall provide as bearing pieces to receive ends of purlins, and in lieu of the angle irons

already provided for, 3x6 angle irons, 10 8-10 lbs. per foot, and 7 feet long, well bolted to roof truss and to purlin ends. The party of the first part will also construct, complete, the front steps to grand stand, as per revised sheet No. 26. In consideration of the foregoing changes, the party of the second part agrees to pay the additional sum of nineteen hundred and seventy-one (\$1,971.61) dollars. Wallis Iron Works. [Seal.] Wm. T. Wallis, Treas. [Seal.] The Monmouth Park Ass'n. By A. J. Cassatt, President. Witness this 11th day of December, 1889: T. M. Croft."

Added to this are "Revised Specifications," the last clause of which is: "Payments. On or about the first day of each month, the engineer will make an approximate estimate of the amount of work erected and delivered under these specifications during the preceding month, and the contractor will be paid ninety per cent. of the amount of these estimates. Thirty days after the acceptance of the completed work by the owner, the retained ten per cent. will be paid the contractor, upon his furnishing satisfactory evidence that no liens or unsatisfied claims exist on the work, or any part of it." These specifications were also signed and sealed by the parties. The pleadings are sufficient to warrant the questions involved in the exceptions taken at the trial.

Jos. D. Bedle, for plaintiff in error. Gilbert Collins, for defendant in error.

DIXON, J. (after stating the facts). The first exception to be considered took its rise from the fact that the structure was not completed within the time limited by the contract, nor until 94 days after the expiration of a month's extension of that time. The defendant claimed a deduction or set off of \$100 for each day's delay. The plaintiff met this claim by insisting that the clause in the contract mentioning the \$100 per day is unintelligible, and therefore nugatory, because in its opening line it reads: "In case the said party of the first part shall * * * to fully and entirely," etc., omitting any effective verb. We agree, however, with the trial judge, in thinking that the context shows the verb which should be supplied. It makes the \$100 payable for each day that "the party of the first part shall be in default." This plainly indicates the verb "fail" as the omitted word, to be supplied as an equivalent for the expression, "be in default." The right of a court of law to read an instrument according to the obvious intention of the parties, in spite of clerical errors or omissions which can be corrected by perusing the instrument, is sufficiently vindicated by the decision of this court in *Sisson v. Donnelly*, 38 N. J. Law, 432. See, also, *Burchell v. Clark*, 2 C. P. Div. 88.

Taking the clause thus perfected, the plaintiff urged that the \$100 a day was a penalty; and so the trial judge ruled, requiring that the defendant should prove the actual dam-

ages, and be allowed only for what was proved. To this ruling the defendant excepted. In determining whether a sum which contracting parties have declared payable on default in performance of their contract is to be deemed a penalty, or liquidated damages, the general rule is that the agreement of the parties will be effectuated. Their agreement will, however, be ascertained by considering, not only particular words in their contract, but the whole scope of their bargain, including the subject to which it relates. If, on such consideration, it appears that they have provided for larger damages than the law permits, e. g. more than the legal rate for the nonpayment of money, or that they have provided for the same damages on the breach of any one of several stipulations, when the loss resulting from such breaches clearly must differ in amount, or that they have named an excessive sum in a case where the real damages are certain, or readily reducible to certainty by proof before a jury, or a sum which it would be unconscionable to award, under any of these conditions the sum designated is deemed a penalty. And if it be doubtful, on the whole agreement, whether the sum is intended as a penalty or as liquidated damages, it will be construed as a penalty, because the law favors mere indemnity. But when damages are to be sustained by the breach of a single stipulation, and they are uncertain in amount, and not readily susceptible of proof under the rules of evidence, then, if the parties have agreed upon a sum as the measure of compensation for the breach, and that sum is not disproportionate to the presumable loss, it may be recovered as liquidated damages. These are the general principles laid down in the text books, and recognized in the judicial Reports of this state. *Cheddick's Ex'r v. Marsh*, 21 N. J. Law, 463; *Whitfield v. Levy*, 35 N. J. Law, 149; *Hoagland v. Segur*, 38 N. J. Law, 230; *Lansing v. Dodd*, 45 N. J. Law, 525. In the present case the default consists of the breach of a single covenant, to complete the grand stand as described in the approved plans and specifications within the time limited. It is plain that the loss to result from such a breach is not easily ascertainable. The magnitude and importance of the grand stand may be inferred from its cost,—\$133,000. It formed a necessary part of a very expensive enterprise. The structure was not one that could be said to have a definable rental value. Its worth depended upon the success of the entire venture. How far the noncompletion of this edifice might affect that success, and what the profits or losses of the scheme would be, were topics for conjecture only. The conditions, therefore, seem to have been such as to justify the parties in settling for themselves the measure of compensation. The stipulations of parties for specified damages on the breach of a contract to build within a limited time have frequently been enforced by the

courts. In *Fletcher v. Dyche*, 2 Term R. 32, £10 per week for delay in finishing the parish church; in *Duckworth v. Allison*, 1 Mees. & W. 412, £5 per week for delay in completing repairs of a warehouse; in *Legge v. Harlock*, 12 Q. B. 1015, £1 per day for delay in erecting a barn, wagon shed, and granary; in *Law v. Local Board* (1892) 1 Q. B. 127, £100 and £5 per week for delay in constructing sewerage works; in *Ward v. Building Co.*, 125 N. Y. 230, 26 N. E. 256, \$10 a day for delay in erecting dwelling houses; and in *Malone v. City of Philadelphia* (Pa. Sup.) 23 Atl. 628, \$50 a day for delay in completing a municipal bridge,—were all deemed liquidated damages. Counsel has referred us to two cases of building contracts, where a different conclusion was reached: *Muldoon v. Lynch*, 66 Cal. 536, 6 Pac. 417, and *Clements v. Railroad Co.*, 132 Pa. St. 445, 19 Atl. 274, 276. In the former case a statutory rule prevailed, and in the latter the real damage was easily ascertainable, and the stipulated sum was unconscionable. In the case at bar we have no data for saying that \$100 a day was unconscionable. The sole question remaining on this exception, therefore, is whether the parties have agreed upon the sum named as liquidated damages. Their language seems, indisputably, to have this meaning. They expressly declare the sum to be agreed upon as the damages which the defendant will suffer, they expressly deny that they mean it as a penalty, and they provide for its deduction and retention by the defendant in a mode which could be applied only if the sum be considered liquidated damages. But it is argued that as the defendant authorized the engineer of the defendant to make any alterations or additions that he might find necessary during the progress of the structure, and required the plaintiff to accede thereto, it is unreasonable to suppose that the plaintiff could have intended to bind itself, in liquidated damages, for delay in completing such a changeable contract. But this argument seems to be aside from the present inquiry, which is, not whether the plaintiff became responsible for damages by reason of the noncompletion of the grand stand on the day named, but whether, if it did become so responsible, those damages are liquidated by the contract. On the question first stated, changes ordered by the engineer may afford matter for consideration; on the second question, they are irrelevant. Certainly the bills of exceptions do not indicate any alterations or additions which, as matter of law, would relieve the plaintiff from responsibility for the admitted delay, and consequently there may have been ground for considering the defendant's damages. If there was, the amount of the damages was adjusted by the contract at \$100 per day. We think the ruling at the circuit on this point was erroneous.

We think, also, that the letter, Exhibit P 8, written September 10, 1890, by F. Latou-

rette to the plaintiff, was illegally received in evidence. It was offered and admitted as a decision by the chief engineer of the defendant under the contract. Since it was written after the completion of the work, and after the writer had ceased to be the engineer of the defendant, and without notice to the defendant, it could not possess the character attributed to it.

The only other exception which it appears useful to notice is that relating to the existence of claims by outside parties. The agreement contains two clauses on this subject,—one under the head, "Specification;" the other, under the head, "Revised Specification." It seems proper to hold that the latter clause is substituted in the contract for the former, and therefore it only need be considered. It reads: "Thirty days after the acceptance of the completed work by the owner, the retained ten per cent. will be paid the contractor, upon his furnishing satisfactory evidence that no liens or unsatisfied claims exist on the work, or any part of it." The expression, "liens or unsatisfied claims on the work," must mean claims which can be enforced against the work, and such claims could exist only under our mechanic's lien law. By "liens" the parties intended claims filed under that law; by "unsatisfied claims," they intended claims which were not, but might be, filed under that law. The statute (Revision, p. 668, § 2) provides "that when any building shall be erected, in whole or in part, by contract in writing, such building, and the land whereon it stands, shall be liable to the contractor alone for work done or materials furnished in pursuance of such contract: provided such contract, or a duplicate thereof, be filed in the office of the clerk of the county in which such building is situate before such work done or materials furnished;" and (section 13) "that no debt shall be a lien by virtue of this act unless a claim is filed as hereinbefore provided within one year from the furnishing the materials or performing the labor for which such debt is due." The contract between these parties was filed January 2, 1890. Hence no liens could arise in favor of outside parties for work done or materials furnished after that date. For work done or materials furnished before that date, no debt would be a lien unless a claim were filed within a year, i. e. before January 2, 1891. At the date last named, no such claim was filed, and, so far as appears, no such claim was ever filed. The suit was commenced March 12, 1891. We think these facts furnished satisfactory evidence that there were no liens or unsatisfied claims on the work when the action was brought, and that on this point there was no error at the trial.

The other exceptions adverted to by counsel for the defendant are either untenable, or on questions not likely to arise upon a new trial. Let the judgment be reversed, and a venire de novo be awarded.

KECK v. BIEBER.

(24 Atl. 170, 148 Pa. 645.)

Supreme Court of Pennsylvania. May 2, 1892.

Appeal from court of common pleas, Lehigh county; Edwin Albright, Judge.

Assumpsit by Emeline C. Keck against Sylvester Bieber on a bond whereby he promised to pay her \$2,000 upon the non-performance of certain conditions. There was no dispute as to the breach of condition, and a verdict was directed for plaintiff for the full amount of the bond. From a judgment entered thereon, defendant appeals. Reversed.

Jas. S. Blery and Edward Harvey, for appellant. C. J. Erdman and R. E. Wright's Sons, for appellee.

MITCHELL, J. The general principle upon which the law awards damages is compensation for the loss suffered. The amount may be fixed by the parties in advance, but, where a lump sum is named by them, the court will always look into the question whether this is really liquidated damages or only a penalty, the presumption being that it is the latter. The name by which it is called is but of slight weight, the controlling elements being the intent of the parties and the special circumstances of the case. The subject has always presented difficulties in the formulation of a general rule, and especially in its application. The books are full of inharmonious decisions. In no state, however, have the difficulties been more successfully minimized than in Pennsylvania, and in no case that I have seen is there a better generalization than that by Agnew, J., in *Streep v. Williams*, 48 Pa. St. 450: "In each case we must look at the language of the contract, the intention of the parties as gathered from all its provisions, the subject of the contract and its surroundings, the ease or difficulty of measuring the breach in damages, and the sum stipulated, and from the whole gather the view which good conscience and equity ought to take of the case." The only criticism to which this would seem to be fairly open is that it does not perhaps give sufficient prominence to the intention of the parties as the controlling element, and it should therefore be read in connection with the restatement of it by our late Brother Clark, in *March v. Allabough*, 103 Pa. St. 335: "The question * * * is to be determined by the intention of the parties, drawn from the words of the whole contract, examined in the light of its subject-matter and its surroundings; and in this examination we must consider the relation which the sum stipulated bears to the extent of the injury which may be caused by the several breaches provided against, the ease or difficulty of measuring a breach in damages, and such other matters as are legally or neces-

sarily inherent in the transaction." The intent of the parties being, therefore, the principal object of ascertainment, Greenleaf lays down certain rules as the result of the cases, and, among them, that the sum is to be taken as a penalty "where the agreement contains several matters of different degrees of importance, and yet the sum named is payable for the breach of any, even the least." 2 Greenl. Ev. § 258. This rule is approved in *Shreve v. Brereton*, 51 Pa. St. 175, and the present case falls exactly within it. The conditions of the appellant's bond are two—First, he is to "save, defend, keep harmless, and indemnify the said Emeline C. Keck" from liability by reason of the assignment to him over the head of Neiser, and the termination of the latter's mining rights. This is clearly a covenant for indemnity only, and, as no breach was assigned, need not be further discussed. But, secondly, he is to pay the royalty accruing in the future, and "keep and perform all the covenants, conditions, and stipulations of the said lease and assignment." Turning now to the lease, we find that plaintiff's covenants with Kemmerer, which appellant thus bound himself to keep and perform, were to save harmless and indemnify him against all costs and damages to his neighbors from the washing of the ore, to run the water in such places as the lessor should order, to pay a stipulated royalty, to fill up holes made and left in the search for ore, to produce or pay royalty upon a minimum of one thousand tons a year, "to use the old wagon road for hauling said iron ore, and, in case there are gates or bars on said road, * * * to keep said gates and bars in repair, * * * and keep them shut when through," etc. The assignment adds to these a covenant to pay plaintiff, the assignor, an additional royalty upon a sliding scale of the price of ore per ton. No better illustration of the propriety of the rule referred to could be stated. Here are numerous covenants of the most varied kinds and importance. The covenants to indemnify against claims by Neiser, and against damages to the neighbors by the operation of washing, are undertakings which may be of serious magnitude; and under *Dick v. Gas-kill*, 2 Whart. 184; *Shreve v. Brereton*, 51 Pa. St. 175; *Moore v. Colt*, 127 Pa. St. 289, 18 Atl. 8,—and similar cases, the recovery for a breach would probably not be limited by the sum named in the bond. On the other hand, the covenants to fill up the holes made in prospecting for ore, and to keep the gates on the old wagon road in repair and shut, are against such trivial inconveniences that it would savor of absurdity to suppose that the parties meant to stipulate for \$2,000 damages for the breach of any one of them. We are therefore of opinion that defendant's fourth point, that the contract of the parties was for a penalty, should have been affirmed. It will not follow, however, as appellee seems

to fear, that her recovery must be limited to the loss of the royalty due her at the time of bringing suit, and that she must bring repeated suits for future failures to pay. The defendant has, by his acts, disabled himself absolutely and permanently from performance of his covenants. Under such circum-

stances, the plaintiff may sue on the contract from time to time for the royalties due, and for such other damages as she may suffer, or she may, at her election, treat the contract as rescinded, and claim damages in one action for the entire breach. Judgment reversed, and venire de novo awarded.

LAW DAM.—9

TENNESSEE MANUF'G CO. v. JAMES.

(18 S. W. 262, 91 Tenn. 154.)

Supreme Court of Tennessee. Jan. 26, 1892.

Error to circuit court, Davidson county; W. K. McALLISTER, Judge.

Action by Minnie James, a minor, by her next friend, against the Tennessee Manufacturing Company, to recover on a *quantum meruit* for work and labor performed by her for defendant. Judgment for plaintiff, and defendant brings error. Reversed.

Dickinson & Frazer, for plaintiff in error.
E. J. Wickware, for defendant in error.

LURTON, J. Minnie James, a minor, was an employe of the appellant, a corporation engaged in the manufacture of cotton goods. The contract of employment was in writing, and was with the minor and her father. By one of the provisions of the contract it was stipulated that the employe should give two weeks' notice of her intention to quit. It is further provided that, in case she should leave without giving two weeks' notice, "or fail or refuse to faithfully work during a period of two weeks after giving notice of an intention to leave, * * * then it is hereby agreed that the amount stated below for the class to which I may belong is agreed upon as liquidated damages due said Tennessee Manufacturing Company at the time of my failure to comply with the terms of this contract, to compensate it for all damages, both actual and exemplary, and all loss, arising from my failure to carry out the terms of this agreement; and it is further agreed upon that said amount, applicable to the class of employes to which I may belong, shall be deducted from any sum which may be due me by said company, whether on account of services rendered or otherwise." The class to which appellee belonged was that of those receiving 50 cents per day and under \$1. The damages stipulated for this class was \$10. At the foot of this agreement, which was signed by appellee, was this further agreement signed by her father: "The foregoing agreement has been read by me, and, fully understanding the same, it is also agreed to by me, as binding both me and my daughter, Minnie James, who is legally disqualified from making this contract, to all its terms and conditions. I agree, further, that said Minnie James is hereby authorized to receive the wages of said work, and that all sums paid to said employe are to be accepted as fully discharging all liability, to the full amount so paid; and said wages are to be subject to all the conditions of this contract, as though said employe was legally empowered to act in person." Appellee gave notice of her intention to leave, and thereafter worked 10 days, but at the end of that time quit without any excuse. At the time she quit there was due her 20 days' wages, including the 10 days after her notice. If the stipulation as to damages is invalid, then the company is due her \$10; if valid, then nothing is due her. Upon quitting she brought suit, by her

father as next friend, upon a *quantum meruit*. The contract has been set up as a defense to her suit.

The circuit judge being of opinion that the contract was invalid, as being one with a minor who had a legal right to repudiate same, gave judgment for the plaintiff. In this we think his honor erred. If the contract had been alone with the minor, she might undoubtedly repudiate it, and recover upon a *quantum meruit*. The law would give the infant the privilege of judging whether such a contract was beneficial or not, and of avoiding it if she elected to do so, and recovering the value of her services as if she worked without any contract. 10 Amer. & Eng. Enc. Law, tit. "Infant." But this contract was in law with the father, who agreed that the wages in law due to him might be paid over to his child, "subject to all the conditions of this contract." The wages of a minor, peculiar circumstances out of the way, are due to the father. This springs from his legal duty to support and educate his child. He may permit the minor to take and use his own earnings. This is called "emancipation," and emancipation will be a defense to the father's suit for the minor's wages. It may be express or implied; entire or partial. It may be conditional. It may be in writing or oral; for the whole minority or for a shorter term; as to a part of the child's wages or as to the whole. Emancipation will not enlarge the minor's capacity to contract; it simply precludes the father from asserting his claim to the wages of his child. Bish. Cent. § 898. If one employ a minor with notice of the non-emancipation of the infant, it will be no defense to the father's suit for the wages that the child has received them. On the other hand, payment to the father will be no defense to the minor's suit, if the employer knew of the fact of emancipation. These principles of the common law are well settled, and have not been affected by statute. *Cloud v. Hamilton*, 11 Humph. 105. The cases in America are collected in a note to *Wilson v. McMillan*, 35 Amer. Rep. 117.

In view of these principles, we must construe the contract of the father as an emancipation, subject to the conditions as to damages in case his child shall quit without cause and without the stipulated notice. It is as much as if he had said: "My child is a minor. As such, I am entitled to her wages. I am willing that she shall work in your mill, and that the wages she may earn shall be paid to her. I agree that she shall comply with this contract, and, if she does not, then the wages legally due me shall be detained by you to the extent provided in the contract I make for her, and only such wages paid to her as I would be entitled to receive if the contract were exclusively with me." This was a conditional emancipation, under a special contract made by and with the father for himself and his child. Her emancipation was partial. The father, having a legal right to her entire wages, has stipulated that none shall be paid her beyond the sum due under this agreement with him. If this contract is binding on

him, the minor cannot recover beyond its limits. If the contract is invalid as to him, as stipulating for a penalty, then it will not be in the way of plaintiff's suit. We agree with the circuit judge in holding that this contract does not fall within the case of *Schrimpf v. Manufacturing Co.*, 86 Tenn. 219, 6 S. W. Rep. 131. That case concerned a contract construed as stipulating for a penalty in case of a breach. It was held not to be an agreement for liquidated damages, because the forfeiture covered all the wages due at time of breach, regardless of amount due, and regardless as to whether the arrearages were the consequence of the default of the company. It was a contract harsh and unconscionable. It preserved no proportion between the sum forfeited and the actual damages, and put all employes upon same footing, whether much or little was earned, much or little due, when breach occurred. The damages were to be all that was due, in any case. To one, this might have been the wages of months; to another, the earnings of but a day. But in that case Chief Justice TURNEY quoted and indorsed the language of CAMPBELL, J., in *Richardson v. Woenler*, 26 Mich. 90, where he said: "We have no difficulty in holding that the injury caused by the sudden breaking off of a contract of service by either party involves such difficulties concerning the actual loss as to render a reasonable agreement for stipulated damages appropriate. If a fixed sum, or a maximum within which wages unpaid and accruing since the last pay-day might be forfeited, should be agreed on, and shall not be unreasonable or an oppressive exaction, there would seem to be no legal objection to the stipulation, if both parties are equally and justly protected." Applying these principles to the case for judgment, we have no difficulty in holding that the stipulation here is for liquidated damages, and not for a penalty, and that the contract is neither unreasonable nor oppressive. "The tendency and preference of the law is to regard stated sums as a penalty, because actual damages can then be recovered, and the recovery limited to such damages. This tendency and preference, however, do not exist when the actual damages cannot be ascertained by any standard. A stipulation to liquidate damages in such cases is considered favorably." 1 Suth. Dam. 490. This contract of employment on its face affords no data by which the actual damages likely to result from its non-observance can with any certainty be ascertained. Such a circumstance has been regarded as justifying the courts in

holding the sum stipulated as liquidated damages.

The plaintiff in error was a cotton-mill, having in its employment hundreds of hands. The work is divided into many departments. The raw material is handled by one set of hands, and put in condition for another, and the second department still further advances its manufacture; and so on, through successive stages of progress. The evidence shows that each department is dependent upon that immediately below it. Now, if the operatives of one department quit, or their work is delayed, its effect is felt in all to a greater or less degree. It is also shown that it is not always easy to replace an operative at once, and that the unexpected quitting of even one hand will to some extent affect the results throughout the mill. Yet the evidence shows that it would be impossible to calculate with any certainty the precise, actual loss due to an unexpected breach of an employee's engagement; though it is shown that there are some departments of work where the quitting of a small number of hands, without notice, would stop the entire mill, and throw other hundreds out of employment. In this day of great factories, and the consequent division of labor into separate departments, a degree of interdependence among employes exists, which they ought and do recognize, and which makes the obligation of each to the whole, and to the common employer, all the more important. The case is one, then, where the certainty of some damage, and the uncertainty of means and standards by which the actual damage can be ascertained, require the courts to uphold the contract as one for liquidated damages, and not as providing for a penalty. The sum fixed is certain. It is proportioned to the earning capacity of the employe, and hence presumably with regard to the particular results of a breach in each department. There is no hardship in the agreement requiring 2 weeks' notice. If the operative leaves for good cause, the contract would not apply. If able to work, the pay continues until notice has been worked out.

That she returned the next day after quitting, and offered to work out her notice, is no compliance. The mischief had been done. She had voluntarily, and without pretense of excuse, or asking to be released, gone off, and left her work standing, and endeavored to get others to go with her. The damages had accrued, and, under the facts of this case, appellant was not bound to restore her. Reverse. Judgment here for plaintiff in error.

TODE et al. v. GROSS.

(28 N. E. 469, 127 N. Y. 480.)

Court of Appeals of New York, Second Division. Oct. 6, 1891.

Appeal by defendant from a judgment of the general term of the supreme court in the second judicial department, affirming a judgment entered upon the decision of the court after a trial without a jury. Affirmed.

Action for breach of covenant to recover the sum of \$5,000 as stipulated damages. On the 15th of October, 1884, the defendant owned a cheese factory situate in the town of Monroe, Orange county, comprising two parcels of land, with the buildings thereon, and a quantity of fixtures, machinery, and tools connected therewith. For some time prior, with the assistance of her husband, Conrad Gross, her brother-in-law, August Gross, and her father, John Hoffman, she had been engaged in the business of manufacturing cheeses at said factory known as "Fromage de Brie," "Fromage d'Isigny," and "Neufchatel." Such cheeses were made by a secret process known only to herself and her said agents. On the day last named, she entered into a sealed agreement with the plaintiffs, whereby she agreed to sell and transfer to them the said factory and all its belongings, together with the "good-will, custom, trade-marks, and names used in and belonging to the said business," for the sum of \$25,000, to be paid and secured March 1, 1885, when possession was to be given. Said instrument contained a covenant on her part that she would "communicate after the first day of March, 1885, or cause to be communicated, to" said plaintiffs, "by Conrad Gross, John Hoffman, and August Gross, or one or other of them, the secret of the manufacture of the cheeses known as 'Fromage de Brie,' 'Neufchatel,' and 'D'Isigny,' and the recipe therefor, and for each of them, and will instruct or cause to be instructed them, and each of them, in the manufacture thereof. And that she and the said Conrad Gross, John Hoffman, and August Gross will refrain from communicating the secret recipe and instructions for the manufacture of said cheeses, or either of them, to any and all persons other than the above-named parties of the second part, [plaintiffs,] and will also, after the first day of April, 1885, refrain from engaging in the business of making, manufacturing, or vending of said cheeses, or either of them, and from the use of the trade-marks or names, or either of them, hereby agreed to be transferred in connection with said cheeses, or either of them, or with any similar product, under the penalty of five thousand dollars, which is hereby named as stipulated damages to be paid by the party of the first part, [defendant,] or her heirs, executors, administrators, or assigns, in case of a violation by the party of the first part [defendant] of this covenant, of this contract, or any part thereof, within five years from the date hereof." She further covenanted that she herself, as well as "said Conrad Gross, John Hoffman, and August Gross, during and up to

and until the first day of May, 1885, shall continue and remain in said county of Orange, and from time to time, and at all reasonable times during said period, by herself, or by said Conrad Gross, John Hoffman, and August Gross, whenever so requested by the said parties of the second part, [plaintiffs,] impart to them, or either of them, the secret of making such cheeses, and each of them, and instruct them, and each of them, in the process of manufacturing the same, and each of them, as fully as she or the said Conrad Gross, John Hoffman, or August Gross, or either of them, are informed concerning the same." Both parties appear to have duly kept and performed the agreement, except that, as the trial court found, "subsequently to the 1st day of May, 1885, Conrad Gross, the husband of defendant, went to New York city, and engaged in the business of selling 'foreign and domestic fruits, and all kinds of cheese and sausages, &c.,' * * * and while so engaged * * * sold and personally delivered from his place of business to one John Wassung three boxes of cheese marked and named 'Fromage d'Isigny,' and having substantially the same trade-marks thereon as that sold by defendant to plaintiffs, and having stamped thereon the name 'Fromage d'Isigny,' and that said cheese so sold by him to said Wassung was a similar product to that formerly manufactured by defendant." Also, that "said August Gross, the brother-in-law of defendant, subsequent to the 1st day of May, 1885, engaged in the business of retailing fancy groceries in the city of New York, and in and during the fall of 1887, and prior to the commencement of this action, kept for sale at his place of business in New York city boxes of cheese marked or stamped 'Fromage d'Isigny.'" The court further found that the cheese so sold by Conrad Gross under the name of "Fromage d'Isigny," "was never sold by plaintiffs, nor made or manufactured by them, or either of them, but that the same was a similar product." The court found as conclusions of law that said agreement was a reasonable one, and was founded upon a good and sufficient consideration; that said sale by Conrad and said keeping for sale by August Gross was a direct violation of the covenant in question; that the restriction imposed was no more than the interests of the parties required, and that it was not in restraint of trade or against public policy. Judgment was ordered for the plaintiffs for the sum of \$5,000 as stipulated damages.

John Fennel, for appellant. Henry Bacon, for respondents.

VANN, J. (after stating the facts). The business carried on by the defendant was founded on a secret process known only to herself and her agents. She had the right to continue the business, and by keeping her secret to enjoy its benefits to any practicable extent. She also had the right to sell the business, including as an essential part thereof the secret process, and, in order to place the purchasers in the same position that she

occupied, to promise to divulge the secret to them alone, and to keep it from every one else. In no other way could she sell what she had, and get what it was worth. Having the right to make this promise, she also had the right to make it good to her vendees, and to protect them by covenants with proper safeguards against the consequences of any violation. Such a contract simply left matters substantially as they were before the sale, except that the seller of the secret had agreed that she would not destroy its value after she had received full value for it. The covenant was not in general restraint of trade, but was a reasonable measure of mutual protection to the parties, as it enabled the one to sell at the highest price, and the other to get what they paid for. It imposed no restriction upon either that was not beneficial to the other, by enhancing the price to the seller, or protecting the purchaser. Recent cases make it very clear that such an agreement is not opposed to public policy, even if the restriction was unlimited as to both time and territory. *Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. Rep. 419; *Hodge v. Sloan*, 107 N. Y. 244, 17 N. E. Rep. 335; *Leslie v. Lorillard*, 110 N. Y. 519, 534, 18 N. E. Rep. 363; *Thermometer Co. v. Pool*, (Sup.) 4 N. Y. Supp. 861. The restriction under consideration, however, was not unlimited as to time.

The chief reliance of the defendant in this court, where the point seems to have been raised for the first time, is that the covenant, so far as stipulated damages are concerned, is confined to the personal acts of Mrs. Gross, and does not embrace the acts of her agents. A careful reading of the agreement, however, in the light of the circumstances surrounding the parties when it was made, shows that no such result was intended. What was the object of the covenant? It was to keep secret, at all hazards, the process upon which the success of the business depended. On no other basis could the plaintiffs safely buy, or the defendant sell, for what her property was worth. Who had the power to keep the process secret? Clearly the defendant, if any one, as she had confided it to no one except her trusted agents, who were nearly related to her by blood or marriage. But could she covenant against the acts of those over whom she had no control? She had the right to so covenant, by assuming the risk of their actions; and, unless she had done so, presumptively she could not have sold her factory for so large a sum. It was safer for her to sell with such a covenant than it was for the plaintiffs to buy without it. She could exercise some power over her own husband and her father and her husband's brother, all of whom had been associated with her in carrying on the business, and whose actions in certain other respects she assumed to control for a limited time, whereas the plaintiffs were powerless, unless they had her promise to keep the process secret at the peril of paying heavily if she did not. It is not surprising, therefore, to find that the restrictive part of the covenant applies with the same force to her agents that it does to herself; for she undertakes

that neither she nor they will disclose the secret, or engage in making or selling either kind of cheese, or use the trade-marks or names connected with the business. We do not think that a personal act of the defendant is essential to a violation of this covenant by her; for if she permits, or even does not prevent, her agents from doing the prohibited acts, the promise is broken. While it is her exclusive covenant, it relates to the action of others; and, if they do what she agreed that they would not do, it is a breach by her, although not her own act. She violated her agreement, not by selling herself, but by not preventing others from selling. This construction of the restrictive part of the covenant would hardly be open to question, were it not that in the same sentence occurs the reparative or compensatory part designed to make the plaintiffs whole if the defendant either could not or did not keep her agreement. While this provides that any violation involves the penalty of \$5,000, it adds, "which sum is hereby named as stipulated damages to be paid" by the defendant in case of a violation by her of the covenant in question. What kind of violation is thus referred to? The defendant says a personal violation by her only, but we think, for the reasons already given, that the spirit of the agreement includes both a violation by her own act and by the act of those whom she did not prevent from selling, although she had agreed that they would not sell. As no one not a party to a contract can violate it, every act of defendant's former agents contrary to her covenant was a violation thereof by her, whether she knew of it or assented to it or not. Whenever that was done which she agreed should not be done, it was a breach of a covenant by her, even if the act was contrary to her wishes, and in spite of her efforts to prevent it. Her covenant was against a certain act by any one of four persons, including herself. Two of those persons separately did the act which she had agreed that neither of them should do, and thus there was a violation of the covenant by her, the same as if she had done the act in person. The argument of the learned counsel for the defendant that the contract fixed a sum to be paid in case of a violation by the defendant, but not in case of a violation "by the other parties," while plausible, is unsound, for there were no "other parties" who could break the covenant. She was the sole covenantor, and unless she kept the covenant she broke it; and she did not keep it. As the actual damages for a breach of the covenant would necessarily be "wholly uncertain, and incapable of being ascertained except by conjecture," we think that the parties intended to liquidate them when they provided that the sum named should be "as stipulated damages." The use of the word "penalty" under the circumstances is not controlling. *Bagley v. Peddie*, 16 N. Y. 469; *Dakin v. Williams*, 17 Wend. 448, affirmed 22 Wend. 201; *Wooster v. Kisch*, 26 Hun, 61. As there is no other question that requires discussion, the judgment should be affirmed, with costs. All concur, except Brown J., not sitting.

CONDON v. KEMPER.

(27 Pac. 829, 47 Kan. 126.)

Supreme Court of Kansas. Oct. 10, 1891.

Error from district court, Labette county; GEORGE CHANDLER, Judge.

This was an action brought in the district court of Labette county by L. H. Kemper against C. M. Condon to recover \$500 as liquidated damages for the alleged breach of the following written contract, to-wit: "This agreement between L. H. Kemper and C. M. Condon witnesseth, that whereas, the said Kemper has sold to said Condon lot 7, block 38, in Oswego, Kansas, said Condon, as a part of the consideration therefor, agrees to erect thereon a two-story stone or brick building, not less than 100 feet deep, within six months, and to give use of the north wall thereof to said Kemper; or else remove the house now on lot 6, in said block 38, three feet north of where it now stands, as said Condon shall elect to do, and put said building in as good condition as it is in its present location. It is mutually agreed between said parties that a failure on the part of said Condon to perform these obligations shall entitle said Kemper to recover from him the sum of five hundred dollars as liquidated and ascertained damages for the breach of this contract. C. M. CONDON. Oswego, Kansas, March 11, 1887." The defendant answered as follows: "Said defendant admits the execution and delivery of the writing marked 'Exhibit A,' attached to and made part of plaintiff's petition, but he alleges the fact to be that said writing was executed and delivered under a misapprehension and a mistake of the facts in reference to the subject-matter of the transaction therein referred to as they actually existed, and that but for such mistake such writing would not have been executed. Defendant alleges that plaintiff was the owner of lots 6 and 7, in block 38, in the city of Oswego, Kansas. That the frame house mentioned in said writing belonged to plaintiff, and was appurtenant to said lot 6. That defendant negotiated for and purchased from plaintiff said lot 7 with a view of erecting thereon a stone or brick building. That at the time of purchasing said lot 7, and of executing and delivering said writing, both plaintiff and defendant understood and believed that said frame house, mentioned in said writing, and which belonged on and was appurtenant to said lot 6, stood on the line between said lots 6 and 7; the main part of it being, as said parties supposed, on lot 6, and about two or three feet in width of it standing on said lot 7. That to permit defendant to build on his said lot 7 would necessitate the removal of said house, as said parties believed, some three feet to the north. That plaintiff sold, and defendant bought, said lot under such belief. That plaintiff, in negotiating for the sale of said lot 7, objected to being put to the expense of removing said house so that it would all stand on his own lot 6, or insisted, if he were put to such expense, he should be compensated therefor; and to this defendant assented, and agreed that he would, at his own expense, remove

said frame house so that it should entirely stand on said lot 6, and far enough across the line between said lots 6 and 7 not to interfere with the erection of a wall on said line, and put it in as good condition as it then was, where it then stood; or if he should so elect, instead of removing and repairing said house as aforesaid, he might erect on said lot 7 a brick or stone building not less than 100 feet deep, and give plaintiff the use of the north wall thereof as compensation for his moving and repairing said house as aforesaid. That it was to meet such contingency, and secure such end, that said writing was executed and delivered. That thereafter this defendant elected not to erect said stone or brick building on said lot 7, and not to furnish plaintiff the use of the north wall thereof. That, by agreement between said plaintiff and defendant, said block was afterwards surveyed, and the fact was then ascertained that said frame building did not stand, as both of said parties had supposed it did, across the line between said lots 6 and 7,—a part on 6 and a part on 7,—but that it all then stood on said lot 6, and so far from the line between lots 6 and 7 as not to interfere with the erection of a wall thereon, and therefore a removal of said frame building was unnecessary, and would be of no advantage whatever to plaintiff. Defendant alleges that the only purpose on the part of plaintiff or defendant in the execution and delivery of said writing was to indemnify plaintiff against cost and expense in the removal and repair of said house as aforesaid, and that, had plaintiff desired its removal after the fact in reference to its true location was ascertained, he could have had it removed three feet north of where it then stood, and put in as good condition as it was, where it then stood, at a cost and expense of not to exceed one hundred dollars. That said house could, at the time of the execution of said writing, or at any time since then, have been removed three feet north of where it then stood and now stands, and put in as good condition as it then was, in its then location, at a cost of not to exceed one hundred dollars. That in no event could plaintiff's damage, had he desired to have had said house removed, exceed one hundred dollars. That to indemnify against such possible damage was the only object in giving said writing. Defendant alleges that plaintiff has not removed said house, and has in no way been to any cost or expense on account of the removal of said house, or for any other purpose referred to in any way in said writing. Defendant denies that plaintiff has suffered any damage on his account, and denies any liability to him in any respect. Wherefore defendant asks that this cause be dismissed, and that he recover his costs herein." The plaintiff replied, denying every allegation of the answer inconsistent with the allegations of his petition. At the February term, 1889, when the case was called for trial, the plaintiff moved for judgment upon the pleadings; and the court sustained the motion, and rendered judgment accordingly in favor of the plaintiff and against the defendant for \$500, with interest and

costs; the defendant excepted, and afterwards, as plaintiff in error, brought the case to this court for review.

Case & Glasse, for plaintiff in error. J. H. Morrison, for defendant in error.

VALENTINE, J. (after stating the facts as above). The substantial question involved in this controversy is whether the plaintiff below, L. H. Kemper, may recover from the defendant below, C. M. Condon, the sum of \$500 as agreed and liquidated damages, or whether he can recover only the amount of his actual loss or damage resulting from the breach of the contract sued on, which amount, according to the facts of the case as presented to us, cannot exceed \$100. The contract upon which Kemper seeks to recover contains the following among other stipulations: "It is mutually agreed between said parties that a failure on the part of said Condon to perform these obligations shall entitle said Kemper to recover from him the sum of five hundred dollars as liquidated and ascertained damages for the breach of this contract." It will be seen that the parties themselves have used the words "liquidated and ascertained damages;" but nearly all the authorities agree that neither these words, nor any other words of similar import, are conclusive, but that the amount named, notwithstanding the use of such words, may nevertheless be nothing more than a penalty. Some of such authorities are the following: *Lampman v. Cochran*, 16 N. Y. 275; *Ayres v. Pease*, 12 Wend. 393; *Hoag v. McGinnis*, 22 Wend. 163; *Beale v. Hayes*, 5 Sandf. 640; *Gray v. Crosby*, 18 Johns. 219; *Jackson v. Baker*, 2 Edw. Ch. 471; *Shreve v. Brereton*, 51 Pa. St. 175; *Fitzpatrick v. Cottingham*, 14 Wis. 219; *Fisk v. Gray*, 11 Allen, 132; *Wallis v. Carpenter*, 13 Allen, 19; *Ex parte Pollard*, 2 Low. 411; *Basye v. Ambrose*, 28 Mo. 39; *Carter v. Strom*, 41 Minn. 522, 43 N. W. Rep. 394; *Schrimpf v. Manufacturing Co.*, 86 Tenn. 219, 6 S. W. Rep. 131; *Haldeman v. Jennings*, 14 Ark. 329; *Davis v. Freeman*, 10 Mich. 188; *Hahn v. Horstman*, 12 Bush, 249; *Low v. Nolte*, 16 Ill. 475; *Kemble v. Farren*, 6 Bing. 141; *Davies v. Penton*, 6 Barn. & C. 216; *Horner v. Flintoff*, 9 Mees. & W. 678; *Newman v. Capper*, 4 Ch. Div. 724. Of course, the words of the parties with respect to damages, losses, penalties, forfeitures, or any sum of money to be paid, received, or recovered, must be given due consideration, and, in the absence of anything to the contrary, must be held to have controlling force; but when it may be seen from the entire contract, and the circumstances under which the contract was made, that the parties did not have in contemplation actual damages or actual compensation, and did not attempt to stipulate with reference to the payment or recovery of actual damages or actual compensation, then the amount stipulated to be paid on the one side, or to be received or recovered on the other side, cannot be considered as liquidated damages, but must be considered in the nature of a penalty; and this, even if the parties should name such amount "liquidated damages." The fol-

lowing text-books upon this subject may be examined with much profit: 1 Sedg. Dam. (8th Ed.) c. 12, §§ 389-427; 1 Suth. Dam. pp. 475-530, c. 7, § 6; 13 Amer. & Eng. Enc. Law, pp. 857-868; 1 Pom. Eq. Jur. §§ 440-447; 3 Pars. Cont. pp. 156-163, § 2. The text-books upon this subject unite in saying that the tendency and preference of the law is to regard a stated sum as a penalty, instead of liquidated damages, because actual damages can then be recovered, and the recovery be limited to such damages. 1 Suth. Dam. 490; 13 Amer. & Eng. Enc. Law, pp. 853, 860. The decisions of this court are also in this same line. The only decisions of this court upon the subject of liquidated damages are the following: *Kurtz v. Sponable*, 6 Kan. 395; *Foot v. Sprague*, 13 Kan. 155; *Railway Co. v. Shoemaker*, 27 Kan. 677; *Heatwole v. Gorrell*, 35 Kan. 692, 12 Pac. Rep. 135. We are satisfied with the foregoing decisions of this court, but they do not go to the extent of controlling the decision in the present case. The last case cited is supported by the following additional cases: *Davis v. Gillett*, 52 N. H. 126; *Caswell v. Johnson*, 58 Me. 164; *Burrill v. Daggett*, 77 Me. 545, 1 Atl. Rep. 677.

In 1 Sedgwick on Damages (8th Ed.) the following among other language is used: "From the foregoing we derive the following as a general rule governing the whole subject: Whenever the damages were evidently the subject of calculation and adjustment between the parties, and a certain sum was agreed upon and intended as compensation, and is in fact reasonable in amount, it will be allowed by the court as liquidated damages." Section 405. "And here we are brought back by a somewhat circuitous path to the great fundamental principle which underlies our whole system,—that of compensation. The great object of this system is to place the plaintiff in as good a position as he would have had if his contract had not been broken. So long as parties themselves keep this principle in view, they will be allowed to agree upon such a sum as will probably be a fair equivalent of a breach of contract. But when they go beyond this, and undertake to stipulate, not for compensation, but for a sum out of all proportion to the measure of liability which the law regards as compensatory, then the law will not allow the agreement to stand. In all agreements, therefore, fixing upon a sum in advance as the measure or limit of liability, the final question is whether the subject of the contract is such that it violates this fundamental rule of compensation. If it does so, the sum fixed is necessarily a penalty. If it does not do so, the question arises, as in any other contract, as to what agreement the parties have actually made; and here, as in all other cases, their intention, as ascertained from the language employed, is a guide." Section 406. "Where the stipulated sum is wholly collateral to the object of the contract, being evidently inserted merely as security for performance, it will not be allowed as liquidated damages." Section 410. "Whenever an amount stipulated is to be paid on the non-payment of a less amount, or on default in delivering a thing of less value, the sum will

generally be treated as a penalty." Section 411. "Whenever the stipulated sum is to be paid on breach of a contract of such a nature that the loss may be much greater or much less than the sum, it will not be allowed as liquidated damages." Section 412. "A sum fixed as security for the performance of a contract containing a number of stipulations of widely different importance, breaches of some of which are capable of accurate valuation, for any of which the stipulated sum is an excessive compensation, is a penalty." Section 413. "If the contract is one in which the measure of damages for part performance is ascertainable, and a sum is stipulated for breach of it, this sum will not be allowed as liquidated damages, in case of a partial breach." Section 415.

In 1 Pomeroy on Equity Jurisprudence the following language is used: "Where an agreement contains provisions for the performance or non-performance of several acts of different degrees of importance, and then a certain sum is stipulated to be paid upon a violation of any or all of such provisions, and the sum will be in some instances too large, and in others too small, a compensation for the injury thereby occasioned, that sum is to be treated as a penalty, and not as liquidated damages. This rule has been laid down in a somewhat different form, as follows: Where the agreement contains provisions for the performance or non-performance of acts which are not measurable by any exact pecuniary standard, and also of one or more other acts in respect of which the damages are easily ascertainable by a jury, and a certain sum is stipulated to be paid upon a violation of any or of all these provisions, such sum must be taken to be a penalty." Section 443. "Whether an agreement provides for the performance or non-performance of one single act, or of several distinct and separate acts, if the stipulation to pay a certain sum of money upon a default is so framed, is of such a nature and effect, that it necessarily renders the defaulting party liable in the same amount at all events, both when his failure to perform is complete and when it is only partial, the sum must be regarded as a penalty, and not as liquidated damages." Section 444.

In Sutherland on Damages the following among other language is used: "While no one can fail to discover a very great amount of apparent conflict, still it will be found on examination that most of the cases, however conflicting in appearance, have yet been decided according to the justice and equity of the particular case." Page 478. "To be potential and controlling that a stated sum is liquidated damage, that sum must be fixed as the basis of compensation, and substantially limited to it; for just compensation is recognized as the universal measure of damages not punitory. Parties may liquidate the amount by previous agreement. But, when a stipulated sum is evidently not based on that principle, the intention to liquidate damages will either be found not to exist, or will be disregarded, and the stated sum treated as a penalty. Contracts are not made to be broken; and hence, when parties provide for consequen-

ces of a breach, they proceed with less caution than if that event was certain, and they were fixing a sum absolutely to be paid. The intention in all such cases is material; but, to prevent a stated sum from being treated as a penalty, the intention should be apparent to liquidate damages in the sense of making just compensation. It is not enough that the parties express the intention that the stated sum shall be paid in case of a violation of the contract. A penalty is not converted into liquidated damages by the intention that it be paid. It is intrinsically a different thing, and the intention that it be paid cannot alter its nature. A bond, literally construed, imports an intention that the penalty shall be paid if there be default in the performance of the condition; and formerly that was the legal effect. Courts of law now, however, administer the same equity to relieve from penalties in other forms of contract as from those in bonds. The evidence of an intention to measure the damage, therefore, is seldom satisfactory when the amount stated varies materially from a just estimate of the actual loss finally sustained." Pages 480, 481. See also, especially, 3 Parsons on Contracts (16th Ed., p. 156 et seq.)

Many courts hold that the intention of the parties must govern, but say that if the damages stipulated to be paid, received, or recovered on the breach of the contract are out of proportion to the actual damages that might be sustained, then the parties could not in fact have intended liquidated damages, but merely a penalty, whatever their language might be. Other courts hold that it makes no difference what the intention of the parties might be; that the nature of the contract itself must govern, and if the amount stipulated to be paid, received, or recovered is out of all proportion to the actual damages that might be sustained; then that such amount must be treated as a penalty, whatever may have been the intention of the parties; that in fact, and in the very nature of things, such amount would be a penalty, and could not be anything else; that the parties could not by misnaming the amount, and calling it liquidated damages, make it such. In this connection, the following language of Judge CHRISTIANCY, who delivered the opinion of the court in the case of *Jaquith v. Hudson*, 5 Mich. 121, 136, 137, is instructive: "Again, the attempt to place this question upon the intention of the parties, and to make this the governing consideration, necessarily implies that, if the intention to make the sum stipulated damages should clearly appear, the court would enforce the contract according to that intention. To test this, let it be asked whether, in such a case, if it were admitted that the parties actually intended the sum to be considered as stipulated damages, and not as a penalty, would a court of law enforce it for the amount stipulated? Clearly, they could not, without going back to the technical and long-exploded doctrine which gave the whole penalty of the bond, without reference to the damages actually sustained. They would thus be simply changing the names of things, and enforcing, under the name of stipulated damages,

what in its own nature is but a penalty. The real question in this class of cases will be found to be, not what the parties intended, but whether the sum is in fact in the nature of a penalty; and this is to be determined by the magnitude of the sum, in connection with the subject-matter, and not at all by the words or the understanding of the parties. The intention of the parties cannot alter it. While courts of law gave the penalty of the bond, the parties intended the payment of the penalty as much as they now intend the payment of stipulated damages. It must therefore, we think, be very obvious that the actual intention of the parties in this class of cases, and relating to this point, is wholly immaterial; and, though the courts have very generally professed to base their decisions upon the intention of the parties, that intention is not, and cannot be made, the real basis of these decisions. In endeavoring to reconcile their decisions with the actual intention of the parties, the courts have sometimes been compelled to use language wholly at war with any idea of interpretation, and to say 'that the parties must be considered as not meaning exactly what they say.' *Horner v. Flintoff*, 9 Mees. & W. 678, per PARKE, B. May it not be said, with at least equal propriety, that the courts have sometimes said what they did not exactly mean?" And in the case of *Myer v. Hart*, 40 Mich. 517, 523, the supreme court of Michigan held as follows: "Just compensation for the injury sustained is the principle at which the law aims, and the parties will not be permitted, by express stipulation, to set this principle aside."

We might quote further from the textbooks and the reported cases, but we think the foregoing is sufficient; and from the

foregoing it certainly follows that the plaintiff below, Kemper, cannot "recover" "the sum of \$500 as liquidated and ascertained damages for the breach of this contract," notwithstanding such is the language of the contract. If the defendant, Condon, had removed the building situated on lot 6 three feet north, and had then put the same in as good condition as it was before, he would have so completed his contract that not one cent of damage could be recovered from him; and to so remove such building, and to put it in as good condition as it was before, would not have cost to exceed \$100. But suppose that Condon had removed the building, and then have failed to put the same in as good condition as it was before; he would have committed a breach of the contract, but the actual damages might not have been \$25. Then, should the plaintiff, Kemper, recover the said sum of \$500? Or suppose that Condon had removed the house, and attempted to put it in as good condition as it was before, but have failed to repair a lock, or a small portion of the plastering, or a broken window, which repairing might not have cost \$1; then, should Kemper have the right to recover the said sum of \$500? All this shows that the parties did not have in contemplation the matter of actual compensatory damages when they stipulated that Kemper might recover \$500 from Condon as liquidated and ascertained damages, in case of a breach of the contract, but shows that in fact, though not in words, they fixed the sum of \$500 as a penalty to cover all or any damages which might result from a breach of the contract. The judgment of the court below will be reversed, and cause remanded for further proceedings. All the justices concurring.

PRIMROSE v. WESTERN UNION TEL. CO.

(14 Sup. Ct. 1098, 154 U. S. 1.)

May 26, 1894.

No. 59.

In error to the circuit court of the United States for the eastern district of Pennsylvania.

This was an action on the case, brought January 25, 1888, by Frank J. Primrose, a citizen of Pennsylvania, against the Western Union Telegraph Company, a corporation of New York, to recover damages for a negligent mistake of the defendant's agents in transmitting a telegraphic message from the plaintiff, at Philadelphia, to his agent at Waukeney, in the state of Kansas.

The defendant pleaded (1) not guilty; (2) that the message was an unrepeatable message, and was also a cipher and obscure message, and therefore, by the contract between the parties under which the message was sent, the defendant was not liable for the mistake. At the trial, the following facts were proved and admitted:

On June 16, 1887, the plaintiff wrote and delivered to the defendant, at Philadelphia, for transmission to his agent, William B. Toland, at Ellis, in the state of Kansas, a message upon one of the defendant's printed blanks, the words printed below in italics being the words written therein by the plaintiff, to wit:

THE WESTERN UNION TELEGRAPH COMPANY.

THOS. T. ECKERT, General Manager. NORVIN GREEN, President.

Receiver's No.	Time Filed 13	Check
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"Send the following message, subject to the terms on back hereof, which are hereby agreed to." } June 16, 1887.

"To Wm. B. Toland, Ellis, Kansas.

"Despot am exceedingly busy bay all kinds quo perhaps bracken half of it mince moment promptly of purchases."

"FRANK J. PRIMROSE.

"~~READ~~ READ THE NOTICE AND AGREEMENT ON BACK OF THIS BLANK. ~~21~~"

Upon the back of the message was the following printed matter:

"ALL MESSAGES TAKEN BY THIS COMPANY ARE SUBJECT TO THE FOLLOWING TERMS:

"To guard against mistakes or delays, the sender of a message should order it REPEATED; that is, telegraphed back to the originating office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery or for nondelivery of any UNREPEATED message, whether happening by

negligence of its servants or otherwise, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery or for nondelivery of any REPEATED message beyond fifty times the sum received for sending the same, unless specially insured; nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages. And this company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination.

"Correctness in the transmission of a message to any point on the lines of this company can be INSURED by contract in writing, stating agreed amount of risk, and payment of premium thereon, at the following rates. In addition to the usual charge for repeated messages, viz. one per cent. for any distance not exceeding 1,000 miles, and two per cent. for any greater distance. No employe of the company is authorized to vary the foregoing.

"No responsibility regarding messages attaches to this company until the same are presented and accepted at one of its transmitting offices; and, if a message is sent to such office by one of the company's messengers, he acts for that purpose as the agent of the sender.

"Messages will be delivered free within the established free delivery limits of the terminal office. For delivery at a greater distance, a special charge will be made to cover the cost of such delivery.

"The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission.

"NORVIN GREEN, President.

"THOS. T. ECKERT, General Manager."

On the evening of the same day, an agent of the defendant delivered to Toland, at Waukeney, upon a blank of the defendant company, the message in this form, the written words being printed below in italics:

THE WESTERN UNION TELEGRAPH COMPANY.

"This company TRANSMITS and DELIVERS messages only on conditions limiting its liability, which have been assented to by the sender of the following message.

"Errors can be guarded against only by repeating a message back to the sending station for comparison, and the company will not hold itself liable for errors or delays in transmission or delivery of UNREPEATED MESSAGES beyond the amount of tolls paid thereon, nor in any case where the claim is not presented in writing within sixty days after sending the message.

"This is an UNREPEATED MESSAGE, and is delivered by request of the sender, under the conditions named above.

THOS. T. ECKERT, General Manager.		NORVIN GREEN, President.	
NUMBER R.	SENT BY S.	REC'D BY F. N.	CHECK. 22 Collected 3 extra words.

"RECEIVED at 5 K. p. m. June 16, 1887.

"Dated Philadelphia, 16. Forwarded from Ellis.

"To W. B. Toland, Waukeney, Kansas.

"*Destroy am exceedingly busy buy all kinds quo perhaps bracken half of it mince moment promptly of purchase.*

"FRANK J. PRIMROSE."

The difference between the message as sent and as delivered is shown below, where so much of the message sent as was omitted in that delivered is in brackets, and the words substituted in the message delivered are in italics.

"[Despot] *Destroy* am exceedingly busy [bay] *buy* all kinds quo perhaps bracken half of it mince moment promptly of purchase[s]."

By the private cipher code made and used by the plaintiff and Toland, the meaning of these words was as follows:

"Yours of the [fifteenth] *seventeenth* received; am exceedingly busy; [I have bought] *buy* all kinds, five hundred thousand pounds; perhaps we have sold half of it; wire when you do anything; send samples immediately, promptly of [purchases] *purchase*."

The plaintiff testified that on June 16, 1887, he wrote the message in his own office on one of a bunch or book of the defendant's blanks which he kept at hand, and sent it to the defendant's office at Philadelphia; that he had a running account with the defendant's agent there, which he settled monthly, amounting to \$180 for that month; that he did not then read, and did not remember that he had ever before read, the printed matter on the back of the blanks; and that he paid the usual rate of \$1.15 for this message, and did not pay for a repetition or insurance of it.

He also testified that he then was, and for many years had been, engaged in the business of buying and selling wool all over the country, and had employed Toland as his agent in that business, and early in June, 1887, sent him out to Kansas and Colorado, with instructions to buy 50,000 pounds, and then to await orders from him before buying more; that, before June 12th, Toland bought 50,000 pounds, and then stopped buying; and that he had sent many telegraphic messages to Toland during that month and previously, using the same code.

The defendant's agent at Philadelphia, called as a witness for the plaintiff, testified that he sent this message for the plaintiff, and knew that he was a dealer in wool, and that Toland was with him, but in what capacity he did not know; that he had frequently sent messages for him, and considered him one of his best customers during the wool season; that telegraphic messages by the present system were sent and received by sound, and were all dots and dashes; that "b" was a dash and three dots, and "y" was

two dots, a space, and then two dots; and that the difference between "a" and "u" was one dot, "a" being a dot and a dash, and "u" two dots and a dash, and the pause upon the last touch of the "u;" that an experienced telegraph operator, if the words were properly rapped out, and he was paying proper attention, could not well mistake the one for the other, but might be misled if he was not careful; and that it was very likely that another dot could be put in if there was any interruption in the wire. He further testified that there was a great difference between the words "despot" and "destroy" in telegraphic symbols; and that the letter "s" was made by three dots, so that, if an operator received the word "purchases" over the wires, and wrote down "purchase," he omitted three dots from the end of the word.

The plaintiff introduced depositions, taken in September, 1888, of one Stevens and one Smith, who were respectively telegraph operators of the defendant at Brookville and at Ellis, in the state of Kansas, on June 16, 1887.

Stevens testified that Brookville was a relay station of the company, at which messages from the east were repeated westward; that on that day one Tindall, his fellow operator in the Brookville office, handed him a copy in Tindall's handwriting of the message in question (an impression copy of which he identified and annexed to his deposition), containing the words "despot" and "bay," and he immediately transmitted it, word for word, to Ellis; that the equipment of the office at Brookville was in every respect good and sufficient; and that he had no recollection of the wires between it and Ellis having been in other than good condition on that day.

Smith testified that on that day he received the message at Ellis from Brookville, and immediately wrote it down, word for word, just as received (and identified and annexed to his deposition an impression copy of what he then wrote down), containing the words "destroy" and "buy," and transmitted it, exactly as he received it, to Waukeney, to which Toland had directed any messages for him to be forwarded; and that the office at Ellis was well and sufficiently equipped for its work, but he could not recall what was the condition of the wires between it and Brookville.

The plaintiff also introduced evidence tending to show that June 16, 1887, was a bright and beautiful day at Ellis and Waukeney; that Toland, upon receiving the message at Waukeney, made purchases of about 300,000 pounds of wool; and that the plaintiff, in settling with the sellers thereof, suffered a loss of upwards of \$20,000.

The circuit court, following *White v. Telegraph Co.*, 5 McCrary, 103, 14 Fed. 710, and *Jones v. Telegraph Co.*, 18 Fed. 717, ruled that there was no evidence of gross negligence on the part of the defendant; and that, as the message had not been repeated,

the plaintiff, by the terms printed upon the back of the message, and referred to above his signature on its face, could not recover more than the sum of \$1.15, which he had paid for sending it. The plaintiff not claiming that sum, the court directed a verdict for the defendant, and rendered judgment thereon. The plaintiff tendered a bill of exceptions, and sued out this writ of error.

Geo. Junkin and Jos. de F. Junkin, for plaintiff in error. Silas W. Pettit, John H. Dillon, Geo. H. Fearons, and Rush Taggart, for defendant in error.

Mr. Justice GRAY, after stating the case, delivered the opinion of the court.

This was an action by the sender of a telegraphic message against the telegraph company to recover damages for a mistake in the transmission of the message, which was in cipher, intelligible only to the sender and to his own agent, to whom it was addressed. The plaintiff paid the usual rate for this message, and did not pay for a repetition or insurance of it.

The blank form of message, which the plaintiff filled up and signed, and which was such as he had constantly used, had upon its face, immediately above the place for writing the message, the printed words, "Send the following message, subject to the terms on back hereof, which are hereby agreed to;" and, just below the place for his signature, this line: "Read the notice and agreement on back of this blank ~~and~~."

Upon the back of the blank were conspicuously printed the words, "All messages taken by this company are subject to the following terms," which contained the following conditions or restrictions of the liability of the company:

"[1] To guard against mistakes or delays, the sender of a message should order it REPEATED; that is, telegraphed back to the originating office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery or for nondelivery of any UNREPEATED message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same; [2] nor for mistakes or delays in the transmission or delivery or for nondelivery of any REPEATED message beyond fifty times the sum received for sending the same, unless specially insured; [3] nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages." After stating the rates at which correctness in the transmission of a message may be insured, it is provided that "no employe of the company is authorized to vary the foregoing." "[4] The company will not be liable for damages or statutory penalties

in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission."

The conditions or restrictions, the reasonableness and validity of which are directly involved in this case, are that part of the first by which the company is not to be liable for mistakes in the transmission or delivery of any message beyond the sum received for sending it, unless the sender orders it to be repeated by being telegraphed back to the originating office for comparison, and pays half that sum in addition; and that part of the third by which the company is not to be liable at all for errors in cipher or obscure messages.

Telegraph companies resemble railroad companies and other common carriers, in that they are instruments of commerce, and in that they exercise a public employment, and are therefore bound to serve all customers alike, without discrimination. They have, doubtless, a duty to the public to receive, to the extent of their capacity, all messages clearly and intelligibly written, and to transmit them upon reasonable terms. But they are not common carriers. Their duties are different, and are performed in different ways; and they are not subject to the same liabilities. *Express Co. v. Caldwell*, 21 Wall. 264, 269, 270; *Telegraph Co. v. Texas*, 105 U. S. 460, 464. See page 156

The rule of the common law by which common carriers of goods are held liable for loss or injury by any cause whatever, except the act of God or of public enemies, does not extend even to warehousemen or wharfingers, or to any other class of bailees, except innkeepers, who, like carriers, have peculiar opportunities for embezzling the goods or for collusion with thieves. The carrier has the actual and manual possession of the goods. The identity of the goods which he receives with those which he delivers can hardly be mistaken. Their value can be easily estimated, and may be ascertained by inquiry of the consignor, and the carrier's compensation fixed accordingly; and his liability in damages is measured by the value of the goods.

But telegraph companies are not bailees, in any sense. They are intrusted with nothing but an order or message, which is not to be carried in the form or characters in which it is received, but is to be translated and transmitted through different symbols, by means of electricity, and is peculiarly liable to mistakes. The message cannot be the subject of embezzlement. It is of no intrinsic value. Its importance cannot be estimated, except by the sender, and often cannot be disclosed by him without danger of defeating his purpose. It may be wholly valueless, if not forwarded immediately; and the measure of damages, for a failure to transmit or deliver it, has no relation to any value of the message itself, except as such value may be disclosed by the message, or

be agreed between the sender and the company.

As said by Mr. Justice Strong, speaking for this court, in *Express Co. v. Caldwell*, above cited: "Like common carriers, they cannot contract with their employers for exemption from liability for the consequences of their own negligence. But they may by such contracts, or by their rules and regulations brought to the knowledge of their employers, limit the measure of their responsibility to a reasonable extent. Whether their rules are reasonable or unreasonable must be determined with reference to public policy, precisely as in the case of a carrier."

By the settled law of this court, common carriers of goods or passengers cannot, by any contract with their customers, wholly exempt themselves from liability for damages caused by the negligence of themselves or their servants. *Railroad Co. v. Lockwood*, 17 Wall. 357; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 442, 9 Sup. Ct. 469, and cases cited.

But even a common carrier of goods may, by special contract with the owner, restrict the sum for which he may be liable, even in case of a loss by the carrier's negligence; and this upon the distinct ground, as stated by Mr. Justice Blatchford, speaking for the whole court, that "where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations." *Hart v. Railroad Co.*, 112 U. S. 331, 343, 5 Sup. Ct. 151.

By the regulation now in question, the telegraph company has not undertaken to wholly exempt itself from liability for negligence; but only to require the sender of the message to have it repeated, and to pay half as much again as the usual price, in order to hold the company liable for mistakes or delays in transmitting or delivering or for not delivering a message, whether happening by negligence of its servants or otherwise.

In *Telegraph Co. v. Hall*, 124 U. S. 444, 453, 8 Sup. Ct. 577, the effect of such a regulation was presented by the certificate of the circuit court, but was not passed upon by this court, because it was of opinion that, upon the facts of the case, the damages claimed were too uncertain and remote.

But the reasonableness and validity of such regulations have been upheld in *McAndrew v. Telegraph Co.*, 17 C. B. 3, and in *Baxter v. Telegraph Co.*, 37 U. C. Q. B. 470, as well as by the great preponderance of authority in this country. Only a few of the principal cases need be cited.

In the earliest American case, decided by the court of appeals of Kentucky, the reasons for upholding the validity of a regulation very like that now in question were thus stated: "The public are admonished by the notice that, in order to guard against mistakes in the transmission of messages, every message of importance ought to be repeated. A person desiring to send a message is thus apprised that there may be a mistake in its transmission, to guard against which it is necessary that it should be repeated. He is also notified that, if a mistake occur, the company will not be responsible for it unless the message be repeated. There is nothing unreasonable in this condition. It gives the party sending the message the option to send it in such a manner as to hold the company responsible, or to send it for a less price at his own risk. If the message be unimportant, he may be willing to risk it without paying the additional charge. But if it be important, and he wishes to have it sent correctly, he ought to be willing to pay the cost of repeating the message. This regulation, considering the accidents to which the business is liable, is obviously just and reasonable. It does not exempt the company from responsibility, but only fixes the price of that responsibility, and allows the person who sends the message either to transmit it at his own risk, at the usual price, or by paying in addition thereto half the usual price to have it repeated, and thus render the company liable for any mistake that may occur." *Camp v. Telegraph Co.*, 1 Metc. (Ky.) 164, 168.

In *Telegraph Co. v. Carew*, 15 Mich. 525, 535, 536, the supreme court of Michigan held that a similar regulation was a valid part of the contract between the company and the sender, whether he read it or not. "The regulation," said Chief Justice Christiancy, "of most, if not all, telegraph companies operating extensive lines, allowing messages to be sent by single transmission for a lower rate of charge, and requiring a larger compensation when repeated, must be considered as highly reasonable, giving to their customers the option of either mode, according to the importance of the message or any other circumstance which may affect the question." "The printed blank, before the message was written upon it, was a general proposition to all persons of the terms and conditions upon which messages would be sent. By writing the message under it, signing, and delivering it for transmission, the plaintiff below accepted the proposition, and it became a contract upon those terms and conditions."

In *Birney v. Telegraph Co.*, 18 Md. 341, 358, the court of appeals of Maryland, while recognizing the validity of similar regulations, held that they did not apply to a case in which no effort was made by the telegraph company or its agents to put the message on its transit.

In *Telegraph Co. v. Gildersleve*, 29 Md. 232, 246, 248, the same court, speaking by

Mr. Justice Alvey (since chief justice of Maryland and of the court of appeals of the district of Columbia), said: "The appellant had a clear right to protect itself against extraordinary risk and liability by such rules and regulations as might be required for the purpose." "The appellant could not, by rules and regulations of its own making, protect itself against liability for the consequences of its own willful misconduct or gross negligence or any conduct inconsistent with good faith; nor has it attempted by its rules and regulations to afford itself such exemption. It was bound to use due diligence, but not to use extraordinary care and precaution. The appellee, by requiring the message to be repeated, could have assured himself of its dispatch and accurate transmission to the other end of the line, if the wires were in working condition; or, by special contract for insurance, could have secured himself against all consequences of nondelivery. He did not think proper, however, to adopt such precaution, but chose rather to take the risk of the less expensive terms of sending his message; and, having refused to pay the extra charge for repetition or insurance, we think he had no right to rely upon the declaration of the appellant's agent that the message had gone through, in order to fix the liability on the company."

In *Passmore v. Telegraph Co.*, 9 Phila. 90, 78 Pa. St. 238, at the trial in the district court of Philadelphia, there was evidence that Passmore, of whom one Edwards had offered to purchase a tract of land in West Virginia, wrote and delivered to the company at Parkersburg, upon a blank containing similar conditions, a message to Edwards, at Philadelphia, in these words: "I hold the Tibbs tract for you; all will be right,"—but which, as delivered by the company in Philadelphia, was altered by substituting the word "sold" for "hold;" and that Edwards thereupon broke off the contract for the purchase of the land, and Passmore had to sell it at a great loss. The verdict being for the plaintiff, the court reserved the question whether the defendant was liable, inasmuch as the plaintiff had not insured the message nor directed it to be repeated, and afterwards entered judgment for the defendant, notwithstanding the verdict, in accordance with an opinion of Judge Hare, the most important parts of which were as follows:

"A railway, telegraph, or other company, charged with a duty which concerns the public interest, cannot screen themselves from liability for negligence; but they may prescribe rules calculated to insure safety, and diminish the loss in the event of accident, and declare that, if these are not observed, the injured party shall be considered as in default, and precluded by the doctrine of contributory negligence. The rule must however, be such as that reason, which is said to be the life of the law, can approve; or, at the least, such as it need not condemn.

By no device can a body corporate avoid liability for fraud, for willful wrong, or for the gross negligence which, if it does not intend to occasion injury, is reckless of consequences, and transcends the bounds of right with full knowledge that mischief may ensue. Nor, as I am inclined to think, will any stipulation against liability be valid which has the pecuniary interest of the corporation as its sole object, and takes a safeguard from the public without giving anything in return. But a rule which, in marking out a path plain and easily accessible, as that in which the company guaranties that every one shall be secure, declares that, if any man prefers to walk outside of it, they will accompany him, will do their best to secure and protect him, but will not be insurers, will not consent to be responsible for accidents arising from fortuitous and unexpected causes, or even from a want of care and watchfulness on the part of their agents, may be a reasonable rule, and, as such, upheld by the courts."

"The function of the telegraph differs from that of the post office in this: that while the latter is not concerned with the contents of the missive, and merely agrees to forward it to its address, the former undertakes the much more difficult task of transcribing a message written according to one method of notation, in characters which are entirely different, with all the liability to error necessarily incident to such a process. Nor is this all. The telegraph operator is separated by a distance of many miles from the paper on which he writes, so that his eye cannot discern and correct the mistakes committed by his hand. It was also contended during the argument that the electric fluid which is used as the medium of communication is liable to perturbations arising from thunder storms and other natural causes. It is therefore obvious that entire accuracy cannot always be obtained by the greatest care, and that the only method of avoiding error is to compare the copy with the original, or, in other words, that the operator to whom the message is sent should telegraph it back to the station whence it came."

"Obviously he who sends a communication is best qualified to judge whether it should be returned for correction. If he asks the company to repeat the message, and they fail to comply, they will clearly be answerable for any injury that may result from the omission. If he does not make such a request, he may well be taken to have acquiesced in the conditions which they prescribe, and at all events cannot object to the want of a precaution he has virtually waived. It is not a just ground of complaint that the power to choose is coupled with an obligation to pay an additional sum to cover the cost of repetition." 9 Phila. 92-94; 78 Pa. St. 242-244.

The judgment was affirmed by the supreme court of Pennsylvania, for the reasons given

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by Judge Hare and above stated. 78 Pa. St. 246; *Telegraph Co. v. Stevenson*, 128 Pa. St. 442, 455, 18 Atl. 441.

In *Breese v. Telegraph Co.*, 48 N. Y. 132, the plaintiffs' agent wrote, at his own office in Palmyra, on one of the company's blanks, substantially like that now before us, and delivered to the company at Palmyra, a message addressed to brokers in New York, and in these words, "Buy us seven (\$700) hundred dollars in gold." In the statement of facts upon which the case was submitted, it was agreed that he had never read the printed part of the blank, and that "the message thus delivered was transmitted from the office at Palmyra as written; but, by some error of the defendant's operators working between Palmyra and New York," it was received in New York and delivered in this form, "Buy us seven thousand dollars in gold," and the brokers accordingly bought that amount for the plaintiffs, who sold it at a loss. It was held that there was no evidence of negligence on the part of the company, and that, the message not having been repeated, the company was not liable.

In *Kiley v. Telegraph Co.*, 109 N. Y. 231, 235-237, 16 N. E. 75, a similar decision was made, the court saying: "That a telegraph company has the right to exact such a stipulation from its customers is the settled law in this and most of the other states of the Union and in England. The authorities hold that telegraph companies are not under the obligations of common carriers; that they do not insure the absolute and accurate transmission of messages delivered to them; that they have the right to make reasonable regulations for the transaction of their business, and to protect themselves against liabilities which they would otherwise incur through the carelessness of their numerous agents, and the mistakes and defaults incident to the transaction of their peculiar business. The stipulation printed in the blank used in this case has frequently been under consideration in the courts, and has always in this state, and generally elsewhere, been upheld as reasonable." "The evidence brings this case within the terms of the stipulation. It is not the case of a message delivered to the operator, and not sent by him from his office. This message was sent, and it may be inferred from the evidence that it went so far as Buffalo, at least; and all that appears further is that it never reached its destination. Why it did not reach there remains unexplained. It was not shown that the failure was due to the willful misconduct of the defendant, or to its gross negligence. If the plaintiff had requested to have the message repeated back to him, the failure would have been detected and the loss averted. The case is therefore brought within the letter and purpose of the stipulation."

In the supreme judicial court of Massachusetts, the reasonableness and validity of such regulations have been repeatedly affirmed.

Ellis v. Telegraph Co., 13 Allen, 226; *Redpath v. Telegraph Co.*, 112 Mass. 71; *Grinnell v. Telegraph Co.*, 113 Mass. 299; *Clement v. Telegraph Co.*, 137 Mass. 463.

There are cases, indeed, in which such regulations have been considered to be wholly void. It will be sufficient to refer to those specially relied on by the learned counsel for the plaintiff, many of which, however, upon examination, appear to have been influenced by considerations which have no application to the case at bar.

Some of them were actions brought, not by the sender, but by the receiver, of the message, who had no notice of the printed conditions until after he received it, and could not therefore have agreed to them in advance. Such were *Telegraph Co. v. Dryburg*, 35 Pa. St. 298; *Harris v. Telegraph Co.*, 9 Phila. 88; and *De la Grange v. Telegraph Co.*, 25 La. Ann. 383.

Others were cases of night messages, in which the whole provision as to repeating was omitted, and a sweeping and comprehensive provision substituted, by which, in effect, all liability beyond the price paid was avoided. *True v. Telegraph Co.*, 60 Me. 9, 18; *Bartlett v. Telegraph Co.*, 62 Me. 209, 215; *Candee v. Telegraph Co.*, 34 Wis. 471, 476; *Hibbard v. Telegraph Co.*, 33 Wis. 558, 564. In *Bartlett's Case* the court said: "Most, if not all, the cases upon this subject, refer to rules requiring the repeating of messages to insure accuracy, and seem to be justified in their conclusion on the ground that, owing to the liability to error from causes beyond the skill and care of the operator, it is but a matter of common care and prudence to have the messages repeated, the neglect of which in messages of importance, after being warned of the danger, is a want of care on the part of the sender, and, as the person sending the message is presumed to be the best judge of its importance, he must, on his own responsibility, make his election whether to have it repeated." 62 Me. 216, 217.

The passage cited from the opinion of the circuit court of appeals in *Delaware & A. Telegraph & Telephone Co. v. State*, 3 U. S. App. 30, 105, 2 C. C. A. 1, and 50 Fed. 677, in which the same judge who had decided the present case in the circuit court said, "It is no longer open to question that telephone and telegraph companies are subject to the rules governing common carriers and others engaged in like public employment," had regard, as is evident from the context, and from the reference to *Budd v. New York*, 143 U. S. 517, 12 Sup. Ct. 468, to those rules only which require persons or corporations exercising a public employment to serve all alike, without discrimination, and which make them subject to legislative regulation.

In *Rittenhouse v. Independent Line*, etc, 1 Daly, 474, 44 N. Y. 263, and in *Turner v. Telegraph Co.*, 41 Iowa, 458, it does not appear that the company had undertaken to restrict its liability by express stipulation.

The Indiana decisions cited appear to have been controlled by a statute of the state enacting that telegraph companies should "be liable for special damages occasioned by failure or negligence of their operators or servants in receiving, copying, transmitting, or delivering despatches." *Telegraph Co. v. Meek*, 49 Ind. 53; *Telegraph Co. v. Fenton*, 52 Ind. 1.

The only cases cited by the plaintiff in which, independently of statute, a stipulation that the sender of a message, if he would hold the company liable in damages beyond the sum paid, must have it repeated and pay half that sum in addition, has been held against public policy and void, appear to be *Tyler v. Telegraph Co.*, 60 Ill. 421, 74 Ill. 168; *Ayer v. Telegraph Co.*, 79 Me. 493, 10 Atl. 495; *Telegraph Co. v. Griswold*, 37 Ohio St. 301; *Telegraph Co. v. Crall*, 38 Kan. 679, 17 Pac. 309; *Telegraph Co. v. Howell*, 38 Kan. 685, 17 Pac. 313; and a charge to the jury by Mr. Justice Woods, when circuit judge, as reported in *Dorgan v. Telegraph Co.*, 1 Am. Law T. (N. S.) 406, Fed. Cas. No. 4,004, and not included in his own reports.

The fullest statement of reasons, perhaps, on that side of the question, is to be found in *Tyler v. Telegraph Co.*, above cited.

In that case the plaintiffs had written and delivered to the company on one of its blanks, containing the usual stipulation as to repeating, this message, addressed to a broker: "Sell one hundred (100) Western Union; answer price." In the message, as delivered by the company to the broker, the message was changed by substituting "one thousand (1,000)." It was assumed that "Western Union" meant shares in the Western Union Telegraph Company. The supreme court of Illinois held that the stipulation was "unjust, unconscionable, without consideration, and utterly void." 60 Ill. 439.

The propositions upon which that decision was based may be sufficiently stated, in the very words of the court, as follows: "Whether the paper presented by the company, on which a message is written and signed by the sender, is a contract or not, depends on circumstances;" and "whether he had knowledge of its terms, and consented to its restrictions, is for the jury to determine as a question of fact, upon evidence allunde." "Admitting the paper signed by the plaintiffs was a contract, it did not, and could not, exonerate the company from the use of ordinary care and diligence, both as to their instruments and the care and skill of their operators." "The plaintiffs having proved the inaccuracy of the message, the defendants, to exonerate themselves, should have shown how the mistake occurred;" and, "in the absence of any proof on their part, the jury should be told the presumption was a want of ordinary care on the part of the company." The printed conditions could not "protect this company from losses and damage occasioned by causes wholly within their own control," but "must be confined to mistakes due to the infirmities

of telegraphy, and which are unavoidable." 60 Ill. 431-433.

The effect of that construction would be either to hold telegraph companies to be subject to the liability of common carriers, which the court admitted in an earlier part of its opinion that they were not, or else to allow to the stipulation no effect whatever; for, if they were not common carriers, they would not, even if there were no express stipulation, be liable for unavoidable mistakes, due to causes over which they had no control.

But the final, and apparently the principal, ground for that decision, was restated by the court when the case came before it a second time, as follows: "On the question whether the regulation requiring messages to be repeated, printed on the blank of the company on which a message is written, is a contract, we held it was not a contract binding in law, for the reason the law imposed upon the companies duties to be performed to the public, and for the performance of which they were entitled to a compensation fixed by themselves, and which the sender had no choice but to pay, no matter how exorbitant it might be. Among these duties, we held, was that of transmitting messages correctly; that the tariff paid was the consideration for the performance of this duty in each particular case, and, when the charges were paid, the duty of the company began, and there was therefore no consideration for the supposed contract requiring the sender to repeat the message at an additional cost to him of fifty per cent. of the original charges." 74 Ill. 170, 171.

The fallacy in that reasoning appears to us to be in the assumption that the company, under its admitted power to fix a reasonable rate of compensation, establishes the usual rate as the compensation for the duty of transmitting any message whatever; whereas, what the company has done is to fix that rate for those messages only which are transmitted at the risk of the sender, and to require payment of the higher rate of half as much again if the company is to be liable for mistakes or delays in the transmission or delivery or in the nondelivery of a message.

Indeed, that learned court frankly admitted that its decision was against the general current of authority, saying: "It must, however, be conceded that there is great harmony in the decisions that these companies can protect themselves from loss by contract, and that such a regulation as the one under which appellees defended is a reasonable regulation, and amounts to a contract." And, again: "We are not satisfied with the grounds on which a majority of the decisions of respectable courts are placed." 60 Ill. 430, 431, 435.

In the case at bar, the message, as appeared by the plaintiff's own testimony, was written by him at his office in Philadelphia, upon one of a bunch of the defendant's blanks, which he kept there for the purpose. Although he testified that he did not remember to have read the printed matter on the back, he did

not venture to say that he had not read it; still less that he had not read the brief and clear notices thereof upon the face of the message, both above the place for writing the message and below his signature. There can be no doubt, therefore, that the terms on the back of the message, so far as they were not inconsistent with law, formed part of the contract between him and the company under which the message was transmitted.

The message was addressed by the plaintiff to his own agent in Kansas, was written in a cipher understood by them only, and was in these words: "Despot am exceedingly busy bay all kinds quo perhaps bracken half of it mance moment promptly of purchases." As delivered by the company to the plaintiff's agent in Kansas, it had the words "destroy" instead of "despot," "buy" instead of "bay," and "purchase" instead of "purchases."

The message having been sent and received on June 16th, the mistake, in the first word, of "despot" for "destroy," by which, for a word signifying to those understanding the cipher, that the sender of the message had received from the person to whom it was addressed his message of June 15th, there was substituted a word signifying that his message of June 17th had been received (which was evidently impossible), could have had no other effect than to put him on his guard as to the accuracy of the message delivered to him.

The mistake of substituting, for the last word "purchase," in the singular, the word "purchases," in the plural, would seem to have been equally unimportant, and is not suggested to have done any harm.

The remaining mistake, which is relied on as the cause of the injury for which the plaintiff seeks to recover damages in this action, consisted in the change of a single letter, by substituting "u" for "a," so as to put "buy" in the place of "bay." By the cipher code, "buy" had its common meaning, though the message contained nothing to suggest to any one, except the sender or his agent, what the latter was to buy; and the word "bay," according to that code, had (what no one without its assistance could have conjectured) the meaning of "I have bought."

The impression copies of the papers kept at the defendant's offices at Brookville and Ellis, in the state of Kansas (which were annexed to the depositions of operators at those offices, and given in evidence by the plaintiff at the trial), prove that the message was duly transmitted over the greater part of its route, and as far as Brookville; for they put it beyond doubt that the message, as received and written down by one of the operators at Brookville, was in its original form, and that, as written down by the operator at Ellis, it was in its altered form. While the testimony of the deponents is conflicting, there is nothing in it to create a suspicion that either of them did not intend to tell the

truth; nor is there anything in the case tending to show that there was any defect in the defendant's instruments or equipment, or that any of its operators were incompetent persons.

If the change of words in the message was owing to mistake or inattention of any of the defendant's servants, it would seem that it must have consisted either in a want of plainness of the handwriting of Tindall, the operator who took it down at Brookville, or in a mistake of his fellow operator, Stevens, in reading that writing or in transmitting it to Ellis, or else in a mistake of the operator at Ellis in taking down the message at that place. If the message had been repeated, the mistake, from whatever cause it arose, must have been detected by means of the differing versions made and kept at the offices at Ellis and Brookville.

As has been seen, the only mistake of any consequence in the transmission of the message consisted in the change of the word "bay" into "buy," or rather of the letter "a" into "u." In ordinary handwriting, the likeness between these two letters, and the likelihood of mistaking the one for the other, especially when neither the word nor the context has any meaning to the reader, are familiar to all; and in telegraphic symbols, according to the testimony of the only witness upon the subject, the difference between these two letters is a single dot.

The conclusion is irresistible that, if there was negligence on the part of any of the defendant's servants, a jury would not have been warranted in finding that it was more than ordinary negligence; and that, upon principle and authority, the mistake was one for which the plaintiff, not having had the message repeated according to the terms printed upon the back thereof, and forming part of his contract with the company, could not recover more than the sum which he had paid for sending the single message.

Any other conclusion would restrict the right of telegraph companies to regulate the amount of their liability within narrower limits than were allowed to common carriers in *Hart v. Railroad Co.*, already cited, in which five horses were delivered by the plaintiff to a railroad company for transportation under a bill of lading, signed by him and by its agent, which stated that the horses were to be transported upon the terms and conditions thereof, "admitted and accepted by" the plaintiff "as just and reasonable," and that freight was to be paid at a rate specified, on condition that the carrier assumed a liability not exceeding \$200 on each horse; and the circuit court, and this court on writ of error, held that the contract between the parties could not be controlled by evidence that one of the horses was killed by the negligence of the railroad company, and was a race horse, worth \$15,000. 2 McCrary, 333, 7 Fed. 630; 112 U. S. 331, 5 Sup. Ct. 151.

It is also to be remembered that, by the

third condition or restriction in the printed terms forming part of the contract between these parties, it is stipulated that the company shall not be "liable in any case" "for errors in cipher or obscure messages;" and that it is further stipulated that "no employe of the company is authorized to vary the foregoing," which evidently includes this as well as other restrictions.

It is difficult to see anything unreasonable or against public policy in a stipulation that if the handwriting of a message delivered to the company for transmission is obscure, so as to be read with difficulty, or is in cipher, so that the reader has not the usual assistance of the context in ascertaining particular words, the company will not be responsible for its miscarriage, and that none of its agents shall, by attempting to transmit such a message, make the company responsible.

As the message was taken down by the telegraph operator at Brookville in the same words in which it was delivered by the plaintiff to the company at Philadelphia, it is evident that no obscurity in the message, as originally written by the plaintiff, had anything to do with its failure to reach its ultimate destination in the same form.

But it certainly was a cipher message, and to hold that the acceptance by the defendant's operator at Philadelphia made the company liable for errors in its transmission would not only disregard the express stipulation that no employe of the company could vary the conditions of the contract, but would wholly nullify the condition as to cipher messages, for the fact that any message is written in cipher must be apparent to every reader.

Beyond this, under any contract to transmit a message by telegraph, as under any other contract, the damages for a breach must be limited to those which may be fairly considered as arising according to the usual course of things from the breach of the very contract in question, or which both parties must reasonably have understood and contemplated, when making the contract, as likely to result from its breach. This was directly adjudged in *Telegraph Co. v. Hall*, 124 U. S. 444, 8 Sup. Ct. 577.

In *Hadley v. Baxendale* (decided in 1854) 9 Exch. 345, ever since considered a leading case on both sides of the Atlantic, and approved and followed by this court in *Telegraph Co. v. Hall*, above cited, and in *Howard v. Manufacturing Co.*, 139 U. S. 199, 206, 207, 11 Sup. Ct. 500; Baron Alderson laid down, as the principles by which the jury ought to be guided in estimating the damages arising out of any breach of contract, the following: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered

either arising naturally—i. e. according to the usual course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract." 9 Exch. 354, 355.

In *Sanders v. Stuart*, which was an action by commission merchants against a person whose business it was to collect and transmit telegraph messages, for neglect to transmit a message in words by themselves wholly unintelligible, but which could be understood by the plaintiffs' correspondent in New York as giving a large order for goods, whereby the plaintiffs lost profits, which they would otherwise have made by the transaction, to the amount of £150, Lord Chief Justice Coleridge, speaking for himself and Lords Justices Brett and Lindley, said: "Upon the facts of this case, we think that the rule in *Hadley v. Baxendale* applies, and that the damages recoverable are nominal only. It is not necessary to decide, and we do not give any opinion, how the case might be if the message, instead of being in language utterly unintelligible, had been conveyed in plain and intelligible words. It was conveyed in terms which, as far as the defendant was concerned, were simple nonsense. For this reason, the second portion of Baron Alderson's rule clearly applies. No such damages as above mentioned could be 'reasonably supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it;' for the simple reason that the defendant, at least, did not know what his contract was about, nor what nor whether any damage would follow from the breach of it. And for the same reason, viz. the total ignorance of the defendant as to the subject-matter of the contract (an ignorance known to, and indeed intentionally procured by, the plaintiffs), the first portion of the rule applies also; for there are no damages more than nominal which can 'fairly and reasonably be considered as arising naturally—i. e. according to the usual course of things—from the breach' of such a contract

as this." 1 C. P. Div. 326, 328, 45 Law J. C. P. 682, 684.

In *Telegraph Co. v. Gildersleve*, already referred to, which was an action by the sender against a telegraph company for not delivering this message received by it in Baltimore, addressed to brokers in New York, "Sell fifty (50) gold," Mr. Justice Alvey, speaking for the court of appeals of Maryland, and applying the rule of *Hadley v. Baxendale*, above cited, said: "While it was proved that the dispatch in question would be understood among brokers to mean fifty thousand dollars of gold. It was not shown, nor was it put to the jury to find, that the appellant's agents so understood it, or whether they understood it at all. 'Sell fifty gold' may have been understood in its literal import, if it can be properly said to have any, or was as likely to be taken to mean fifty dollars as fifty thousand dollars by those not initiated; and, if the measure of responsibility at all depends upon a knowledge of the special circumstances of the case, it would certainly follow that the nature of this dispatch should have been communicated to the agent at the time it was offered to be sent, in order that the appellant might have observed the precautions necessary to guard itself against the risk. But without reference to the fact as to whether the appellant had knowledge of the true meaning and character of the dispatch, and was thus enabled to contemplate the consequences of a breach of the contract, the jury were instructed that the appellee was entitled to recover to the full extent of his loss by the decline in gold. In thus instructing the jury, we think the court committed error, and that its ruling should be reversed." 29 Md. 232, 251.

In *Baldwin v. Telegraph Co.*, which was an action by the senders against the telegraph company for not delivering this message, "Telegraph me at Rochester what that well is doing," Mr. Justice Allen, speaking for the court of appeals of New York, said: "The message did not import that a sale of any property or any business transaction hinged upon the prompt delivery of it, or upon any answer that might be received. For all the purposes for which the plaintiffs desired the information, the message might as well have been in a cipher or in an unknown tongue. It indicated nothing to put the defendant upon the alert, or from which it could be inferred that any special or peculiar loss would ensue from a nondelivery of it. Whenever special or extraordinary damages, such as would not naturally or ordinarily follow a breach, have been awarded for the nonperformance of contracts, whether for the sale or carriage of goods or for the delivery of messages by telegraph, it has been for the reason that the contracts have been made with reference to peculiar circumstances known to both, and the particular loss has been in the contemplation of both, at the time of making the contract, as a contingen-

cy that might follow the nonperformance." "The dispatch not indicating any purpose other than that of obtaining such information as an owner of property might desire to have at all times, and without reference to a sale, or even a stranger might ask for purposes entirely foreign to the property itself, it is very evident that, whatever may have been the special purpose of the plaintiffs, the defendant had no knowledge or means of knowledge of it, and could not have contemplated either a loss of a sale, or a sale at an undervalue, or any other disposition of or dealing with the well or any other property, as the probable or possible result of a breach of its contract. The loss which would naturally and necessarily result from the failure to deliver the message would be the money paid for its transmission, and no other damages can be claimed upon the evidence as resulting from the alleged breach of duty by the defendant." 45 N. Y. 744, 749, 750, 752. See, also, *Hart v. Cable Co.*, 86 N. Y. 633.

The supreme court of Illinois, in *Tyler v. Telegraph Co.*, above cited, took notice of the fact that in that case "the dispatch disclosed the nature of the business as fully as the case demanded." 60 Ill. 434. And in the recent case of *Cable Co. v. Lathrop* the same court said: "It is clear enough that, applying the rule in *Hadley v. Baxendale*, supra, a recovery cannot be had for a failure to correctly transmit a mere cipher dispatch, unexplained, for the reason that to one unacquainted with the meaning of the ciphers it is wholly unintelligible and nonsensical. An operator would therefore be justifiable in saying that it can contain no information of value as pertaining to a business transaction, and a failure to send it or a mistake in its transmission can reasonably result in no pecuniary loss." 131 Ill. 575, 585, 23 N. E. 583.

The same rule of damages has been applied, upon failure of a telegraph company to transmit or deliver a cipher message, in one of the Wisconsin cases cited by the plaintiff, and in many cases in other courts. *Candee v. Telegraph Co.*, 34 Wis. 471, 479-481; *Beaupre v. Telegraph Co.*, 21 Minn. 155; *Mackay v. Telegraph Co.*, 16 Nev. 222; *Daniel v. Telegraph Co.*, 61 Tex. 452; *Cannon v. Telegraph Co.*, 100 N. C. 300, 6 S. E. 731; *Telegraph Co. v. Wilson*, 32 Fla. 527, 14 South. 1; *Behm v. Telegraph Co.*, 8 Biss. 131, Fed. Cas. No. 1,234; *Telegraph Co. v. Martin*, 9 Ill. App. 587; *Abeles v. Telegraph Co.*, 37 Mo. App. 554; *Kinghorne v. Telegraph Co.*, 18 U. C. Q. B. 60, 69.

In the present case the message was, and was evidently intended to be, wholly unintelligible to the telegraph company or its agents. They were not informed, by the message or otherwise, of the nature, importance, or extent of the transaction to which it related, or of the position which the plaintiff would probably occupy if the message were correctly transmitted. Mere knowledge that the plaintiff was a wool merchant, and that To-

land was in his employ, had no tendency to show what the message was about. According to any understanding which the telegraph company and its agents had, or which the plaintiff could possibly have supposed that they had, of the contract between these parties, the damages which the plaintiff seeks to recover in this action, for losses upon wool purchased by Toland, were not such as could reasonably be considered, either as arising, according to the usual course of things, from the supposed breach of the contract itself, or as having been in the contemplation of both

parties, when they made the contract, as a probable result of a breach of it.

In any view of the case, therefore, it was rightly ruled by the circuit court that the plaintiff could recover in this action no more than the sum which he had paid for sending the message. Judgment affirmed.

Mr. Chief Justice FULLER and Mr. Justice HARLAN dissented.

Mr. Justice WHITE, not having been a member of the court when this case was argued, took no part in its decision.

WESTERN UNION TEL. CO. v. WILSON.

(14 South. 1, 32 Fla. 527.)

Supreme Court of Florida. Nov. 8, 1893.

Appeal from circuit court, Escambia county; James F. McClellan, Judge.

Action by Charles M. Wilson against the Western Union Telegraph Company for a failure to transmit and deliver a message. Plaintiff had judgment, and defendant appeals. Reversed.

Mallory & Maxwell, for appellant. John C. Avery, for appellee.

TAYLOR, J. The appellee sued the appellant in the circuit court of Escambia county, in case, for damages for its failure to transmit and deliver a telegraphic message in cipher. The suit resulted in a judgment for the plaintiff in the sum of \$688.88, and therefrom the defendant telegraph company appeals.

The declaration alleges as follows: "That the Western Union Telegraph Company, a corporation, the defendant, on the 12th day of December, 1887, was engaged in the business of transmitting telegraphic messages between Pensacola, Fla., and New York, in the state of New York, and in the delivery thereof to other cable and telegraph companies for transmission to Liverpool, England, where the said plaintiff had a regular merchant broker or agent, to wit, one A. Dobell, through whom the plaintiff negotiated, by means of such messages, the sale in Europe of cargoes of lumber and timber, the plaintiff being then and there a timber and lumber merchant at the city of Pensacola. That on said day the plaintiff delivered to the defendant, and the defendant received from him at its office in the city of Pensacola, and undertook to transmit and cause to be transmitted, and it was its duty to transmit and cause to be transmitted, to the said A. Dobell, the following cipher message: 'Dobell, Liverpool: Gladfulness—shipment—rosa — bonheur — luciform — banewort — margin,'—which the said Dobell would have understood, and the plaintiff intended to be an offer of a cargo of lumber and timber from said port of Pensacola for sale through the said Dobell in Europe, and the said Dobell would have sold the same for the plaintiff on the terms of said offer at a profit to the plaintiff of twelve hundred dollars, but the defendant failed and neglected to send the said message, in violation of its duty to the plaintiff, and to the plaintiff's loss of \$1,200," and therefore he sues, etc.

At the trial the plaintiff, over the defendant's objection, was permitted to testify, in establishment of the damages claimed, that he had to sell his cargo of lumber in Europe upon the market for the best price he could get, which was 52 shillings a load, and which amounted to \$630.84 less than the price at which he offered same for sale in the message failed to be sent. The over-

ruled objection of the defendant to this testimony was that the damages sought to be shown thereby was too remote, and was not in the contemplation of the parties at the time of the alleged making of the contract for the transmission of said message. To this ruling the defendant excepted, and it is assigned as error. The question presented is, what is the proper measure of damages to be recovered of a telegraph company holding itself out to the service of the public, for hire, as the transmitter of messages by electricity, upon its failure to transmit or deliver a message written in cipher, or in language unintelligible except to those having a key to its hidden meaning. As this question has heretofore been passed upon by this court contrary to the views we find it impossible to become divested of, and, as we think, contrary to the great weight of the well-reasoned adjudications both in this country and in England, we take it up with diffidence that finds no palliative in the fact that the decision heretofore was by a divided court. *Telegraph Co. v. Hyer*, 22 Fla. 637, 1 South. 129. In that case the majority of the court, while approving the following well-established rule first formulated in reference to carriers of goods in the cause celebre of *Hadley v. Baxendale*, 9 Exch. 341: "Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be either such as may fairly and substantially be considered as arising naturally, i. e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it,"—hold that it has no applicability to the contracts of telegraph companies for the transmission of messages, and that such companies may be justly considered and treated as standing alone,—a system unto itself. The reasoning leading to this conclusion is as follows: "The common carrier charges different rates of freight for different articles, according to their bulk and value, and their respective risks of transportation, and provides different methods for the transportation of each. It is not shown here that the defendant company had any scale of prices which were higher or lower, as the importance of the dispatch was great or small. It cannot be said, then, that for this reason the operator should be informed of its importance, when it made no difference in the charge of transmission. It is not shown that, if its importance had been disclosed to the operator, that he was required by the rules of the company to send the message out of the order in which it came to the office, with reference to other messages awaiting transmission; that he was to use any extra degree of skill, any different method or agency for sending it, from the time, the skill used, the agencies

employed, or the compensation demanded for sending an unimportant dispatch, or that it would aid the operator in its transmission. For what reason, then, could he demand information that was in no way whatever to affect his manner of action, or impose on him any additional obligation? It could only operate on him persuasively to perform a duty for which he had been paid the price he demanded, which, in consideration thereof, he had agreed to perform, and which the law, in consideration of his promise, and the reception of the consideration therefor, had already enjoined on him." The answer to all this is that the same argument is equally applicable as a reason why the rule in *Hadley v. Baxendale* should not apply to carriers of goods for hire. The carrier of goods, in contracting to carry and deliver, deals with the tangible. When he contracts, he has in his mind's eye, from the visible, tangible subject of his contract, what will be the probable damage resulting directly from a breach of it on his part, and so has the other party to the contract with the carrier. Therefore, the damage likely to flow from a breach by the carrier can properly be said to enter mutually into the contemplation of both parties to the contract, and it is this mutuality in the contemplation of both parties to the contract of the results that will be likely to flow directly from its breach that really furnishes that equitable feature of the rule that the damages thus mutually contemplated are in fact the damages that the law will impose for the breach. Why? Because, in the eye of the law, the parties having mutually contemplated such damages in going into such contract, those damages can alone be inferred as having entered into their contract as a silent element thereof. The rule in *Hadley v. Baxendale* is applicable alone to breaches of contract, and formulates concisely the measure of damages for the breach of those contracts that do not within themselves, in express terms, fix the penalty to follow their breach. In other words, this rule does nothing more than to give expression to that part of the contract which, in the eye of the law, has been mutually agreed upon between the parties, but concerning which their contract itself is silent. This essential leading feature of the rule, we think, was wholly lost sight of in the discussion of the question in *Telegraph Co. v. Hyer*, supra, i. e. that the damages provided for under the rule arise *ex contractu*, and that, unless there is mutuality in all the essential elements that enter into or grow out of the contract, the whole fabric becomes unilateral, and abhorrent in the eyes of the law. The assertion, as a rule of law, that one party to a contract shall alone have knowledge that a breach of that contract will directly result in the loss of thousands of dollars, and that upon such breach he can recover of the other party to the contract all of such, to him, unforeseen, unexpected, unanticipated, nonconsented-to damages, seems to us to

be a complete upheaval of all the old landmarks in reference to damages upon broken contracts, and the establishment of a new rule, that is neither fair, just, or equitable, and which, if it is to be applied to the broken contracts of telegraph companies, must also, according to every principle of consistency, be applied, under like conditions, to every violated contract where individuals are the contracting parties. The argument in *Telegraph Co. v. Hyer*, supra, that it was not shown that the telegraph company would have charged more, or used more dispatch, or taken more care, or been aided in any way in the performance of its duty, if it had been informed of the contents or purport of the message contracted to be sent in that case, is entirely foreign to the question. In arriving at the rule of law as to the damage that parties to contracts are entitled to, as matter of legal right, upon breach thereof, a consideration of anything that might or might not in fact have prevented the wrongful breach has nothing to do with the subject whatever. But we are to look to and consider the mutual rights of the parties from the inception of the contractual relations between them, down through the contract itself, to the breach complained of. One of the primary rights that each party has, who is about to enter into a contract with another, a breach of which may result in damage, is to be so situated that he may foresee what direct, probable results will reasonably, and in the usual course of events, follow bad faith, neglect, or other breach upon his part. Why? Not that it will or will not in fact deter him from being delinquent, but that he may, if he will, so act as to guard against and avoid, for his own benefit, the foreseen, calamitous consequence, or that he may, if he does not, be held to have knowingly and willingly subjected himself to the contemplated consequences of his wrong, that, from being foreseen and contemplated, the law will impute his consent thereto.

That the rule formulated in *Hadley v. Baxendale*, supra, is the one properly applicable to the contracts of telegraph companies for the transmission of messages has the support of the overwhelming weight of the decided cases, not only as to the numerical strength of the decisions concurring therein, but in the logical soundness of the reasoning upon which their conclusions rest, as will be seen from the following authorities: *Telegraph Co. v. Hall*, 124 U. S. 444, 8 Sup. Ct. 577; *Sanders v. Stuart*, 1 C. P. Div. 326; *Behm v. Telegraph Co.*, 8 Biss. 131; *White v. Telegraph Co.*, 14 Fed. 710; *Baldwin v. Telegraph Co.*, 45 N. Y. 744; *Telegraph Co. v. Graham*, 1 Colo. 230; *First Nat. Bank v. W. U. Tel. Co.*, 30 Ohio St. 555; *Candee v. Telegraph Co.*, 34 Wis. 471; *Daniel v. Telegraph Co.*, 61 Tex. 452; *Beaupre v. Telegraph Co.*, 21 Minn. 155; *True v. Tel-*

¹ Fed. Cas. No. 1,234.

egraph Co., 60 Me. 9; Squire v. Telegraph Co., 98 Mass. 232; Telegraph Co. v. Wenger, 55 Pa. St. 262; Tyler v. Telegraph Co., 60 Ill. 421; Telegraph Co. v. Gildersleve, 29 Md. 232; Telegraph Co. v. Kirkpatrick, 76 Tex. 217, 13 S. W. 70; Cannon v. Telegraph Co., 100 N. C. 300, 6 S. E. 731; Landsberger v. Telegraph Co., 32 Barb. 530; Manville v. Telegraph Co., 37 Iowa, 214; Telegraph Co. v. Edsall, 63 Tex. 668; Hibbard v. Telegraph Co., 33 Wis. 558; Thompson v. Telegraph Co., 64 Wis. 531, 25 N. W. 789; Abeles v. Telegraph Co., 37 Mo. App. 554; Telegraph Co. v. Cornwell, 2 Colo. App. 491, 31 Pac. 303; 3 Suth. Dam. 298; Wood, Mayne, Dam. 40; Thomp. Elect. §§ 311-316, inclusive; Id. §§ 346, 358-375, inclusive. Opposed to this array of authorities are the following decisions by divided courts, with the exception of the Georgia and Mississippi cases: Telegraph Co. v. Hyer, supra; Daughtery v. Telegraph Co., 75 Ala. 168; Id., 89 Ala. 191, 7 South. 660; Telegraph Co. v. Way, 83 Ala. 542, 4 South. 844; Telegraph Co. v. Fatman, 73 Ga. 285; Alexander v. Telegraph Co., 66 Miss. 161, 5 South. 397. The case of Telegraph Co. v. Reynolds, 77 Va. 173, is also cited as sustaining a contrary rule, but a careful reading of that case will disclose the fact that the conclusions reached are predicated upon a statutory provision in their Code. In the case at bar, the message that it is alleged the defendant company failed to send was in cipher, and contained nothing that would indicate to the defendant's operator whether it contained a criticism upon the "Horse Fair" painting by the great artist, Rosa Bonheur, named in the message, or whether it related to a matter of dollars and cents. There was no explanation made to the operator as to its meaning or importance, except that the plaintiff said that the word "gladfulness," in the message, had a special meaning. What that special meaning was, he did not disclose. Under these circumstances, all that the plaintiff could rightfully recover for the defendant's failure to send or deliver the message would be nominal damages, or, at most, the sum paid by him as the price of its transmission. It was error, therefore, for the court to admit testimony as to the damage sustained by the plaintiff by the loss of sale of a cargo of timber consequent upon the failure to forward the message.

There is another feature presented in the proofs, aside from all that has been said upon the rule of damages in such cases, that would prevent the recovery had in this case. The plaintiff himself testifies that he received from his agent, Dobell, in Europe, an offer for the cargo of timber. What that offer was, is nowhere stated or shown. Then he says: "I decided to make a final proposition, which I did by taking the message to the telegraph office, that was not sent, which message, when translated, was an offer by me of said cargo of timber for sale at 54 shillings per load." Then he says that he

missed the sale of the cargo at the terms offered by him in his message in consequence of the defendant's failure to send it, and consequently had to sell on the market for the best price he could get, which was 52 shillings per load. There is not a word of proof in the record to show that his offer contained in the unsent message would ever have been accepted, or that he could ever at any time have sold the timber at the price at which he so offered it, or that it could ever have been sold at any greater price than the one he actually received for same, whether his message had been sent or not. Yet, in the face of this state of the proofs, damages have been allowed to the plaintiff equal to the difference between a price at which he simply offered his timber for sale, and the price actually received by him for it, without a word of proof to show whether the higher price at which he offered it for sale could ever have been obtained for it or not.

The appellee contends that because of the decision in Telegraph Co. v. Hyer, supra, the question of damages cannot be considered; that, as to this case, it is *stare decisis*. This doctrine, as we understand it, is properly applicable to decisions furnishing rules of property, and those construing statutes, and to those passing upon the validity of contracts in which investments have or may have been made upon the faith of the adjudication as to their validity, in which cases former decisions upon the same questions will be adhered to, but we do not think this case falls within the rule.

In reversing the former ruling of the court in the Hyer Case, we do not interfere with any vested right acquired upon the faith of that adjudication, but pass upon the rule of damages, as upon an abstract proposition, to follow the breach of such contracts. Of the erroneousness of the rule as laid down in that case, we are perfectly and clearly satisfied; and in such case, in determining the propriety of overruling it as a solemn adjudication, we are to be governed largely by a consideration of the results that will likely flow from the enunciation and establishment of the one or the other of the two rules. If, in such case, we conclude that the affirmance of what we deem to be the erroneous rule in that case will be productive of more far-reaching and harmful results than would follow the disaffirmance thereof, then it becomes our duty to overturn it, and such we think would be the result here. Besides being unilateral and wholly unfair, as we have before stated, we cannot see why, if the protection of the rule in *Hadley v. Baxendale* is to be withheld from contracts with telegraph companies, it should not also be denied in the daily recurring contractual controversies between individuals. To overturn the rule in controversies as between man and man, would be such an uprooting of the old landmarks as to make it impracticable to surmise the harmful results that would follow.

Entertaining these views, we do not think that the doctrine of stare decisis constrains us to adhere to the rule in the Hyer Case, but think that less harm will follow our return to the well-beaten and familiar track that furnishes a plain and easily comprehended rule for all contracting parties, be they corporate or individual.

The judgment appealed from is reversed, and a new trial ordered.

RANEY, C. J., (concurring.) A reconsideration of the question of the measure of damages involved here confirms the correctness of the view expressed in my dissenting opinion in *Telegraph Co. v. Hyer*, 22 Fla. 649 et seq., 1 South. 129, and I concur in the opinion of Judge Taylor, that the rule followed in the case mentioned is unfair, and ought not to be perpetuated; and, without committing myself further upon the question of stare decisis, my conclusion is that more injury will result in the future from adhering to the rule of the Hyer Case than will accrue to parties to past transactions from changing it, and that the judgment should be reversed. *Cooley, Const. Lim. (5th Ed.)* 65, and note 1; *Wells, Stare Dec.* § 624 et seq.; *Chamberlain, Stare Dec.* 19.

MABRY, J., (dissenting.) The question of liability to damage for a failure on the part

of a telegraph company to send a cipher message is not a new one in this court. Over six years ago this question was deliberately settled here by the decision in the case of *Telegraph Co. v. Hyer*, 22 Fla. 652, 1 South. 129. It is proposed now to reverse this case, and my view is that it should not be done. Every question in reference to cipher messages entering into the case now before us was fully discussed and maturely considered in the Hyer Case, and this case has the support of decisions in Alabama, Mississippi, Georgia, and Virginia. Under the decision in the Hyer Case, there was a remedy for damages for a failure on the part of a telegraph company to send a cipher message, when it had, for compensation, agreed to do so. There is much merit in the rule that, where the company holds itself out to the public as a transmitter of cipher messages for pay, it should not be allowed, after receiving the money and agreeing to send the message, to deny its liability for damages resulting from its own violation of duty on the ground that the message was in cipher, and its contents not known to the company when it agreed to send it. This court having planted itself in favor of this rule over six years ago, I do not think we should now disturb it. I do not see how greater harm will result from adhering to the decision than overruling it.

CONNELL v. WESTERN UNION TEL. CO.

(22 S. W. 345, 116 Mo. 34.)

Supreme Court of Missouri, Division No. 2.
May 16, 1893.

Error to circuit court, Pettis county; Richard Field, Judge.

Action by Mathew Connell against the Western Union Telegraph Company for failure to promptly deliver a telegram. From an order of dismissal for want of jurisdiction, plaintiff appeals. Affirmed.

Wm. S. Shirk, for plaintiff in error. Karnes, Holmes & Krauthoff, Charles E. Yeater, and G. H. Fearons, for defendant in error.

GANTT, P. J. This is an action for damages for the negligence of defendant in failing to deliver to plaintiff the following telegraphic message sent to him by his wife: "Sedalia, Mo., Dec. 13, 1889. To Matt Connell, Soldiers' Home, Leavenworth, Kansas: Your child is dying. Mary." The plaintiff alleged that his wife paid the customary charge, 50 cents, for its transmission, and that he had refunded that sum to her. Plaintiff then alleges that his child died on the 24th day of December, 1889, "and that if said message had been transmitted and delivered with any degree of diligence or promptness whatever, he would have been able to be present with his said child during its last sickness, and at its death, and that by reason of the great negligence and carelessness of defendant in failing to deliver said message, and of his being thereby deprived of being with his said child during its last sickness, and at its death, he lost, not only the fifty cents paid for sending said message, but also suffered great anguish and pain of mind and body, and was physically and mentally prostrated when he learned that his child had died, and been buried, without knowledge on his part of its sickness and death." He alleges that he was an inmate of the soldiers' home from December 13, 1889, continuously, till February 21, 1890, and by the slightest diligence he could have been found. He alleges, further, that he is damaged in the sum of \$5,000, for which he prays judgment. On motion of defendant the circuit court struck out of the petition the words, "but also suffered great anguish and pain of mind and body, and was physically and mentally prostrated, when he learned that his child had died, and had been buried, without knowledge on his part of its sickness and death." This left the action pending for the 50 cents only, and, plaintiff declining to amend, the court sustained another motion to dismiss for want of jurisdiction of the subject-matter of the action.

The sole question discussed by the appellant in this case is this: "Where a telegraph company is advised by the contents of a message that great mental suffering and pain will naturally result from its neglect to transmit and deliver the message promptly, can

damages be recovered by the sendee for such mental agony and distress, caused by a failure to promptly transmit and deliver?" The proposition, it will be observed, relates simply to damages arising from a breach of contract. Prior to this time there had been but one opinion expressed in the decisions of this court, and that is clearly adverse to the contention of the appellant, and this is not questioned by the able counsel who represents the appellant; but he urges that, inasmuch as telegraphy is of comparatively recent origin, we should, in view of the function it performs, make an exception in the construction of the contracts made by those engaged in it, and the damages which flow from a breach thereof. That an action for mental anguish, disconnected with physical injury, for the breach of a contract, could not be maintained at common law, with the single exception of the breach of a marriage contract, we think, is abundantly established. Wood, Mayne, Dam. 75; Lynch v. Knight, 9 H. L. Cas. 577; Walsh v. Railroad Co., 42 Wis. 23; Wyman v. Leavitt, 71 Me. 227. The subject came under view in this court in Trigg v. Railway Co., 74 Mo. 147. In that case a lady, with two little children, was carried beyond the station to which she was traveling. It was not claimed that any indignity was offered, or that she suffered personal injury. The trial court instructed that the jury might award her damages for the anxiety and suspense of mind suffered in consequence of the delay in reaching her destination. This court, in reversing the cause, said: "The instruction as to the measure of damages was erroneous. Neither the anxiety and suspense of mind suffered by the plaintiff in consequence of the delay, nor the effect upon her health, nor the danger to which she was exposed in consequence of the train being stopped an insufficient length of time, were proper elements of damage in this case, as no personal injury was received by the plaintiff, and no circumstances of aggravation attended the wrongful act complained of. If the anxiety and suspense of mind suffered by the plaintiff in consequence of the delay in this case is a ground of recovery, similar suspense and anxiety of mind would be an equally good ground of recovery in a case where a railroad train should wrongfully stop to take on a passenger." The general rule is that "pain of mind, when connected with bodily injury, is the subject of damages; but it must be so connected in order to be included in the estimate, unless the injury is accompanied by circumstances of malice, insult, or inhumanity;" citing Pierce, R. R. (1881) 302; Railway Co. v. Birney, 71 Ill. 391. The authority of this case has never been questioned by the courts of this state, to our knowledge. The rule announced is in strict harmony with that of the courts of last resort in our sister states, until, in 1881, the supreme court of Texas, in So Relle v. Telegraph Co., 55 Tex. 308, announced the doctrine that the sender of a so-

cial telegram could recover for the mental anguish caused by delay in its delivery. The authorities relied upon by the supreme court of Texas in that case were actions for physical injuries, in which the mental agony formed an inseparable part,—a doctrine never questioned in this state since *Porter v. Railroad Co.*, 71 Mo. 66. The learned commissioner who prepared the opinion did quote a suggestion of the authors of *Shearman & Redfield on Negligence*, to the effect that they thought such an action ought to lie, but they did not claim that any court in this country or England had previously sustained their view. The Texas case has been followed in that state in a great number of cases, and has been adopted in Indiana, North Carolina, Kentucky, Alabama, and Tennessee. On the other hand, this new departure has been vigorously assailed and denied by the supreme courts of Mississippi, Georgia, Kansas, and in Dakota, and in a most luminous dissenting opinion by Judge Lurton, of the supreme court of Tennessee, now judge of the United States circuit court for the sixth circuit, in which *Folkes, J.*, concurred. The majority of the supreme court of Tennessee do not go to the length contended for by the appellant here. The majority lay great stress upon the fact that by virtue of a statute in Tennessee a cause of action is given to the aggrieved party for damages for failure to deliver any message. Hence they argue that, as the party has the right to some damages by virtue of the statute, they conclude they may add the anguish of mind as an element. It is impossible to escape the feeling that the very able judges were resorting to a fiction to justify them in supporting the action. The case of *So Relle v. Telegraph Co.*, 55 Tex. 310, has been nowhere more flatly repudiated than by the supreme court of Texas itself, in *Railway Co. v. Levy*, 59 Tex. 563. Judge Stayton, in an able and lucid discussion of the authorities, demonstrates "that the cases in which damages have been allowed for mental distress * * * was the incident to a bodily injury suffered by the distressed person, or cases of injury to reputation or property, in which pecuniary damage was shown, or the act such that the law presumes some damage, however slight, from the act complained of. They are not cases in which the bodily injury or other wrong was suffered by one person, and the mental distress by another." The reasoning of the supreme court of Tennessee—that, because the Code gave an action for some damages, that opened the way to add damages for mental distress—is, we think, at complete variance with our own decisions. In this state we have a damage act which gives a right of action where death has resulted, and similar statutes exist in most of the states. The construction placed upon these statutes has been that no relative, save those named in the statute, can recover at all, and no recovery as a solatium for mental suffering is allowed,

where not expressly given by the statute. *Field, Dam.* 498; *Porter v. Railroad Co.*, 71 Mo. 66; *Parsons v. Railroad Co.*, 94 Mo. 286, 6 S. W. Rep. 464; *Schaub v. Railroad Co.*, 106 Mo. 74, 16 S. W. Rep. 924.

But it is said damages for injury to the feelings have always been allowed in actions founded upon a breach of promise to marry, and this is true in this as in other states. *Wilbur v. Johnson*, 58 Mo. 600; *Bird v. Thompson*, 96 Mo. 424, 9 S. W. Rep. 788. But it has always been regarded as an exception to the rule. In this action, plaintiff's pecuniary loss forms an important element. The action is of common-law origin, and at common law the husband, on marriage, became liable for the wife's debts, and for support in a manner and style commensurate with his own social standing, and evidence of his station in life and financial condition has always been admitted. *Wilbur v. Johnson*, supra. As was well said by *Cooper, J.*, in *Telegraph Co. v. Rogers*, 68 Miss. 748, 9 South. Rep. 823: "This action, though in form one for the breach of contract, partakes in several features of the characteristics of an action for the willful tort; and, though the damages recoverable for the plaintiff for mental suffering are spoken of as 'compensatory,' the fervent language of the courts indicates how shadowy is the line that separates them from those strictly pecuniary." *Harrison v. Swift*, 13 Allen, 144; *Kurtz v. Frank*, 76 Ind. 595; *Thorn v. Knapp*, 42 N. Y. 475; *Coryell v. Colbaugh*, 1 N. J. Law, 77. "Especially those cases in which evidence of seduction is admitted to ascertain the damages. So much, indeed, does the motive of the defendant enter into the question of damages, that in *Johnson v. Jenkins*, 24 N. Y. 252, the defendant was permitted to give in evidence, in mitigation of damages, the fact that he refused to consummate the marriage because of the settled opposition of his mother, who was in infirm health."

These considerations sufficiently indicate the reasons that actuated the courts to make this exception. Few precedents for this action will be found where the defendant was impecunious. The learned counsel has collected various other cases in which mental anguish was recognized as an element of damage, and concludes with the query, "If allowed in these, why not in this action?" Let us consider these in the order of his brief: Assault and battery. Under this head is cited the case of *Craker v. Railway Co.*, 36 Wis. 657. In that case the conductor of a train seized upon the moment when the other employes were absent from the car to take improper liberties with a lady passenger. The evidence showing that he placed his arm around her, and, against her vehement protests, kissed her. It was a clear physical violation of her person, which the courts have ever held constituted an assault and battery, and actionable. The law redresses such a wrong in its initial

stages. The protection of the person has ever been an object of great solicitude to the common law. The present ability of actual violence often justifies recourse to extreme measures in preventing a consummation of threatened wrong to the person. The cases cited under this head clearly add no weight to plaintiff's claim. The cases of malicious prosecution and false imprisonment come under that general class of willful wrong to the person, affecting the liberty, character, reputation, personal security, and domestic relations. Judge Lumpkin, in *Chapman v. Telegraph Co.*, (Ga.) 15 S. E. Rep. 901, disposes of the argument attempted to be drawn from this class as follows: "In an action for wrongful attachment, on the ground that the defendant was about to dispose of his property with intent to deprive his creditors, it was held (by a divided court) that the mortification was a part of the actual damages. *Byrne v. Gardner*, 33 La. Ann. 6. Of course it was a case of serious injury to the plaintiff's business standing, and therefore, even if sound, is no authority on the present question. In an action for false imprisonment, or for malicious arrest and prosecution, mental anguish has been held a proper subject for compensatory damages. *Fisher v. Hamilton*, 49 Ind. 341; *Stewart v. Maddox*, 63 Ind. 51; *Coleman v. Allen*, 79 Ga. 637, 5 S. E. Rep. 204. Of course, such injuries are essentially willful, and, besides, are violations of the great right of personal security or personal liberty." As to the action of seduction, every lawyer knows that proof of some service by the daughter has been invariably required to sustain it; and the same rule is rigidly adhered to in *Magee v. Holland*, 27 N. J. Law, 86, to which we are cited by counsel, for the forcible abduction of a daughter. In the case of enticing away a daughter, we are referred to *Stowe v. Heywood*, 7 Allen, 118. The court permitted damages for mental suffering on the express ground that it was a willful injury, and declined to say whether such damages could ever be recovered for negligence alone, as in the case at bar. This case illustrates the greatest difficulty in estimating damages for mental suffering. Judge Metcalf says: "Mental suffering cannot be measured aright by outward manifestations, for there may be a show of great distress where little or none is felt. And great distress may be concealed, and borne in silence, with an apparently quiet mind. *Ab inquieto saepe stimulator quies.*" "And we nowhere find that any other evidence of mental suffering, besides that of the injury which was the alleged cause of action, was ever before admitted." The court reversed the case because the trial court permitted evidence "tending to show" plaintiff suffered from "pain and anxiety of mind." It is hardly necessary to add that in a case of libel or slander, if the words are not actionable per se, special damages must be al-

leged and proved. When they are actionable per se, they are construed because of their evident tendency to degrade the citizen in the estimation of his neighbors, and in both cases they are malicious. We have now gone through the list, and we find in none of them any reason for adopting the rule that, for the mere negligent failure to comply with a contract, damages may be recovered on the sole ground of injured feelings, when the plaintiff has suffered no physical injury. The law, up to this time, has essayed to protect the person and property of the individual. All the cases cited are based upon this principle. Reputation is included in the person. *Johnson v. Bradstreet Co.*, 87 Ga. 79, 13 S. E. Rep. 250.

The damages claimed in this action cannot be allowed as exemplary damages. The Texas court, in one case, did so hold, but afterwards repudiated it. *Stuart v. Telegraph Co.*, 66 Tex. 580, 18 S. W. Rep. 351. But we do not think that the courts of England and of this country, prior to 1881, were rejecting actions like this on a mere arbitrary assumption, unsustained by reason. A doctrine which has passed so long unchallenged by the great jurists who have adorned the bench of our state and federal courts is not to be lightly discarded at the behest of ingenious and able counsel. The law is, and ought to be, more stable than this. It has long been the boast of common-law writers that the common law was a system founded upon reason; and one of its maxims has ever been that, when the reason upon which a law was based ceased, the law itself ceased. Speaking for ourselves, we are satisfied that the common law, denying an action for mental distress alone, was founded upon the best of reason, and an enlightened public policy. And we question if the real reasons were ever more clearly and satisfactorily stated than by Judge Lurton, which opinion we adopt: "The reason why an independent action for such damages cannot and ought not to be sustained is found in the remoteness of such damages, and in the metaphysical character of such an injury, considered apart from physical pain. Such injuries are generally more sentimental than substantial. Depending largely upon physical and nervous condition, the suffering of one under precisely the same circumstances would be no test of the suffering of another. Vague and shadowy, there is no possible standard by which such an injury can be justly compensated, or even approximately measured. Easily simulated, and impossible to disprove, it falls within all the objections to speculative damages, which are universally excluded because of their uncertain character. That damages so imaginary, so metaphysical, so sentimental shall be ascertained and assessed by a jury with justness, not by way of punishment to the defendant, but as mere compensation to

plaintiff, is not to be expected. That the grief natural to the death of a loved relative shall be separated from the added grief and anguish resulting from delayed information of such mortal illness or death, and compensation given for the latter only, is the task imposed by the law, as determined by the majority of the supreme court of Tennessee." "It is legitimate to consider the evils to which such a precedent logically leads. Upon what sound legal considerations can this court refuse to award damages for injury to the feelings, mental distress, and humiliation, when such injury results from the breach of any contract? Take the case of a debtor who agrees to return the money borrowed on a certain day, who breaches his agreement willfully, with knowledge that such breach on his part will probably result in the financial ruin and dishonor of his disappointed creditor. Why shall not such a debtor, in addition to the debt and the interest, also compensate his creditor for this ruin, or at least for his mental sufferings? Upon what principle can we longer refuse to entertain an action for injured feelings consequent upon the use of abusive and defamatory language, not charging a crime, or resulting in special pecuniary damages? Mental distress is, or may be in some cases, as real as bodily pain, and it as certainly results from language not amounting to an imputation of crime; yet such actions have always been dismissed as not authorized by the law as it has come down to us, and as it has been for all time administered."

Why, if this rule is to become the law of this state in regard to this contract, shall it not apply to all disappointments and mental sufferings caused by delays in railroad trains? Telegraph companies are common carriers; so are railroad companies; and yet this court, in the Trigg Case, held the company not liable for mental anguish, as an independent cause of action for a mere act of negligence. A similar conclusion was also reached in the United States circuit court for the fourth circuit in Wilcox v. Railroad Co., 52 Fed. Rep. 264, 3 C. C. A. 73, where the plaintiff made a special contract for a train to take him to the bedside of a sick parent. The court held that the trouble of mind caused by the delay at a railroad station could not be made the basis of an action, saying: "But we know of no decided case which holds that mental pain alone, unattended by injury to the person, caused by simple negligence, can sustain an action." "The plaintiff was the subject of two mental pains,—one, for the condition of the sick person; the other, from the delay at the station,—the latter, only, being the subject of this action." "It cannot be pretended that damages from the latter cause of 'anxiety' and 'suspense'—uncertain, indefinite, undefinable, unascertainable, dependent so largely on the peculiar temperament of the person suffering the delay—was in the con-

templation of the defendant when it entered into the contract." Griffin v. Colver, 16 N. Y. 489; Telegraph Co. v. Hall, 124 U. S. 444, 1 Sup. Ct. Rep. 577. But, as before said, if we establish the rule as to one common carrier or private person, with what sort of consistency can we refuse to extend it to all? The courts of Texas have already spoken of a similar case as "intolerable litigation." We see no reason for making this innovation or exception. The legislature has imposed a penalty for each infraction of its duty in delaying a message, and it seems very clear to us that, if it is to become the policy of the state to adopt this new rule, the legislature, and not this court, should do it. The common law has always attempted to deal with the citizen, and his rights and wrongs, in a practical way, and the declared object of awarding damages is to give compensation for pecuniary loss. The right, in a civil action, to inflict punishment by way of punitive damages, has been ably controverted. The allowance of damages for wounded feelings, when they are the concomitant or result of a physical injury, is placed rightfully on the ground that the mind is as much a part of the body as the bones and muscles, and an injury to the body included the whole, and its effects were not separable; but the experience of every judge and lawyer teaches him how unsatisfactory, in these personal injury cases, are the verdicts of juries. They are utterly inconsistent, and the courts do not attempt to justify these inconsistencies upon any other theory than that it is the sole province of the jury to fix the amount. The result is that, in nearly every appeal that reaches this court, one ground for reversal is the excessive damage awarded; and the right of this court to interfere at all on this ground is seriously challenged. It is no uncommon thing to have the appellee voluntarily enter a remittitur to save his verdict from the charge of passion or prejudice. Under these circumstances, is it wise to venture upon the far more speculative field of mental anguish, without guide and without compass? We think not. We have examined the cases in the courts of Kentucky, Indiana, Tennessee, Alabama, and North Carolina. They are all based upon the So Relle Case, in 55 Tex. 308, which, we have shown, stands upon no previous adjudication, but is opposed by the Levy Case, in 59 Tex., which, to our minds, completely refutes it. The cases holding this view are Stuart v. Telegraph Co., 66 Tex. 580, 18 S. W. Rep. 351; Railroad Co. v. Wilson, 69 Tex. 739, 7 S. W. Rep. 653; Telegraph Co. v. Cooper, 71 Tex. 507, 9 S. W. Rep. 598; Same v. Broesche, 72 Tex. 654, 10 S. W. Rep. 734; Same v. Simpson, 73 Tex. 423, 11 S. W. Rep. 385; Same v. Adams, 75 Tex. 531, 12 S. W. Rep. 857; Wadsworth v. Telegraph Co., 86 Tenn. 695, 8 S. W. Rep. 574; Reese v. Same, 123 Ind. 204, 24 N. E. Rep. 163; Bensley v. Same, 39 Fed. Rep. 181; Telegraph Co. v. Henderson,

89 Ala. 510, 7 South. Rep. 419; Thompson v. Telegraph Co., 106 N. C. 549, 11 S. E. Rep. 269; Chapman v. Same, (Ky.) 13 S. W. Rep. 880; Young v. Same, 107 N. C. 370, 11 S. E. Rep. 1044; Thomp. Elect. § 378, and cases cited. The cases opposing this view are, notably, the dissenting opinion of Judge Lurton in Wadsworth v. Telegraph Co., 86 Tenn. 695, 8 S. W. Rep. 574; Chapman v. Telegraph Co., (Ga.) 15 S. E. Rep. 901, in which Judge Lumpkin, of the supreme court of Georgia, reviews all the cases in a most admirable tone, and with great clearness; Wilcox v. Railroad Co., (4th circuit,) 52 Fed. Rep. 264, 3 C. C. A. 73; Crawson v. Telegraph Co., 47 Fed. Rep. 544; Chase v. Same, 44 Fed. Rep. 554, where all the authorities are cited; West v. Same, 39 Kan. 93, 17 Pac. Rep. 807; Russell v. Same, 3 Dak. 315, 19 N. W. Rep. 408; Telegraph Co. v. Rogers, 68 Miss. 748, 9 South. Rep. 823; Lynch v. Knight, 9 H. L. 577; Commissioners v. Coultas, L. R. 13 App. Cas. 222; Tyler v. Telegraph Co., 54 Fed. Rep. 634;

Kester v. Telegraph Co., (Taft, Judge.) 55 Fed. Rep. 603.

We are fully aware that the plaintiff's claim appeals strongly to the sensibilities; but to adopt that view we must either be guilty of adopting one rule of damages for one class of common carriers, and the breach of their contracts, or we must conclude that all of our predecessors in the great common-law courts were at fault, and henceforth repudiate, not only their utterances, but our own, on this subject, and this we have no inclination to do. We prefer to travel yet awhile *super antiquas vias*. If, in the evolution of society and the law, this innovation should be deemed necessary, the legislature can be safely trusted to introduce it, with those limitations and safeguards which will be absolutely necessary, judging from the variety of cases that have sprung up since the promulgation of the Texas case. Our conclusion is, the judgment should be and is affirmed. All concur.

141 DWYER v. CHICAGO, ST. P., M. & O. RY. CO.

(51 N. W. 244, 84 Iowa, 479.)

Supreme Court of Iowa. Feb. 1, 1892.

Appeal from district court, Plymouth county; Scott M. Ladd, Judge.

Action for personal injury. Judgment for plaintiff and the defendant appealed.

J. H. & C. M. Swan, for appellant. Joy, Hudson, Call & Joy, for appellee.

GRANGER, J. 1. The plaintiff is the administrator of the estate of Ann Dwyer, deceased, who was on the 9th day of July, 1889, struck by defendant's cars, as a result of which she died about 30 days thereafter. The petition specifies the injuries sustained, and adds: "All of which caused her great pain and suffering for a period of about thirty days, when she died from such injuries." A motion to strike out the words as to pain and suffering was overruled, and the court instructed the jury that, if it found for the plaintiff, to allow a "reasonable compensation for pain and suffering." The jury returned a general verdict for the plaintiff for \$3,000, and specially found that \$2,300 of the amount was for "pain and suffering," and \$700 "as damages to the estate." An assignment brings in question the correctness of the court's action in permitting the jury to consider pain and suffering as an element of damage. (The action was commenced after the death of plaintiff's intestate. If the action had been commenced in her life-time, it is unquestioned that pain and suffering caused by the injury would have been a proper element of damage; and this would be true if, after the commencement of the action, she had died, and her administrator had been substituted as party plaintiff, and prosecuted the suit to judgment.) *Muldowney v. Railway Co.*, 36 Iowa, 462. We come, then, to the important inquiry if such damages are permissible in such a case, where the action is commenced by the administrator. The only authority for maintaining such an action by the legal representative is by virtue of the statute. At the common law, the cause of action abated with the death of the injured party. The law authorizing the action is found in Code, § 2525. "All causes of action shall survive and may be brought notwithstanding the death of the person entitled or liable to the same." We are cited to no case, in this or any other state, where the rule contended for by the appellee, and allowed by the district court, has been sustained. It is claimed, however, that the reason for this, as to other states, is because of the peculiarity of the statutes under which such actions are permitted to survive. In several cases this court has expressed its view as to the measure of damages in such cases, and in such a way that the appellant regards the law on this point as settled in its favor, while the appellee regards the language thus relied

upon as merely incidental to other points determined, and in no way decisive of the question now before us. It is true that the precise question now before us was not involved for determination in any of the Iowa cases cited, and the language relied upon by the appellant has been used incidentally in the discussion of other questions; but it is not to be understood, because of this, that such language is without value in our deliberations on this question; for much of the language so used is in regard to questions so allied to this in its legal significance as to make them determinable upon quite similar considerations. For instance, the rule as to the measure of damage in cases of this kind has been considered, and, with the point before us in view, a rule excluding such damage has been adopted.

In *Rose v. Railway Co.*, 39 Iowa, 246, it is said: "The action is brought by the administrator for the injury to the estate of the deceased sustained in his death. There is therefore no basis for damage for pain and suffering. * * * Compensation for the pecuniary loss to his estate is alone to be allowed." See, also, *Donaldson v. Railway Co.*, 18 Iowa, at page 290, and *Muldowney v. Railway Co.*, 36 Iowa, at page 468. In the latter case the action was commenced by the injured party, who died pending the suit, and his administrator was substituted; and it was held that pain and suffering were proper elements of damage because of the action having been commenced by the injured party; but the court guards the rule by saying: "A different rule would obtain if the action had been commenced after his death." It is thought that the expression may be accounted for on the theory that the case was determined under a different statute. Rev. St. § 3467, under which the action arose, is as follows: "No cause of action *ex delicto* dies with either or both of the parties, but the prosecution thereof may be commenced or continued by or against their personal representatives." With reference to the particular matter under consideration, it is difficult to trace a distinction between the statutes. The one says, in effect, that such causes of action shall survive the party, and the other that it does not die with the party. The effect of each is to create a survival, and the one, as plainly as the other, contemplates the existence of the cause of action before the death. It is not the effect of either, as seems to be thought by the appellee, to create a cause of action because of the death. The statutes deal with the "cause of action," and not with the rule of damage to be applied. In fixing the damage, we look to the wrong to be remedied; to the injury to be repaired. If the action is brought by the injured party, the law attempts to remedy the wrong to him,—not specifically to his estate,—and that may include loss of property, time, and that bodily ease and comfort to which he is entitled as against the wrong-doers. If the action is brought to repair an injury to his estate, the law looks,

in fixing the rule of damage, to how the estate is affected by the act, and attempts to repair the injury. Loss of time and expenses paid, as a result of the wrong, presumably lessen the estate; but bodily pain and suffering in no manner affect it. It is an item of damage peculiar to the person, and not to pecuniary or property rights. Under our statute, these damages belong "to the estate of the deceased." Code, § 2526. This distinction is maintained throughout all the cases and authorities that have come to our notice. This court has repeatedly said that these actions are for "injury to the estate." See cases cited supra: *Rose v. Railway Co.*, *Donaldson v. Railway Co.*, *Muldowney v. Railway Co.* Mr. Sutherland, in his work on *Damages*, (volume 3, p. 282,) speaking in general of these statutes of survival of actions, says: "The measure of damages is not the loss or suffering of the deceased, but the injury resulting from his death to his family. It is only for pecuniary injuries that this statutory right of action is given. Although it can be maintained only in cases in which an action could have been brought by the deceased if he had survived, damages are given on different principles and for different causes. Neither the pain and suffering of the deceased, nor the grief and wounded feelings of his surviving relatives, can be taken into account in the estimate of damages." In *Rail-*

way Co. v. Barron, 5 Wall. 90, a like case, it is said, speaking of the wife or next of kin, who, under the Illinois statutes, are the beneficiaries in such a case: "They are confined to the pecuniary injuries resulting to the wife and next of kin; whereas, if the deceased had survived, a wider range of inquiry would have been admitted. It would have embraced personal suffering as well as pecuniary loss, and there would have been no fixed limitation as to the amount." The language of the Illinois statute is different in phraseology from ours, but not to the extent of inducing a different rule in this respect. Under the statute of Minnesota, so similar to ours as to justify the same rule as to these damages, it is held that "no compensation can be given * * * for the pain and suffering of the deceased." *Hutchins v. Railway Co.* (Minn.) 46 N. W. 79. We conclude, without doubt, that the district court erred in its ruling on the motion and the instruction to the jury. Some other questions are argued which we have examined, the consideration of which would require extensive quotations from the evidence, and we think they do not involve reversible error, and it is unnecessary to discuss them. The cause is remanded to the district court, with instructions to deduct from the judgment entered the \$2,300 allowed for pain and suffering, and give judgment for the balance. Modified and affirmed.

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MORGAN v. SOUTHERN PAC. CO. (No. 14,812.)

(30 Pac. 603, 95 Cal. 510.)

Supreme Court of California. Aug. 5, 1892.

Department 2. Appeal from superior court, Kern county; A. R. Conklin, Judge.

Action by Flora Morgan against the Southern Pacific Company to recover damages for the death of her child caused by defendant's negligence. From a judgment rendered on the verdict of a jury in favor of plaintiff, defendant appeals. Reversed.

The facts fully appear in *Morgan v. Pacific Co.*, 30 Pac. 601.

E. L. Craig, Foshay Walker, Horace Hawes, and R. B. Carpenter, for appellant. Charles G. Lamberson, Lamberson & Taylor, and J. W. Ahern, for respondent.

McFARLAND, J. The parties to this action are the same as in *Morgan v. Pacific Co.*, 30 Pac. Rep. 001 (No. 14,841, this day decided), in which plaintiff recovered a judgment for \$15,000 for alleged personal injuries received by being thrown from the steps of defendant's car, which judgment was by this court affirmed. When she fell from the steps of the car she had in her arms her infant daughter, aged about two years. Nine days afterwards the child died from an attack of pneumonia; and plaintiff brought this present action to recover damages for the death of said child, upon the theory that the pneumonia was caused by said fall. The jury gave her damages in the amount of \$20,000, for which sum judgment was rendered; and defendant appeals from the judgment, and from an order denying a motion for a new trial. The evidence upon the issues of the alleged negligence of defendant's employes at the time of the accident, and the alleged contributory negligence of plaintiff, was substantially the same as in the other case, and as to those issues the verdict cannot be disturbed. There was some evidence tending slightly to show that the death of the child was caused by the accident, but it is not necessary to inquire whether or not it was sufficient to establish that fact, because the judgment must clearly be reversed on account of the excessive damages awarded by the jury.

There was no averment in the complaint of any special damage, and no averment of any damage at all, except the general statement that the child died, "to the damage of plaintiff in the sum of fifty thousand dollars;" and there was no evidence whatever introduced or offered upon the subject of damage. The jury, therefore, had nothing before them upon which to base damages except the naked fact of the death of a female child two years old; and it is apparent, at first blush, that "the amount of the damages is obviously so disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool and dispassionate discretion of the

jury." The main element of damage to plaintiff was the probable value of the services of the deceased until she had attained her majority, considering the cost of her support and maintenance during the early and helpless part of her life. We think that the court erred in charging that "the jury is not limited by the actual pecuniary injury sustained by her, by reason of the death of her child." An action to recover damages for the death of a relative was not known to the common law; it is of recent legislative origin. There are statutes in many of the American states providing for such an action, and it has been quite uniformly held that in such an action the plaintiff does not represent the right of action which the deceased would have had if the latter had survived the injury, but can recover only for the pecuniary loss suffered by the plaintiff on account of the death of the relative; that sorrow and mental anguish caused by the death are not elements of damage; and that nothing can be recovered as a solatium for wounded feelings. The authorities outside of this state are almost unanimous to the point above stated. The following are a few of such authorities: *Railroad Co. v. Vandever*, 36 Pa. St. 298; *Iron Co. v. Rupp*, 100 Pa. St. 95; *Railroad Co. v. Freeman*, 36 Ark. 41; *Railroad Co. v. Brown*, 26 Kan. 443; *Pennsylvania Co. v. Lilly*, 73 Ind. 252; *Donaldson v. Railroad Co.*, 18 Iowa, 286; *Railroad Co. v. Paulk*, 24 Ga. 374; *Railroad Co. v. Miller*, 2 Colo. 466; *Kesler v. Smith*, 66 N. C. 154; *March v. Walker*, 48 Tex. 372; *Railroad Co. v. Levy*, 59 Tex. 543; *James v. Christy*, 18 Mo. 162; *Hyatt v. Adams*, 16 Mich. 180; *Chicago v. Major*, 18 Ill. 349; *Railroad Co. v. Delaney*, 82 Ill. 198; *Blake v. Railroad Co.*, 18 Q. B. 93.

With respect to the decisions in this state we do not think those cited by respondent (except one) are, when closely examined, inconsistent with the general authorities. *Beeson v. Mining Co.*, 57 Cal. 20, is a leading case on the subject, and is cited by all the cases which follow it. In that case the action was brought by the widow for the death of her husband, and the question was whether or not the lower court erred in allowing evidence of the kindly relations between the plaintiff and the deceased during the lifetime of the latter. The court sustained the ruling of the court below, but clearly upon the ground that those relations could be considered only in estimating the pecuniary loss. The court say: "It is true that in one sense the value of social relations and of society cannot be measured by any pecuniary standard; * * * but, in another sense, it might be not only possible, but eminently fitting, that a loss from severing social relations, or from deprivation of society, might be measured or at least considered from a pecuniary standpoint. * * * If a husband and wife were living apart by mutual consent, neither rendering the other assistance or kindly offices, the jury might take into consideration the absence of social relations and the absence of society in esti-

inating the loss sustained by either from the death of the other. So if the husband and wife had lived together in concord, each rendering kindly offices to the other, such facts might be taken into consideration, not, as the books say, for the purpose of affording solace in money, but for the purpose of estimating pecuniary losses. The loss of a kind husband may be a considerable pecuniary loss to a wife; she loses his advice and assistance in many matters of domestic economy." A quotation is made from a Pennsylvania case where the same rule was applied to the loss of a wife, the court saying that "certainly the service of a wife is peculiarly more valuable than that of a mere hireling." The Beeson Case, therefore, does not decide that the jury may depart from a pecuniary standpoint in assessing damages; it merely holds that in estimating the pecuniary losses of a wife from the death of her husband they may consider whether or not the deceased was a good husband, able and willing to provide well for his wife. The opinion of the court no doubt goes somewhat further in this direction than the general current of authorities, but it decides nothing more than above stated. *Cook v. Railroad Co.*, 60 Cal. 604, also cited by respondent, decides nothing more than the Beeson Case. In *McKeever v. Railroad Co.*, 59 Cal. 300, the point was not involved, and in *Nehrbas v. Railroad Co.*, 62 Cal. 320, the point does not appear in any way to have been involved; and the dictum at the close of the opinion, as it refers to the Beeson Case, must be held as only intended to go to the length of the latter case. It is true, however, that in *Cleary v. Railroad Co.*, 76 Cal. 240, 18 Pac. 269, a decision in department, views were expressed favorable to respondent's contention. The opinion of the commission in that case was, however, expressly based on *Beeson v. Mining Co.*, supra, and upon, as we have seen, a misunderstanding of that case. There appears to have been no petition for a hearing in bank. It was stated in that case that there could be a recovery for the "mental anguish and suffering of the parents," but we have been referred to no other case that holds such doctrine. Certainly it was not so held in the Beeson Case. But entirely contrary views were expressed in the latest decision of this court on the subject (*Munro v. Reclamation Co.*, 84 Cal. 515, 24 Pac. 303). In that case—which was for the death of an adult son—the lower court had instructed that the jury in estimating the damages might consider "the sorrow, grief, and mental suffering occasioned by his death to his mother;" and this court held the instruction erroneous, and for that reason reversed the judgment, the court holding that such a rule would afford an "opportunity to run into wild and excessive verdicts." The court said: "We are of opinion that the court erred in including in the instruction the words, 'sorrow,

grief, and mental suffering, occasioned by the death of the son to his mother.' In thus directing the jury the court fell into error. In our opinion, the damage should have been confined to the pecuniary loss suffered by the mother, and the loss of the comfort, society, support, and protection of the deceased. * * * We have found no case in which damages for sorrow, grief, and mental suffering are allowed, under any of the statutes." And, further, that the statutory action is a new one, "and not the transfer to the representative of the right of action which the deceased person would have had if he had survived the injury." The case was decided in bank. Justice Thornton delivered the opinion, which was concurred in by two other justices, and a fourth justice concurred in the judgment, and must, therefore, have concurred in the one main reason for which the judgment was reversed. He may not have been ready to say that the "comfort and society" of the deceased could be considered. There was only one dissent, but upon what ground does not appear. We think, therefore, that the case is full authority on the main point. At all events, we think that the opinion states the general propositions of law governing the case correctly, although, as to one matter, it may be misunderstood. The language, "the loss of the comfort, society, support, and protection of the deceased," must be held as having been used within the meaning given to it in *Beeson v. Mining Co.*, supra, as hereinbefore stated, that is, with reference to the value of the life of the deceased, and the pecuniary loss to the plaintiff caused by the death. The said language would not be correct in any other sense. But in the case at bar the jury were not confined by the instructions to pecuniary loss or any other kind of loss; they were given wide range to run into any wild and excessive verdict which their caprice might suggest. We do not think that the complaint is defective because it does not specially aver the loss of the services of the deceased; that was a natural and necessary sequence of the death. It was not special damage necessary to be averred. There is nothing in the point made by respondent that the answer was not verified. Upon that point the court ruled in favor of defendant, and plaintiff is not appealing. The judgment and order appealed from are reversed, and a new trial ordered.

SHARPSTEIN, J. I concur.

DE HAVEN, J. I concur in the judgment and generally in the foregoing opinion. The measure of damages in actions by a parent for the death of a child, when the facts are not such as to warrant exemplary damages, is correctly stated in section 763 of *Shearman and Redfield on Negligence*, as follows: "The damages recoverable by a husband, parent, or master for a negligent injury to the

person of his wife, child, or servant are strictly limited to an amount fully compensatory for the consequent loss of service for a period not exceeding the minority of the child, or the term of service of a servant, and the expenses which the plaintiff has incurred in consequence of the injury, such as for surgical attendance, nursing, and the like." The sixth instruction given upon the request of plaintiff, to the effect that "in estimating the damage sustained by her the jury is not limited by the actual pecuniary injury sustained by her by reason of the death of her child, but such damages may be given as under all the circumstances of the case may be just," is contrary to this rule, and was erroneous. The object of section 376 of the Code of Civil Procedure is not to give redress or compensation for the mental distress of a mother, consequent upon the death of her child. The general language of section 377 of the Code of Civil Procedure, that in actions of this character "such damages may be given as under all the circumstances of the case may be just,"

is used with reference to the fact that the damages which are allowed to be recovered by sections 376 and 377 of the Code of Civil Procedure are, with the exception of the expenses incurred by the plaintiff in consequence of the injury resulting in the death for which they are claimed, prospective in their nature, relating, as they do, to the loss of future service, and necessarily based upon probabilities, and upon data which in many respects are uncertain, and therefore the estimate of such damages must necessarily call for the exercise of a very large discretion upon the part of the jury; and all that is meant by the language quoted is that the jury shall, in view of all the circumstances of the case, and considering also the age and the ability of the deceased to serve the relative for whose benefit the action is brought, give such damages as they shall deem just, keeping in view that such damages are to be measured by what shall fairly seem the pecuniary injury or loss to the plaintiff.

Hearing in bank denied.

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DWIGHT v. ELMIRA, C. & N. R. CO.

(30 N. E. 398, 132 N. Y. 190.)

Court of Appeals of New York, Second Division.
March 15, 1892.Appeal from supreme court, general term,
Fourth department.Action by Ira Dwight against the Elmira,
Cortland & Northern Railroad Company.
From a judgment for plaintiff entered on an
order affirming a judgment entered on the
report of a referee, defendant appeals. Re-
versed.James Armstrong, for appellant. Ray-
mond L. Smith, for respondent.

PARKER, J. The judgment awards to the plaintiff \$503 for damages occasioned by the defendant's negligence in setting on fire and destroying 21 apple-trees, 2 cherry-trees, and 2½ tons of standing grass, and also injuring 7 apple-trees, the property of plaintiff. The only question presented on this appeal is whether the proper measure of damages was adopted on the trial.

A witness called by the plaintiff was asked: "Question. What were those twenty-one trees worth at the time they were killed?" Objection was made that the evidence did not tend to prove the proper measure of damages, but the objection was overruled, and the answer was: "Answer. I should say they were worth fifty dollars apiece." Similar questions were propounded as to the other trees; a like objection interposed; the same ruling made; answers to the same effect, except as to value, given; and appropriate exceptions taken. Testimony was also given, tending to prove that the land burned over by the fire was depreciated in value \$30 per acre. The only evidence offered by the plaintiff, touching the question of damages, was of the character already alluded to.

Fruit-trees, like those which are the subject of this controversy, have little if any value after being detached from the soil, as the wood cannot be made use of for any practical purpose; but, while connected with the land, they have a producing capacity which adds to the value of the realty. Necessarily the testimony adduced tended to show, not the value of the trees severed from the freehold, but their value as bearing trees, connected with and depending on the soil for the nourishment essential to the growth of fruit. How much was the realty, of which the trees formed a part, damaged, was the result aimed at by the questions and attempted to be secured by the answers. Can the owner of an injured freehold because the trees taken or destroyed happen to be fruit instead of timber trees, have his damages measured in that manner? is the question presented now, for the first time, in this court, so far as we have observed. The learned referee followed the decision in *Whitbeck v. Railroad Co.*, 36 Barb. 644, in

which the proposition is asserted that, while fruit-trees form a part of the land, the true rule is that if the thing destroyed has a value which can be accurately measured without reference to the value of the soil in which it stands, or out of which it grows, the recovery must be for the value of the thing destroyed, and not for the difference in the value of the land before and after such destruction. The court cited no authority for the conclusion reached, and our attention has not been called to any prior decision justifying its position. Nor has the *Whitbeck Case* been approved in this court, although cited and distinguished in *Argotsinger v. Vines*, 82 N. Y. 309. While the rule is, undoubtedly, as stated by the learned judge in the *Whitbeck Case*, that a recovery may be had for the value of the thing destroyed, where it has a value which may be accurately measured without reference to the soil in which it stands, he apparently overlooked the fact that fruit-trees do not have such a value; and the rule was, therefore, as we think, wrongly applied. Cases are not wanting to illustrate a proper application of that rule. Where timber forming part of a forest is fully grown, the value of the trees taken or destroyed can be recovered. In nearly all jurisdictions, this is all that may be recovered; and the reason assigned for it is that the realty has not been damaged, because, the trees having been brought to maturity, the owner is advantaged by their being cut and sold, to the end that the soil may again be put to productive uses. 3 *Suth. Dam.* p. 374; 3 *Sedg. Dam.* (8th Ed.) p. 45; *Single v. Schneider*, 30 *Wis.* 570; *Webster v. Moe*, 35 *Wis.* 75; *Webber v. Quaw*, 46 *Wis.* 118, 49 *N. W.* 830; *Haseltine v. Mosher*, 51 *Wis.* 443, 8 *N. W.* 273; *Tuttle v. Wilson*, 52 *Wis.* 643, 9 *N. W.* 822; *Wooden-Ware Co. v. U. S.*, 106 *U. S.* 432, 1 *Sup. Ct.* 398; *Graessle v. Carpenter*, 70 *Iowa*, 166, 30 *N. W.* 392; *Ward v. Railroad Co.*, 13 *Nev.* 44; *Tilden v. Johnson*, 52 *Vt.* 628; *Adams v. Blodgett*, 47 *N. H.* 219; *Cushing v. Longfellow*, 26 *Me.* 306. In this state it is settled that even where full-grown timber is cut or destroyed the damage to the land may also be recovered, and in such cases the measure of damages is the difference in the value of the land before and after the cutting or destruction complained of. *Argotsinger v. Vines*, 82 *N. Y.* 308; *Van Deusen v. Young*, 29 *N. Y.* 36; *Easterbrook v. Railroad Co.*, 51 *Barb.* 94. The rule is also applicable to nursery trees grown for market, because they have a value for transplanting. The soil is not damaged by their removal, and their market value necessarily furnishes the true rule of damages. 3 *Sedg. Dam.* (8th Ed.) p. 48; *Birket v. Williams*, 30 *Ill. App.* 451. Coal furnishes another illustration of the rule making the value of the thing separated from the realty, although once a part of it, the measure of damages, where it has a value after removal, and the

land has sustained no injury because of it. 3 Sedg. Dam. (8th Ed.) p. 48; 3 Suth. Dam. p. 374; 5 Am. & Eng. Enc. Law, p. 36, note 2; Stockbridge Iron Co. v. Cone Iron-Works, 102 Mass. 80; Coal Co. v. Rogers, 108 Pa. St. 147-152; Dougherty v. Chesnutt 86 Tenn. 1, 5 S. W. 444; Coleman's Appeal, 62 Pa. St. 252; Ross v. Scott, 15 Lea, 479-488; Forsyth v. Wells, 41 Pa. St. 291; Chamberlain v. Collinson, 45 Iowa, 429; Morgan v. Powell, 3 Q. B. 278; Martin v. Porter, 5 Mees. & W. 351. On the other hand, cases are not wanting where the value of the thing detached from the soil would not adequately compensate the owner for the wrong done, and in those cases a recovery is permitted, embracing all the injury resulting to the land. This is the rule where growing timber is cut or destroyed. Because not yet fully developed, the owner of the freehold is deprived of the advantage which would accrue to him could the trees remain until fully matured. His damage, therefore, necessarily extends beyond the market value of the trees after separation from the soil, and the difference between the value of the land before and after the injury constitutes the compensation to which he is entitled. Longfellow v. Quimby, 33 Me. 457; Chipman v. Hibberd, 6 Cal. 163; Wallace v. Goodall, 18 N. H. 439-456; Hayes v. Railroad Co., 45 Minn. 17-20, 47 N. W. 260. In Wallace's Case, supra, the court said: "The value of young timber, like the value of growing crops, may be but little when separated from the soil. The land, stripped of its trees may be valueless. The trees, considered as timber, may from their youth be valueless; and so the injury done to the plaintiff by the trespass would be but imperfectly compensated unless he could receive a sum that would be equal to their value to him while standing upon the soil." The same rule prevails as to shade-trees, which, although fully developed, may add a further value to the freehold for ornamental purposes, or in furnishing shade for stock. Nixon v. Stillwell (Sup.) 5 N. Y. Supp. 248, and cases cited supra. The cur-

rent of authority is to the effect that fruit-trees and ornamental or growing trees are subject to the same rule. Montgomery v. Locke, 72 Cal. 75, 13 Pac. 401; Mitchell v. Billingsley, 17 Ala. 391-393; Wallace v. Goodall, 18 N. H. 439-456; 3 Sedg. Dam. (8th Ed.) § 933.

It is apparent from the authorities already cited, as well as those following, that in cases of injury to real estate the courts recognize two elements of damage: (1) The value of the tree or other thing taken after separation from the freehold, if it have any; (2) the damage to the realty, if any, occasioned by the removal. Ensley v. Mayor, 2 Baxt. 144; Striegel v. Moore, 55 Iowa, 88, 7 N. W. 413; Longfellow v. Quimby, 33 Me. 457; Foote v. Merrill, 54 N. H. 400. A party may be content to accept the market value of the thing taken when he is also entitled to recover for the injury done to the freehold. But if he asserts his right to go beyond the value of the thing taken or destroyed after severance from the freehold, so as to secure compensation for the damage done to his land because of it, then the measure of damages is the difference in value of the land before and after the injury. In this case the plaintiff was not satisfied with a recovery based on the value of the trees destroyed, after separation from the realty, of which they formed a part,—as indeed he should not have been, as such value was little or nothing,—so he sought to obtain the loss occasioned to the land by reason of the destruction of an orchard of fruit-bearing trees, which added largely to its productive value. This was his right, but the measure of damages in such a case is, as we have observed, the difference in value of the land before and after the injury; and as this rule was not followed, but rejected, on the trial, and a method of proving damages adopted not recognized nor permitted by the courts, the judgment should be reversed. All concur, except BRADLEY, BROWN, and LANDON, JJ., dissenting.

Judgment reversed.

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BEEDE v. LAMPREY.

(15 Atl. 133, 64 N. H. 510.)

Supreme Court of New Hampshire. Belknap.
July 19, 1888.

Trover for 200 spruce logs. The defendant was defaulted, with the right to be heard as to the assessment of damages. Facts found by the court. The parties own adjoining timber lots in Moultonborough. The defendant, while engaged in an operation on his own lot, negligently, but without malice, cut over the line dividing the lots, and cut down, trimmed, hauled to, and deposited in the lake at Melvin village, in Tuftonborough, and thence towed to his saw-mill, the trees in question, which facts constitute the cause of action. The question whether the measure of damages is the value of the stumpage, or the value of the logs when cut and trimmed, or when deposited in the lake, or when delivered at the mill, was reserved.

E. A. & C. B. Hibbard, for plaintiff. Jewell & Stone, for defendant.

ALLEN, J. The claim of the plaintiff to recover as damages the value of the logs at the mill, which includes the value added by cutting and transporting them, is founded upon his title and right of possession of the property there, and his right to treat it as converted at any time between its severance from the realty and the commencement of the action. The plaintiff had the title to the logs and the right of possessing them at the mill. Whenever and wherever they may have been converted, the conversion did not change the title so long as the property retained its identity. The title could be changed only by a suit for damages with judgment, and satisfaction of that judgment. *Smith v. Smith*, 50 N. H. 212, 219; *Dearth v. Spencer*, 52 N. H. 213. The plaintiff might have recovered the logs themselves at the mill, or wherever he could have found them, and so availed himself of their value there, by replevin, or by any form of action in which the property in specie, and not pecuniary damages, are sought. But in such a case, if the claimant makes a title, no question of damages or compensation for loss arises. He recovers his own in the form and at the time and place in which he finds it. In trespass *quare clausum*, with an averment of taking and carrying away trees, the plaintiff may recover for the whole injury to the land, including the damage for prematurely cutting the trees, and for the loss of the trees themselves, but nothing for the value added by the labor of cutting and transporting them. *Wallace v. Goodall*, 18 N. H. 436; *Foote v. Merrill*, 54 N. H. 490. Trover cannot be maintained for any injury to the realty, but only for the conversion of chattels; and in this case the plaintiff is limited in his recovery to the loss of the trees; that is, his loss by the defendant's converting them by

their severance from the land. The usual rule of damages in actions of trover is compensation to the owner for the loss of his property occasioned by its conversion; and where the conversion is complete, and results in an entire appropriation of the property by the wrong-doer, the loss is generally measured by the value of the property converted with interest to the time of trial. *Hovey v. Grant*, 52 N. H. 569; *Gove v. Watson*, 61 N. H. 136. The defendant converted the logs by cutting and severing the trees from the land, and, the conversion being complete by that wrongful act, their value there represents the plaintiff's loss. His loss is no greater by reason of the value added by the labor of cutting and transportation to the mill. It does not appear that the logs were of special or exceptional value to the plaintiff upon the land from which they were taken, nor that he had a special use for them other than obtaining their value by a sale, nor that the market price had risen after their conversion. If, in estimating the damages, the value at the mill, increased by the cost of cutting and transportation, is to be taken as the criterion, the plaintiff will receive more than compensation for his loss. With such a rule of damages, if, besides the defendant, another trespasser had cut logs of an equal amount upon the same lot, and had hauled them to the lake shore, and a third had simply cut and severed the trees from the land, and sold them there, and suits for their conversion had been brought against each one, the sums recovered would differ by the cost of transporting the logs to the place of the alleged conversion, while the loss to the plaintiff would be the same in each of the three cases. The injustice of such an application of the rule of damages is apparent from the unequal results. In *Foote v. Merrill*, supra, which was trespass *quare clausum*, and for cutting and removing trees, it was decided that the plaintiff could recover for the whole injury to the land, including the value of the trees there, but not any increase in value made by the cost of cutting and taking them away. In the opinion it is said, (Hibbard, J.): "If the owner of timber cut upon his land by a trespasser gets possession of it increased in value, he has the benefit of the increased value. The law neither divests him of his property, nor requires him to pay for improvements made without his authority. Perhaps, in trover, and, possibly, in trespass *de bonis asportatis*, he may be entitled to the same benefit." This dictum, not being any part of, nor necessary to, the decision of that case, and given in language expressive of doubt, cannot be invoked as a precedent decisive of this case. When trespass *de bonis asportatis* is coupled with trespass *quare clausum*, either as a separate count or as an averment in aggravation of damages, as in *Foote v. Merrill*, the increase in damages by reason of such averment and proof of it is the value of the chattels taken

and converted; and in such a case is the same as the whole damages would have been in an action of trespass de bonis. *Smith v. Smith*, 50 N. H. 212, 219. Had the plaintiff in *Foot v. Merrill*, sued in trespass for taking and carrying away the trees merely, he would have recovered their value upon the lot at the time of the taking, allowing nothing for the expense of cutting and removing them; and no good reason appears why the same rule of damages should not prevail in trover as in trespass de bonis asportatis. The loss to the plaintiff from the taking and carrying away of his property is, ordinarily, the same as the conversion of it by complete appropriation, and the rule of compensation for the loss gives him the value of his property at the time and place of taking or conversion, and interest from that time for its detention.

The English cases upon the subject give as the rule of damages, when the conversion and appropriation of the property are by an innocent mistake, and bona fide, or where there is a real dispute as to the title, the value of the property in place upon the land, allowing nothing for enhancement of value by labor in its removal and improvement. But when the conversion is by fraud or willful trespass, the full value at time of demand and refusal is given. *Martin v. Porter*, 5 Mees. & W. 351; *Morgan v. Powell*, 3 Adol. & E. (N. S.) 278; *Wood v. Morewood*, Id. 440, note; *Wild v. Holt*, 9 Mees. & W. 672; In re *United Collieries Co.*, L. R. 15 Eq. 46. The early New York cases give the full value at the time of conversion, including any value added by labor and change in manufacturing. *Betts v. Lee*, 5 Johns. 348; *Curtis v. Groat*, 6 Johns. 168; *Babcock v. Gill*, 10 Johns. 287; *Brown v. Sax*, 7 Cow. 95; *Baker v. Wheeler*, 8 Wend. 505. In these cases the conversion is treated as tortious, and the same as if made by willful trespass. In later cases a distinction is made between a willful taking and conversion, and the rule of just compensation is upheld in case of the conversion of trees at least, and their value upon the land, is given as damages when the conversion does not result from willful trespass. *Whitbeck v. Railroad Co.*, 36 Barb. 644; *Spicer v. Waters*, 65 Barb. 227. The Illinois decisions make no distinction between cases of willful trespass and those of conversion by mistake or inadvertence, and include in damages all enhancement in value, from any cause, before suit is brought. *Robertson v. Jones*, 71 Ill. 405; *Coal Co. v. Long*, 81 Ill. 359; *Railroad Co. v. Ogle*, 82 Ill. 627. In Maine the increased value added by cutting and removing the timber is not included in the damages, although the conversion be by willful trespass. *Cushing v. Longfellow*, 26 Me. 306; *Moody v. Whitney*, 38 Me. 174. And the same rule seems to govern in Massachusetts, (*Iron Co. v. Iron-Works*, 102 Mass. 80, 86.) and did in Wisconsin (*Weymouth v. Railway Co.*, 17 Wis. 567; *Single v. Schneider*, 30

Wis. 570) until the legislature of that state, in 1873, enacted a statute providing that the rule of damages, in the case of one wrongfully cutting and converting timber on the land of another, should be the highest market value of the property up to the time of trial, in whatever state it might be put. *Webster v. Moe*, 35 Wis. 75; *Ingram v. Rankin*, 47 Wis. 406, 2 N. W. 755. The weight of authority, however, in this country is in favor of the rule which gives compensation for the loss; that is, the value of the property at the time and place of conversion, with interest after, allowing nothing for value subsequently added by the defendant, when the conversion does not proceed from willful trespass, but from the wrong-doer's mistake or from his honest belief of ownership in the property, and there are no circumstances showing a special and peculiar value to the owner or a contemplated special use of the property by him. *Forsyth v. Wells*, 41 Pa. St. 291; *Herdic v. Young*, 55 Pa. St. 176; *Wooley v. Carter*, 7 N. J. Law, 85; *Coal Co. v. McMillan*, 49 Md. 549; *Coal Co. v. Cox*, 39 Md. 1; *Bennett v. Thompson*, 13 Ired. 146; *Railway Co. v. Hutchins*, 32 Ohio St. 571; *Wetherbee v. Green*, 22 Mich. 311; *Winchester v. Craig*, 33 Mich. 205; *Nesbitt v. Lumber Co.*, 21 Minn. 491; *Ellis v. Wire*, 33 Ind. 127; *Ward v. Wood Co.*, 13 Nev. 44; *Waters v. Stevenson*, Id. 177; *Goller v. Fett*, 30 Cal. 481; *Gray v. Parker*, 38 Mo. 160, 166; *Wooden Ware Co. v. U. S.*, 106 U. S. 432, 434, 1 Sup. Ct. 398; *Sedgw. Dam.* (5th Ed.) 571, 572; *Cooley, Torts*, 457, 458, note. In cases of conversion by willful act or by fraud, the value added by the wrong-doer, after conversion, is sometimes given as exemplary or vindictive damages, or because the defendant is precluded from showing an increase in value by his own wrong, and from claiming a corresponding reduction of damages. The contention of the plaintiff that he is entitled to recover the value of the logs increased by the expense of cutting and removal to the mill in *Wolfborough*, because, as the case finds, the defendant's acts constituting the conversion were negligent, cannot be sustained on any ground warranting vindictive damages. The cutting and taking the logs was not willful trespass; nor does it appear that the defendant's want of reasonable care amounted to a fraud. No malice is shown, nor were there other facts of outrage upon which such damages could be predicated. No part of the damages in dispute is found as exemplary, and the plaintiff cannot be permitted to assign as damages to his feelings a mere value added to the property by the defendant after the completion of the tort, nor take as a benefit that which is outside of compensation for the wrong. *Fay v. Parker*, 53 N. H. 342; *Bixby v. Dunlap*, 56 N. H. 456; *Kimball v. Holmes*, 60 N. H. 163. The damages must be according to the usual rule in trover,

which is the value of the property at the time of conversion, and interest after. The severance of the trees from the land, and their conversion from real to personal property, was in law a conversion of the property to the defendant's use. The value of the trees, immediately upon their becoming chat-

tels,—that is, as soon as felled,—which is found to be \$1.50 per thousand feet, with interest from that time, the plaintiff is entitled to recover. Judgment for the plaintiff.

SMITH, J., did not sit. The others concurred.

48 ✓ GASKINS v. DAVIS.

(20 S. E. 188, 115 N. C. 85.)

Supreme Court of North Carolina. Oct. 16, 1894.

Appeal from superior court, Craven county; Bynum, Judge.

Action of trespass by Patsy Ann Gaskins against Henry C. Davis. Judgment was rendered for defendant, and plaintiff appeals. Reversed.

W. W. Clark, for appellant. F. M. Simmons and P. M. Pearsall, for appellee.

AVERY, J. The plaintiff's complaint is in the nature of a declaration for trespass in the entry by the defendant upon her land, after being forbidden, and cutting, carrying away, and converting to his own use valuable timber that was growing thereon, to her damage \$500. The logs, after being severed, were transported to Newbern in two lots, one of which lots was seized by plaintiff after reaching that city, where it was much more valuable than at the stump, and was sold by her for the sum of \$112. The other lot was converted into boards and sold by the defendant. The defendant, for a second defense, sets up by way of counterclaim the seizure of the logs by the plaintiff; and though the counterclaim may be a defective statement of the defendant's cause of action, in that it fails to aver an unlawful taking, the defect is cured, if the counterclaim can be maintained at all, by the reply, which, by way of answer, raises the question of the rightfulness of the seizure. The well-established rule is that in such cases the injured party is entitled to recover of the trespasser the value of the timber where it was first severed from the land and became a chattel (Bennett v. Thompson, 13 Ired. 146), together with adequate damage for any injury done to the land in removing it therefrom. As long as the timber taken was not changed into a different species, as by sawing into boards, the owner of the land retained her right of property in the specific logs as fully as when by severance it became her chattel, instead of a part of the realty belonging to her. Potter v. Mardre, 74 N. C. 40. The value of the material taken indicates the extent of the loss, where there are no circumstances of aggravation or willfulness shown, and is the usual measure of damages. Where the trespasser has converted the property taken into a different species, under the rule of the civil law which we have adopted, the article, in its altered state, cannot be recovered, but only damages for the wrongful taking and conversion, when the change in its form is "made by one who is acting in good faith, and under an honest belief that the title was in him." In Potter v. Mardre, supra, Rodman, J., delivering the opinion of the court, says: "The principle of equity [applied in that case] is supported by the analogy of the rule estab-

lished in this state by the decisions which hold that a vendee of land by a parol contract of sale, who takes possession and makes improvements, and is afterwards ejected by the vendor, may recover the value of his improvements. Albea v. Griffin, 2 Dev. & B. Eq. 9. So if one who has purchased land from another, not having title, enters and improves, believing his title good, and is ejected by the rightful owner, he is entitled to compensation. In both cases one who is morally innocent has confused his property with that of another, and he is held entitled to separate it in the only way it can be done, viz. by being allowed the value of his improvements in the raw material." The judge laid down correctly the rule as to the damage that the plaintiff was entitled to recover of the defendant for the original trespass,—the value of the logs when severed at the stump, and adequate damage for injury done to the land in removing them. Potter v. Mardre, supra; 5 Am. & Eng. Enc. Law, p. 36; Ross v. Scott, 15 Lea, 479. The character of the logs had not been changed by cutting and transporting to Newbern, but the value had probably been greatly enhanced. The approved rule, where the plaintiff is asking damage for trespass, seems to be that the owner is entitled to recover the value of the logs when and where they were severed, and without abatement for the cost of severance. Coal Co. v. McMillan, 49 Md. 549. But, if he prefers to follow and claim the timber removed, he is entitled to do so, as long as the species remains unchanged. The plaintiff was entitled to recover in a claim and delivery proceeding the logs that she seems to have acquired peaceful possession of without action. Was the defendant entitled, by way of recoupment, to the benefit of the enhanced value imparted to the property by transporting it to market? Had they been sawed up in planks, and used to construct a boat, the plaintiff would not have been entitled to recover the boat, or the material used in its construction. But if the plaintiff had then unlawfully seized and lost or destroyed the boat, and the defendant had been thereby driven to an action to recover compensation for his loss, he might have recovered the value of the boat, together with the damage, if any, done to his land in removing it therefrom; but the present plaintiff would have been entitled "to deduct, by way of counterclaim, the value of the timber which was manufactured into the boat, just after it was felled and converted into a chattel." Potter v. Mardre, supra. It seems to have been conceded that the defendant cut and carried away the logs under the honest but mistaken belief that the land upon which they were growing was his own. Where a trespasser acts in good faith under a claim of right in removing timber, though he may not be allowed compensation for the cost of converting the tree into a chattel, may he not recoup, in analogy to the equitable doc-

trine of betterments, for additional value imparted to the property after its conversion into a chattel, and before it is changed into a different species? The judge below, in allowing the defendant, by way of recoupment, the benefit of the enhanced value imparted to the logs by removal from the stump to the Newbern market, seems to have acted upon the idea that the defendant, by reason of his good faith, was entitled to the benefit of the improvement in value imparted by his labor and expense. In *Ross v. Scott*, supra, where it appeared that the defendant had entered upon land to mine for coal, and, under the honest but erroneous belief that he was the owner, had built houses thereon, it was held that the plaintiff might recover the cost of the coal in situ, subject to reduction by an allowance for permanent improvements put upon the land. See, also, *In re United Merthyr Collieries Co.*, L. R. 15 Eq. 46; *Hilton v. Woods*, L. R. 4 Eq. 432; *Forsyth v. Wells*, 41 Pa. St. 291. The weight of authority, it must be conceded, sustains the rule that, where the action is brought for damages for logs cut and removed in the honest belief on the part of the trespasser that he had title to them, the measure of damages is the value in the woods from which they were taken, with the amount of injury incident to removal, not at the mill where they were carried to be sawed. *Tilden v. Johnson*, 52 Vt. 628, 36 Am. Rep. 769, and note, 770; *Herdie v. Young*, 55 Pa. St. 176; *Hill v. Canfield*, 56 Pa. St. 454; *Moody v. Whitney*, 38 Me. 174; *Cushing v. Longfellow*, 26 Me. 306; *Goller v. Fett*, 30 Cal. 482; *Foot v. Merrill*, 54 N. H. 496; *Railway Co. v. Hutchins*, 32 Ohio St. 571. In the absence of any evidence that would justify the assessment of vindictive damages, there is only one exception to the rule, as we have stated it, and that is where the trees destroyed are not the ordinary timber of the forest, but are peculiarly valuable for ornament, or as shade trees.

It being settled in this state that the right to the specific chattel, which vests on severance from the land in the owner of the soil, remains in him till the species is changed, we are constrained to go further, though it may sometimes subject a mistaken trespasser to hardship, and hold that the true owner is entitled to regain possession of a log cut and removed from his land, either by recapture or by any other remedy provided by law, whatever additional value may have been imparted to it by transporting it to a better market, or by any improvements in its condition short of an actual alteration of species. In *Weymouth v. Railroad Co.*, 17 Wis. 550, the court say: "In determining the question of recaption the law must either allow the owner to retake the property, or it must hold that he has lost his right by the wrongful act of another. If retaken at all,

it must be taken as it is found, though enhanced in value by the trespasser. It cannot be returned to its original condition. The law, therefore, being obliged to say either that the wrongdoer shall lose his labor, or the owner shall lose the right to take the property wherever he may find it, very properly decides in favor of the latter. But where the owner voluntarily waives the right to reclaim the property itself, and sues for damages, the difficulty of separating the enhanced value from the original value no longer exists. It is then entirely practicable to give the owner the entire value that was taken from him, which it seems that natural justice requires, without adding to it such value as the property may have afterwards acquired from the labor of the defendant. In the case of recaption the law does not allow it, because it is absolute justice that the original owner should have the additional value. But where the wrongdoer has by his own act created a state of facts, when either he or the owner must lose, then the law says the wrongdoer shall lose." *Id.*, 26 Am. Rep. 529, note. When, therefore, the plaintiff recaptured the one lot of logs that had been enhanced in value by transportation from the stump to the city market, she but exercised the right given her by law to peacefully regain possession of her own chattels wherever found. She was guilty of no infringement of the rights of the defendant, for which an action would lie. It is familiar learning that a defendant can only maintain successfully a counterclaim when it is of such a nature that he could recover upon it in a separate suit brought against the plaintiff. The defendant could not recover, therefore, either in a distinct action for the taking of the logs, or by way of counterclaim. When the plaintiff recaptured the logs she was guilty of no wrong, and the question of title to the property so rightfully taken was eliminated from all possible future controversy. Her remedy by act of the law remained as to so many of the logs as she had not regained possession of by her own act. After she had recaptured one lot the property in them in their altered state, and at the new situs, revested in her, with the absolute *jus disponendi*, as in the case of her other personal property. Nothing remained to be adjusted in the courts, except her claim for damages for the taking of the other lot and the injury to the land, if any, incident to the removal of both lots. It was error, therefore, to instruct the jury that the enhanced value imparted by removal to the one lot of logs might be allowed the defendant as a counterclaim, so as to set off the damages assessed for injury to the land and for the value at the stump of the other lot, and the plaintiff is entitled to a new trial.

New trial.

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49 OMAHA & GRANT SMELTING & REFINING CO. et al. v. TABOR et al.

(21 Pac. 925, 13 Colo. 41.)

Supreme Court of Colorado. May 28, 1889.

Commissioners' decision. Appeal from district court, Lake county.

Two suits, in the nature of actions in trover, brought by Horace A. W. Tabor, David H. Moffatt, Jacob J. B. Du Bois, James G. Blaine, and Jerome B. Chaffee,—the first, against Eddy, James, and Grant; the second, against the Omaha & Grant Smelting & Refining Company, in which it appears the business of the former defendants was merged. Plaintiffs alleged that they, with Charles E. Rider, were the owners and in the possession of the mine in the county of Lake known as the "Maid of Erin Lode," and as survey "Lot No. 568," and "Mineral Entry No. 384," from the 1st day of January, 1882, until the 11th of October, 1883. That between the 3d of July and the 31st of August, 1883, Thomas Ovens, Stanley G. Wight, and others wrongfully entered upon the property, and mined and took out a large quantity of valuable ore, and sold the same to the defendants, who converted it to their own use; and that the ore so mined, sold, and purchased by the defendants was of the value of \$25,000 over and above the cost of mining, raising, hauling, and treating. That about the 9th day of March, 1886, the plaintiff Jerome B. Chaffee died, and David H. Moffatt became executor. That on or about the 20th of November, 1885, Charles E. Rider sold and transferred to David H. Moffatt his cause or causes of action in the premises, and that the defendants mixed and confused the ores of plaintiffs with other ores, destroyed their identity, and sold and converted them into money. Plaintiffs pray judgment for \$25,000, and interest. Defendants answer, denying all the allegations in the complaint, except the allegation of sale and assignment by Rider to Moffatt, in regard to which they say they are not informed, and the allegation that defendant had not paid plaintiffs for the ore, which is admitted. For further defense, defendants allege that, at the time of the alleged entry and wrongful taking of ore, Stanley G. Wight, Jervis Joslin, Chester B. Bullock, Boyd Park, A. W. Rucker, and ——— Rucker were the owners and in the possession of the Vanderbilt lode mining claim, which conflicted with and embraced a part of the Maid of Erin claim. That the territory in conflict was in litigation between the respective parties. That several actions at law and equity concerning it were pending and undetermined. That at the dates mentioned in the complaint Wight and others were mining and taking ores from the Vanderbilt claim, and from that part in conflict with the Maid of Erin. That these facts were unknown to defendants; and that the ore so taken, or a part of it, was sold and delivered to the defendant at its smelting

works in Leadville, as ore from the Vanderbilt lode, and purchased by defendants in regular course of business. That long after the purchase of the ore by defendants they were informed that the ore was taken from the ground in dispute. Defendants further say, in answer, that some time during August or September, 1883, they did purchase ores belonging to Wight, Rucker, and others which were known as and called "Vanderbilt Ores," which as defendants believe were taken from the Vanderbilt claim, of which the said Wight and others were the owners and claimants, and in possession under claim and color of title. Plaintiffs, in reply, deny that Wight and others were the owners of any part of the Vanderbilt claim in conflict with the Maid of Erin claim; deny that any part of the Vanderbilt claim conflicted; and allege that prior to the date mentioned the government of the United States had sold to the plaintiffs Tabor and Du Bois the Maid of Erin claim, and given a receiver's receipt for the same from the land-office at Leadville; and aver that Ovens and Wight wrongfully went into a portion of the ground described in the complaint while plaintiffs were in possession of it, and mined and carried away the ore, which was the same ore mentioned in defendants' answer; deny that Ovens and Wight had any title to the ground from which ore was taken, and aver that all the possession they had was wrongful and illegal, and temporary, for the purpose of obtaining the ore; that the entry of Ovens and Wight was through a shaft on the Big Chief claim, not owned by either party to the controversy, and that from such shaft they worked over the boundary into plaintiffs' property; deny that defendants did not know that Ovens and Wight were taking the ore from plaintiffs' ground; and aver full notice and knowledge of the fact. The two suits were consolidated for the purpose of the trial. The venue was changed to Lake county; the cause tried before the court and a jury, April 15, 1888; verdict for plaintiffs against Eddy, James, and Grant for \$3,990.45, and against the Omaha & Grant Smelting & Refining Company for \$14,397.67. There are 61 assignments of error. Of these, 38 are to the ruling of the court in admitting and rejecting testimony; 22 (being those from 39 to 60, both inclusive) are to the rulings of the court in giving and refusing the instructions asked; the 61st and last is to the refusal of the court to grant a new trial. The other facts necessary to a proper understanding of the case necessarily appear in the opinion.

Patterson & Thomas, for appellant. *Wolcott & Vaile, J. B. Bissell*, and *L. C. Rockwell*, for appellees.

REED, C., (*after stating the facts as above.*) The first 15 and the 18th errors assigned are to the ruling of the court on the cross-examination of plaintiffs' witness O. H. Harker. Counsel in their argument for appellants say: "The defendants sought to

show by cross-examination of the plaintiffs' witnesses that at the time of the commission of the trespasses complained of, the Maid of Erin mine was owned by the Henriett Mining & Smelting Company and J. B. Du Bois, and that the original trespassers were enjoined at the suit of these parties by proper proceedings instituted for that purpose, but they were not permitted to do so." It appears that counsel for appellants (defendants below) upon the trial attempted, on cross-examination of the witness, to show that the plaintiff Du Bois owned one-half of the Maid of Erin property, and the Henriett Company the other half, and that the other plaintiffs were not owners, by showing that the witness had so stated in a legal document signed and verified by him as manager and agent in some former proceeding concerning the property, in which case an injunction was issued to restrain a trespass upon the Maid of Erin claim upon the complaint so signed and verified; but the court would not permit it to be done. An examination of the questions asked the witness, which the court did not permit him to answer, will show that none of the testimony sought went to any issue in the case, was not directed to anything in his direct testimony, and was not legitimate cross-examination. Many of the questions were in regard to facts that could only have been proved by production of records or documents. Some of the questions were in regard to suits at law and proceedings where there is nothing in the record to show he in any way participated or of which he had any knowledge; and all the testimony sought, in our view of the case, was immaterial, except in so far as it tended to discredit him or weaken his testimony by showing that his acts or declarations on previous occasions were at variance and inconsistent with his testimony at that time. This counsel had a right to do by introducing the records or documents, and asking him in regard to oral statements. It appears that in the course of the trial the papers executed by the witness, to which his attention was called, were admitted in evidence for the purpose of impeachment,—the only legitimate purpose they could serve.

It is clear that the title of the Henriett Company to one-half of the Maid of Erin claim could not have been established by parol statements, or the acts of an agent in verifying papers where the facts were so stated. Counsel say this was one purpose for which the evidence was sought to be elicited on cross-examination. Had it been proper cross-examination, and directed to an issue, it was incompetent for the declared purposes for which it was sought. The agency of the witness had not been established by any testimony but his own. He stated under oath at the time suit was brought that he was the manager and agent of the Henriett Company. This was insufficient. An agency cannot be established by his own declarations. *Harker v. Dement*, 9 Gill, 16;

James v. Stookey, 1 Wash. C. C. 330.¹ If an agency had been proved, it was that at the time of verifying the papers he was the manager and agent of the Henriett Company; and his sworn statement that he was such agent, and that his principal owned one-half of defendants' claim, could not be binding upon or in any way affect the plaintiffs in this action. And although he was the agent of plaintiffs, in charge of their work in the Maid of Erin, no statement, no matter how solemnly made by him as the agent of the Henriett Company, in favor of such company, or against the title of plaintiffs, could affect either, much less conclude and estop the plaintiffs from asserting the contrary, as is urged by counsel. There was no plea of property in the Henriett Company, and of entry and justification under such a title. The defendant in this case cannot set up a title of a third person in defense, unless he in some manner connects himself with it. *Duncan v. Spear*, 11 Wend. 54; *Weymouth v. Railroad Co.*, 17 Wis. 555; *Harker v. Dement*, 9 Gill, 7. It follows that the court did not err in limiting the testimony on the cross-examination to the attempted discrediting of the witness, and in refusing to admit records, except for purposes of impeachment.

It is assigned for error that the court allowed plaintiff Tabor to testify to a conversation with McComb after the latter had been called, and had given his version of it. Counsel put it upon the ground that a party cannot be allowed to contradict or impeach his own witness. It does not appear that Tabor was called for any such purpose, or that his testimony had that effect. He was called to give his version of what occurred at that interview with McComb. A careful comparison of the testimony of both shows that of Tabor more corroborative of than contradictory to that of McComb,—at least, as to the result of such conversation,—although there is some discrepancy in regard to the language used. "The party calling a witness is not precluded from proving the truth of any particular fact by any other competent testimony." 1 Greenl. Ev. § 443.

Appellants' counsel rely upon the conversation of Tabor with McComb as a license or consent on the part of Tabor to the entry and taking of the ores from the Maid of Erin ground, and contend that his license or consent as a co-owner to the extent of one-sixteenth of the Maid of Erin ground was conclusive upon himself, and also upon his co-owners of the other fifteen-sixteenths, and was equivalent to a license or consent from all, to the extent of covering the entire property. A license or consent cannot be extended by inference as a consent to enter property not spoken of or referred to in the conversation, and we can find nothing in the testimony of either McComb or Tabor in regard to entering and taking ore from the Maid of Erin ground. It was not attempted

¹ Fed. Cas. No. 7,184.

to be shown that Ovens, Wight, and Rucker entered under license or consent from Tabor. At the conversation both testify that Tabor was informed the parties had entered under an order from the court, against which he was powerless for the time. It further appears that those parties were in at the time McComb and Tabor had the conversation, and McComb only asked consent to join them. It cannot be contended that such a consent was a license to Ovens, Wight, and Rucker to enter. The testimony went to the jury, and in the eighth and ninth instructions given on prayer of plaintiffs they were instructed, in effect, that they could not limit or reduce the amount to be recovered by reason of the supposed license or consent of Tabor, unless they should find that there was a consent on his part that they should enter through the Big Chief shaft, and take the ore from the Maid of Erin claim; and the same proposition is submitted in the instruction given on behalf of defendants in place of No. 7, refused. These instructions on that point, we think, were correct, and fairly submitted to the jury the question of license or consent. And it is evident from the verdict that the jury found against any such license or consent; and, the jury having so found, it would seem unnecessary to determine whether the instructions were correct or otherwise in regard to the extent such consent, if found, should affect or modify the amount; or, in other words, whether it should cover the whole taking of ore, or be confined to the one-sixteenth owned by Tabor. The jury having found no consent or license on the part of Tabor, defendants could not be prejudiced by the instructions of the court in regard to its effect, if it were found.

The question is quite different from what it would be if it related to a transaction in the ordinary course of business relative to the joint property of tenants in common. Here it is attempted to justify a tort, and the injury to the entire property by the supposed license of one joint owner. If the entry had been made by Tabor in person, and the wrongs attempted to be justified under permission from, had been done by, him, his co-tenants could have had against him the same actions at law for injuries to their interests that all are attempting to enforce against parties having no interest. It is held "an action on the case sounding in tort may be maintained by one tenant in common against his co-tenant for a misuse of the common property, though not amounting to a total destruction of it." *McLellan v. Jenness*, 43 Vt. 183; *Agnew v. Johnson*, 17 Pa. St. 373; *Lowe v. Miller*, 3 Grat. 205. And, if one tenant in common assume to own and sell the thing held in common, the other may maintain an action of trover against him. *Burbank v. Crooker*, 7 Gray, 159; *Wheeler v. Wheeler*, 33 Me. 347; *Coursin's Appeal*, 79 Pa. St. 220; *White v. Osborn*, 21 Wend. 72; *Smyth v. Tankersley*, 20 Ala. 212. The authority of the tenant in common could not

be extended to cover acts of others that he could not legally have done himself. Hence the court was correct in holding and instructing the jury that the consent or license of Tabor, if such were found, could only extend to the interest owned by him in the common property.

Appellants further assign for error the ruling of the court in admitting the testimony of Tabor when called by the plaintiffs to show that, by a parol agreement made at the time of the conveyance of the different interests by Tabor, Moffatt, and Chaffee in the Henriett Company, possession of the property conveyed was to remain in the grantors until the purchase price was paid; that it never was paid; and possession under the conveyance never delivered. A part of such testimony—that which went to show that possession was to be retained—was inadmissible. "All conveyances of real estate and of any interest therein duly executed and delivered shall be held to carry with them the right to immediate possession of the premises or interest conveyed, unless a future day for the possession is therein specified." Gen. St. c. 18, § 9; *Drake v. Root*, 2 Colo. 685. Under the statute, it is certainly required that the intention to postpone the operation of a deed shall be declared in the instrument, and it cannot be proved by parol. It follows that the instructions of the court on this point were in part erroneous; that part of the testimony going to prove that possession of the property was never delivered, and remained in the grantors, was clearly competent and proper; and the instructions of the court were proper on that point.

The admission in evidence of the deeds of reconveyance by the Henriett Mining Company and the assignment of Rider of his cause of action was not erroneous, and should be sustained,—the former investing plaintiffs with full title before the commencement of suit; and of the validity of the latter, so as to enable Moffatt, assignee, to succeed to all the rights of his assignor. There can be no question under our statute. Had defendants, by proper and competent testimony, attempted to prove the ownership of one-half of the Maid of Erin claim in the Henriett Company, it would have been inadmissible. There was no attempted justification of entry of Wight and others under the Henriett title of one-half. Under a plea that the close upon which the alleged trespass was committed was not at that time the close of the plaintiff, the defendant may show lawful right to the possession of the close in a third person, under whom he claims to have acted. *Jones v. Chapman*, 2 Exch. 803. But a bare tort-feasor cannot set up in defense the title of a third person between whom and himself there is no privity of connection. *Branch v. Doane*, 18 Conn. 238. In justifying under a third person, the defendant must show both the title and the possession of that person, (Chambers

v. Donaldson, 11 East, 65; Merrill v. Burbank, 23 Me. 538; Reed v. Price, 30 Mo. 442,) and that the acts were done by that person's authority. (Dunlap v. Glidden, 31 Me. 510.) A defendant can only justify upon the ground of a better right or title than the plaintiffs have. And it has been held that mere naked possession, however acquired, is good as against a person having no right to the possession. Knapp v. Winchester, 11 Vt. 351; Haslem v. Lockwood, 37 Conn. 500; Cook v. Patterson, 35 Ala. 102. It will be apparent that in the judgment of this court the effort of defendants to set up title to half of the property in the Maid of Erin claim in the Hennett Company, without a plea to that effect, and attempting to show privity or attempting to justify under it, was unwarranted in law, and that no testimony should have been taken in support of any such attempted defense.

Another defense interposed, which seems incompatible with the former, was that certain parties, named in the answer, were the owners of the Vanderbilt claim, and that such claim conflicted with and comprised a part of the Maid of Erin claim, and that the claim was in the possession of the owners named under claim and color of title; and that the ground from which the ore was taken was in conflict between the owners of the claim, and that divers suits in regard to the same were pending and undetermined; that Wight and others, while engaged in mining the Vanderbilt claim, took the ores from the ground in controversy, which defendants bought as Vanderbilt ore; and that the same was taken by the owners of such claim while the *locus* was in their possession under color of title. It is shown in evidence that there were two entries on the property in controversy,—the first by Wight, one of the owners of the Big Chief in 1882, after the Maid of Erin had a receiver's receipt from the United States land-office, when a drift was run from the Big Chief shaft for the Maid of Erin, and was run over the line 20 or 28 feet, into the Maid of Erin ground. The second entry was by the same party and others, in the same way, and upon the same ground. Neither entry was made by extending the work of the Vanderbilt claim to its exterior limits, and thus entering the Maid of Erin property. The party entering and participating in the proceeds of the ores mined were not the owners of the Vanderbilt, but seems to have been one made up for the occasion,—part of the owners of the Vanderbilt, some of the owners of the Big Chief, and, perhaps, parties owning in neither. The plaintiffs pleaded title to the Maid of Erin claim from the government of the United States, and put in evidence a receiver's receipt for the purchase of the property, of date November 23, 1881, and a patent from the United States government dated March 17, 1884. It has been frequently held that a patent for land emanating from the government of the United States is the highest evidence of title,

and in courts of law is evidence of the true performance of every prerequisite to its issuance, and cannot be questioned either in courts of law or equity, except upon ground of fraud or mistake, and, if not assailed for fraud or mistake, is conclusive evidence of title. On the 23d of November, 1881, the government parted with its title to the Maid of Erin property, sold it to Tabor and Du Bois, and gave a receipt. The government could thereafter no more dispose of the land than if a patent had been issued. "The final certificate obtained on the payment of the money is as binding on the government as the patent. * * * When the patent issues it relates back to the entry. * * *" *Astrom v. Hammond*, 3 McLean, 107;² *Blackley v. Coles*, 6 Colo. 350; *Poire v. Wells*, Id. 406; *Steel v. Smelting Co.*, 106 U. S. 447, 1 Sup. Ct. Rep. 389; *Heydenfeldt v. Mining Co.*, 93 U. S. 634. The patent does not invest the purchaser with any additional property in the land. It only gives him better legal evidence of the title which he first acquired by the certificate. *Cavender v. Smith*, 5 Clarke, (Iowa,) 189; Id. 3 G. Green, 349; *Arnold v. Grimes*, 2 Clarke, (Iowa,) 1; *Carroll v. Safford*, 3 How. 460; *Bagnell v. Broderick*, 13 Pet. 450; *Carman v. Johnson*, 29 Mo. 94; *Hutchings v. Low*, 15 Wall. 88. A patent title cannot be attacked collaterally. "Individuals can resist the conclusiveness of the patent only by showing that it conflicts with prior rights vested in them." *Boggs v. Mining Co.*, 14 Cal. 362; *Leese v. Clark*, 18 Cal. 555; *Jackson v. Lawton*, 10 Johns. 24. An "adverse possession" is defined to be the enjoyment of land, or such estate as lies in grant, under such circumstances as indicate that such enjoyment has been commenced and continued under assertion or color of right on the part of the possessor. *Wallace v. Duffield*, 2 Serg. & R. 527; *French v. Pearce*, 8 Conn. 440; *Smith v. Burtis*, 9 Johns. 174. The entry of a stranger, and the taking of rents or profits by him, is not an adverse possession. When two parties are in possession, the law adjudges it to be the possession of the party who has the right. *Reading v. Rawsterne*, 2 Ld. Raym. 829; *Barr v. Gratz*, 4 Wheat. 213; *Smith v. Burtis*, 6 Johns. 218; *Stevens v. Hollister*, 18 Vt. 294; *Brimmer v. Long Wharf*, 5 Pick. 131. Possession, to be supported by the law, must be under a claim of right, and adverse possession must be strictly proved. *Grube v. Wells*, 34 Iowa, 150. The color must arise out of some conveyance purporting to convey title to a tract of land. 3 Washb. Real Prop. 155; *Shackleford v. Bailey*, 35 Ill. 391.

The title of the Maid of Erin claim was in the government of the United States until divested by its own act. There could be no adverse possession against the government. The claimants of the Vanderbilt claim entered under license only from the govern-

² Fed. Cas. No. 596.

ment. Admitting, for the purposes of this case, that the entry under the license was legal, that they had complied with the laws of congress and the state, and that their possession extended to and was protected to their exterior lines while the fee remained in the government, when the fee passed from the government to the other party conveying the *locus*, before that time in controversy, the supposed license was revoked, and all acts and declarations of the parties themselves, whether by record or otherwise, as establishing a possessory right, were void as against the grantees of the government, and there could be no entry under color of title, except by some right by conveyance either from the government or its grantees. The fact of the actual possession and occupancy of the Maid of Erin by plaintiffs was not seriously disputed, and the testimony was ample to warrant the jury in finding the fact. The government had granted the land previous to the entry of Wight and others, and that such possession under a legal title was co-extensive with its bounds is so well settled that authorities in its support are unnecessary.

We do not think the court erred in refusing to admit the testimony offered in support of possessory title of the Vanderbilt in the land from which the ore was taken, nor in refusing the testimony in reference to litigation and suits pending between the parties. Neither the title nor right of possession of plaintiffs could be attacked collaterally as attempted, and the testimony offered under the law as shown above was incompetent and inadmissible to prove either adverse possession or color of title. From our view of the law controlling the case, as stated above, it follows that the court did not err in refusing the instructions asked on this point by the defendants, or in giving those which were given. They were substantially correct.

The sale of ore by Wight and others, and purchase by the defendants, was a conversion. A "conversion" is defined to be any act of the defendant inconsistent with the plaintiff's right of possession, or subversive of his right of property. *Harris v. Saunders*, 2 Strob. Eq. 370, note; *Webber v. Davis*, 44 Me. 147; *Gilman v. Hill*, 36 N. H. 311; *Clark v. Whitaker*, 19 Conn. 319. The defendants, by purchasing the ore, acquired no title, and are consequently equally liable for its conversion as the parties who sold it. *Clark v. Wells*, 45 Vt. 4; *Clark v. Rideout*, 39 N. H. 238; *Carter v. Kingman*, 103 Mass. 517. And it was a matter of no importance, so far as the legal liability of defendants was concerned, whether they were ignorant or informed of the true ownership. *Morrill v. Moulton*, 40 Vt. 242; *Johnson v. Powers*, Id. 611; *Railroad Co. v. Car-Works Co.*, 32 N. J. Law, 517; *Dixon v. Caldwell*, 15 Ohio St. 412; *Hoffman v. Carow*, 22 Wend. 285. The principle *caveat emptor* applies. A person purchasing property of the party in possession, without ascertaining where the true

title is, does so at his peril, and, although honestly mistaken, will be liable to the owner for a conversion. *Taylor v. Pope*, 5 Cold. 413; *Gilmore v. Newton*, 9 Allen, 171; *Sprights v. Hawley*, 39 N. Y. 441.

The question of the proper measure of damages is one of much greater difficulty. We can find no conclusive adjudication in our own court. The decisions of the different states are conflicting and irreconcilable. Although, under our Code, different forms of action are abolished, the principles controlling the different actions remain the same as before its adoption. Consequently the law applicable and to be administered in each case depends as much as formerly upon the nature of the case,—the allegations and the distinctive form the case assumes. In many states the courts have attempted in this action to make the rule of damage correspond to that in the action of trespass, and make it in that respect as full and complete a remedy. In the state of New York it was long held, and perhaps still is, that the increased value of the property, added by the labor and acts of defendant, belongs to the rightful owner of the property, and the value of the property in its new and improved state thus becomes the measure of damages, but the doctrine has been questioned and severely criticised in the same state. *Brown v. Sax*, 7 Cow. 95. In trespass, damage for the whole injury, including diminution in the value of the land by the entry and removal, as well as of the value of the property removed, may be recovered; and the character of the entry, whether willful and malicious, or in good faith, through inadvertence or mistake, is an important element.—an element that cannot enter into the action of trover. In trover, the specific articles cannot be recovered as in replevin. Consequently the same rule as to increased value cannot be applied as in that action, where the specific property can be followed, and, when identified, taken without regard to the form it has assumed. It seems, on principle, therefore, (and this is in harmony with the English authorities and those of many of the states,) that where a party makes his election, and adopts trover, the rule of damage is and should be proper compensation for the property taken and converted, regardless of the manner of entry and taking; and, where the chattel was severed from the realty, regardless of the diminished value of the realty by reason of the taking. In other words, the true rule should be the value of the chattel as such when and where first severed from the realty and becoming a chattel. An examination of the authorities will show that the rule of damages to some extent depends upon the form of action,—whether the action is for an injury to the land itself, or for the conversion of a chattel which had been severed from the land. This distinction seems well founded in principle and reason. This view of the law is supported by *Martin v. Porter*, 5 Mees. & W. 352; *Wild v. Holt*, 9 Mees. & W. 672; *Morgan v.*

Powell, 3 Q. B. 278; *Hilton v. Woods*, L. R. 4 Eq. 492; *Maye v. Yappen*, 23 Cal. 306; *Goller v. Fett*, 30 Cal. 481; *Coleman's Appeal*, 62 Pa. St. 252; *Cushing v. Longfellow*, 26 Me. 306; *Forsyth v. Wells*, 41 Pa. St. 291; *Kier v. Peterson*, Id. 357; *Moody v. Whitney*, 38 Me. 174. We are therefore of the opinion that the rule of damage adopted, and the instructions of the court as to the measure of damage, were erroneous, and that it should have been the value of the ore sold, as shown, less the reasonable and proper cost of raising it from the mine after it was broken, and hauling from the mine to the defendants' place of business. We do not find it necessary to decide whether or not plaintiffs' counsel, by stating in the complaint that the ore taken and converted was of a certain value "over and above the cost of mining, digging, and extracting the same from the ground, raising the same to the surface, hauling the same to the defendants' reduction works, and the cost of treating the same," and defendants taking issue upon it, precluded them from proving and taking greater damage upon the trial; but if it were necessary, for the purpose of determining this case, we should be inclined to so hold. In this action value is a material averment, and the plaintiffs have deliberately asserted one rule, and, issue having been taken upon it, should not be permitted to change base, and adopt upon trial another more disadvantageous to the defendants. In this case it could not have been said the evidence was in support of the allegation or directed to an issue. The testimony should have been directed to the issue, or the pleadings amended.

Counsel for appellees, after obtaining leave from this court, assigned for cross-error the refusal of the court to allow interest on the amount found due from the time of the conversion, and the instruction of the court on that point. It is true, as stated by the learned judge, "that interest in this state is a creature of statute, and regulated thereby; that it is only recoverable in the absence of contract in cases enumerated in the statute; and that damages to property arising from a wrong or negligence of the defendants is not one of the enumerated cases." This could not come under the last clause of the instruction. It is not for damage to property. It is for the wrongful detention of money belonging to plaintiffs. It is clearly distinguishable from *Railroad Co. v. Conway*, 8 Colo. 1, 5 Pac. Rep. 142, and *Hawley v. Barker*, 5 Colo. 118. There does not appear to have been any decision in this state directly on the question presented. The same statute has been con-

strued in Illinois (from which state it was taken) as allowing interest in this class of cases from the time of the conversion, and there has been an unbroken line of decisions in that state from *Bradley v. Geiselman*, 22 Ill. 494, to *Railroad Co. v. Cobb*, 72 Ill. 143, in which it is said, reviewing the decisions: "The doctrine established by these authorities is, where property has been wrongfully taken or converted into money, and an action of trespass or trover may be maintained, interest may properly be recovered; and this is based upon the statute which authorizes interest when there has been an unreasonable and vexatious delay of payment. There can be no difference between the delay of payment of a money demand and one where property has been wrongfully taken, or taken and converted into money or its equivalent. The two rest upon the same principle." The rule is that when the statute of another state is adopted the construction of the statute in that state is also adopted, and remains the true construction until authoritatively construed by the courts of the state adopting it. The general rule in trover is that the damages should embrace the value of the property at the time of the conversion, with interest up to the time of judgment, and this rule has been followed in almost if not all the states, and seems right on principle. But our statute does not seem to have received the same construction here as in the state of Illinois. While in that state it has been put plainly and squarely as interest under the statute, in our state damage for the detention of the money equal to the legal interest upon the value of the chattels converted from the time of the conversion has been allowed, not as interest, but as damage. *Machette v. Wanless*, 2 Colo. 170; *Hanauer v. Bartels*, Id. 514; *Tucker v. Parks*, 7 Colo. 62, 1 Pac. Rep. 427. We think the court erred in its instructions to the jury on this point. They should have been instructed to add to the amount found as the value of the ore, as further damage, a sum equal to legal interest on the same from the time of the conversion. For the errors in assessing the damage, the case should be reversed, and remanded for a new trial in accordance with the views herein expressed.

RICHMOND and PATTISON, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is reversed.

Reversed.

**E. E. BOLLES WOODEN WARE CO. v.
UNITED STATES.**

(1 Sup. Ct. 398, 106 U. S. 432.)

Supreme Court of the United States. Dec. 18, 1882.

In Error to the Circuit Court of the United States for the Eastern District of Wisconsin.

Samuel D. Hastings, Jr., for plaintiff in error.

Asst. Atty. Gen. Maury, for defendant in error.

MILLER, J. This is a writ of error to the circuit court for the eastern district of Wisconsin, founded on a certificate of division of opinion between the judges holding that court. The facts, as certified, out of which this difference of opinion arose appear in an action in the nature of trover, brought by the United States for the value of 242 cords of ash timber, or wood suitable for manufacturing purposes, cut and removed from that part of the public lands known as the reservation of the Oneida tribe of Indians, in the state of Wisconsin. This timber was knowingly and wrongfully taken from the land by Indians, and carried by them some distance to the town of Depere, and there sold to the E. E. Bolles Wood-Ware Company, the defendant, which was not chargeable with any intentional wrong or misconduct or bad faith in the purchase. The timber on the ground, after it was felled, was worth 25 cents per cord, or \$60.71 for the whole, and, at the town of Depere, where defendant bought and received it, \$3.50 per cord, or \$850 for the whole quantity. The question on which the judges divided was whether the liability of the defendant should be measured by the first or the last of these valuations. It was the opinion of the circuit judge that the latter was the proper rule of damages, and judgment was rendered against the defendant for that sum. We cannot follow counsel for the plaintiff in error through the examination of all the cases, both in England and this country, which his commendable research has enabled him to place upon the brief. In the English courts the decisions have in the main grown out of coal taken from the mine, and in such cases the principle seems to be established in those courts that when suit is brought for the value of the coal so taken, and it has been the result of an honest mistake as to the true ownership of the mine, and the taking was not a willful trespass, the rule of damages is the value of the coal as it was in the mine before it was disturbed, and not its value when dug out and delivered at the mouth of the mine. *Martin v. Porter*, 5 Mees. & W. 351; *Morgan v. Powell*, 3 Adol. & E. (N. S.) 278; *Wood v. Morewood*, 3 Adol. & E. 440; *Hilton v. Woods*, L. R. 4 Eq. 438; *Jegon v. Vivian*, L. R. 6 Ch. App. 760.

The doctrine of the English courts on this subject is probably as well stated by Lord Hatherly in the house of lords, in the case of *Livingston v. Coal Co.*, L. R. 5 App. Cas. 33, as anywhere else. He said: "There is no doubt that if a man furtively, and in bad faith, robs his neighbor of his property, and because it is underground is probably for some little time not detected, the court of equity in this country will struggle, or I would rather say, will assert its authority, to punish the fraud by fixing the person with the value of the whole of the property which he has so furtively taken, and making him no allowance in respect of what he has so done, as would have been justly made to him if the parties had been working by agreement." But "when once we arrive at the fact that an inadvertence has been the cause of the misfortune, then the simple course is to make every just allowance for outlay on the part of the person who has so acquired the property, and to give back to the owner, so far as is possible under the circumstances of the case, the full value of that which cannot be restored to him in specie."

(There seems to us to be no doubt that in the case of a willful trespass the rule as stated above is the law of damages both in England and in this country, though in some of the state courts the milder rule has been applied even to this class of cases. Such are some that are cited from Wisconsin. *Single v. Schneider*, 24 Wis. 299; *Weymouth v. Railroad Co.*, 17 Wis. 567. On the other hand, the weight of authority in this country as well as in England favors the doctrine that where the trespass is the result of inadvertence or mistake, and the wrong was not intentional, the value of the property when first taken must govern.) or if the conversion sued for was after value had been added to it by the work of the defendant, he should be credited with this addition. *Winchester v. Craig*, 33 Mich. 205, contains a full examination of the authorities on the point. *Heard v. James*, 49 Miss. 236; *Baker v. Wheeler*, 8 Wend. 505; *Baldwin v. Porter*, 12 Conn. 484. While these principles are sufficient to enable us to fix a measure of damages in both classes of torts where the original trespasser is defendant, there remains a third class where a purchaser from him is sued, as in this case, for the conversion of the property to his own use. In such case, if the first taker of the property were guilty of no willful wrong, the rule can in no case be more stringent against the defendant who purchased of him than against his vendor.

But the case before us is one where, by reason of the willful wrong of the party who committed the trespass, he was liable, under the rule we have supposed to be established, for the value of the timber at Depere the moment before he sold it, and the question to be decided is whether the defendant who

purchased it then with no notice that the property belonged to the United States, and with no intention to do wrong, must respond by the same rule of damages as his vendor should if he had been sued. It seems to us that he must. The timber at all stages of the conversion was the property of plaintiff. Its purchase by defendant did not divest the title nor the right of possession. The recovery of any sum whatever is based upon that proposition. This right, at the moment preceding the purchase by defendant at Depere, was perfect, with no right in any one to set up a claim for work and labor bestowed on it by the wrong-doer. It is also plain that by purchase from the wrong-doer defendant did not acquire any better title to the property than his vendor had. It is not a case where an innocent purchaser can defend himself under that plea. If it were, he would be liable to no damages at all, and no recovery could be had. On the contrary, it is a case to which the doctrine of caveat emptor applies, and hence the right of recovery in plaintiff. On what ground, then, can it be maintained that the right to recover against him should not be just what it was against his vendor the moment before he interfered and acquired possession? If the case were one which concerned additional value placed upon the property by the work or labor of the defendant after he had purchased, the same rule might be applied as in case of the inadvertent trespasser. But here he has added nothing to its value. He acquired possession of property of the United States at Depere, which, at that place, and in its then condition, is worth \$850, and he wants to satisfy the claim of the government by the payment of \$60. He founds his right to do this, not on the ground that anything he has added to the property has increased its value by the amount of the difference between these two sums, but on the proposition that in purchasing the property, he purchased of the wrong-doer a right to deduct what the labor of the latter had added to its value.

If, as in the case of an unintentional trespasser, such right existed, of course defendant would have bought it and stood in his shoes; but, as in the present case, of an intentional trespasser, who had no such right to sell, the defendant could purchase none.

Such is the distinction taken in the Roman law as stated in the *Inst. Just. lib. 2, tit. 1, § 34*.

After speaking of a painting by one man on the tablet of another, and holding it to

be absurd that the work of an Appelles or Parrhasius should go without compensation to the owner of a worthless tablet, if the painter had possession fairly, he says, as translated by Dr. Cooper: "But if he, or any other, shall have taken away the tablet feloniously, it is evident the owner may prosecute by action of theft."

The case of *Nesbitt v. Lumber Co.*, 21 Minn. 491, is directly in point here. The supreme court of Minnesota says: "The defendant claims that because they [the logs] were enhanced in value by the labor of the original wrong-doer in cutting them, and the expense of transporting them to Anoka, the plaintiff is not entitled to recover the enhanced value, that is, that he is not entitled to recover the full value at the time and place of conversion."

That was a case, like this, where the defendant was the innocent purchaser of the logs from the willful wrong-doer, and where, as in this case, the transportation of them to a market was the largest item in their value at the time of conversion by defendant; but the court overruled the proposition and affirmed a judgment for the value at Anoka, the place of sale. To establish any other principle in such a case as this would be very disastrous to the interest of the public in the immense forest lands of the government. It has long been a matter of complaint that the depredations upon these lands are rapidly destroying the finest forests in the world. Unlike the individual owner, who, by fencing and vigilant attention, can protect his valuable trees, the government has no adequate defense against this great evil. Its liberality in allowing trees to be cut on its land for mining, agricultural, and other specified uses, has been used to screen the lawless depredator who destroys and sells for profit. To hold that when the government finds its own property in hands but one remove from these willful trespassers, and asserts its right to such property by the slow processes of the law, the holder can set up a claim for the value which has been added to the property by the guilty party in the act of cutting down the trees and removing the timber, is to give encouragement and reward to the wrong-doer, by providing a safe market for what he has stolen and compensation for the labor he has been compelled to do to make his theft effectual and profitable.

We concur with the circuit judge in this case, and the judgment of the circuit court is affirmed.

LAW DAM.—12

57 GRIGGS v. DAY et al.

(32 N. E. 612, 136 N. Y. 152.)

Court of Appeals of New York. Nov. 29, 1892.

Appeal from superior court of New York City, general term.

Action by Clark R. Griggs against Melville C. Day and another, as executors of Cornelius K. Garrison, for an accounting for transactions had between plaintiff and said Garrison. From a judgment of a referee both parties appeal. For former reports, see 11 N. Y. Supp. 885, 12 N. Y. Supp. 958, 18 N. Y. Supp. 796, and 19 N. Y. Supp. 1019. Reversed.

Melville C. Day and Esek Cowen, for appellants. John H. Post, for respondent.

EARL, C. J. This action was brought against Cornelius K. Garrison, since deceased, for an accounting. It was referred to a referee, and he ordered judgment in favor of the plaintiff for upwards of \$188,000. The record is very voluminous, and in the briefs submitted and the arguments of counsel many questions of law and fact were presented for our consideration. A careful study of the record has satisfied me that the judgment appealed from is both illegal and unjust. In September, 1879, the plaintiff entered into a contract with the Wheeling & Lake Erie Railroad Company, an Ohio corporation, for the construction and equipment of its line of railroad in that state according to the specifications and upon the terms and conditions mentioned in the contract. By one of the provisions of the contract the railroad company was "to furnish the contractor available subscriptions, or proceeds thereof, and aid, to the amount of \$4,000 per mile of main track, branches, and sidings, or so much as may be necessary to furnish right of way, grade, bridge, and the said railroad between Hudson's and Martin's Ferry," a distance of 143 miles, and "to use its best endeavors to secure for the contractor available subscriptions and aid to the extent of \$4,000 per mile, or so much as may be necessary," for a similar purpose, as to the balance of the road, a distance of 58 miles. For the performance of this contract, besides the aid to be furnished as above stated, the plaintiff was to receive bonds and stock of the company. He was without financial ability, and he applied to Garrison for financial aid to enable him to perform his contract; and upon his application Garrison, from time to time, advanced him large sums of money, amounting in all, besides interest, to nearly \$4,500,000. For the money so advanced the plaintiff assigned and delivered to Garrison as collateral security his construction contract and bonds and stock of the company, and some of it was repaid by the sales to him of bonds

and stock. In 1882 the plaintiff received from the company for extra work claimed to have been done by him, and on account of its failure to perform the portions of the contract above quoted, its promissory notes, amounting to \$1,949,710.72, and they were delivered by him to Garrison for moneys advanced and to be advanced by him for the construction of the road. Garrison held these notes until May, 1883, when there was due to him for moneys advanced to the plaintiff for the construction of the road nearly \$2,500,000. He then received from the company 2,280 of its second mortgage bonds of the denomination of \$1,000, at 75 cents on the dollar, amounting, with some interest, to \$1,736,600, to apply upon his claims, and he then surrendered to it all of the above-mentioned promissory notes, and they were canceled. On the same day he caused an original entry to be made in his journal,—one of his account books,—as follows: "This amount of notes and interest, \$2,062,643.13, taken from contractor at 75 per cent., \$1,546,982.35." He then charged the company in his books of account with the whole amount of the notes and interest, and gave it credit for \$1,736,600,—the price, including interest, at which he took the second mortgage bonds; and he credited the plaintiff with the sum of \$1,546,982.35. The difference between the total amount due upon the notes and the amount allowed by him for the second mortgage bonds was \$326,043.13, and thus he had in his hands, not used for the payment of the bonds, the notes to that amount, which he then surrendered to the company without any consideration whatever; and, as the referee found, he elected to look to the company as his debtor on open account for that amount. The referee also found that by reason of the surrender of the notes in consideration of the purchase of the bonds, and by reason of the surrender of the balance of the notes, and by reason of the election before mentioned, Garrison discharged the indebtedness of the plaintiff to him to the amount of the face value of the notes at the time of the surrender. He also found that the plaintiff's rights as pledgor in the construction contract, and in the bonds, stock, and other property transferred to Garrison as collateral security, were never cut off by foreclosure of his rights, or in any other way. These facts having been found by the referee, he found, among other conclusions of law, that the legal effect of the surrender by Garrison to the railroad company of the promissory notes held by him as collateral security for moneys advanced to the plaintiff, and of the charge by him against the railroad company of the full amount of the notes and interest, was to relieve the plaintiff from any liability to him for the amount thereof; and in the accounting he charged Garrison with the full amount of the notes, with interest. The

only question which I deem it important now to consider is whether the learned referee was right in making that charge.

The further fact must be taken into consideration that the notes surrendered were of no value as against the company. It was utterly insolvent, with property no more than sufficient to pay its first mortgage bonds. The second mortgage bonds were absolutely of no intrinsic value. The referee held these facts to be immaterial, and that, under the circumstances, Garrison had made himself chargeable with the full amount of the notes, without reference to their value. Such a conclusion is somewhat startling, and should not be sanctioned unless it has support in well-recognized principles of law or authorities which we feel constrained to follow. The entries in Garrison's books of account in reference to these notes have very little bearing upon the controversy between these parties. They were private entries, made by Garrison, undisclosed to the plaintiff, and without his authority. They were important simply as evidence, and are entitled to no more weight than would have been the oral declarations or admissions of Garrison made to any third party. They show what use he made of the notes, and about that there is no dispute. They did not bind the plaintiff, and he has never, so far as appears, assented to them. They show that Garrison intended to take the notes at 75 cents on the dollar, and that he was willing to allow the plaintiff that sum for them. But there was no actual purchase of them. If that entry had come to the knowledge of the plaintiff, and he had adopted it, and so notified Garrison, he could probably have held him to a purchase of the notes for that sum. But he repudiates that entry, and refuses to let Garrison have the notes for that sum. He cannot use that entry to fasten upon him a purchase of the notes at their face value. The minds of the parties never met upon such a contract. Garrison either purchased the notes used in exchange for the bonds at 75 per cent. of their face value, or he did not purchase them at all. Therefore, as the plaintiff repudiates the purchase at the price named, there was no contract of purchase; and as to these notes, pledged for collateral security, Garrison must be held to have wrongfully converted them to his own use. It would make no difference whether we consider these notes as having been exchanged for the bonds, or as having been used in payment for the bonds. In either view, Garrison was, at most, guilty of a conversion of them. As to the balance of the notes, which were surrendered to the company without any consideration, there was simply a wrongful conversion of them. They had no value as obligations against the company, and it is preposterous to suppose that Garrison intended by the surrender to charge himself for their full face value against an indebtedness of the plaintiff

to him for money actually loaned. By the surrender he did not intend to release the company from its indebtedness evidenced by the notes, but he intended and elected still to hold the indebtedness, evidenced by his charge in open account upon his books. The obligation of the company was not impaired or lessened by the transaction, and it owed just as much after it as before. Even if he made the notes his own by surrendering them, there was simply a conversion of them. It is true that he elected to hold the company as his debtor upon open account, just as it was his debtor before for the same amount evidenced by the notes. He did not take a new debtor, but he retained and intended to retain the same debtor. Here there was no novation, and nothing resembling it. It usually, if not always, takes three parties to make a novation, and they must all concur upon sufficient consideration in making a new contract to take the place of another contract, and in substituting a new debtor in the place of another debtor. "Novation" is thus briefly defined: "A transaction whereby a debtor is discharged from his liability to his original creditor by contracting a new obligation in favor of a new creditor by the order of the original creditor." 1 Pars. Cont. 217. Here there was no element answering to this definition. There was no intention to make a novation, no consideration for a new contract, no concurrence of the three or even of the two parties. So we reach the conclusion as to all the notes that Garrison, by their surrender, made himself liable for a wrongful conversion of them to his own use, and thus became responsible to the plaintiff for the damages caused by the wrong; and the question is, what were such damages? The answer must be, the value of the notes converted. There can be no other measure, as that measures the entire damage of the plaintiff absolutely. As to the notes surrendered for the bonds, the plaintiff could have elected to take the bonds or their value; but this he refuses to do, as the bonds have no value, and thus he is confined absolutely to the value of the notes. ✓

Now, how does the case stand upon authority? In *Garlick v. James*, 12 Johns. 146, the plaintiff deposited with the defendant a promissory note of a third person as collateral security for a debt, and the defendant, without the knowledge or consent of the plaintiff, compromised with the maker of the note, and surrendered the note to him upon payment of one half of the face thereof. It was found that the maker was at the time of the compromise abundantly able to pay the full amount of the note, and under such circumstances it was properly held that the pledgee was liable for the balance unpaid upon the note. In *Hawks v. Hinchcliff*, 17 Barb. 492, the plaintiff sued the defendant upon an account for merchandise delivered,

and the defendant showed that the plaintiff took two notes for the amount of the account as collateral security for the payment thereof; that he transferred one of the notes to a person, who recovered judgment thereon against the makers, and afterwards assigned the judgment to one Prindle; that he recovered judgment upon the other note, and assigned that to Prindle; and it appeared that the defendants in those judgments had never paid the notes or the judgments. It was held that the plaintiff, the pledgee, could not recover upon his account. It was not shown upon what consideration the notes and the judgments were transferred by the pledgee, or that at the time of the transfer the makers of the notes were not perfectly solvent. The plaintiff there relied upon the simple fact that the notes and judgments were not paid. Upon this state of the facts the court held that the presumption, nothing appearing to the contrary, was that the note and judgments were transferred by the plaintiff for the full amount appearing to be due upon them, and hence he was charged with the full amount. There are some broad expressions contained in the opinion, which, when isolated from the facts of the case, tend to give some countenance to the plaintiff's contention here. In *Vose v. Railroad Co.*, 50 N. Y. 369, it was held that a wrongful sale by a creditor of collateral securities placed in his hands by the principal debtor does not, per se, discharge even a surety for the debt (much less the principal debtor) in toto, but that by such sale the creditor makes the securities his own to the extent of discharging the surety only to an amount equal to their actual value. In *Potter v. Bank*, 28 N. Y. 641; *Booth v. Powers*, 56 N. Y. 22; and *Thayer v. Manley*, 73 N. Y. 305, —it was held that in an action to recover damages for the conversion of a promissory note the amount appearing to be unpaid thereon at the time of the conversion, with interest, is prima facie the measure of damages, but that the defendant has the right to show in reduction of damages the insolvency or inability of the maker, or any other fact impugning the value of the note. In *Bank v. Gordon*, 8 N. H. 66, where the bank had received a note as collateral security,

and had subsequently, without the consent of the pledgor, compromised it by receiving the one half thereof from the maker, it was held that the bank was bound to credit the pledgor with only the amount received upon compromise, upon proof that the compromise was advantageous, and that the maker was insolvent, and unable to pay the balance; and the general rule was laid down which was announced in the cases last above cited. If the pledgee of the note of an insolvent maker may surrender it upon a compromise for one dollar without being made liable for more than he receives, upon what conceivable principle can a pledgee be held for the face value of a worthless note by surrendering it without any consideration whatever? If one intrusted with a note as agent, or holding it as pledgee, loses it by his carelessness, or even willfully destroys it, he can, in an action against him by the principal or pledgor, be held liable only for the value of the note. If Garrison had broken into the plaintiff's safe and taken these notes without any right whatever, in an action for their conversion the plaintiff could have recovered against him as damages only the actual, not the face, value of the notes. I need go no further. Other illustrations are not needed. Our attention has been called to no case in law or equity which upholds the plaintiff's contention as to these notes. I should be greatly surprised to find any, and do not believe there are any. I have assumed, without a careful examination of the defendants' objections to the notes, that they were valid, and properly issued by the company for their full amount. I have also assumed, without examining the matter, that upon this record we must hold against the contention of the defendants that the second mortgage bonds took the place of the notes given for them, and were held in their stead as collateral security. Statements made upon the argument by the counsel for the appellants render it unnecessary for us to consider any other objections to the judgment, and for the reasons stated the judgment should be reversed, and new trial granted, costs to abide the event. All concur; GRAY, J., in result.

Judgment reversed.

62 DIMOCK et al. v. UNITED STATES NAT. BANK.

(25 Atl. 926, 55 N. J. Law, 296.)

Court of Errors and Appeals of New Jersey.
Feb. 6, 1893.

Error to circuit court, Union county; Van Syckel, Judge.

Action on a note by the United States National Bank against Anthony W. Dimock and others. Plaintiff had judgment, and defendants bring error. Affirmed.

The facts appear in the following statement by DEPUE, J.:

This suit was brought upon a note of which the following is a copy:

"\$50,000. New York, April 15, 1884. Four months after date, without grace, we promise to pay to the United States National Bank, or order, at its office in the city of New York, the sum of fifty thousand ⁰⁰/₁₀₀ for value received, with interest at the rate of six per cent. per annum payable; having deposited herewith, and pledged as collateral security to the holder thereof, the following property, viz.: 200 shares Bankers' & Merchants' Tel. stock; 200 shares Missouri Pacific R. R. stock; 200 shares Delaware, Iac. & W. R. R. stock; 15 shares Central Iowa, Ill. Div. 1st bonds,—with authority to the holder hereof to sell the whole of said property, or any part thereof, or any substitute therefor, or any additions thereto, at any brokers' board in the city of New York, or at public or private sale in said city or elsewhere, at the option of such holder, on the nonperformance of any of the promises herein contained, without notice of amount claimed to be due, without demand of payment, without advertisement, and without notice of the time and place of sale, each and every of which is hereby expressly waived.

"It is agreed that, in case of depreciation in the market value of the property hereby pledged, (which market value is now \$——,) or which may hereafter be pledged for this loan, a payment shall be made on account of this loan upon the demand of the holder hereof, so that the said market value shall always be at least ——— per cent. more than the amount unpaid of this note; and that, in case of failure to make such payment, this note shall, at the option of the holder hereof, become due and payable forthwith, anything hereinbefore expressed to the contrary notwithstanding; and that the holder may immediately reimburse ——— by sale of the said property or any part thereof. In case the net proceeds arising from any sale hereunder shall be less than the amount due hereon, ——— promise to pay to the holder, forthwith after such sale, the amount of such deficiency, with legal interest.

"It is further agreed that any excess in the value of said collaterals, or surplus from the sale thereof beyond the amount due

hereon, shall be applicable upon any other note or claim held by the holder hereof against ——— now due or to become due, or that may be hereafter contracted; and that, if no other note or claim against ——— is so held, such surplus, after the payment of this note, shall be returned to ——— or ——— assigns.

"It is further agreed that, upon any sale by virtue hereof, the holder hereof may purchase the whole or any part of such property discharged from any right of redemption, which is hereby expressly released to the holder hereof, who shall retain a claim against the maker hereof for any deficiency arising upon such sale. A. W. Dimock & Co."

The other facts appear in the opinion of the court.

Bradbury C. Chetwood, for plaintiff in error. Edward A. & William T. Day, for defendants in error.

DEPUE, J. (after stating the facts). The note on which this suit was brought was in terms made payable in four months after date. It became due August 15, 1884. This suit was brought May 21, 1891. The suit was in all respects regular, and its regularity was in no wise dependent upon that paragraph in the pledge of securities which, upon certain conditions, accelerated the maturity of the note, and made the money payable at a time earlier than that named on its face. The securities pledged for the payment of the note were sold by the plaintiff on the 15th of May, 1884, as the note matured in the following August. From the sale the sum of \$45,456.26 was realized, leaving a balance due on the note of \$4,456.25, for which the plaintiff claimed judgment. The defendants' contention was that the sale in May was unauthorized, and amounted in law to a conversion. In all other respects the sale was in conformity with the power. On the theory that the sale at the time in question was unauthorized, the defendants contended that they were entitled to have the value of the securities allowed to them at their highest market price between the conversion and the time of the trial. The defendants gave in evidence the fact that in December, 1886, and April and May, 1887, these securities were worth in the market the sum of \$56,860, sufficient to pay the plaintiff's note, and leave a balance of \$6,860 due the defendants. The defendants' claim was disallowed, and judgment given for the plaintiff for the sum of \$4,456.25, being the balance due on the note after crediting on it the proceeds of sale with interest. The case was tried by the judge, a jury being waived. A general exception was taken to his finding. Upon such an exception, if there be evidence to sustain the finding, the exception will not be sustained.

The plaintiff is a national bank, located in the city of New York. The defendants, at

the time of these transactions, were bankers and brokers in New York. The debt for which the note was given was a loan of \$50,000 to the defendants. The form of the contract pledging securities for the repayment of loans is such as is usual in that city. It must be assumed that the parties were aware of the effect of the terms of such contracts, and with the course of dealing in that market with securities pledged as security for loans.

By the first paragraph in the defendants' contract the plaintiff was authorized to sell the securities at any brokers' board in the city of New York, or at public or private sale in said city or elsewhere, at its option, on the nonperformance of any of the defendants' promises therein contained, without any notice of the time and place of sale. This contract was embodied in and made part of the note itself, and the promise to pay in the note was one of the promises on the nonpayment of which a sale was authorized. The sale was made through a firm of brokers who were members of the stock exchange in New York city. There is no foundation in the evidence for complaint of the manner or fairness with which the sale was conducted.

The power of the plaintiff to sell the securities before the four months named in the note had expired depends upon the construction and effect of the second paragraph of the contract. There was some discussion on the argument as to the right to fill the blanks in that paragraph. The evidence was not sufficient to justify the court in filling the blanks. The contract will be construed in the condition it was in when it was delivered to the plaintiff. In this paragraph it is provided that, in case of a depreciation in the market value of the property pledged, the defendants should, on demand by the holder of the note, make a payment thereon, so that the market value of the securities should always be more than the amount of the debt; and that, in case of the failure of the defendants to make such payment, the note should, at the payee's option, become due forthwith; and that the plaintiff might immediately reimburse itself by the sale of the property or any part thereof; and that in case the net proceeds of such sale should be less than the amount then due on the note, the defendants should forthwith, after such sale, pay the amount of such deficiency, with interest. The power to sell the securities before the maturity of the note, according to its terms, was made to depend upon the concurrence of two conditions,—the depreciation in the market value of the property pledged; and the failure of the defendants, after demand, to make a payment on account of the loan, so that the market value of the securities pledged should be more than the amount due on the note. The proof was that on the 6th of May, 1884, the firm of Grant, Ward & Co. failed, and the Marine

Bank closed its doors. On the 14th, the Metropolitan Bank closed its doors, and a number of leading bankers failed. These failures created a panic in the money market, and a great depreciation in the market value of all commercial securities. Early on the morning of the 15th, the defendants' embarrassments led them to an assignment for the benefit of their creditors. It fully appeared that, at the commencement of business hours on the morning of May 15th, the securities pledged had so depreciated that their market value was considerably below the amount of the plaintiff's debt. Under a pledge, with a power of sale such as exists in this case, the pledgee, unless restrained by other conditions in the contract of pledge, has a right to sell whenever the condition of the market makes it prudent for him to do so for the protection of his interests. The other condition was that a demand should be made upon the defendants, and that, upon such demand, the defendants should pay on account of the note a sum sufficient to reduce the amount due below the market value the securities then had. The case shows that, at the beginning of business hours on the morning of the 15th, two notices were served on the defendants. One of these notices was in form signed by the cashier of the bank, in these words: "I hereby call your loan of April 15, 1884, for \$50,000." This notice was plainly not a demand in conformity with the condition expressed in the contract. A depreciation in the market value of the securities pledged did not convert the loan, which was made on four months' time, into a call loan. That condition of affairs imposed upon the defendants the obligation not to pay the note in full, but, by a payment upon it, to reduce the loan until the amount remaining due was under the market value of the securities. It appeared in evidence that the other notice served was "a demand for the payment on account of the loan to a degree corresponding to the depreciation of the securities." Neither the original notice nor a copy was produced. The witness who testified upon this subject was not able to state the amount of the depreciation, but he added that such depreciation was known to both the borrower and lender. The object of a demand in a contract of this sort is to give the party an opportunity to comply with the terms of his contract, and preserve his securities from sale before the expiration of the time for which the loan was negotiated; and it would be reasonable that, in making the demand, the party, before he is put in default, should have been made aware of the extent of the depreciation, approximately at least, and the sum required to be paid to save his rights should be specified. If the case rested solely on the sufficiency of the demand made, I should have some hesitation in sustaining this judgment.

Assuming that the sale of the securities in

May was unauthorized, it was a conversion of the property, though the sale was made in good faith. Nevertheless, the judge's finding, and the rule of damages applied, were correct. The general rule is that the measure of damages for conversion is the value of the property at the time of the conversion. This rule has been modified with respect to the conversion of stocks and bonds, commercial securities vendible in the market, the market value of which is liable to frequent and great fluctuations, caused by the depression and inflation of prices in the market. In *Markham v. Jaudon*, 41 N. Y. 235, the court of appeals held that as between a customer and his broker, holding stock purchased for the former which had been pledged as security for advances made in the purchase, the measure of damages for the conversion by an unauthorized sale was the highest market price between the time of the conversion and the trial. Relying upon this case, the defendants put in evidence no proof of value except the market value in December, 1886, and April and May, 1887. But *Markham v. Jaudon* has been overruled by a series of cases in the New York courts, and the rule adopted that in such cases the principal may disaffirm the sale, and that the advance in the market price from the time of sale up to a reasonable time to replace it after notice of the sale was the proper measure of damages. *Baker v. Drake*, 53 N. Y. 211, 66 N. Y. 518; *Gruman v. Smith*, 81 N. Y. 25; *Colt v. Owens*, 90 N. Y. 368. These decisions were made in cases where the transactions were dealings between the customer and broker in the purchase and sale of stocks on a margin. Subsequently the same rule was applied where the owner of stock for which he had paid full value, and which he held as an investment, put it in the hands of a broker as collateral security for the debt of a third person, upon condition that it should not be sold for six months, the stock having been sold without the owner's authority before the expiration of that time. Under the decisions of the New York courts, reasonable time, where the facts are undisputed, is a question of law for the court. * *Wright v. Bank*, 110 N. Y. 238, 18 N. E. 79. In *Colt v. Owens*, 90 N. Y. 368, 30 days after the sale and notice of it was regarded as reasonable time. The rule of the highest intermediate value between the time of the conversion and the time of the trial has been rejected in the supreme court of the United States as the proper measure of damages, and the rule that the highest intermediate value between the time of the conversion and a reasonable time after the owner has received notice of it was adopted as the correct view of the law; for the reason, as expressed by Mr. Justice Bradley, that more transactions of this kind arise in the state of New York than in all other parts of the country, and that the New York rule, as finally settled by its court of appeals, has

the most reason in its favor. *Gallagher v. Jones*, 129 U. S. 194, 9 Sup. Ct. 335. The principle upon which this doctrine rests is the consideration that the general rule that in an action for a conversion the market value of the property at the time of the conversion would afford an inadequate remedy, or rather no remedy at all, for the real injury, which consisted in the wrongful sale of property of a fluctuating value at an unfavorable time, chosen by the broker himself; hence the cost of replacing the securities by a purchase in the market, allowing a reasonable time for that purpose, has been regarded as the proper measure of damages. As was said by Mr. Justice Bradley in *Gallagher v. Jones*: "A reasonable time after the wrongful act complained of is to be allowed to the party injured to place himself in the position he would have been in had not his rights been invaded." The general rule that the market value at the time of the conversion is the measure of damages being found to be impracticable in these cases, and having been abandoned, the effort has been to obtain some rule by which substantial justice, as near as may be, may be attained. In England the market value at the time of the trial appears to be the measure of damages. *Owen v. Routh*, 14 C. B. 327. In some of the sister states the rule of the highest intermediate price before the trial has been adopted. In New York, and in most of the sister states, as well as in the supreme court of the United States, the formula which has been called the "New York Rule" has been adopted, and is the rule which will accomplish the most complete justice in the ordinary transactions between the broker and his customer dealing in stocks when an unauthorized sale is the act of conversion. In such cases the customer has a choice of remedies. He may claim the benefit of the sale, and take the proceeds; he may require the broker to replace the stock, or replace it himself, and charge the broker for the loss; or he may recover the advance in the market price up to a reasonable time within which to replace it after notice of the sale. *Cook, Stock & S.* 460. But where stocks and negotiable securities are pledged as collateral security for the payment of a debt to become due and payable on a future day, another element enters into the consideration of the compensation to be awarded to the owner of the securities for the unauthorized sale of them before the debt matures. Upon such a bailment it is the duty of the pledgee to keep the securities in hand at all times ready to be delivered to the pledgor on the payment of the debt. *Cook, Stock & S.* 460-471. An unauthorized sale before the debt matures is a conversion, for which the pledgor may have remedy in the manner above mentioned. But the sale may be made when the market value is depreciated, and the market with a downward tendency. The market may revive, and prices be enhanced

before the debt matures. Under such circumstances, a rule that the pledgor shall be at liberty to elect to treat the unauthorized sale as a conversion, or to hold the pledgee for the breach of his duty to keep the securities until the maturity of the debt, and recover as damages the market value of the securities as of that time, would commend itself in reason and justice. As applied to the facts of this case, this rule would be eminently just. The plaintiff in good faith sold the securities in the manner authorized by the contract of pledge. The breach of duty was in selling at an unauthorized time. The debt was not paid or tendered at maturity; and if the plaintiff had held the stock, and sold it at that time, the sale would have been strictly in conformity with the power. If the defendants lost anything by the sale at a time unauthorized, they would be recompensed for that loss by an award of damages equivalent to the market value of the securities at the time the debt became due. Tested by either of these standards, the proper credit was allowed, the proof being that the prices of the securities were less when the note matured than when the securities were sold. No evidence of an increased price prior to December, 1886, was produced.

The finding of the judge should be affirmed on the ground, also, that the sale was consented to and ratified by the defendants. The notices served on the morning of May 15th informed the defendants that the securities pledged had, in the plaintiff's estimation, depreciated in market value, and that the contingency provided for in this part of the contract had happened, and also plainly indicated the purpose on the part of the plaintiff to avail itself of the right which, under those circumstances, would accrue under the contract. Immediately after the sale

was made, the defendants had notice of the fact of sale, and, very shortly after, of the amount realized therefrom. No objection was made to the sale or the amount realized. On the 4th of June, 1884, the defendants filed a schedule of their indebtedness under their assignment. This schedule was verified by the oaths of the defendants that it contained a true account of their creditors, and of the sum owing to each, and also a statement of any existing collateral or other security for the payment of such debt. In this statement the plaintiff was put down as a creditor for the sum of \$4,737.50, which was about the amount due the plaintiff after the proceeds were applied to the debt; and to this specification of the existing debt due the plaintiff was appended a statement that for the payment of this debt there was no existing collateral or other security. In September, 1885, the defendants caused to be presented to the plaintiff a composition agreement with a view to a compromise with their creditors, in which the debt due the plaintiff was stated to be the sum of \$5,118.87, figures which represented approximately the net amount due the plaintiff on the note after applying thereon the proceeds of the sale of the securities, with interest. This agreement was signed by the plaintiff, but the project fell through, the defendants being unable to effect a compromise with all their creditors. The defendants had the election either to ratify the sale, and claim the benefit of it, or repudiate it, and hold the plaintiff in damages. The act of the defendants in applying the proceeds of the sale as a credit on the plaintiff's note is so positive and emphatic an act of ratification and adoption that it cannot be retracted. The case was properly decided at the trial, and the judgment should be affirmed.

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ELLIS v. HILTON.

(43 N. W. 1048, 78 Mich. 150.)

Supreme Court of Michigan. Nov. 15, 1889.

Error to circuit court, Grand Traverse county; RAMSDELL, Judge.

Pratt & Davis, for appellant. I orin Roberts (J. R. Adsit, of counsel), for appellee.

LONG, J. This is an action to recover damages against the defendant for negligently placing a stake in a public street in Traverse City, which plaintiff's horse ran against, and was injured. It was conceded on the trial by counsel for defendant that the horse of plaintiff was so injured that it was entirely worthless. Plaintiff claimed damages, not only for the full value of the horse, but also for what he expended in attempting to effect a cure, and on the trial his counsel stated to the court that plaintiff was entitled to recover a reasonable expense in trying to cure the horse before it was decided that she was actually worthless. The court ruled, however, that the damages could not exceed the value of the animal. A claim is made by the declaration for moneys expended in trying to effect a cure of the horse after the injury. Upon the trial the plaintiff testified that he put the horse, after the injury, into the hands of a veterinary, and paid him \$35 for cure and treatment. On his cross-examination, he also testified that the veterinary said "there was hopes of curing her, if the muscles were not too badly bruised. He didn't say he could cure her. He thought there was a chance that he might."

Dr. DeCow, the veterinary, was called, and testified, as to the injury, that the stake entered the breast of the horse, on the left side, about six inches; that the muscles were bruised, and the left leg perfectly helpless. He got the wound healed, but on account of the severe bruise of the muscles the leg became paralyzed and useless. On being asked whether he thought she could be helped when he first saw her, he stated that he did not know but she might; that she might be helped, and kept for breeding purposes, and be of some value.

It is evident from the testimony that the plaintiff acted in good faith in attempting the cure, and under the belief that the mare could be helped, and be of some value. The court below, however, seems to have based its ruling that no greater damages could be recovered than the value of the animal, and that these moneys expended in attempting a cure could not be recovered, upon the ground that the defendant was not consulted in relation to the matter of the attempted cure. Whatever damages the plaintiff sustained were occasioned by the negligent conduct of the defendant, and recovery in such cases is always permitted for such amount as shall compensate for the actual loss. If the horse had been killed outright the only loss would

have been its actual value. The horse was seriously injured; but the plaintiff, acting in good faith, and in the belief that she might be helped and made of some value, expended this \$35 in care and medical treatment. He is the loser of the actual value of the horse, and what he in good faith thus expended. He is permitted to recover the value, but cut off from what he has paid out. This is not compensation.

Counsel for defendant contends that such damages cannot exceed the actual value of the property lost, because the loss or destruction is total. There may be cases holding to this rule; but it seems to me the rule is well stated, and based upon good reason, in *Watson v. Bridge*, 14 Me. 201, in which the court says: "Plaintiff is entitled to a fair indemnity for his loss. He has lost the value of his horse, and also what he has expended in endeavoring to cure him. The jury having allowed this part of his claim, it must be understood that it was an expense prudently incurred, in the reasonable expectation that it would prove beneficial. It was incurred, not to aggravate, but to lessen the amount for which the defendants might be held liable. Had it proved successful, they would have had the benefit of it. As it turned out otherwise, it is but just, in our judgment, that they should sustain the loss." In *Murphy v. McGraw*, 41 N. W. Rep. 917, it appeared on the trial that the horse was worthless at the time of purchase by reason of a disease called "eczema." The court charged the jury that if the plaintiff was led by defendant to keep on trying to cure the horse the expense thereof would be chargeable to the defendant, as would also be the case if there were any circumstances, in the judgment of the jury, which rendered it reasonable that he should keep on trying as long as he did to effect the cure. The plaintiff recovered for such expense and on the hearing here the charge of the trial court was held correct.

It is a question, under the circumstances, for the jury to determine whether the plaintiff acted in good faith, and upon a reasonable belief that the horse could be cured, or made of some value, if properly taken care of; and the trial court was in error in withdrawing that part of the case from them. Such damages, of course, must always be confined within reasonable bounds, and no one would be justified, under any circumstances, in expending more than the animal was worth in attempting a cure. This is the only error we need notice. The judgment of the court below must be reversed, with costs, and a new trial ordered.

CHAMPLIN and MORSE, JJ, concurred with LONG, J.

SHERWOOD, C. J. I concur in the result.

CAMPBELL, J. I think the rule laid down at the circuit the proper one.

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LOUISVILLE & N. R. CO. v. WALLACE.

(17 S. W. 882, 91 Tenn. 35.)

Supreme Court of Tennessee. Dec. 12, 1891.

Appeal from circuit court, Sumner county; H. C. CARTER, Judge.

Action by W. L. Wallace against the Louisville & Nashville Railroad Company for personal injuries. Judgment for plaintiff, and defendant appeals. Reversed.

J. J. Turner, for plaintiff. S. F. Wilson, R. K. Gillespie, and Geo. W. Boddie, for defendant.

SNODGRASS, J. The defendant in error, while in the service of the Louisville & Nashville Railroad Company as brakeman, sustained severe personal injury, resulting in the loss of a leg, which he alleged was occasioned by the negligence of the company. He sued for \$15,000 damages and recovered judgment for \$9,940. The railroad company appealed, and assigned numerous errors. It is not deemed material to notice but one of them, as the others are not well taken, and involve nothing new, so as to make their consideration in a written opinion necessary. The one material to be considered relates to the question of interest. The court told the jury it could assess plaintiff's damages with or without interest, as the jury should see proper, in connection with instructions as to the measure of damages not otherwise complained of. The verdict assessed the damages at \$7,000 with 7 years' interest \$2,940, aggregating \$9,940. It is objected in the assignment of errors that the charge on this question, and verdict, with judgment thereon, are erroneous. This involves a consideration of the question, what is the true measure of damages for such personal injury? The rule for determining damages for injuries not resulting in death, (where the statute fixes the measure,) and not calling for exemplary punishment, deductible from the decisions of this court since its organization in this state, is that of compensation for mental suffering and physical pain, loss of time, and expenses incident to the injury, and, if it be permanent, the loss resulting from complete or partial disability in health, mind, or person thereby occasioned. And this is the rule most consonant to reason adopted in other states. 3 Sedg. Dam. (8th Ed.) § 481 et seq.; 5 Amer. & Eng. Enc. Law, pp. 40-44, and notes; Railroad Co. v. Read, 87 Amer. Dec. 260. As this sum in gross includes all the compensation which is requisite to cover pain, suffering, and disability to date of judgment, and prospectively beyond, it is intended to be and is the full measure of recovery, and cannot be supplemented by the new element of damages for the detention of this sum from the date of the injury. The measure of damages being thus fixed, it is expected that in determining it juries and courts will make the sum given in gross a fair and just compensation, and one in full of amount proper to be given when rendered, whether soon or late after the injury; as, if given soon, it looks to continuing suffering and disability, just as, when given late, it includes that of the past. It

is obvious that damages could not be given for pain and suffering and disability experienced on the very day of trial, and then interest added for years before. These are items considered to make up the aggregate then due, and the gross sum then for the first time judicially ascertained. The error of the court below was in the assumption that a like measure of damages is applied in this class of cases as in that of injury to property effecting its destruction or conversion or other unlawful or fraudulent misappropriation, or detention of property or money, in which the rule applied by the circuit judge is held to be a proper one; not on the theory, even in this class of cases, that interest as such is due, but that the plaintiff is entitled to the fixed sum of money or definite money value of property converted or destroyed, and the jury may give as damages an amount equal to interest on the value of the property. But such rule applies alone to such cases, and not to that of personal injury, which does not cease when inflicted, and is not susceptible of definite and accurate computation. It never creates a debt, nor becomes one, until it is judicially ascertained and determined. Only from that time can it draw interest; and interest as damages cannot at any preceding time be added to it without changing and superadding a new element, never given in this state or any other in a similar case, so far as our investigation has discovered. The counsel of plaintiff, who cite many authorities supposed to be in support of the ruling below, were doubtless misled by the generality of terms used in some of them. Under the head of "Interest," after stating that "it was generally allowed by law on two grounds, namely, on contract, express or implied, or by way of damages either for default in payment of a debt or for a use or benefit derived from the money of another," it is stated in 11 Amer. & Eng. Enc. Law that, "where it is imposed to punish tortious, negligent, or fraudulent conduct, it is a question within the discretion of the jury." Page 380. For this proposition various authorities are cited, including Mr. Sedgwick on Damages, p. 374, (the reference being to paging of the fifth or earlier edition.) This author uses similar general terms, but neither was speaking of cases of personal injury, but of the class of cases to which we have referred, as fully appears from Mr. Sedgwick's further discussion of this general head, on pages 385, 386, and as most clearly appears from a reference to the authorities cited by both, which relate to cases of trover and trespass and to property controversies only. In neither of these books is the proposition now thought to be sustained by them advanced,—that the measure of damages for a personal injury includes damages for detention of the supposed amount due. The generality of statement indulged in that and former editions of this work is corrected by editors of the last edition. Chapter 10 of the first volume of this edition is devoted to interest allowed in actions where it is by rule of law, or in the discretion of the jury or court trying the case, allowed as part of the measure of damages. In these cases are enumerated

and discussed those actions sounding in tort in which interest may be given as damages. The distinction is there taken, as taken here, and actions for personal injuries excluded, because of the existence of a wholly different measure of damages respecting them. In this connection we quote section 320 in the volume and chapter referred to: "It sufficiently appears, from what has already been said, that there is no general principle which prevents the recovery of interest in actions of tort. The fact that the demand is unliquidated has been shown to be insufficient to exclude interest, and there is nothing in the mere form of the action which renders it unreasonable that interest should be given. Nevertheless it is in the region of tort that we find the clearest cases for disallowance of interest. There are many cases which are not brought to recover a sum of money representing a property loss of the plaintiff, and it is frequently said broadly that interest is not allowed in such actions. It is certainly not allowed in such actions as assault and battery, or for personal injury by negligence, libel, slander, seduction," etc.) The measure of damage in such case seems nowhere to include this or be based upon this idea. Even in respect to injury or destruction of property, where the supreme court of the United States has adopted fully the prevailing rule (allowing damages in the form of interest) on value of the property, the rule has been limited to such injury of property or property right as had a fixed or certain value; and it is accordingly held in that court that indefinite damages, as that resulting from infringement of a patent, could not bear interest until after the amount had been judicially ascertained. *Tilghman v. Proctor*, 125 U. S. 161, 8 Sup. Ct. Rep. 894.

The direct question we are considering also came before the supreme judicial court of Maine, and it was there held that the rule permitting damages equal to interest on value of property in cases of trespass and trover did not apply, and that interest could not be allowed upon a recovery for personal injury, and that, too, under a statute authorizing a recovery "to the amount of the damage sustained." (This is not material, however, as their statute gave no more nor less right than exists here.) *Sargent v. Hampden*, 38 Me. 581. The cases cited by the editors of the last edition of *Sedgwick on Damages* sustaining the proposition that interest cannot be included in a recovery of damages for personal injuries are from Georgia and Pennsylvania. *Ratteree v. Chapman*, 79 Ga. 574, 4 S. E. Rep. 684; *Railroad Co. v. Young*, 81 Ga. 397, 7 S. E. Rep. 912; *Railway Co. v. Taylor*, 104 Pa. St. 306. These cases have all been examined, and fully sustain the text. One of the cases cited to the proposition in *Amer. & Eng. Enc. Law* was a Pennsylvania case, earlier than either of

those to which we have referred. The case there cited, (*Fasholt v. Reed*, 16 Serg. & R. 266,) which we have not been able to find in libraries here, was evidently not one of personal injury, or else not consistent with later holdings of that court. Indeed, the Pennsylvania court seems hardly to have gone as far on that question in reference to allowance of interest as damages in other actions *ex delicto* as other courts. In suits for the destruction of property that court has held that, while lapse of time may be looked to, it is error to instruct the jury that plaintiff is entitled to interest on such damage from the time it occurred. *Township of Plymouth v. Graver*, 125 Pa. St. 24, 17 Atl. Rep. 249; *Emerson v. Schoonmaker*, 135 Pa. St. 437, 19 Atl. Rep. 1025. Of the other cases cited in *Amer. & Eng. Enc. Law*, we have examined those in 13 Wis. 31, (*Hinckley v. Beckwith*), 36 N. Y. 639, (*Vandevoort v. Gould*), and 30 Tex. 349, (*Wolfe v. Lacy*). They all sustain the text as it is intended to be understood, and as we have herein explained, and doubtless the other cases do so. To the same effect are the cases of *Lincoln v. Clafin*, 7 Wall. 132; *Dyer v. Navigation Co.*, 118 U. S. 507, 6 Sup. Ct. Rep. 1174; *U. S. v. North Carolina*, 136 U. S. 211, 10 Sup. Ct. Rep. 920; *Clement v. Spear*, 56 Vt. 401; and cases from American decisions and reports cited in *Rapalje's Digest*, volume 1, pp. 1039-1041, under heads "Trover," and "When Interest may be Added," and volume 2, p. 1991, under head of "Interest." See also 11 Sedg. Dam. §§ 432-493, (8th Ed.) The effect and meaning of statements quoted from *Amer. & Eng. Enc. Law* and its reference to *Sedg. Dam.* are made perfectly clear when these cases and authorities herein added are examined, and the generality of expressions limited to the purpose of their use and the class of cases being considered. They were not dealing at all, nor intended to be understood as dealing, with the question of recovery for personal injuries, (which is itself a recovery of damages pure and simple, and measured by a rule which needs no supplement that would add damages to damages.) The charge and verdict were therefore erroneous on this point, and prejudicial to defendant to the extent and only to the extent of the injury. The circuit judge might have refused to receive the verdict as to interest, and the same effect may now follow a remitting of the interest by plaintiff, if he elects to do so. In that event the plaintiff is entitled to a judgment for \$7,000, with interest from date of its rendition, and costs, and with this modification the judgment will be affirmed. This was the practice adopted in the Maine case on this point, as well as in one of the Pennsylvania cases, (135 Pa. St. 437, 19 Atl. Rep. 1025,) citing several others, and is clearly the correct rule. In default of such remission, a new trial will be granted.

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WILSON v. CITY OF TROY.

(32 N. E. 44, 135 N. Y. 96.)

Court of Appeals of New York. Oct. 4, 1892.

Appeal from supreme court, general term, third department.

Action by Walter V. Wilson against the city of Troy to recover damages for an injury to a horse resulting from a defective street. Plaintiff had judgment, which was affirmed at general term (14 N. Y. Supp. 721), and defendant appeals. Affirmed.

Wm. J. Roche, for appellant. Chas. E. Patterson, for respondent.

O'BRIEN, J. The record in this case presents two questions: First, whether the finding of the jury that the damage was the result of the defendant's negligence is sustained by any evidence; and, secondly, whether interest could legally be allowed by the jury in estimating the amount of the damages. On the night of the 13th of November, 1879, a valuable horse belonging to one Learned, plaintiff's assignor, while being driven through South street in the city of Troy, fell into an open ditch or unguarded excavation, made during that day, and was permanently injured. There is little, if any, controversy with respect to the value of the horse, the extent of the injury, or the amount of damages. The night was dark, and it is not denied that there was evidence for the jury sufficient to sustain a finding of negligence on the part of some one by reason of the failure to protect a place of danger in a public street, by proper guards and lights. It was not shown that the city had any actual notice of the existence of the excavation, if made by private parties without its permission; and a sufficient period had not elapsed between the time of opening it and the accident to render the city liable on the ground of implied notice. The excavation was made for the purpose of conducting the water from the principal main in the street, through lateral pipes, into a private house. The owner of the house employed a firm of plumbers to do the work, which included the digging of the trench as well as laying and connecting the lateral pipes with the main in the street. The firm applied to the superintendent of the waterworks for men to open the trench in the street, and that officer directed laborers in the employ of the city to do so. The opening in the street was made by them, and they were paid for the work by the city, the plumbers refunding to it the sum so paid. The question is whether the men who dug the ditch were under the control and direction of the defendant, or subject to the orders of the plumbers engaged in performing a piece of work for the owner of the house.

The system of waterworks in Troy is the property of the municipality, and is under the management and control of a board of water commissioners, which may be regarded as a

department of the city government. The commissioners are by law required to nominate, and the common council of the city to appoint, a superintendent of the waterworks, who is the executive officer in that department, and who, in this case, directed the men in the employ and pay of the city to make the excavation in the street. The board is authorized by law to extend the distributing pipes of the waterworks wherever they might think proper, and to make such alterations and improvements in the works, and in the management and preservation thereof, as they might deem necessary and expedient, and to employ such persons and assistants as they might require, to execute any of these purposes, which employes were to be paid for their services from the city treasury. The commissioners were also empowered to enact such by-laws, regulations, and ordinances as they should deem necessary for the protection of hydrants and water pipes, and the preservation, protection, and management of the waterworks. These by-laws, unless disapproved by a vote of two-thirds of all the members of the common council of the city, were to have all the force and effect of law. In pursuance of the power thus conferred by the statute, the board of water commissioners enacted by-laws and ordinances on the subject which were in force at the time the excavation in question was made. They, in effect, prohibited any person except the superintendent, and those employed by him or by the commissioners, to tap or make any connection with the main or distributing pipe, or to permit the same to be done, unless by the permission and under the direction of the superintendent. The learned counsel for the defendant contends that this regulation simply forbids the act of connecting the lateral pipes from the house with the main, and did not prohibit private persons from digging the necessary trenches and uncovering the main or distributing pipe, and hence that part of the work was done by the contractors who were employed by the owner of the house to make the connection, and not by the city. But a private individual had no right to dig in the street for this or any other purpose without the permission of the proper municipal authorities, and the object, as well as the language, of the ordinance indicates that it was intended to prevent the uncovering of the main, or any interference with the street in which it was placed, by private parties. At all events, the water board and its chief executive officer, the superintendent, in the discharge of the duties imposed upon them by the statute, might very properly give to it that construction, and act accordingly. To hold that such a by-law did not embrace within its object and purview the evils that might result from unguarded and unregulated interference with the bed of the street by private parties in order to reach the main, would be giving to it a construction al-

together too narrow. The evidence tends to show that the water board gave to it the broader and more comprehensive meaning, as it was the custom and practice for years before the accident in question to make application to the superintendent for men to do the digging, and they were always furnished, as in this case. As between the owner of the house and the plumbers employed by her to introduce the water into her house, the digging was undoubtedly a part of the contract or work of the latter. If no main had been placed in the street at that time, they could also have contracted with her to procure its extension, but that part of the work would be subject to the action and regulations of the water board, and, while the contractors might be obliged to pay the city for the whole or some part of the expense, it would be none the less the work of the city. One of the plumbers testified that while he agreed with the owner of the house to do all the work, yet he knew then that it was the practice and custom to apply to the superintendent of the waterworks for men to do the digging and to make the connection, and acted upon the assumption that he had no right to do it. He also says that the men who made the excavation were not employed by him, but by the city. We think that, upon the proof, it could not be held, as matter of law, that the men who dug the trench and left it unguarded ceased for the time being to be the servants of the city, and subject to the directions of the superintendent, and became, while doing this job of work, the servants of the party employed to put in the lateral pipes into the house, as is urged by the learned counsel for the defendant. What party sustained the relation of master to the men who dug the trench, and had the control and direction of them, and was charged with the duty of directing them to properly guard the ditch,—whether the plumbers on the one hand, or the city, through the superintendent of the waterworks, on the other,—was the important question to be determined, and the trial court submitted it to the jury. Under all the circumstances, the question became one of fact, and this disposition of it was not error. *Ward v. Fibre Co.*, 154 Mass. 420, 28 N. E. Rep. 290. This finding of the jury is conclusive upon us, and imports that the city itself, through one of its officers or departments, caused the trench to be dug, and left it unguarded, resulting in the damage complained of. In such a case the negligent act is imputable to the city, and the doctrine of actual or implied notice has no application, or, at least, is unnecessary, where one injured by the neglect of the city to properly guard a place made dangerous by its own act brings the action. *Pettengill v. City of Yonkers*, 116 N. Y. 558, 22 N. E. 1095; *Walsh v. Mayor, etc.*, 107 N. Y. 220, 13 N. E. 911; *Turner v. City of Newburgh*, 109 N. Y. 301, 16 N. E. 344; *Brusso v. City of Buffalo*, 90 N. Y. 679; *Rus-*

sell v. Village of Canastota, 98 N. Y. 496; *Nelson v. Village of Canisteo*, 100 N. Y. 89, 2 N. E. 473; *Ehrgott v. Mayor, etc.*, 96 N. Y. 273; *Barnes v. District of Columbia*, 91 U. S. 540.

The amount demanded in the complaint on account of the injury to this horse was \$3,000, and the court instructed the jury that they could not, in awarding damages, go beyond that sum, with interest. The defendant's counsel excepted to this in so far as it authorized interest, and requested the court to charge that the jury could not allow interest in the action. The court declined to so charge, and the defendant's counsel excepted. The jury afterwards came into court, and announced that they had found a verdict for the plaintiff for \$3,000 and interest. The court then said: "You must compute the interest if you give interest. You will have to render your verdict in dollars and cents." This direction was complied with, and the verdict as entered included interest from the date of the injury, which result has been modified by the general term by striking out the interest awarded prior to the date of the presentation of the claim to the city, which was held to be a prerequisite to the maintenance of the action. The fair construction of the charge is that the jury could include in the damages interest upon the sum found to represent the diminished value of the horse in consequence of the injury, and not that the plaintiff was entitled to interest as matter of right. The exception, therefore, presents the question whether, in an action to recover damages to property by reason of negligence on the part of the defendant, it is within the power of the jury, in the exercise of discretion, to include in their award of damages interest on the sum found to represent the diminished value of the property in consequence of the injury from the time that the cause of action accrued. When interest may be allowed as part of the damages, in actions of this character, is a question which, in the present state of the law, is involved in much confusion and uncertainty, and in regard to which the decisions of the courts are not harmonious. It is perhaps impossible to formulate a general rule embracing every possible case. The tendency of courts in modern times has been to extend the right to recover interest on demand far beyond the limits within which that right was originally confined. What seemed to be the demands of justice did not permit the principle to remain stationary, and hence it has been for years in a state of constant evolution. This, in some measure, accounts for many of the apparently contradictory views to be found in the adjudged cases. There are certain fundamental principles, however, established by the decisions in this state, which, when properly applied, will aid in the solution of the question. There is, of course, a manifest distinction, always to be observed, between actions

sounding in tort and actions upon contract. In the latter class of actions there is not much difficulty in ascertaining the rule as to interest until we come to unliquidated demands. The rule in such cases has quite recently been examined in this court, and principles stated that will furnish a guide in most cases. *White v. Miller*, 78 N. Y. 393. We are concerned now only with the rule applicable in actions of tort. The right to interest, as a part of the damages, in actions of trover and trespass de bonis asportatis, was given first in England by St. 3 & 4 Wm. IV. The recovery was not, however, allowed by that statute as matter of right, but in the discretion of the jury. The earlier cases in this state followed the rule thus established in England, and permitted the jury, in their discretion, to allow interest in such cases. *Beals v. Guernsey*, 8 Johns. 446; *Hyde v. Stone*, 7 Wend. 354; *Bissell v. Hopkins*, 4 Cow. 53; *Rowley v. Gibbs*, 14 Johns. 385. The principle that the right to interest in such cases was in the discretion of the jury, was, however, gradually abandoned, and now the rule is that the plaintiff is entitled to interest on the value of the property converted or lost to the owner by a trespass as matter of law. The reason given for this rule is that interest is as necessary a part of a complete indemnity to the owner of the property as the value itself, and in fixing the damages is not any more in the discretion of the jury than the value. *Andrews v. Durant*, 18 N. Y. 496; *McCormick v. Railroad Co.*, 49 N. Y. 315; *Turnpike Co. v. City of Buffalo*, 53 N. Y. 639; *Parrott v. Ice Co.*, 40 N. Y. 369. It is difficult to perceive any sound distinction between a case where the defendant converts or carries away the plaintiff's horse and a case where, through negligence on his part, the horse is injured so as to be valueless. There is no reason apparent for a different rule of damages in the one case than in the other. In an early case in this state the principle was recognized that interest might be allowed, by way of damages, upon the sum lost by the plaintiff in consequence of defendant's negligence. *Thomas v. Weed*, 14 Johns. 255. We think the rule is now settled in this state that, where the value of property is diminished by an injury wrongfully inflicted, the jury may, in their discretion, give interest on the amount by which the value is diminished from the time of the injury. That is the rule laid down in the elementary books and sustained by the adjudged cases. 1 Sedg. Dam. (8th Ed.) §§ 317, 320; *Walrath v. Redfield*, 18 N. Y. 457, 462; *Mairs v. Association*, 89 N. Y. 498; *Durree v. Mayor, etc.*, 96 N. Y. 477, 499; *Home Ins. Co. v. Pennsylvania R. Co.*, 11 Hun, 182, 188; *Moore v. Railroad Co.*, 126 N. Y. 671, 27 N. E. 791; *Railroad Co. v. Ziemer*, 124 Pa. St. 560, 17 Atl. 187.

There is a class of actions sounding in tort, in which interest is not allowable at all, such

as assault and battery, slander, libel, seduction, false imprisonment, etc. There is another class in which the law gives interest on the loss as part of the damages, such as trover, trespass, replevin, etc.; and still a third class in which interest cannot be recovered as of right, but may be allowed in the discretion of the jury, according to the circumstances of the case. This action belongs to the latter class, and, as we have construed the charge as a direction that the jury might, in their discretion, allow interest on the diminished value of the horse, it was not erroneous.

Our attention has been called to the case of *Sayre v. State*, 123 N. Y. 291, 25 N. E. 163, and it is urged, upon the authority of that case, that interest cannot be allowed in any case for the recovery of unliquidated damages arising from negligence. We think that the case, when correctly understood, does not sustain the contention, but, in effect, holds the contrary. In that case a party appealed from the decision of the board of claims upon an award in his own favor, and the only question was whether, upon the evidence and findings, the claimant had been allowed all the damages that he was entitled to, and this court not only affirmed his right to all the damages that the board had awarded him, but increased the award from \$3,000 to \$8,136. The claim was based upon the negligent act of the state in overflowing the lands of the claimant, from which the damages claimed resulted. The board of claims allowed no interest, nor did this court. In adding to the award a sum of over \$5,000, this court acted, in some sense, as a court of original jurisdiction, and in making up the sum which was to constitute the final award it refused to allow an item of interest claimed. Now, it is admitted that a court or jury, charged with the duty of making up the amount of damages in such cases, may refuse to allow interest, and that is precisely what this court did, and nothing more, and therefore the case is in harmony with the rule above stated, and with the cases from which we have deduced it. It is far from holding that it is error when, in such a case, the jury, or the original court, after considering all the facts and circumstances bearing upon the loss, allows interest, in the exercise of discretion, as part of the indemnity to which the party is entitled. It simply recognized the rule that interest in such cases was not a matter of right, but of sound discretion, and held that the claimant was fully indemnified for his loss without adding interest. It is true that the learned judge who gave the opinion cited the cases arising upon contract in which it has been held that interest is not allowable, and remarked that he found no case justifying an allowance of interest. That was probably an inadvertence, but the decision refusing interest was right, though the reasons may have been based upon a principle applicable to another class of actions. It

must be remembered that the court was not reviewing any question decided below in regard to interest, but seeking to make up for itself a new award from the items of the claim appearing in the record, and whatever was said by way of argument, and as the reason for throwing out an item of interest on a sum claimed to have been expended in restoring or reclaiming the land, cannot be

considered as the judgment of the court on the question now under consideration. That question was not noticed in the argument, and was not involved in the case, except, perhaps, as a matter of discretion. For these reasons the judgment should be affirmed. All concur, except EARL, C. J., and FINCH and GRAY, JJ., dissenting.

Judgment affirmed.

56 TRIGG et al. v. CLAY et al.
(13 S. E. 434, 88 Va. 330.)

Supreme Court of Appeals of Virginia. July 23, 1891.

Appeal from decree of circuit court of Scott county rendered March 27, 1890, in a suit wherein T. P. Trigg, A. McBradley, and H. Fugate, surviving partners of themselves and James C. Greenway, deceased, partners doing business in the firm name Trigg, Fugate & Co., were complainants, and H. B. Clay, Jr., and W. D. Kenner, partners in the firm name of H. B. Clay, Jr., & Co., were defendants. The decree being adverse to the complainants, they appealed. Opinion states the case.

Dani. Trigg, for appellants. Holdman & Ewing and J. J. A. Powell, for appellees.

LACY, J. The suit is a foreign attachment in equity, brought to attach the property situated within the jurisdiction of the court belonging to non-resident defendants, and to subject the same to the satisfaction of the debt of the plaintiffs. The case is briefly as follows: The appellants, a firm of lumber merchants resident at Abingdon, in Virginia, made a contract by which they agreed to buy, at a stated price, lumber of agreed dimensions from the appellees, a firm of lumber getters, resident at Rogersville, in the state of Tennessee; the lumber to be delivered at Clinchport, in Scott county, in Virginia, from 500,000 feet to 700,000 feet thereof; and the plaintiffs agreed to accept the drafts of the said appellees to the amount of \$3,000. And on the 28th day of November, 1888, the date of the contract, the appellee H. B. Clay, Jr., of the said firm, represented to the appellants that 300,000 to 400,000 feet were already cut and dry or drying; and that the residue, necessary to compensate for the \$3,000 in drafts to be accepted at 60 days, should be delivered at Clinchport at the maturity of the drafts. The drafts were all made in the first week in December, 1888, a few days after the contract was made, which was on the 28th day of November, as has been stated. The lumber was not delivered,—not a foot of it,—and the drafts were neglected and allowed to fall upon the hands of the plaintiffs, when the lumber had not yet been delivered, and the drafts had been paid. So the plaintiffs, as had been agreed between the parties in case the said contingency should arise that the drafts should have to be paid before the lumber in sufficient quantity had arrived, drafted back upon the defendants for the money thus paid out; but this action was treated with derision by the appellee, and the draft dishonored. Upon the hearing, the circuit court decreed in favor of the plaintiffs for the \$3,000 paid on the draft and the costs of protest, etc., and referred it to a commission to ascertain what damages the plaintiffs had sustained. It was proved that the defendants had absolutely refused to fulfill the contract upon the ground that the lumber had been priced too low by them, and also refused to refund the money paid them under the contract. The plaintiffs proved that they

were lumber merchants, and, as was known to the defendants, purchased the lumber for sale; and they proved that they had actually placed this lumber to their customers at a profit which amounted to \$1,000, but which they were made to lose by the wrongful act and fraudulent conduct of the defendants; and the commissioner reported that the said plaintiffs were entitled to this sum of actual damages incurred by them, estimating the profits on the maximum amount of the lumber to be delivered under the contract. But the defendants excepted to this report, "because the damage allowed is excessive, and not supported by law; because the commissioner had based his damages on supposed profits, instead of the market value of the lumber at the places of delivery." The circuit court by its decree of March 27, 1890, sustained these exceptions, and held that the plaintiffs were entitled to no specific damages for the non-performance of the contract set out in the plaintiffs' bill, and rested the matter where it had been placed by the former decree, which decreed in favor of the plaintiffs for the amount paid on the said drafts. From this decree the appeal is here. The idea of the circuit court was that the general rule applied which fixed the difference between the market price at the place of delivery and the contract price agreed to be paid. Upon the principle that the buyer could supply himself in the market overt, and when he had been compensated for the excess in the cost, over and above what his cost would have been under the contract, he had nothing more to complain of. But this case does not come within that principle, (1) because there is no market at that place from which, or in which, the plaintiffs could supply their need; (2) because there is no other market practically near enough to purchase the lumber and add transportation to the market price; (3) because the plaintiffs, relying on the promises and good faith of their bargain-ers, as they had a right to do, when they had themselves fully complied on their part by paying the purchase money therefor, had contracted to sell this lumber at a profit, which profit is the basis on which the commissioner assessed his damages.

In a case like this, with such circumstances as we have here, the case where there had been a contract to resell them at an agreed price, and when there is no market to afford a surer test, the price at which they were bargained to a purchaser affords the best and indeed very satisfactory evidence of their value. This was a purchase in that market, and there was no more for sale. In a case of such actual sale, why should the court go into conjecture as to what the goods were there worth? And again, if lumber could have been purchased and brought there at a lower price, there is not only no proof of it, but we have satisfactory proof to the contrary, because the defendants had the lumber, and were by their solemn contract under the highest obligations to deliver it; to say nothing of the requirement of common honesty, when they had agreed to do it, and had collected the purchase price. And yet they preferred to break their contract, and dis-

honored their bank obligation, rather than deliver this lumber at the agreed price, which they declared had been bargained at too low a price. In *Wood's Mayne on Damages*, § 22, it is said: "But, if they [the goods] cannot be purchased for want of a market, they must be estimated in some other way. If there had been a contract to resell them, the price at which such contract was made will be evidence of their value." In the *American and English Encyclopædia of Law* it is said: "Where there is no market at the place of delivery, the price of the goods in the nearest market, with the cost of transportation added, determines their value." *Ice Co. v. Webster*, 68 Me. 463; *Griffin v. Colver*, 16 N. Y. 489. In the case of *Culin v. Glass-Works*, 108 Pa. St. 220, it is said: "Upon the breach of a contract to furnish goods, when similar goods cannot be purchased in the market, the measure of damages is the actual loss sustained by the purchaser by reason of the non-delivery." A distinction is drawn in some of the cases between a resale made at an advance subsequent to a contract of purchase and a resale made at an advance before the contract of purchase, which was known to the seller of the goods. *Carpenter v. Bank*, 119 Ill. 354, 10 N. E. Rep. 18. This is rather a fanciful distinction. It is not in accord with the ordinary usages of trade that a dealer, a man buying to sell again, should disclose his dealings with the same goods at a profit to his vendor. But, if there were any sound principle upon which this could rest, if the seller could be supposed to enter into his contract upon the basis of a resale in which he had no interest, still, in this case, it is reasonable to suppose that a lumber getter selling 700,000 feet of lumber to a dealer in lumber should know (1) that it was for a resale, (2) that this resale was to be on a profit, and (3) that he should know that his vendee would be damaged to the amount of his profit, if the vendor should prove faithless. But the true basis of the general rule is that when there is a market, the vendee cannot be damaged, except in the difference between what the lumber did actually cost him and what he had purchased it at from the seller to him. But this rule can have, upon reason, no application whatever to a case where there is no market, (1) because the disappointed purchaser cannot buy in that market when there is no market to buy in, and (2) because the market price cannot be ascertained when there is no market.

Under the circumstances of this case, the commissioner ascertained the true and just amount of the damages. It has been often held that profits which are the direct and immediate fruits of the contract are recoverable. There are many cases in which the profit to be made by the bargain is the only thing purchased, and in such cases the amount of such profit is strictly the measure of damages. *Wood's Mayne, Dam.* p. 82. It has been held that, when the defendant refused to allow the contracts to be executed, the jury should allow the plaintiffs as much as the contract would have benefited them,—profits or advantages which are the direct and immediate fruits of the contract, entered

into between the parties, are part and parcel of the contract itself, entering into and constituting a portion of its every element, something stipulated for, and the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation. They are presumed to have been taken into consideration and deliberated upon before the contract was made, and formed, perhaps, the only inducement to the arrangement. If the inducement to the plaintiffs to buy this lumber, they being lumber dealers, and trading in lumber, was not the profits they were to make by a resale, what was their inducement? And if the sellers did not understand and contemplate this resale on a profit, what contemplation on the subject can be reasonably ascribed to them? See *Masterston v. Mayor, etc.*, 7 Hill, 62; *Morrison v. Lovejoy*, 6 Minn. 319, (Gil. 224;); *Fox v. Harding*, 7 Cush. 516; *Devlin v. Mayor, etc.*, 63 N. Y. S.; *McAndrews v. Tippet*, 39 N. J. Law, 105; *Kendall Bank Note Co. v. Commissioners of the Sinking Fund*, 79 Va. 563; *Bell v. Reynolds*, 78 Ala. 511. An examination of the cases will show that the courts have been endeavoring to establish rules by the application of which a party will be compensated for the loss sustained by the breach of contract; in other words, for the benefits and gain he would have realized from its performance, and nothing more. It is sometimes said that the profit that would have been derived from performance cannot be recovered; but this is only true of such as are contingent upon some other operation. Profits which certainly would have been realized but for the defendant's default are recoverable. It is not an uncertainty as to the value of the benefit or gain to be derived from performance, but an uncertainty or contingency whether such gain or benefit can be derived at all. It is sometimes said that speculative damages cannot be recovered because the amount is uncertain, but such remarks will generally be found applicable to such damages as it is uncertain whether sustained at all from the breach. Sometimes the claim is rejected as being too remote. This is another mode of saying that it is uncertain whether such damages resulted necessarily and immediately from the breach complained of. The general rule is that all damages resulting necessarily and immediately and directly from the breach are recoverable, and not those that are contingent and uncertain. The latter description embraces, as I think, such only as are not the certain result of the breach, and does not embrace such as are the certain result of the breach, but uncertain in amount, for which the plaintiff will be fully compensated by recovering the value of his bargain. He ought not to have more, and I think he is not precluded from recovering this by any infirmity in the law in ascertaining the amount. *Wakeman v. Manufacturing Co.*, 101 N. Y. 205, 4 N. E. Rep. 264; *Taylor v. Bradley*, 4 A. b. Dec. 363; *Bell v. Reynolds*, 78 Ala. 511. In this case the report of the commissioner was upon the correct principle, and the circuit court erred in sustaining the defendants' exception to the said report; for said exceptions should have been overruled, and the commissioner's report confirmed. The

decree of the circuit court appealed from here is therefore erroneous, and the same will be reversed and annulled, and this court will render such decree as the said circuit court ought to have rendered.

HINTON, J., dissents.

LEWIS, P., (dissenting.) In this case I dissent from the opinion of the court and am for affirming the decree of the circuit court. The case is narrowed down by the exception to the commissioner's report to the simple question of the measure of damages. The rule adopted by this court is, in my opinion, not only unjust, but con-

trary to the long-settled rule which governs in such cases. Here the measure of damages is held to be the loss sustained by the appellants by reason of their inability, on account of the default of the appellees, to fulfill certain contracts made by them for the sale and delivery of lumber to other parties. But those contracts were collateral to the contract between the parties to this appeal, and were, in point of time, subsequent thereto. They could not, therefore, have been in the contemplation of the parties when the contract was made, the breach of which is the subject of this controversy.

Decree reversed.

57 HOFFMAN v. CHAMBERLAIN.

(5 Atl. 150, 40 N. J. Eq. 663.)

Court of Errors and Appeals of New Jersey.
November Term, 1885.

On appeal from a decree of the chancellor, whose opinion is reported in *Chamberlain v. Hoffman*, 38 N. J. Eq. 40.

P. S. Scovel, for appellant.

C. A. Bergen, for respondent.

REED, J. Sarah Chamberlain, the complainant below, together with one Amelia B. Ellis, sold to Mary W. Miller, now Hoffman, certain household furniture for the sum of \$1,800. A part of the property sold belonged to Mrs. Chamberlain, and a part to Mrs. Ellis. It was paid for in the following manner: \$500 in cash were paid to Mrs. Ellis, and to her were given, also, two notes of \$150 each, and one note of \$100; to Mrs. Chamberlain were given nine \$100 notes. All of Mrs. Ellis' notes are paid. Three of the Chamberlain notes are paid, leaving still unpaid six of the notes given to her. At the time these notes were given a chattel mortgage was executed to Mrs. Chamberlain, to secure all these notes, to the amount of \$1,300. Mrs. Chamberlain filed her bill to foreclose this mortgage. The defense to it is that some of the articles sold did not belong to either Mrs. Ellis or Mrs. Chamberlain. All the articles to which title is alleged to have failed were sold as the property of Mrs. Ellis, and all the notes given to her have been paid. Only the remaining six notes given to Mrs. Chamberlain are outstanding, and it is as security for the payment of these that the chattel mortgage is being foreclosed. If this transaction is to be treated as involving two sales, with a distinct consideration for each, then there is no defense to the present suit.

The failure of title to Mrs. Ellis' goods could not affect the consideration paid to Mrs. Chamberlain under a distinct contract. Upon a consideration of all the circumstances surrounding the sale, I think the affair was understood to be a single transaction, in which all these household goods were sold for a single price. The two ladies who sold were relatives, and had been intimately connected in business. They desired to sell all the furniture in the house to one person. The values which they fixed to the separate articles were for the purpose of determining their separate interests in the consideration. The notes were made in part to one and in part to the other vendor, for the purpose of convenience. The chattel mortgage was given to secure all the notes, without regard to whom they were payable. So far as the purchaser felt concerned in the affair, all she wished was to get all the furniture as it stood in the house. She was not concerned in the proportion of interest in the entire stock, so long as she got the title to it all. The price was agreed upon, not in view of any part, but of the whole lot. The consid-

eration was single, in which both vendors were jointly concerned, and both vendors were equally responsible for any defect in the title to the goods sold for which this consideration passed.

In what articles was there a failure of title? It is claimed that title failed to a portion of the goods which Mrs. Ellis had bought of a Mr. Hutchins, and which Mr. Hutchins recovered of Mrs. Chamberlain by an action of replevin. It appears, however, that the replevin suit against Mrs. Chamberlain was undefended; no notice having been given to Mrs. Ellis or Mrs. Hoffman of the pendency of the action. Nor does the evidence in this cause show that Mrs. Ellis had no title to those articles. I think that she had, and that the transaction by which she got possession of the articles was a sale, and not a bailment; and, although she had not paid for them, she could and did pass a title to Mrs. Chamberlain upon which she could have successfully stood in a defense to the replevin suit. The remaining articles in which there was an alleged failure of title were the three Baltimore heaters. As to these, it appears that they belonged to the landlord of Mrs. Ellis. Although she put one in the rented premises, the arrangement by which this was done contemplated that it should remain there after the termination of her lease. The other two were placed in the house by the landlord. In respect to these heaters, neither of the vendors to Mrs. Chamberlain had title, and there should be a deduction from the amount due upon the six outstanding notes for this failure of title.

The question then arises, what is the proper measure of the deduction to be allowed? Perhaps no feature relating to the sale of chattels has been so little and so unsatisfactorily discussed and determined in previous adjudications as this. It seems to be the settled doctrine in the English courts that, where there is a failure of title to all the chattels sold, the purchaser can treat the transaction as presenting an instance of an entire failure of consideration, and may sue for the money paid. *Elchholz v. Bannister*, 17 C. B. (N. S.) 708. There is, however, no case decided in their courts that holds that the right of a purchaser is limited to a recovery of this sum in an action brought, not for the money paid, but for a breach of the warranty of title. The rule is entirely settled that for a breach of a covenant for title to real property the measure of damages is the consideration paid, and the interest upon such sum. This rule, early settled in the English courts, is the rule in this and many other states. This rule has also been adopted in many states in this country as equally applicable to breaches of the warranty of title to personal property. The following cases display the extent to which this rule has here been adopted: *Noel v. Wheatly*, 30 Miss. 181; *Ware v. Weathnall*, 2 McCord. 413; *Wood v. Wood*, 1 Mete. (Ky.) 512; *Crittenden*

v. Posey, 1 Head, 311; Ellis v. Gosney, 7 J. J. Marsh. 111; Arthur v. Moss, 1 Or. 193; Goss v. Dysant, 31 Tex. 186.

A perusal of the opinions in these cases, and the reasons given for the adoption of this rule in the sale of chattels, is not calculated to vindicate the wisdom of the rule. The doctrine, so far as it is applicable to breaches of the covenants in real conveyances, rests upon grounds which appertain to the character of real estate. The reason for the adoption of this rule in this class of actions is set forth at length by Kent, in the leading case of *Staats v. Ten Eyck*, 3 Caines, Cas. 111. The rule is an exception to the general principle which underlies the measure of damages for breaches of contract; namely, the standard of compensation. This latter rule applies to actions for breaches of warranties of quality in the sale of chattels to its full extent. In what respect the loss resulting from a breach of the warranty of title differs from that resulting from a breach of the warranty of quality in dealing with personal property is difficult to conceive. Outside of the vice of extending an exception to a general rule in any event, there appears to be no reason why the rule of recovery should not be uniform in actions upon both kinds of warranties. Nor do the cases in which the exceptional rule applicable to damages for breaches of real covenants has been extended to warranties of title to chattels, in my judgment, present any reason for such prejudicial action. In nearly all of these cases the question arose in states when and where slavery prevailed, and was in respect to breaches of a warranty of title to slaves. The reason stated in many of the cases for the adoption of the rule was the precarious and fluctuating character of that kind of property. In other cases the court is content with the citation of the early case of *Armstrong v. Percy*, 5 Wend. 536, as the authority for the rule.

In regard to the latter case, it may be remarked that the rule is drawn from a remark of the judge who delivered the opinion in that case, in a single sentence, unsupported by authority or reason. And this remark was made in the face of the result in the previous case of *Blasdale v. Babcock*, 1 Johns. 517, in which there was a recovery of the value of a horse, and costs, upon a warranty of title. The matter actually decided in the case of *Armstrong v. Percy* was that, where an action had been brought against the purchaser by the real owner, who was not the vendor, the purchaser could recover from the

vendor the money paid, besides the costs of the suit which he was obliged to defend. There was no suggestion that the rule controlling, in this respect, an action for breach of this kind of warranty, differed from the rule in actions upon other kinds of warranties. The cases cited—namely, *Curtis v. Hanway*, 3 Esp. 82; *Caswell v. Coare*, 1 Taunt. 566; *Lewis v. Penke*, 7 Taunt. 153—were all actions for breach of warranty of quality, and the measure of damages in these cases was shown to have been dependent upon the pleadings. In the first two of these cases no special damages were set out in the declaration, and there was nothing but the amount of the consideration to show what was lost, so that was ruled to be the measure of damages. In the last case, the claim for damages having been broader, it was permitted to the plaintiff to recover, in addition to this, the costs of a suit against him by his vendee, to whom he had sold with a similar warranty.

There is nothing in the matters decided in the case of *Armstrong v. Percy* which fixes, as a rule, that for the present kind of warranties the measure of damages is limited to the consideration paid, and interest. The rule, I think, in all actions of this kind, is compensation. Where no special damages are set forth, the measure of the loss is the value of the property purchased; and, where there is no evidence of value but the consideration paid, that will be taken as the standard of value. Where there is a failure of title to a part, or an inferior title only is sold, the loss is the difference between the property as conveyed and its value had the title been as warranted.

In support of the view that this general rule, applicable to damages, appertains to actions upon breaches of warranties of title to chattels, are the cases of *Grose v. Hennessey*, 13 Allen, 389; *Rowland v. Shelton*, 25 Ala. 217; and the text of Mr. Sedgwick, on *Measure of Damages*, 294. My opinion is that there should be a deduction, in this case, of the difference between the value of the entire lot of chattels sold and the value of the lot without the heaters. The only evidence of the value of the entire lot is what it was sold for, namely, \$1,800. The evidence in regard to the value of the heaters fixes their value at about \$200. Adopting these values, there should be a deduction for the latter sum from the notes, as of the date of the sale, leaving due \$400 and interest.

The decree should be reversed.

Decree unanimously reversed.

58 **BERKEY & GAY FURNITURE CO. v. HASCALL.**

(24 N. E. 336, 123 Ind. 502.)

Supreme Court of Indiana. May 1, 1890.

Appeal from circuit court, Elkhart county; JAMES D. OSBORNE, Judge.

Action by the Berkey & Gay Furniture Company against Milo S. Hascall. Judgment was rendered for defendant, and plaintiff appealed.

J. M. Vanfleet, W. H. Vesey, and C. W. Miller, for appellant. H. D. Wilson and W. J. Davis, for appellee.

OLDS, J. This was an action by the appellant against the appellee to recover a balance of \$374.62 for goods sold and delivered. The answer is in three paragraphs, setting up a counter-claim. It is alleged in the first paragraph that on August 26, 1881, the appellee had just completed his hotel, with 50 rooms, and was in need of new furniture therefor, without which he could not carry on his business, as appellant well knew; that on said day, for the purpose of furnishing said hotel in all its parts with suitable furniture, the appellant agreed with him to furnish said furniture and every part thereof complete, and set it up in proper shape and condition in his hotel rooms, ready for use, by September 15, 1881; that said rooms were irregular and different in size, dimensions, and construction, and for the purpose of making said furniture suitable for said rooms, appellant measured said rooms, and a list of goods was agreed upon, and at the foot thereof appellant executed a memorandum in writing as follows: "We agree to put these goods all in good order, (set up in hotel, without charge, except freight and cartage,) custored, with bracket wood-wheels on all beds. All bureaus and washstands to have good wood-wheels on rubber castors. Goods to be ready the 15th of September. Any goods not according to order, or not satisfactory, may be returned free of charge. Goshen, Aug. 26th, 1881. BERKEY & GAY FURNITURE CO. T. M. MOSELEY." The paragraph then alleges that he was ready, able, and willing to comply with his part of said contract, but that appellant, with full knowledge of all the facts, violated said agreement, in this, to-wit: It failed to deliver any of said goods prior to September 30, 1881, whereby he lost the daily use of 29 rooms, of the rental value of \$2 per day for each room from September 15th to September 30th; that appellant failed to deliver said goods prior to January 18, 1882, except as set forth in his complaint; that said furniture was promised to be delivered in sets and suits for specific rooms and places, as set forth in said foregoing memorandum, but the articles so delivered were not in sets or suits, but in disjointed and mismatched pieces, and were not and could not be properly set up or used until all were delivered; by reason of which he lost the daily rental value and use of 20 of said rooms, worth to defendant \$2 each per day from October 1, 1881, to January 18, 1882, inclusive; that because of such failure he was compelled to turn away, and did

turn away, 20 persons each day, who desired to become guests at said hotel, whereby the income and profits of said hotel business were diminished \$50 per day. The second paragraph of the counter-claim alleges that on the 26th day of August, 1881, he had just completed his hotel, at a cost of \$40,000; that it contained 40 rooms (besides dining-room, kitchen, etc.), suitable for the entertainment of guests; that it was then operated and run by him in the business of hotel-keeping, and was so operated for the next two years; that the rental value of said hotel, when furnished, was \$5,500 per year; that on said 26th day of August, 1881, he was in great need of furniture to supply and furnish 30 of the aforesaid guest rooms in said hotel, which rooms were then unfurnished and empty, in which condition they were of no rental value to defendant, all of which appellant well knew; that to supply and furnish said rooms and hotel as aforesaid, appellant promised and agreed with him to deliver and set up, in good order and condition, the furniture mentioned in its complaint by the 15th day of September, 1881, according to written specifications and agreement, (copied into first paragraph above;) that appellant failed and refused to deliver said goods until January 18, 1882, during which time, from September 15, 1881, to January 18, 1882, he was deprived of the use and rental value of said hotel, and the several rooms therein, which use and rental was of the value of \$2,000. The third paragraph of the counter-claim alleges all the matters contained in the other two paragraphs, showing a little more minutely the rooms for which the different articles of furniture were designed. A reply in general denial was filed to the answer.

The cause was submitted to a jury for trial, and the jury returned a special verdict in the words and figures following: "Special Verdict. (1) We, the jury, find that the plaintiff contracted with the defendant, on the 26th day of August, 1881, to sell and deliver to defendant the several items of property mentioned in plaintiff's complaint, at and for the price of each article as stated in plaintiff's complaint, and was to deliver the same and set the same up in defendant's hotel in Goshen, Ind., and have the same ready for use in defendant's hotel, known as 'Hotel Hascall,' by or on the 15th day of September, 1881; that plaintiff, at the time of making such contract, knew the purpose for which said furniture was to be used. (2) Plaintiff failed and neglected to deliver any of said furniture until the 30th day of September, 1881, and thereupon and thereafter, until the 18th day of January, 1882, plaintiff delivered said furniture at the times, and in the specific articles, as severally set forth by the plaintiff in the complaint herein. (3) Defendant paid plaintiff the sums credited to defendant in plaintiff's complaint, and returned to plaintiff the items of furniture, as stated in plaintiff's complaint, to the amount of \$121.85, thus leaving unpaid of the purchase price of said furniture the sum of \$374.62, March, 1882, as stated by the plaintiff. (4) We further find that defendant, at and just prior to the making of said contract, had reconstructed

and built his hotel building in the city of Goshen, Ind., at a cost of \$40,000, and defendant was proprietor and manager thereof, and had within said hotel thirty (30) rooms that were unfurnished, and when so unfurnished were of no use or value to the defendant; that all said rooms remained vacant, and of no use or value to defendant, from the 15th day of September, 1881, to the 30th day of September, 1881, on account and by reason of the failure of plaintiff to comply with its agreement aforesaid; that twenty-three (23) of said rooms remained vacant, and of no use to defendant, from the 30th day of September, 1881, until the 19th day of October, 1881, because of the failure of plaintiff to comply with said contract; that seven (7) of said rooms remained vacant and of no use from the 19th day of October, 1881, to the 5th day of November, 1881, because of the failure of plaintiff to comply with said contract; that from the 5th day of November, 1881, until December 15, 1881, six (6) rooms of said hotel remained vacant, and of no use to defendant, because of the non-fulfillment of said contract by the plaintiff; that the use of each one of said rooms to the defendant was nothing, when unfurnished. (5) We further find that the rental value and use of each of said rooms, when furnished with the furniture designated for same in said contract, would have been to the defendant 75-100 dollars per day during said time. (6) If, upon the foregoing facts, the law be with the plaintiff, then we find for the plaintiff; but, if the law be with the defendant, then we find for the defendant. JOHN A. SMITH, Foreman." The appellant moved for judgment on the special verdict, which motion was overruled, and an exception reserved. The appellee moved for judgment on the special verdict, and the court sustained said motion, to which the appellant excepted. Final judgment was then entered in favor of appellee for \$554.63, and costs.

Appellant filed a motion for new trial, which was overruled, and exceptions reserved. The appellant assigns as error: (1) That the court erred in overruling appellant's motion for judgment in its favor upon the special verdict. (2) That the court erred in sustaining appellee's motion for judgment in his favor on the special verdict. (3) That the court erred in overruling appellant's motion for a new trial. It is contended that, under the facts found, the appellee is only entitled to compensatory or general damages, and not for the special damages set up as a counter claim.

We think the facts found in the special verdict entitled the appellee to recover the special damages claimed. In *Vickery v. McCormick*, 117 Ind. 594-597, 20 N. E. Rep. 495, the court says: "The general rule is that a party who fails to comply with his contract to furnish goods is liable for the value of the goods in the open market at the time of the failure. But, when similar goods cannot be purchased in the market, the measure of damages is the actual loss sustained by the purchaser in not receiving the goods according to the contract." See *Rahn v. Deig*, 23 N. E. Rep. 141, and authorities there cited. In *Hadley v. Baxen-*

dale, 9 Exch. 341, Sedg. Lead. Cas. 126-136, the court states what we deem to be the true rule governing the assessment of damages in such cases as this. In that case it is said: "Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect to such breach of contract should be such as may fairly and reasonably be considered either arising naturally—*i. e.*, according to the usual course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it." The facts found by the jury show that the appellee, at and just prior to August 26, 1881, had reconstructed and built his hotel building in the city of Goshen, Ind., at a cost of \$40,000, and that appellee was proprietor and manager thereof, and had within said hotel 30 rooms that were unfurnished, and when so unfurnished were of no use or value to the appellee; that upon said day he contracted with the appellant to sell and deliver to him the several items of property mentioned in the appellant's complaint, which consisted of the necessary furniture to furnish said rooms, at and for the price of each article as stated in the complaint, and agreed to deliver the same and set the same up in appellee's hotel, and have the same ready for use in said hotel by or on the 15th day of September, 1881; that the appellant, at the time of the making of said contract, knew the purpose for which said furniture was to be used. The contract was to furnish the furniture for 30 rooms in an hotel, and set it up in the rooms, and have it ready for use and occupancy by a day named. From these facts it necessarily follows, as a conclusion, that the party contracting to furnish the same knew that the rooms were valueless as hotel apartments when unfurnished; that the furniture was necessary to enable the purchaser to use and occupy the same, and operate his hotel; and that the appellee would be deprived of the use of such rooms for such purpose until it complied with its contract. The facts found further show that the appellant commenced furnishing the furniture soon after the date when it was all to have been furnished and put up in the rooms, furnishing part at one time and part at another. The facts show the appellee had reconstructed and rebuilt a valuable hotel, and was operating it himself, and the damages naturally resulting from the breach of the contract, according to the facts found, were what the rooms would have been worth to appellant furnished according to the contract, rather than they were worth to him under the contract. The delay in complying with the contract. Appellee built the house for a particular purpose, and was having it furnished for such purpose. He was not bound to rent out the rooms for another purpose, even if he could have done so. If there had been a breach and a total failure of the appellant to have furnished the whole or any part of the furniture, and the appellee had been notified that he was not intending to furnish it, then the appellant would have been liable for the difference in value of the fur-

niture between its price in the open market and the contract price, as well as the loss of the use of the rooms for the time necessary to have procured the furniture elsewhere; but in this case the appellant furnished the furniture, and appellee accepted it, so that the damage was the loss sustained by reason of the delay. We think the loss of the use of the rooms as they were to be furnished might fairly be considered to have been contemplated by the parties at the time of the making of the contract. In *Richardson v. Chynoweth*, 26 Wis. 656, it was held that a defendant failing to deliver an article, knowing the purpose for which it was purchased, was liable for the profits the purchaser would have made. See 1 Sedg. Dam. (7th Ed.) 218-239; Field, Dam. § 250; *City of Terre Haute v. Hudnut*, 112 Ind. 542, 13 N. E. Rep. 686.

It is contended that the facts found do not state the damages correctly; that, if the plaintiff is entitled to recover, the amount he is entitled to recover would be the difference between the rental value of the rooms, unfurnished and furnished. This objection we do not think available for a reversal of the judgment. When special damages of this character are recoverable, it is the damage the party himself has sustained that he is entitled to recover. If A. purchase grain of B., and at the time A. has a previous contract to sell and deliver grain to C., and A. purchases the grain of B. with a view of filling his previous contract with C. and C. is advised of that fact, and the contract is such that on failure to deliver B. becomes liable to A. for the profit he would have made, the damage recoverable is the profit A. would have made; and that amount might be determined by a finding of the facts showing the amount A. was to pay B. for the grain, and the amount he would have received from C. for the same. So, in this case, the amount of damage that the appellee was entitled

to recover was the difference in value to the appellee in the rooms, furnished and unfurnished, for the time they remained unfurnished by reason of appellant's failure to furnish the furniture; and that amount is determined by finding what the rooms were worth to the appellee unfurnished, and what they were worth furnished, for the time he was deprived of the use of them for the purpose for which they were to be used. The jury has found as facts that the use of the rooms unfurnished was worth nothing to the appellee during that time, and furnished they would have been worth 75 cents per day, and the number of days each room was unfurnished from the date appellant contracted to set up the furniture in the rooms is also stated and found in the verdict, and the gross amount may be determined by a mere computation. The facts found in the special verdict entitle the appellee to a judgment for the amount of the damages found to have been sustained by him. *Fasson v. Landrey* (this term) 24 N. E. 96. The facts found cover all the issues in the case, and that is all that is required by a special verdict.

It is further contended that the court erred in not sustaining the motion for new trial, for the reason that the judgment rendered upon the verdict is in excess of the amount found due the appellee by the verdict, but this question is not presented by the record. If the judgment does not follow the verdict, or is not such a judgment as the party was entitled to have rendered upon the verdict, to present any question as to the amount or form of the judgment, it was necessary to make a motion to modify the judgment, and properly reserve exceptions in case the motion was overruled. It follows, therefore, from the conclusion we have reached, that there is no error in the record for which the judgment should be reversed. Judgment affirmed, with costs.

BEEMAN v. BANTA.

(23 N. E. 887, 118 N. Y. 538.)

Court of Appeals of New York, Second Division. Feb. 25, 1890.

Appeal from supreme court, general term, fourth department.

Action by Marcus M. Beeman against George A. Banta. There was a verdict and judgment for plaintiff, which was affirmed by the general term, and defendant again appeals.

Rhodes, Coons & Higgins and John H. Parsons, for appellant. Baldwin & Kennedy, for respondent.

PARKER, J. The recovery in this action was for damages claimed to have been sustained because of a breach of an express warranty on the part of the defendant to so construct a freezer for the plaintiff as that chickens could be kept therein in perfect condition. The jury have found the making of the warranty, its breach, and the amount of damages resulting therefrom. The general term have affirmed these findings, and, as there is some evidence to support each proposition, we have but to consider the exceptions taken. The appellant excepted to the charge of the court respecting the measure of damages. Upon the trial he insisted, and still urges, that the proper measure of damages is the cost of so changing the freezer as to obviate the defect, and make it conform to the warranty. And *Milk Pan Co. v. Remington*, 109 N. Y. 143, 16 N. E. Rep. 48, is cited in support of such contention. That decision was not intended to, nor does it, modify the rule as recognized and enforced in *Pas-singer v. Thorburn*, 34 N. Y. 634; *White v. Miller*, 71 N. Y. 133; *Wakeman v. Manufacturing Co.*, 101 N. Y. 205, 4 N. E. Rep. 264; *Reed v. McConnell*, 101 N. Y. 276, 4 N. E. Rep. 718; and kindred cases. In that case the argument of the court demonstrates—*First*, that improper evidence was received; and, *second*, that the finding of the referee was without evidence to support it. No other proposition was decided, and the discussion is not applicable to the facts before us. The plaintiff was largely engaged in preparing poultry for market, which he had either raised or purchased. Before meeting the defendant, he had attempted to keep chickens for the early spring market in a freezer or cooler which he had constructed for the purpose. The attempt was unsuccessful, and resulted in a loss. The jury have found, in effect, that the defendant, with knowledge of this intention of the plaintiff to at once make use of it in the freezing and preservation of chickens for the May market following, expressly

represented and warranted that for about \$500 he would construct a freezer which should keep them in perfect condition for such market; that he failed to keep his contract in such respect, resulting in a loss to the plaintiff of many hundred pounds of chickens. The court charged the jury that, if they should find for the plaintiff, he was entitled to recover as one of the elements of damage the difference between the value of the refrigerator as constructed, and its value as it would have been if made according to contract. The correctness of this instruction does not admit of questioning. Had the defendant made no use of the freezer, such rule would have embraced all the damages recoverable. But he did make use of it, and such use as was contemplated by the contract of the parties. The result was the total loss of hundreds of pounds of chickens. The fact that the defendant well knew the use to which the freezer was to be immediately put, and his representation and warranty that it would keep chickens in perfect condition, burden him with the damage sustained because of his failure to make good the warranty. Upon that question the court instructed the jury that the plaintiff was entitled to recover the value of the chickens, less cost of getting them to market, including freight and fees of commission merchant. The question of value was left to the jury, but they were permitted to consider the evidence tending to show that frozen chickens were worth 40 cents a pound in the market during the month of May. Such instruction we consider authorized. The object of the freezer was to preserve chickens for the May market. The expense of construction and trouble, as well as expense of operation, was incurred and undertaken in order to secure the enhanced prices of the month of May. It was the extra profit which the plaintiff was contracting to secure, and, in so far as the profits contemplated by the parties can be proven, they may be considered. Gains prevented, as well as losses sustained, are proper elements of damage. *Wakeman v. Manufacturing Co.*, 101 N. Y. 205, 4 N. E. Rep. 264. We have carefully examined the other exceptions to the charge as made, and to the refusals to charge as requested, and also the exceptions taken to the admissibility of testimony, but find no error justifying a reversal. The insistence of the appellant that the judgment be reversed, because against the weight of evidence, may have been entitled to some consideration by the general term, but it cannot be regarded here. The judgment should be affirmed. All concur, except FOLLETT, C. J., and VANN, J., not sitting.

Judgment affirmed.

64 SHAW et al. v. SMITH et al.

SHAW v. JONES.

(25 Pac. 886, 887, 45 Kan. 334.)

Supreme Court of Kansas. Feb. 7, 1891.

Error from district court, Cowley county; M. G. TROUP, Judge.

Samuel Dalton and Samuel J. Day, for plaintiffs in error. S. E. Fink, for defendants in error.

VALENTINE, J. This was an action brought before a justice of the peace of Cowley county on January 31, 1887, by G. B. Shaw & Co. against Yates Smith and James W. McClellen, for the recovery of \$12, and interest, upon the following instrument in writing, to-wit: "Cambridge, April 30, 1886. On or before the first day of October, 1886, we promise to pay to the order of G. B. Shaw & Co., at their office in Cambridge, twelve dollars, for value received, with interest after maturity, at the rate of ten per cent. per annum until paid. This note is given in part consideration of the sale to Y. Smith of eight bushels flaxseed, by said G. B. Shaw & Co.; and, as a further consideration therefor, we agree to plant 14 acres with said seed, to cultivate, harvest, and clean the same in proper and careful manner, and deliver to G. B. Shaw & Co. at Cambridge, Kansas, on or before the 1st day of December, 1886, the whole crop raised therefrom, at a price mentioned below, per bushel of 56 lbs., for pure and prime flaxseed; flaxseed not pure and prime to be inspected and graded subject to the rules of the St. Louis Merchants' Exchange. And should we sell or trade, or attempt to offer to sell or trade, such crop to any other person or persons than said G. B. Shaw & Co., or order, then the note hereto attached shall immediately become due and payable; and the said G. B. Shaw & Co., or their assigns, are hereby authorized to enter any building or premises without any legal process whatever, and seize and remove such crop whatsoever (and in whosoever possession the same may be found), and to pay me the balance on demand, after the amount due upon said note has been deducted, together with all costs and expense incurred, where seizure is necessary; price to be paid per bushel, on basis of pure, to be 35 cents less than St. Louis market price on day of delivery. YATES SMITH, JAMES W. MCCLELLEN." Afterwards the case was taken on appeal to the district court, where the case was tried before the court and a jury, with the result hereafter stated. The plaintiffs' bill of particulars simply set up the foregoing instrument, and asked judgment thereon for \$12, and interest at the rate of 10 per cent. per annum from October 1, 1886. The defendants' amended answer thereto and cross-petition alleged that the flaxseed for which the instrument sued on was given was purchased by Smith, for the purpose of sowing it and raising a crop; that it was warranted by the plaintiffs to be good, but that it was worthless; that he (Smith) sowed it, but that it did not germinate; and that he lost his time, labor,

and use of his ground; and that he was damaged thereby in the sum of \$150. And he asked judgment for that amount, and costs of suit. The trial resulted in a verdict in favor of the defendants and against the plaintiffs for the sum of \$90, and judgment was rendered accordingly; and the plaintiffs, as plaintiffs in error, bring the case to this court for review.

It appears from the evidence that the facts of the case are substantially as follows: The plaintiffs, G. B. Shaw & Co., were dealers in flaxseed at Cambridge, in said Cowley county. Smith went to their place of business about April 20, 1886, and found Joseph Fraley, their agent, in charge. Shaw & Co. did not have any flaxseed on hand, but they were about to order some. Smith told Fraley to order eight bushels for him, for the purpose of sowing it and raising a crop. Fraley told Smith that they would furnish the flaxseed upon the conditions substantially as set forth in the foregoing instrument. Afterwards the flaxseed arrived, and Fraley gave notice to Smith. Smith then, on April 30, 1886, went to Cambridge and received the seed, about 8 bushels in amount, inclosed in sacks, from Fraley, and took it home and sowed it upon about 12 acres of ground. The seed appeared to be good, and Fraley and Smith believed it to be good, but in fact it was not good, and it did not germinate; and Smith lost all his time and labor in procuring it, and in preparing the ground for sowing it, and in sowing it, and he got no crop, and lost the use of his ground. And upon these facts the jury found in favor of the defendants and against the plaintiffs, and assessed the defendants' damages at \$90, as aforesaid. The only questions now involved in the case are as follows: (1) Under the contract between the parties, and under the circumstances of the case, was there any such implied warranty on the part of Shaw & Co., respecting the sufficiency of the flaxseed for the purposes of sowing it and raising a crop, that the plaintiffs may be defeated in their action on the aforesaid written instrument? (2) If so, then under such contract and warranty and circumstances, may the defendants, Smith and McClellen, or rather Smith, recover damages for Smith's losses, necessarily occasioned by reason of the worthlessness of the flaxseed? (3) And, if so, then what is the measure of Smith's damages? The maxim of the common law, *caveat emptor*, is the general rule applicable to purchasers and sales of personal property so far as the quality of the property is concerned; and, under such maxim, the buyer, in the absence of fraud, purchases at his own risk, unless the seller gives him an express warranty, or unless, from the circumstances of the sale, a warranty may be implied. In the present case no express warranty was given, and the question then arises, was there any implied warranty? At the time when the contract for the purchase and sale of the flaxseed was entered into, such seed was not present so that it could be inspected by the purchaser, and, when it arrived and was delivered to him, the defect in the seed was not apparent, and was probably not discoverable by any ordinary

means of inspection, and it was not discovered until after it was sowed, and when it failed to germinate. When the original contract for the purchase and sale of the flaxseed was made, the flaxseed was purchased and sold for the particular purpose, known to both the buyer and the seller, of sowing it in a field, and of raising a crop from it; and therefore this purpose was a part of the contract, and demanded that the seed should be sufficient for such purpose. It, in effect, constituted a warranty on the part of the seller that the seed should be the kind of seed had in contemplation by both the parties when the contract was made. The purchaser had to rely upon the seller's furnishing to him the kind of seed agreed upon, and the seller, in effect, agreed that the seed furnished should be the kind of seed agreed upon. The entire contract when made was executory, and it was to be executed and performed afterwards, and to be performed in parts and at different times. The seller was first to furnish the seed, and he did so in about 10 days after the contract was made, and of course the seed was to be a kind of seed that would grow. The purchaser was afterwards to sow it and to raise a crop, and afterwards the purchaser was to sell, and the seller was to buy, the crop, upon certain terms and conditions expressed in the contract. We think there was an implied warranty on the part of the seller that the seed

should be sufficient for the purpose for which it was bought and sold. *Wolcott v. Mount*, 36 N. J. Law, 262, 38 N. J. Law, 496; *Van Wyck v. Allen*, 69 N. Y. 61; *White v. Miller*, 7 Hun, 427, 71 N. Y. 118; *Whitaker v. McCormick*, 6 Mo. App. 114. We also think that the purchaser may recover damages from the seller for all the losses necessarily sustained by the purchaser, by reason of the worthlessness of the flaxseed furnished by the seller. See the authorities above cited, and also the following: *Passinger v. Thorburn*, 34 N. Y. 634; *Flick v. Wetherbee*, 20 Wis. 392; *Ferris v. Comstock*, 33 Conn. 513; *Randall v. Raper*, El., Bl. & El. 84. And it is not claimed that the purchaser in the present case recovered for more than the foregoing losses. The claim is that the purchaser had no right to recover at all, and that the seller had the right to recover on the instrument sued on. No other questions are presented. We think no material error was committed in the case, and the judgment of the court below will be affirmed. All the justices concurring.

PER CURIAM. It is understood that the same questions of law and fact are involved in the case of *G. B. Shaw & Co. v. T. L. Jones*, from Cowley district court, that are involved in the case of *Shaw v. Smith*, just decided, and the judgment of the court below in this case will be affirmed upon the authority of that case.

61 BARNES v. BROWN et al.

(29 N. E. 760, 130 N. Y. 372.)

Court of Appeals of New York, Second Division. Jan. 20, 1892.

Appeal from supreme court, general term, first department.

Action by Oliver W. Barnes against George H. Brown, and James Seligman, Jesse Seligman, and David Seligman, as executors of Joseph Seligman. The general term dismissed the complaint as to the executors, and reversed the referee's decision, which awarded only nominal damages against Brown. Plaintiff and Brown appeal. Affirmed as to the executors, and reversed as to Brown.

The other facts fully appear in the following statement by Bradley, J.:

The action was brought to recover damages for the alleged breach of contract of which the following is a copy, to-wit: "Oliver W. Barnes having, by instruments bearing even date herewith, assigned and transferred to us, George H. Brown and Joseph Seligman, all claims and demands against the New York City Central Underground Railway Company, and his title to certain subscriptions to the capital stock of said company, and also any interest he may have in a certain alleged contract made with the said company by Francis P. Byrne, and having also transferred sixty shares of stock in said company: Now, we, George H. Brown and Joseph Seligman, do hereby, in consideration of the premises and of one dollar to us paid by the said Oliver W. Barnes, agree that we will, upon certain amendments to the charter of the said New York City Central Underground Railway Company, now pending before the legislature of the state of New York, becoming a law, pay, or cause to be paid, to the said Oliver W. Barnes, his representatives and assigns, the sum of twenty-seven thousand five hundred dollars in currency of the United States, being the amount of certain advances made and services rendered by the said Barnes to the said railway company; and also that we will cause to be delivered to the said Barnes or his assigns at the time of the payment of the said money two thousand shares of the capital stock of the said railway company, which said stock is to be full-paid stock. And we further agree with the said Oliver W. Barnes, his representatives and assigns, that, in the event of the said amendments not becoming a law at the present session of the legislature, we will either cause said money to be paid, and said two thousand shares of stock delivered to the said Barnes or his assigns, or have reassigned to the said Barnes or his assigns the claims, demands, and rights so assigned to us, and transfer to him or his assigns the said sixty shares of stock so transferred to us the next day after the close of the present session of the legislature of New York. And we further agree that not

more than one hundred additional shares of the stock of said company shall be issued until the said payment be made and stock delivered without the consent of the said Barnes, and that so much of said one hundred shares as shall be issued shall be transferred to the said Barnes, if we do not exercise our option of paying said twenty-seven thousand five hundred dollars, and delivering said two thousand shares on the failure of the said amendments to become a law at the present session. And we further agree that no contract for the construction of the railway of the company shall be entered into without the consent of the said Barnes until the said money shall be paid and the stock delivered. In witness whereof we have hereunto set our hands and seals this twenty-sixth day of March, in the year one thousand eight hundred and seventy-two. George H. Brown. [L. S.] Joseph Seligman. [L. S.]" When, in 1882, this action was commenced, Joseph Seligman had died, and executors of his will were joined as defendants with Brown. The alleged default was in the failure or refusal to deliver to the plaintiff the 2,000 shares of the stock of the railway company, as Brown and Seligman had undertaken by the contract. The plaintiff sought to recover \$200,000 and interest. The referee found that the stock had no value, and directed judgment against Brown for nominal or six cents damages; and as to the defendants (executors) the referee directed judgment of dismissal of complaint. Judgments were entered accordingly. The general term affirmed the latter, and reversed the judgment for nominal damages, and as to the defendant Brown granted a new trial.

Edward C. James and Ira Leo Bamberger, for plaintiff. Hamilton Odell and John E. Parsons, for defendants.

BRADLEY, J., (after stating the facts.) The main controversy has relation to the rule or measure of damages applicable to the breach of the contract upon which this action was founded. While the plaintiff claims that damages cannot be less than \$200,000 and interest, it is insisted on the part of the defense that they were only nominal. Before proceeding to the consideration of the question in that respect, reference may properly be made to the facts out of which the alleged claim arose. The New York City Central Underground Railway Company was organized under an act incorporating it, and authorizing the company to construct and operate an underground railway in the city of New York, passed in 1868, and amended in 1869. The authorized capital stock of the company was \$10,000,000. At the time the contract of March 26, 1872, was made, the plaintiff was president of the company. He then had some claims against it, and only 117 shares of capital stock had been issued, of which he held 63 shares. By the trans-

fer of the 60 shares to Brown and Seligman, they took the control of the organization of the company. The amendments to the charter then pending in the legislature did not become a law, and consequently it was optional with them to either retain their purchase and pay, or surrender what they had received, and put an end to the contract. They, however, concluded to treat it as effectual, and assumed the undertaking to perform, and afterwards did pay to the plaintiff the \$27,500, and did deliver to the plaintiff certificates of 2,000 shares of the capital stock of the company. This was apparently full performance, but in fact was not, because that so delivered was not paid stock; and when this was discovered by the plaintiff he offered to return the certificates, and demanded such as he was entitled to. Further performance was refused, and this action followed. The only question as against the defendant Brown was one of damages; and the referee found that at the time when he and Seligman undertook to deliver the stock to plaintiff it had no actual or market value, and determined that he was entitled to recover nominal damages only. The stock certainly had no market value. None was in the market. This finding and conclusion were challenged by the plaintiff's exceptions. By reference to the condition of the company, it is seen that the total amount of money received by it on account of subscriptions to its stock was \$5,700, and that was received in 1869 and 1871. The other credits to the capital stock account were in demand loans and special services rendered the company. The various efforts prior to 1872 were unsuccessfully made to raise money for the purpose of construction of the railway, and the reason why the bonds of the company could not be negotiated was that it had been unable to obtain subscriptions to its capital stock to pay for right of way. The land and consequential damages incident to the construction of the railway were estimated at 5,000,000; and the expenditures by the company for work done towards construction and for land and land damages did not exceed \$4,000. The indebtedness of the company was about \$350,000. This was, in general terms, the situation of the company when the contract of March 26, 1872, was made; and it was known as well to Brown and Seligman as to the plaintiff. Whatever of value they took by the contract was in the franchise of the company, and was dependent upon the use which could be made of it by way of the construction and operation of an underground railway. While the futility of the enterprise tended to show that it never had any actual value, there evidently was hope and expectation of success entertained by Brown and Seligman when they elected to retain the benefit of the contract, and it is in that view insisted by the plaintiff that the stock then had a value which to him may at that time have been available, although later it turn-

ed out to have had none, and therefore he lost whatever he may have realized by its conversion, if it had in due time been delivered to him. There is apparently some force in this suggestion, but it is entirely speculative, assuming that the stock then in fact had no actual value as well as no market value. There was some conflict in the expert evidence upon the subject, founded upon the situation of the company. While that on the part of the defendants was that the stock had no value, that of the witnesses called by the plaintiff was to the effect that it was, as the situation then appeared, worth par. It may be observed that the plaintiff held the stock represented by the certificates so delivered to him until about September 1, 1874, upon the assumption that it was full-paid stock, before his discovery that it was otherwise.

The finding of the referee that the stock had neither actual nor market value was supported by evidence, and for the purposes of this review must be deemed conclusive. But it is insisted by the learned counsel for the plaintiff that the plaintiff should nevertheless have recovered the \$200,000 and interest upon it because he was entitled to the stock or to a sum which it would cost to obtain it. As a general rule, the damages which a party is entitled to recover against another for breach of contract are such as will indemnify him for the loss he has suffered by the default; and it is with a view to that result that the rules for ascertaining and awarding damages have been adopted. The purpose of the rule in that respect is to leave the party in no worse, and place him in no better, condition than he would have been if the act or default complained of had not been committed. It was with a view to such measure of relief, and the adoption of a rule to accomplish it, that the doctrine which gave the highest market value up to the time of the trial as the measure of damages for conversion of property of fluctuating value, as held in *Markham v. Jaudon*, 41 N. Y. 235, and some prior cases, was overruled in *Baker v. Drake*, 53 N. Y. 211, and the market value for a reasonable time within which to replace the property was adopted as furnishing the guide to the proper measure of damages and the more satisfactory means of indemnity. In that case the defendants, pursuant to an arrangement with the plaintiff, had purchased stocks to hold and carry, subject to his order, so long as he kept his margin good. The defendants disposed of the stock in violation of the agreement; and the court there held substantially that an amount sufficient to indemnify a party injured for the loss naturally, reasonably, and proximately resulting from the act complained of, and which a proper degree of prudence on the part of the complainant would not have averted, is the proper measure of recovery when punitive damages are not allowable; and that "the ad-

vance in the market price of the stock from the time of the sale up to a reasonable time to replace it after the plaintiff received notice of the sale would afford a complete indemnity." The principle upon which the determination of *Baker v. Drake* rested was that the measure of the plaintiff's damages was governed by the opportunity which was afforded by the market for him within a reasonable time to replace the stock or the refusal of the defendant to do so. 66 N. Y. 518; *Colt v. Owens*, 90 N. Y. 368. And in *Wright v. Bank*, 110 N. Y. 237, 18 N. E. 79, the same rule was held in like manner applicable where stock fully paid for by the owner is, through the honest mistake of the pledgee, converted by him, and he refuses to replace it. Thereupon the owner may do so within a reasonable time, and the highest market price within that time is the proper measure of damages. This is the recognized rule in this state, and it is applicable alike to actions upon contract as in tort.

In the present case there was no market to resort to for the plaintiff to supply himself with the stock, nor any market value to furnish the measure of damages. The rule applied in the cases last cited was not, therefore, in that sense applicable to the situation in the case at bar. A subscription, however, to 2,000 shares of the capital stock of the railway company, and payment of the full amount to the company, would have produced the stock, and it may be assumed that it could not otherwise have been procured. It is upon that ground that the plaintiff insists that the liability of the defendant is measured by that amount. This would have been so if the agreement of *Brown and Seligman* had been to pay the plaintiff \$200,000 in the stock of the company. Then their indebtedness or liability would not have been controlled by the value of the stock, but would have been fixed by the contract; but when the specific quantum of the stock was made the consideration in that respect for the plaintiff's sale to them, on their failure to deliver it he was entitled in damages to the equivalent of that which they had undertaken to render. In the absence of special circumstances, in an action for conversion of personal property, as well as one for failure to deliver it in performance of a contract, where consideration has been received, the value of the property at the time of such conversion or default, with interest, is the measure of compensation. *Ormsby v. Mining Co.*, 56 N. Y. 623; *Parsons v. Sutton*, 66 N. Y. 92. No special circumstances were alleged in the complaint to take this case out of the general rule. Nor was there any fluctuation in the value of the stock succeeding the time for its delivery, under the contract to qualify the application of such rule.

The damages which a party ordinarily may recover for breach of contract are those which naturally flow from the default; and, if the

contract is made in reference to special circumstances affecting the measure of compensation, such circumstances may be treated as within the contemplation of the parties, and constitute a basis for the assessment of damages. *Booth v. Mill Co.*, 60 N. Y. 487. They come within the meaning of special damages, and must be the subject of allegation in pleading to entitle the party to make proof of them, unless objection in that respect be waived. In the present case, no facts of special character relating to damages were alleged, nor were any established by the evidence further than the mere fact that the stock of the company had no market value. If, notwithstanding that fact, the stock may have had an actual value a different question would have been presented; for the plaintiff could not be subjected to loss, nor could the defendant be permitted to profit, by the fact that the stock had no market value at the stipulated time for delivery. Then other means than those afforded by the market would be resorted to under the contract, as within the contemplation of the parties to ascertain the amount requisite to full indemnity to the plaintiff. *Sternfels v. Clark*, 2 Hun, 122, 70 N. Y. 608. There may be cases in which damages have no support in market values, where the value is peculiar to the party entitled to performance, and relief will be given accordingly. *Scattergood v. Wood*, 14 Hun, 269, 79 N. Y. 263; *Parsons v. Sutton*, 66 N. Y. 92. And when the remedy at law for compensation is inadequate or impracticable, it may be found in equity by way of specific performance. *Pom. Eq. Jur.* § 1401. Those are supposed cases to which the principles of law adapt remedies when they arise. But in the case at bar the stock not only had no market value; it also had no actual value. Nor does it appear that it would have been of any value to the plaintiff, or of any substantial benefit to him, for any purpose, if he had received it. The defendant *Brown*, and his associate *Seligman*, did not, by the contract, undertake to do anything to give any future value to the stock of the company. Thus we have the simple case of a contract to deliver a certificate for a certain quantity of capital stock then having no existence, and when due and thereafter having no value. The claim that, because the creation or issue of this worthless stock would cost its par value, the plaintiff is entitled to recover that sum, does not seem to have the support of any well-defined principle of law. But it is said that, with knowledge of the situation, *Brown* and his associate absolutely agreed to deliver the stock, and therefore they were bound to pay the amount requisite to accomplish it without regard to the value of the stock, or of its beneficial use to the plaintiff. In an action at law to recover damages for breach of contract, the question of damages is one of indemnity; and in that respect the remedy founded upon this contract does not differ

from that upon any other contract for default in the delivery of property which a party has unqualifiedly undertaken to deliver for a consideration received. In *Dana v. Fiedler*, 12 N. Y. 40, the measure of damages for failure to deliver madder pursuant to contract was founded upon the market value at the time of the default. The question there arose upon the exclusion of evidence speculative in character, and which for that reason was held inadmissible upon the question of such value. Nor does *Scattergood v. Wood* have any essential application in principle to the case at bar. In that case there was an element of exemplary damages against the defendant, who had willfully deprived the plaintiff of the use of a test machine designed by him for a special purpose, in consequence of which he was put to the expense of constructing another for such purpose. Of this intended use the defendant was advised when he appropriated and withheld the machine from the plaintiff. The recovery of the expense of constructing the second one as damage for the detention of the other was sustained, although, by reason (as it turned out) of its insufficiency, the value of the latter was much less than such cost. In the present case the action is founded solely upon the failure to deliver to the plaintiff the stock without any supported claim of special circumstances for any damages other than such as flow naturally and reasonably from such default of Brown and Seligman. While the performance of their contract in that respect may have required them to pay to the company \$200,000, the entire value of its performance to the plaintiff was in the stock which they undertook to deliver to him, and this was the only benefit he was entitled to take under that provision of the contract. The value of the stock or its pecuniary equivalent was the measure of his injury by the default; and, as it had no value, the plaintiff was awarded complete indemnity by the conclusion of the referee that he was entitled to recover nominal damages only.

There was no error in the ruling of the referee, by which evidence of value of the stock was received. The complaint alleged that on January 22, 1873, when the plaintiff accepted the certificate before mentioned of stock in performance of the contract, the stock of the company was worth and salable in the market at its full par or face value, and demanded judgment for that amount and interest from January 23, 1873. This was the situation of the complaint when the evidence upon the question of value was given;

and the plaintiff, upon a state of facts embraced in an hypothetical question, called upon the witnesses to state the value of the stock in January, 1873. This was the time when, by the issue tendered in the complaint and taken by the answer, the value of the stock was by the pleadings brought in question; and it may be observed that the assumed facts upon which the answers of the witnesses were predicated were the same, and no different at that time than they were on the day when the contract matured.

These views lead to the conclusion that, as to the defendant Brown, the judgment directed by the referee should be sustained. But, as the order granting an additional allowance of costs to that defendant may be deemed to have been reversed at general term, that disposition of the order is affirmed, and the costs recovered treated as reduced accordingly. The contract was the joint undertaking of Brown and Seligman. The latter having died before the action was commenced, his personal representatives were joined as defendants with Brown. The complaint was as to those executors dismissed by the referee, upon the ground that facts sufficient to constitute a cause of action against them were not alleged. Their testator having only the relation of joint contractor with Brown, his death placed the primary liability upon the latter, unless he was unable to pay or insolvent. Upon that fact the liability of those personal representatives to the plaintiff upon the contract was dependent, and that fact was essential to the cause of action against them. *Grant v. Shurter*, 1 Wend. 148; *Trustees v. Lawrence*, 11 Paige, 80, 2 Denio, 577; *Pope v. Cole*, 55 N. Y. 124, and cases there cited; *Hauck v. Craighead*, 67 N. Y. 432. It was not alleged. This defect was available by objection which was taken at the trial. Code, § 499.

It does not appear on what ground the motion to amend the complaint was denied. The plaintiff was not entitled to it as matter of right; and the discretionary power of the referee exercised in denying the amendment is not the subject of review here. The judgment in favor of the defendants, Seligman, as modified by the general term, should be affirmed; and the order reversing the judgment, and granting a new trial as against defendant Brown, should be reversed, and the judgment entered upon the report of the referee (after deducting therefrom the amount of the additional allowance of costs) affirmed. All concur.

Judgment accordingly.

62 ALLEN v. MOHN.

(49 N. W. 52, 86 Mich. 328.)

Supreme Court of Michigan. June 5, 1891.

Error to circuit court, Branch county;
NOAH P. LOVERIDGE, Judge.*F. A. Lyon*, for appellant. *W. H. Lock-
erby*, for appellee.

GRANT, J. Plaintiff and defendant made a contract, by which plaintiff agreed to sell to defendant certain real estate. The contract was made in November, 1886. In September, 1890, defendant informed plaintiff that he could not go on with the contract, refused to pay the interest which was then due, and said that he would give up the contract. While the testimony is not clear as to the circumstances under which plaintiff took possession of the land, it appears to be conceded by both parties that defendant abandoned the premises, and plaintiff thereupon took possession. The contract contained the following clause: "It is mutually agreed between the parties that the said party of the second part shall have possession of said premises on and after date hereof, and he shall keep the same in as good condition as they are at the date hereof, until the said sum shall be paid as aforesaid; and, if said party of the second part shall fail to perform this contract, or any part of the same, said party of the first part shall, immediately after such failure, have a right to declare the same void,

and retain whatever may have been paid on such contract, and all improvements that may have been made on said premises, and may consider and treat the party of the second part as his tenant holding over without permission, and may take immediate possession of the premises, and remove the party of the second part therefrom." Upon the abandonment of the contract and of the premises by defendant plaintiff had his choice of three remedies: (1) Bill for specific performance; (2) suit at law to recover the purchase price; and (3) a repossession of the premises and a suit to recover damages for a breach of the contract. The latter remedy is supported by the following authorities: *Railroad v. Evans*, 6 Gray, 25; *Griswold v. Sabin*, 51 N. H. 170; *Meason v. Kaine*, 67 Pa. St. 126, 63 Pa. St. 335; *Porter v. Travis*, 40 Ind. 556; *Wasson v. Palmer*, 17 Neb. 330, 22 N. W. Rep. 773. In such case the measure of damages is the difference between the contract price and the value of the land at the time of abandonment and re-entry, less what has been paid. This rule is just, and places vendor and vendee upon a footing of equality and mutuality. In order to deprive the vendor of this remedy it must either be excluded by the terms of the contract, or waived by his acts and conduct. In this case the contract does not exclude it, nor has the plaintiff waived it. The circuit court was in error in directing a verdict for the defendant. Judgment is reversed, with costs, and a new trial ordered. The other justices concurred.

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HOGAN v. KYLE.

(35 Pac. 399, 7 Wash. 505.)

Supreme Court of Washington. Jan. 6, 1894.

Appeal from superior court, King county; Mason Irwin, Judge.

Action by F. V. Hogan against George M. Kyle for breach of contract to buy real estate. From a judgment for plaintiff, defendant appeals. Reversed.

Preston, Albertson & Donworth, for appellant. H. B. Slauson, for respondent.

DUNBAR, C. J. On the 27th day of February, 1890, respondent and appellant entered into a written contract wherein respondent agreed to sell the appellant certain real estate for the sum of \$2,500, one-third of which was paid at the time of the execution of the contract; appellant to pay the balance of the purchase price in two equal installments, the first of which was to be paid on the 27th day of May, 1890, and the second on the 27th day of August, 1890. Time was expressly made the essence of the contract. The appellant paid no part of the purchase price, except the sum which was paid at the time the contract was executed. It does not appear that defendant entered into possession of the property, or exercised any control over it. On November 14, 1892, suit was commenced by the respondent to recover a money judgment against the appellant for the amount of the two unpaid installments, with interest. The complaint simply alleged the making of the contract, failure to pay, the ownership of the property, and the tender of a good and sufficient deed prior to the commencement of the action. A demurrer was interposed to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and the defendant answered, alleging possession in the respondent, but denying his power to give good title. Alleging that respondent had never demanded of appellant the contract price of the land at any time prior to November 14, 1892, the date of the commencement of the action, and never tendered to appellant any deed or conveyance purporting to convey said land until said 14th day of November, 1892, and never at any time conveyed said premises; that, long prior to said last-named date, appellant had informed and notified respondent that he did not have or claim any further interest in said property, and that he would not pay any further installment provided for by said contract, and that the plaintiff did not, up to said November 14, 1892, assert any further right to the balance of said contract price, nor dissent to nor deny said claim of defendant that he was no longer bound by said contract; and that long prior to said last-named date the plaintiff had exercised said option reserved to him under said contract, and had elected to rescind said contract, and to retain as a

forfeited the first payment that had been made to him by the defendant thereunder, aforesaid. At the outset of the trial, appellant objected to the introduction of any testimony in behalf of the plaintiff on the ground that no cause of action was stated in the complaint. This objection was overruled. At the conclusion of respondent's testimony, appellant moved for a nonsuit, which motion was overruled. Thereupon, he rested upon his motion, and did not offer any testimony; and the judge instructed the jury to bring in a verdict against the appellant for the balance of the contract price, with interest; which being done, judgment was entered thereon, from which judgment appellant has appealed. At the commencement of the action the appellant moved to have the case transferred to the equity calendar, which motion was denied. The demurrer and the motion for a nonsuit raised substantially the same questions.

The judgment in this case will have to be reversed, in any event, for under its terms the respondent recovers the full purchase price, and is allowed to retain the land which represented the purchase price. In this case these are dependent obligations upon which the respondent is suing. When the first installment became due, he could have recovered the amount then due as upon an independent contract; but having elected to wait until the last installment became due, and upon the payment of which defendant would be entitled to a deed, the obligations become dependent. They all relate back to the contract, and respondent cannot sustain an action for either installment without proof of performance or readiness to perform on his part. *McCroskey v. Ladd*, (Cal.) 31 Pac. 558, and cases cited. In that case the court said: "There is but one single cause of action,—one and indivisible. The defendant, if he would maintain his deed, must pay all; and the plaintiff, if he would recover, must show such a performance on his part as would entitle him to all the unpaid consideration." It is not enough that the deed was tendered at any particular time, but the tender must be kept good so that it may be taken into consideration in the entry of the judgment. Plaintiff here simply shows that the tender had been made prior to the commencement of the action, and it is therefore insufficient excepting on the theory that the judgment could be rendered independently of the performance of his part of the contract by the vendor, which would result in allowing the vendor to keep both the money and the land. On that proposition we quote from *Warvelle on Vendors*, (page 961:) "There are cases, both in England and the United States, where, on the vendee's default, the vendor, having offered to perform, has been permitted to recover as damages the whole purchase price. The injustice of such a measure, however, is apparent on its face, for it gives the vendor his land, as well as its value, and is

not now regarded as a correct rule in either country." The rule in such cases is that the vendor has a right to the fruits of his bargain, and is entitled to compensation for any loss he may suffer by reason of its nonconsummation. What his damages are, in such circumstances, must be alleged and proven, like any other fact in the case. Under one set of circumstances, the measure of damages might be one thing, and under other circumstances the measure might be governed by an entirely different rule. The land may have deteriorated in value, and his damages would be great, or it might have increased in value, and the damages would be nominal. As is well argued by the appellant in this case, so far as the complaint reveals, the land may be worth as much or more than it was when the agreement was executed; and the respondent, having received an advance payment, which is forfeited, may actually be benefited. The cases cited in Warvelle fully sustain the announcement in the text, both as to the unfairness of allowing the vendor to retain the land and the money, and as to the measure of damages. In *Railroad Co. v. Evans*, 6 Gray, 25, it was held that, in an action at law by the vendor to recover damages for the breach of a contract for the sale of land, the measure of damages is not the contract price, but the difference between that price and the price for which the land could have been sold at the time of the breach. Under this rule, which seems to us to be an equitable one, and one which is adopted by many courts, the complaint is plainly deficient. The case last above cited also holds that a vendor may enforce in equity the specific performance of a written contract for the sale of land. In fact, the prevailing modern authority is that in a case of this kind the vendor can either sue at law for damages, or resort to equity for specific performance. Mr. Pomeroy, in his work on *Contracts*, (page 6,) bases his adherence to this doctrine on the ground of mutuality. The remedy which is enjoyed by one party to a contract must be enjoyed by the other, and as an example he gives the simplest form of contract for the sale of land, when the vendor agrees to convey, and the purchaser merely promises to pay a certain sum as the price. Since the latter may, by a suit at equity, compel the execution and delivery of the deed, the former may also, by a similar suit, enforce the undertaking of the vendee, although the substantial part of his relief is the recovery of money. "A suit in equity against the vendee, to compel a specific execution of a contract of sale, while in effect an action for the purchase money, has nevertheless always been sustained as a part of the appropriate and acknowledged jurisdiction of such court, although the vendor has in most cases another remedy by an action at law upon the agreement." *Warv. Vend.* pp. 779, 780, and cases cited. So that, considering it either as a legal or equitable action, and consider-

ing the complaint amended so as to incorporate the allegations of tender sought to be set up in the reply, the action must equally fail, for the complaint, on its face, shows such a delay on the part of the respondent in bringing his action that, unexplained, it amounts to a waiver of respondent's rights under the contract, and an acceptance of the forfeiture. "The court of chancery was at one time inclined to neglect all consideration of time in the specific performance of contracts for sale, not only as an original ingredient in them, but as affecting them by way of laches. But it is now clearly established that the delay of either party in not performing its terms on his part, or in not prosecuting his right to the interference of the court by the institution of an action, or, lastly, in not diligently prosecuting his action, when instituted, may constitute such laches as will disentitle him to the aid of the court, and so amount, for the purpose of specific performance, to an abandonment, on his part, of the contract." Fry, *Spec. Perf.* § 1070. "The doctrine of the court thus established, therefore, is that laches on the part of the plaintiff, (whether vendor or purchaser,) either in executing his part of the contract, or in applying to the court, will debar him from relief. 'A party cannot call upon a court of equity for specific performance,' said Lord Alvanley, M. R., (u) 'unless he has shown himself ready, desirous, prompt, and eager.' Or, to use the language of Lord Cranworth, 'Specific performance is relief which this court will not give, unless in cases where the parties seeking it come promptly, as soon as the nature of the case will permit.'" *Id.* § 1072. To the same effect, *Pom. Cont.* § 408, and cases cited. It is true that a few of the states, notably Ohio, hold that the laches must fall outside of the statutes of limitation, but the great weight of authority, as we have been able to gather it from the cases, is to the contrary; and relief has been refused on the principle that acquiescence for an unreasonable length of time after the party was in a situation to enforce his right, under the full knowledge of the facts, was evidence of a waiver or abandonment of right, and what shall be deemed a reasonable time must be determined from the circumstances of the case. Six months, in some cases, might be as unreasonable as six years in others. It must be borne in mind that a distinction is made, in the discussion of the cases, between the cases where time is made the essence of the contract, and where it is not; and the conclusion deduced from the authorities is that where time is made the essence of the contract the apparent delay or omission of duty must be explained, or the relief will not be granted.

In this case time was made the essence of the contract, by express terms. The complaint shows that there was no attempt to enforce the claim until two years and three months after the contract matured, and makes no explanation whatever for the delay. Nor

are the averments of the complaint strengthened by the proofs, for the proofs show that no demand, of any kind whatever, had been made, on the part of respondent, until the day the suit was brought. The respondent should not be allowed to speculate in values, so far as this contract is concerned; to wait and see whether the value of the land would enhance or depreciate before he made his election either to enforce the performance or accept the forfeiture. We think the provision of this contract, that, "If the said party of the second part, his heirs, administrators, or assigns, shall fail to pay the full amount of either of the above-specified installments and interest when the same shall become due, as above specified, the said party of the first part shall have the right, at their option, to rescind and cancel this agreement, and in case of such rescission and cancellation all rights of the said party of the second part, his heirs and assigns, shall be terminated, and all payments heretofore made on this contract shall be forfeited," fairly construed, guaranties to the respondent a right which

it must exercise at the maturity of the contract,—the time when he would have a right to make the election; and, as he did not proceed to enforce the contract, the appellant had a right to presume that, inasmuch as he had taken no affirmative action, by tendering the deed, he had elected the remedy which was consistent with silence, namely, the acceptance of the forfeiture; and, considering the rapid changes in value of the real estate in this country, we think an unexplained delay of two and a quarter years ought to prevent the respondent from asserting his claim in a court of equity.

The complaint, therefore, being insufficient, either at law or equity, appellant's demurrer should have been sustained. This conclusion renders unnecessary the discussion of the other errors assigned. For the reasons given, the judgment will be reversed, with instructions to sustain appellant's demurrer to the complaint.

STILES, HOYT, SCOTT, and ANDERS, JJ., concur.

64 McGUINNESS v. WHALEN.

(18 Atl. 158, 16 R. I. 558.)

Supreme Court of Rhode Island. July 13, 1889.

Assumpsit. On demurrer to the declaration.

Edwin D. McGuinness and John Doran, for plaintiff. Edward D. Bassett, for defendant.

DURFEE, C. J. The declaration sets forth that at an administrator's sale at auction, held February 28, A. D. 1885, by William W. Nichols, administrator *de bonis non* on the estate of John Charlton, deceased, all the right, title, and interest of the decedent in certain land described was struck off to the defendant for \$3,100 bid by him, said sum being the highest bid therefor; that the defendant paid \$150 down as earnest money; that afterwards, at a time appointed, the administrator was ready with his deed to convey the land in pursuance of the sale, but the defendant refused to accept it, and pay over the residue of said \$3,100; that subsequently, on May 26, A. D. 1885, the property was again put up at auction by said administrator, and struck off to William H. Washburn for \$2,150, the highest bid therefor, and conveyed to him for that sum. The declaration then proceeds as follows, to-wit: "And the plaintiff avers that on the 21st day of November, 1887, he was appointed administrator *de bonis non* of the estate of John Charlton, deceased, in the place and stead of said Nichols, removed, whereby the defendant became liable and promised to pay to the plaintiff the difference between said sum of \$3,100 and the costs of said second auction sale, viz., \$40.17, and the sum of \$2,150, amounting to the sum of \$990.17." The declaration also contains the common money count. The defendant has demurred to the declaration generally, but both parties have treated the demurrer as if it were simply a demurrer to the special count. We will so treat it. The question, as it has been argued to us, is whether the count is good as a count upon a promise to be implied from the facts alleged. We think not. The contract which the defendant entered into when he made his bid was a contract to pay the price bid by him for the premises upon receiving a deed thereof, and, if on tender of the deed he refused to complete the payment, he committed a breach of said contract, and laid himself liable to an action upon it for damages. In such action the measure of damage is

the loss to the vendor from the default of the vendee, and it may be that the jury, upon proof of the second sale, would find the damages to be the difference between the two bids and the expense of the second sale; but the question would be purely one of damages, and they would not be shut up to that amount. *McCombs v. McKennan*, 2 Watts & S. 216. In order to make the vendee liable in *assumpsit* for such difference and expense, in case of his default, it should be made a condition of the sale that in such case the property should be resold, and the vendee held to pay such difference and expense. *Adams v. McMillan*, 7 Port. (Ala.) 73, was a case of real estate sold at auction, and afterwards resold on default by the vendee. The declaration contained a count like the special count here. The court held that where a declaration does not aver, as part of the contract of sale, a condition that the land shall be resold in case of such default, but only alleges the difference in price of the two sales, and as a consequence of the vendee's breach of his contract a liability on his part to pay that difference, being framed on the supposition that the difference is recoverable as on a contract, and not as unliquidated damages, the declaration will be bad on demurrer. *Robinson v. Garth*, 6 Ala. 204. The plaintiff contends that the mode of declaring here used is proper, because the sale was judicial, and in such sales the defaulting vendee is liable for the deficiency on resale, whether the terms of sale so provide or not. An administrator's sale, however, under our statutes, is not a judicial sale, as was decided by Judge STORY in *Smith v. Arnold*, 5 Mason, 414, 420. It has been held in Alabama that purchasers at official sales who make default are liable by implied contract for the deficit on resale. *Lamkin v. Crawford*, 8 Ala. 153; *Hutton v. Williams*, 35 Ala. 503, 513. We do not find the doctrine recognized elsewhere, (2 Freem. Ex'ns, 2d Ed., § 313;) nor, in our opinion, can an administrator's sale be regarded as an official sale. In some states the defaulting purchaser is liable for "the deficiency arising on resale" by statute. *Alexander v. Herring*, 54 Ga. 200. We have no such statute. The subject of the sale under which the question here arises was real estate, the title to which could not pass to the purchaser without deed. Whether, if the subject had been goods and chattels, the same mode of declaring would have been bad, is a question on which we express no opinion. Demurrer, regarded as a demurrer to the special count, sustained.

65 PUMPELLY v. PHELPS.

(40 N. Y. 59)

Court of Appeals of New York. March, 1869.

Action for specific performance of a contract to convey land, or in the alternative, damages for the breach. The plaintiff had judgment below for damages, and defendant appeals.

John H. Reynolds, for appellant. Samuel Hand, for respondents.

MASON, J. There has never seemed to me to have been any very good foundation for the rule, which excused a party from the performance of his contract, to sell and convey lands, because he had not the title which he had agreed to convey. There seems to have been considerable diversity of opinion in the courts as to the grounds upon which the rule itself is based.

In England, the rule seems to have been sustained upon the ground of an implied outstanding of the parties, that the parties must have contemplated the difficulties attendant upon the conveyance. In the leading case on this subject, of *Flureau v. Thornhill*, 2 W. Bl. 1078, Blackstone, J., said: "These contracts are merely upon condition, frequently expressed, but always implied, that the vendor has a good title."

While in this country the rule is based upon the analogy between this class of cases and actions for breach of covenant of warranty of title. *Baldwin v. Munn*, 2 Wend. 399; *Peters v. McKeon*, 4 Denio, 546. The rule of damages, in an action for a breach of covenant of warranty of title, is settled to be the consideration paid, and the interest; and yet this is an arbitrary rule, and works great injustice many times; and the courts met with the greatest embarrassment in settling it. These difficulties were considered, and well expressed, in the leading case in this state, of *Staats v. Ten Eyck's Ex'rs*, 3 Caines, 115, in which the court said: "To find a rule of damages, in a case like this, is a work of difficulty; none will be entirely free from objection, or will not, at times, work injustice."

"To refund the consideration, even with the interest, may be a very inadequate compensation, when the property is greatly enhanced in value, and when the money might have been laid out to equal advantage elsewhere. Yet to make this increased value the criterion, where there has been no fraud, may also be attended with injustice, if not ruin."

"A piece of land is bought solely for the purpose of agriculture, and by some unforeseen turn of fortune, it becomes the site of a populous city; after which an eviction takes place. Every one must perceive the injustice of calling on a bona fide vendor to refund its value, and that few fortunes could bear the demand. Who for the sake of one

hundred pounds would assume the hazard of repaying as many thousands, to which value the property might rise, by causes unforeseen by either party, and which increase in worth would confer no right on the grantor to demand a further sum of the grantee?" There is still another class of cases where the rule of simply refunding the purchase-money and the interest operates with great hardship and injustice upon the purchaser. A. purchases of B. a city lot for the purpose of building himself a dwelling or buildings upon it, and takes from B. a full covenant deed of the premises, covenanting to assure, warrant and defend the title. The buildings are constructed at the cost of thousands of dollars, and then B. is evicted by a paramount title ascertained to be in some one else. The recovery of the money and six years' interest is not a very just or reasonable return in damages for the law to give to one who holds a covenant to make good and defend the title.

The reasons assigned for this rule in actions for a breach of covenant of warranty of title can scarcely apply to these preliminary contracts to sell and convey title at a future time. In the latter case the vendee knows he has not got the title, and that perhaps he may never get it; and if he will go on and make expenditures under such circumstances it is his own fault; and besides, these preliminary contracts to convey generally have but a short time to run, and there is seldom any such opportunity for the growth of towns, or a large increase in the value of the property as there is in these covenants in deeds, which run with the land through all time.

The supreme court of the United States has refused to yield its sanction to this rule when applied to contracts for the sale of lands, and affirms the doctrine that the reason of the rule as to contracts for the sale of goods and chattels applies with equal force to these executory contracts for the sale of lands. *Hopkins v. Lee*, 6 Wheat. 109. That rule is where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed. *Robinson v. Harman*, 1 Exch. 850. This case of *Hopkins v. Lee*, 6 Wheat. 109, is cited with approbation in some of the American cases, and the rule there laid down affirmed.

These views are not presented to induce the court to overrule or repudiate the adjudged cases in our own courts upon this subject. They reach back over a period of more than forty years, and have been too long sanctioned to be now repudiated.

I have referred to this matter simply as furnishing an argument against in any degree extending the rule, and as a reason for limiting it strictly where the already adjudged cases in our own courts have placed it. It becomes important in this connection

to inquire what that limit is. The general rule certainly is that where the vendor has the title and for any reason refuses to convey it, as required by the contract, he shall respond in law for the damages in which he shall make good to the plaintiff, whom he has lost by his bargain not being lived up to. This gives the vendee the difference between the contract price and the value at the time of the breach, as profits or advantages which are the direct and immediate fruits of the contract. *Griffin v. Colver*, 16 N. Y. 489; *Durkee v. Mott*, 8 Barb. 423; *Underhill v. Gas-light Co.*, 31 How. 37; *Masterson v. Mayor, etc., of Brooklyn*, 7 Hill, 61, 69. Where however the vendor contracts to sell and convey in good faith, believing he has good title, and afterward discovers his title is defective, and for that reason without any fraud on his part, refuses to fulfill his contract, he is only liable to nominal damages for a breach of his contract. *Baldwin v. Munn*, 2 Wend. 399; *Peters v. McKeon*, 4 Denio, 546; *Conger v. Weaver*, 20 N. Y. 140. The rule is otherwise however where a party contracts to sell lands which he knows at the time he has not the power to sell and convey; and if he violates his contract in the latter case, he should be held to make good to the vendee the loss of his bargain, and it does not excuse the vendor, that he may have acted in good faith and believed, when he entered into the contract, that he should be able to procure a good title for his purchaser. 2 Pars. Cont. 503, 504, 505; *Hopkins v. Grazebrook*, 6 Barn. & C. 31; *Driggs*

v. Dwight, 17 Wend. 74; *Bush v. Cole*, 28 N. Y. 261; *Lock v. Furze*, L. R. 1 C. P. 441; *Robinson v. Harman*, 1 Exch. 849; *Hill v. Hobart*, 16 Me. 164; *Fletcher v. Button*, 6 Barb. 650; *Trull v. Granger*, 8 N. Y. 115; *Hopkins v. Lee*, 6 Wheat. 109; *Burwell v. Jackson*, 9 N. Y. 535; *White v. Madison*, 26 N. Y. 124; *Lewis v. Lee*, 15 Ind. 499; *Dean v. Raseler*, 1 Hilt. 420; *Bitner v. Brough*, 11 Pa. St. 127; *McNair v. Crompton*, 35 Pa. St. 23; *Wilson v. Spencer*, 11 Leigh, 261; *Graham v. Hackwith*, 1 A. K. Marsh. 429; *Dart, Vendors*, 447. This rule, applied to the case at bar, sustains the judgment of the supreme court.

The defendant must be held personally liable on this contract. It is essentially his contract. In order to exempt the contracting party from personal liability, he must so contract as to bind those he claims to represent. *Moss v. Livingston*, 4 N. Y. 208; *Dewitt v. Walton*, 9 N. Y. 571; *Bay v. Gunn*, 1 Denio, 108; *Bush v. Cole*, supra.

The fact that the party describes himself as trustee, without stating for whom, does not relieve him from personal liability, or change the effect of his engagement. *Taft v. Brewster*, 9 Johns. 334; *White v. Skinner*, 13 Johns. 307; *Dewitt v. Walton*, supra; *Bush v. Cole*, supra. These views lead to the affirmance of the judgment.

GROVER, WOODRUFF, JAMES, and MURRAY, JJ., concurred with MASON, J., and were for affirmance. DANIELS, J., dissents.

66 BROOKS v. BLACK.

(8 South. 332, 68 Miss. 161.)

Supreme Court of Mississippi. Nov. 10, 1890.

Appeal from chancery court, Noxubee county; T. B. GRAHAM, Chancellor.

G. A. Evans and Brame & Alexander, for appellant. Bogle & Bogle, for appellee.

COOPER, J. This is a proceeding by attachment in chancery by the appellee, Black, against his remote vendor, Brooks, to recover damages for the breach of warranty of title to certain lands. In 1869, Brooks conveyed the land, with covenants of warranty, to one Spencer, the consideration being the sum of \$6,296. Spencer executed a deed of trust, with power of sale, to one Smith, to secure the payment of a debt of \$400 to Graham, Black & Co. In September, 1878, the debt secured being unpaid, the land was sold, as provided by the trust-deed, and at such sale Black, the appellee, became the purchaser, at the price of \$1,000. After his purchase, Black conveyed to Mrs. Spencer an undivided one-half interest in the land. Afterwards, the heirs at law of Mrs. Caroline Daves and Mrs. Neilson recovered in ejectment from Black and Mrs. Spencer the undivided one-half interest in the land, claiming under title paramount to that of Brooks. Brooks was not notified of the pendency of this action of ejectment. Black, by the result of that suit, having lost the one-half of his half interest in the land, (the one-fourth of the whole,) seeks by the present proceeding to recover from Brooks one-fourth of the consideration paid him by Spencer, and interest thereon, and the costs of defending the action of ejectment against the heirs of Daves & Neilson, including attorney's fees. The chancellor found as facts that the title of the heirs of Mrs. Daves and Mrs. Neilson was paramount to that of Brooks; that the value of the land at the time of eviction was \$6,000; and that Black, in good faith, and in discharge of a legal duty, had defended the action of ejectment, and in so doing had expended in court costs the sum of \$249.91, and the further sum of \$200 for attorney's fees, which were reasonable. Upon these facts, he decreed that Brooks should pay to Black the sum of \$1,500, the same being the actual value of the land lost by Black, and less than one-fourth of the purchase price paid to Brooks by Spencer, with interest at 6 per cent. from January 1, 1888, the date of Black's eviction, and also the said sums of \$249.91 and \$200, the court costs and attorney's fees, with interest thereon from the commencement of this suit. Brooks appeals and assigns for error (1) that the court should have not made any decree against him, because the facts proved show that the debt secured by the deed of trust from Spencer to Smith, trustee, had been paid at and before the sale under said deed; (2) that the measure of damages should be the one-fourth of the purchase price paid by Black, and not the one-fourth of the value of the land at the time of eviction, nor the one-fourth of purchase money received by Brooks; (3) the court should not have allowed the court costs expended in defending the action of ejectment; (4) the court

should not have allowed attorney's fee paid in defending said action.

It is sufficient to say, in reference to the first assignment of error, that the facts do not support appellant's contention.

The second assignment of error presents an interesting question which has never before been considered by this court, and, so far as our researches have led, has not often arisen in other states. That question is, what is the measure of damages, in a suit by an evicted vendee, upon the covenant of warranty of a remote vendor, running with land? May he recover the purchase price received by the remote vendor, or is he limited by the consideration he himself has paid? It is supposed by counsel for the appellant that the sum paid by the evicted party—the value of the land at the time of his purchase—is fixed as the measure of damages in this state by the case of *White v. Pressly*, 54 Miss. 313. But the question was not raised by the record in that case; and although CHALMERS, J., in delivering the opinion of the court, declares that the sum paid by the evicted party, with interest, the same being less than the sum received by the remote vendor, is a correct measure of damages, the declaration does not thereby become decisive. In that case, Huntington had sold land to one Jones, from whom the title had passed under execution sale to Pressly. Pressly lost the land by reason of title paramount to that of Huntington, and sued Huntington's administrator on the covenants of warranty, and recovered in the court below the sum he had paid at execution sale, and interest thereon, the same being less than Huntington had received. The administrator appealed. He, as appellant, could not assign as error the fact that damages less than should have been awarded had been given; nor could the appellee raise the point here, that the judgment he sought to maintain should have been for a greater sum. The observation of the judge was not upon any question sought to be raised, or which could have been decided, and therefore is not the decision of the court. Among the first cases in which the liability of a vendor to his vendee for breach of the warranty for quiet possession was considered were *Staats v. Ten Eyck*, 3 Caines, 112, and *Pitcher v. Livingston*, 4 Johns. 1. It was contended for the plaintiffs in these cases that the covenant was one of indemnity, and therefore that the measure of damages should be the value of the land at the time of the breach. In *Staats v. Ten Eyck*, recovery was sought for the appreciation in the value of the land above the price paid by natural causes, and in *Pitcher v. Livingston* to recover above the purchase price the value of permanent improvements put upon the land by the vendee. The argument for the plaintiffs was rested upon the rule of damages in breaches of personal covenants in other instances, but the court rejected the contention, and adopted, by analogy, the measure of damages applied in the common-law action of *warrantia chartæ*, and in suits for the breach of the covenant of seisin, viz., the value of the land, determinable by the price paid the vendor; and, since the vendee was liable to the real owner for mesne profits,

he was also entitled to interest on the purchase money for the time for which such mesne profits might be recovered against him. The measure of damages established in these cases has been so generally adopted in other states as to have become almost universal, and it would be superfluous to cite authorities in its support. It has been announced as the rule in this state. *Phipps v. Tarpley*, 31 Miss. 433. We refer to the cases above not for the purpose of announcing the rule which applies as between vendor and vendee, for that is too well settled to admit of controversy, and is conceded by counsel for appellant; we note them to show that the suggestion now made that the covenant is one of indemnity was rejected by the court in the earliest cases. In a certain sense, all "covenants" are for indemnity; but the sense in which the word is now used, in argument of counsel, that redress is to be afforded to the extent, and within the limit, of the actual loss sustained by the vendee, in an action against his immediate vendor, it may be confidently asserted, is against the overwhelming current of authority. In these cases, at least, the decisions are practically uniform that, regardless of the value of the land at the time of eviction, the recovery is measured by the value of the land at the time of the conveyance, which value is conclusively fixed by the price paid by the vendee or received by the vendor. Another proposition may be confidently stated as supported by an equally uniform current of authority, that the covenant for quiet enjoyment runs with the land, and passes to all subsequent owners claiming in the chain of title. The purchaser of land gets, by operation of law, not only the land, but also the covenant of the first vendor, and that as well where the covenant is by its words to the vendee only, as where it is with him and his assigns. When we come however to the precise question now presented, which is whether a remote vendee may recover from the remote vendor the purchase money paid by the first vendee, or is limited to the amount paid by himself to his vendee, we find direct conflict in the decisions, and, so far as we have found the cases, they are nearly equal in number on each side. In North Carolina, (*Williams v. Beeman*, 2 Dev. 483,) Minnesota, (*Moore v. Frankenfield*, 25 Minn. 540,) Tennessee, (*Mette v. Dow*, 9 Lea. 93; *Whitzman v. Hirsh*, 87 Tenn. 513, 11 S. W. Rep. 421,) and Maryland, (*Crisfield v. Storr*, 36 Md. 129,) it is held that such remote vendee can only recover what he has paid to his own vendor. On the other hand, it is held in South Carolina, (*Lowrance v. Robertson*, 10 S. C. 8,) Iowa, (*Mischke v. Baughn*, 52 Iowa, 528, 3 N. W. Rep. 543,) and Kentucky, (*Dougherty v. Duvall*, 9 B. Mon. 57,) that such vendee may recover the full consideration received by the defendant, the remote vendor. *Williams v. Beeman* was decided by a divided court, *Ruffin, J.*, dissenting, and *Mette v. Dow* (followed by *Whitzman v. Hirsh*) overruled *Hopkins v. Lane*, 9 Yerg. 79. In *Crisfield v. Storr*, 36 Md. 129, the court declares that it had carefully examined many authorities upon the point, and that the decided weight of authority was

that the plaintiff could not recover on the warranty of a remote vendor more than he had himself paid to his immediate vendor, and in support of this declaration cites the following cases: *Booker v. Bell's Ex'rs*, 3 Bibb, 175; *Kelly v. Dutch Church*, 2 Hill, 116; *Bennet v. Jenkins*, 13 Johns. 51; *Hanson v. Buckner*, 4 Dana, 253; *Wyman v. Ballard*, 12 Mass. 304; *Stewart v. Drake*, 9 N. J. Law, 142; *Wilson v. Forbes*, 2 Dev. 39; *Pitcher v. Livingston*, 4 Johns. 1. We have examined these cases, and find all of them, except *Kelly v. Dutch Church*, to be suits by the immediate vendee, or his heirs at law, against the immediate vendor, or his personal representative. *Kelly v. Dutch Church* was a suit by the assignee of the lessee against the lessors of his assignor. The trial court had awarded, as damages, the rent reserved in the lease; thus, as it seems to us, making the sum paid to the lessors, and not that paid for the assignment, the measure of damages. But the facts are not very clearly stated, and the case cannot be held to decide anything upon the point. The question seems to have been more fully examined upon principle in the cases of *Williams v. Beeman*, 2 Dev. 483; *Mette v. Dow*, 9 Lea. 93, and *Lowrance v. Robertson*, 10 S. C. 8, than in any others. In *Williams v. Beeman*, the majority of the court thought that the remote vendee was suing to recover his own damages, and not those of the first vendee, and therefore should be restricted to the actual damages he had sustained. In *Mette v. Dow*, the court compared the covenant to a penal bond, the recovery on which would be limited to the actual damages sustained by the party suing. The dissenting opinion of *Ruffin, J.*, in *Williams v. Beeman*, is, in our opinion, a complete reply to this position. He says: "The value at the time of the sale by the first vendor is the measure prescribed. It ought to operate both ways. If the vendor be not liable for more, he ought not to be for less. I understand it to be admitted that, if his immediate vendee be evicted, he is still liable for that. I do not see why he should not be equally so to the assignee as his vendee. Does the assignment change his covenant? It runs with the land, and he who buys the land buys the covenant. He gets the whole of it. But it is said that the assignor in such case cannot recover from the first vendor more than the evicted vendee gave for the land, because this is all the assignor would be obliged to pay the assignee, and therefore he has complete indemnity. This is changing the rule essentially. It puts it upon the amount of the loss, not the price paid. It would seem to me that whoever buys land with a covenant adhering to it takes it with all the advantages it conferred on his assignor. It is so in personal contracts, for we do not inquire what the assignee of a bond gave for it. The obligor must pay him the whole." This argument seems to us unanswerable. It at least never has been answered in any case we have seen. When it is conceded that, by his covenant, a vendor binds himself to return the purchase price he receives in the contingency of a failure of the title conveyed, and that this obligation is assigned, by operation of law, to whoever may succeed to the

title, it would seem to follow, as a corollary, that the recovery, by whomsoever had, ought to be equal to the obligation. But, under the rule announced in Maryland, Minnesota, Tennessee, and North Carolina, the obligation of the covenantor is variable, and dependent upon transactions with which he is not connected. In these states, a man selling an estate to A. for \$5,000 would be liable to pay A. that sum if he should be evicted. But if A. sells the same land to B. for \$500, the liability of the first vendor is reduced to that sum, and thus B., the purchaser from A., gets less than the obligation A. held. But if B. sells to C. for \$5,000, the original obligation revives, and the absurdity is presented of B.'s failing to get, and therefore to have, what A. owned, and still transferring to C. that which he never had. The rule announced in Kentucky, Iowa, and South Carolina is not only commended by its justice, and by analogy to other well-settled principles, but possesses the advantage of stability and uniformity. As we have said, it is quite generally held that, by the covenant for quiet enjoyment, the grantor binds himself to pay, in event of failure of title, the then value of the land, which value is determined by the price paid. Appreciation by natural causes, or by improvements put upon the property by the vendee, does not enlarge his liability; nor is it decreased by depreciation in value from any cause. By legal intentment the obligation is as though the covenantor should say to the covenantee: "You, or the person succeeding to the title I convey, shall hold the land, or if you cannot, by reason of title in another, the money I have received shall be restored in lieu of the land." We are unable to perceive any principle upon which this obligation shall be diminished because of the price, in consideration of which it may be assigned. We therefore conclude that the obligation of the covenantor is the same to the assignee that it was to the covenantee, and, being such, is governed by the same measure of damages.

The third and fourth assignments of error present the question whether taxed costs and attorney's fees in excess of the purchase price, and interest thereon, may be recovered on the covenant. We are unable to discover any just principle upon which costs, whether taxed or otherwise, have been allowed to plaintiffs over and above the purchase price received by the

covenantor, and interest thereon. We readily perceive the justice of the rule by which the value of the land at the time of the sale by him is accepted as the measure of the liability of the covenantor, and also that the price paid shall be taken as conclusive evidence of that value. We also appreciate the fairness of allowing interest on the purchase money as compensation to the covenantee for so long a time as he has been held liable to the owner for mesne profits. But why costs in excess of the purchase money and interest have ever been allowed we cannot conjecture. In 4 Kent, Comm. p. 476, it is said: "The measure of damages on a total failure of title, even on the covenant of warranty, is the value of the land at the execution of the deed; and the evidence of that value is the consideration money, with interest and costs." How costs, which are uncertain in amount, varying with reference to the character of the suit, the number of witnesses, and the nature of the issues presented in a proceeding, could ever have been supposed to furnish any light upon the past value of lands, passes our comprehension. But so it is that, by practically an unbroken current of authority, the rule has been established that they may be recovered in addition to the purchase price and interest. Rawle, Cov. c. 9; Suth. Dam. 302; 4 Amer. & Eng. Enc. Law, 566. Believing that the rule allowing any costs should never have been established, we decline to extend it beyond the limits of the taxed costs of the case. Attorney's fees have been allowed in some states, and disallowed in others. The conflict in these decisions will be found in the cases cited by the text writers, and the Encyclopedia, above referred to. Constrained by authority to allow the taxed costs, we return to correct principles at the first point at which we may do so, and hold that the attorney's fees paid by the covenantee are not recoverable on the covenant of the grantor. In this cause, the court allowed the defendant an attorney's fee which, added to the taxed costs and other damages, exceeded the value of the land at the time of the sale, and interest thereon, and taxed costs. But, since the court also erred in fixing the value of the land at \$6,000, its value at the time of eviction, instead of \$6,296, the price paid to the defendant, both errors must be corrected to make a proper result. The decree is reversed, and decree here.

67 POPOSKEY v. MUNKWITZ.

(32 N. W. 35, 68 Wis. 322.)

Supreme Court of Wisconsin. March 1, 1887.

Appeal from circuit court, Milwaukee county.

The action is by a lessee against his lessor for failure of the latter to give the lessee possession of the leased premises according to the covenants in the lease. Under date of October 22, 1884, the parties executed an indenture of lease in and by which the defendant leased to the plaintiff his store, No. 411 Broadway, in the city of Milwaukee, from November 15, 1884, to May 1, 1890, at a yearly rent therein reserved, and therein covenanted that, on paying such rent, and performing the conditions contained in such lease to be performed by him, the plaintiff should have the quiet and peaceful possession of the leased premises during such term. The defendant was unable to give the plaintiff the possession of the leased store because he had theretofore leased the same to Wilde & Uhlig for three years, commencing May 1, 1883, and Uhlig was lawfully in possession thereof under such lease when the plaintiff's term under his lease commenced, and so continued in possession thereafter. The plaintiff paid the defendant rent until December 1, 1884, at the execution of the lease, being \$41.67, as stipulated in the lease, and performed all his covenants therein contained. The plaintiff also put some goods in the store with the consent of the defendant, but was required by Uhlig to take them away. This involved an expenditure by the plaintiff of \$14.40. It is averred in the complaint that, for 12 years before the making of the lease first above mentioned, the plaintiff had carried on, in the city of Milwaukee, and for the last five years in the vicinity of the leased store, a wholesale and retail business in pictures, picture-frames, and artist's materials, and in manufacturing picture-frames, and had a very large and lucrative custom and patronage established in said business; that he leased the store No. 411 Broadway for the purpose of carrying on and continuing the same business therein, of which the defendant had notice; that such store was especially well located, and adapted to the requirements of plaintiff's said business; that, relying upon having possession of the leased store at the stipulated time in which to carry on his business, he purchased a large stock of goods adapted to the holiday trade, in December, which is the most profitable trade during the year; and that he lost this trade by reason of his failure to obtain possession of the store. Also that, upon the refusal of the defendant to give him possession of the store, the plaintiff diligently endeavored, but without success, to obtain another store, suited to the requirements of his business, and that the rent-

al value of the leased store for the term of the lease is at least \$2,000 more than the rent thereof reserved in the lease. The closing paragraph of the complaint is as follows: "That, by reason of the premises, plaintiff's said business has been broken up and destroyed, and his trade and custom gone, and his stock of goods purchased to carry on his business at said store so leased has become greatly depreciated and destroyed in value, and plaintiff has lost the profits which he would and could have made in continuing and carrying on his aforesaid business at said leased premises since said fifteenth day of November, 1884, had said leased premises been surrendered and delivered up to him as agreed by defendant, and his said leasehold interest in said premises been lost and destroyed, to the damage of plaintiff in the sum of five thousand dollars." Judgment for \$5,000 and costs is demanded. The answer denies in detail each of the above averments, except that the defendant owned the store No. 411 Broadway, and executed a lease thereof to the plaintiff as alleged in the complaint.

The controversy on the trial was confined to the question of damages. The plaintiff offered testimony for the purpose of proving the special damages stated in the complaint, but the same was rejected, and the judge held that the measure of the plaintiff's damages is the difference between the rent reserved in the lease and the actual rental value of the store, together with the expense of removing the plaintiff's goods (before mentioned) from the store after the term of the lease commenced, and confined the testimony to those elements of damages. Only a single question was submitted to the jury, which is as follows: "What was the actual value per annum of the premises 411 Broadway, Milwaukee, described in the lease from defendant to plaintiff, from and after November 15, 1884?" The jury answered \$1,200. The rent reserved in the lease until May 1, 1887, is \$1,000, and \$1,200 thereafter. On April 5, 1886, the court gave judgment for the plaintiff for \$272.14 damages, and for costs of suit. It is recited in the order for judgment that the plaintiff admitted he went into possession of the leased store March 1, 1886. It is understood that the judgment is made up of \$200 per annum (being the excess in the value of the rent as found by the jury, over and above the rent stipulated in the lease) from November 15, 1884, to March 1, 1886, and the item of \$14.40 above mentioned. The item of \$41.67 paid defendant on account of rent was disallowed for the reason (as stated by the court) that the lease to plaintiff "assigned, by operation of law, the premises during Uhlig's term to Mr. Poposkey, and he has the right to recover the rent from Mr. Uhlig." The plaintiff appeals from the judgment.

Dey & Friend, for appellant. Jenkins, Winkler, Fish & Smith, for respondent.

LYON, J. This action was brought to recover damages for the failure of the defendant to put the plaintiff in possession of the store No. 411 Broadway, Milwaukee, leased by the former to the latter, at the time stipulated in the lease as the commencement of the term. It is substantially an action for a breach of the covenant for quiet enjoyment contained in the lease. 1 Tayl. Landl. & Ten.

309. This appeal presents for determination the question, what is the true rule of damages for a breach of that covenant in that case, in view of the facts proved and offered to be proved therein? The rule is undoubtedly the same as in an action for a breach of covenants for title in an absolute conveyance; that is to say, had the plaintiff purchased the store No. 411 Broadway of the defendant, and taken an absolute conveyance thereof, instead of a lease for five or more years, under the same circumstances which existed when the lease was executed, the measure of his damages for a breach of the covenants for title in such conveyance would be the same that it is for a breach of the covenant for quiet enjoyment in the lease. 3 Suth. Dam. 147; Blossom v. Knox, 3 Pin. 262. Indeed, the covenant for quiet enjoyment is one of the covenants for title in a conveyance. Rawle, Cov. 17. It is also said to be "an assurance consequent upon a defective title." Id. 125.

The general rule of damages which obtains in England and many of our sister states for a breach of covenant for title was first authoritatively laid down in 1775, in the case of the common pleas of *Flureau v. Thornhill*, 2 W. Bl. 1078. The defendant covenanted to sell the plaintiff a rent for a term of years issuing out of leasehold premises, but, without fault on his part, the defendant was unable to make good title thereto. The plaintiff claimed damages for the loss of his bargain, but it was held that he was not entitled thereto. De Grey, C. J., said: "Upon a contract for a purchase, if the title proves bad, and the vendor is (without fraud) incapable of making a good one, I do not think the purchaser can be entitled to any damages for the fancied goodness of the bargain which he supposes he has lost." Blackstone, J., said: "These contracts are merely upon condition, frequently expressed, but always implied, that the vendor has a good title." The rule of the above case has been much considered in both England and this country; and while its scope has been more clearly defined, and its application somewhat limited by later adjudications, the rule itself, as applied to cases in which the vendor honestly believed he had a good title, but the title failed for some defect not known to him, and of which he was

not chargeable with notice, is now firmly established in the jurisprudence of England by the judgment of the house of lords in *Bain v. Fothergill*, L. R. 7 Eng. & Ir. App. 158. As already observed, the rule prevails in several of the United States, including this state, under the limitations just mentioned, of (good faith and excusable ignorance) of the vendor of defects in his title. Indeed, these are scarcely limitations, but rather an interpretation of the qualification "without fraud," in the opinion by De Grey, C. J., in the principal case. The rule as it now stands has been applied in this state in *Rich v. Johnson*, 2 Pin. 88; *Blossom v. Knox*, 3 Pin. 262; *Nichol v. Alexander*, 28 Wis. 118; *Messer v. Oestreich*, 52 Wis. 684, 10 N. W. 6, and in other cases.

Under this or any other rule, the plaintiff is entitled to recover the consideration paid by him on account of the purchase. Hence, in the present case, whatever may be the measure of damages, the plaintiff should have recovered the amount he advanced for rent, and interest thereon. The reason given by the circuit judge for excluding this amount from the plaintiff's recovery, to-wit, that he could recover the rent from Uhlig, the tenant under the paramount lease, is conceived to be unsound. The plaintiff did not purchase a term subject to the lease of Uhlig, but an absolute term; and while he might, perhaps, have treated his lease as an assignment of the rents accruing under the prior lease, and collected the same from Uhlig, there is no rule of law which compels him to do so. Indeed, had he done so, it possibly might have operated as a waiver of any claim for damages for the breach of the covenant sued upon.

The limitations of the rule of *Flureau v. Thornhill*, or rather the exceptions thereto, are well stated in 3 Suth. Dam. 149, as follows: "Where a lessor knows, or is chargeable with notice, of such defect of his title that he cannot assure to his lessee quiet enjoyment for the term which such lessor assumes to grant; where he refuses, in violation of his agreement, to give a lease, or possession pursuant to a lease, having the ability to fulfill, as well as where the lessor evicts his tenant,—he is chargeable with full damages for compensation, and the doctrine of *Flureau v. Thornhill* has no application. On this general proposition the authorities agree. In such cases the difference between the rent to be paid and the actual value of the premises at the time of the breach for the unexpired term is considered the natural and proximate damages. Where the lessee is deprived of the possession and enjoyment under such circumstances, the lessor is either guilty of intentional wrong, or he has made the lease, and assumed the obligation to assure the lessee's quiet enjoyment, with a culpable ignorance of defects in his title, or

on the chance of afterwards acquiring one. In neither case has he any claim to favorable consideration; and he is not excused, on the doctrine of *Flureau v. Thornhill*, from making good any loss which the lessee may suffer from being deprived of the demised premises for the whole or any part of the stipulated term." This quotation doubtless contains a correct statement of the law acted upon in all the states, as well in those which have adopted the rule in *Flureau v. Thornhill* as in those which have not.

We are clear that this case comes within the exceptions. When the defendant leased the store to the plaintiff, he knew that there was a valid paramount lease upon the premises, executed by himself to *Wilde & Uhlig*, having 17 or 18 months to run after the commencement of the plaintiff's term. There is no claim that the former lessees had forfeited their lease. Indeed, the defendant afterwards made an unsuccessful attempt to evict them by legal proceedings for an alleged breach of the covenants of their lease, occurring after the execution of the plaintiff's lease. But it was held there was no breach. *Munkwitz v. Uhlig*, 64 Wis. 380, 25 N. W. 424. These proceedings are in evidence. Hence the defendant knew, when he leased the store to the plaintiff, of a defect in his title which prevented him from assuring to the plaintiff the quiet enjoyment of the leased premises. He thus entered into the contract on the chance of being able afterwards to avoid, in some way, his lease to *Wilde & Uhlig*, but having no legal cause for avoiding it. These facts deprive him of the protection of the rule in *Flureau v. Thornhill*, and bring the lease within the rule above quoted from *Sutherland*. In other words, the case is thus brought within the general rule which prevails in actions for breaches of contracts, that the plaintiff shall recover the loss he has proximately sustained by reason of the breach.

But, in order to determine what elements of loss come within the general rule, it is necessary to apply other rules of law to the particular case. In the present case (perhaps in most cases) the rules laid down in the leading case of *Hadley v. Baxendale*, 9 Exch. 341, 26 Eng. Law & Eq. 398, which have many times been approved by this court, are sufficient. *Shepard v. Milwaukee Gaslight Co.*, 15 Wis. 318; *Hibbard v. W. U. Tel. Co.*, 33 Wis. 558; *Candee v. W. U. Tel. Co.*, 34 Wis. 471; *Walsh v. Chicago, M. & St. P. R. Co.*, 42 Wis. 30; *Hammer v. Schoenfelder*, 47 Wis. 455, 2 N. W. 1129; *Brown v. Chicago, M. & St. P. R. Co.*, 54 Wis. 342, 11 N. W. 356, 911; *Cockburn v. Ashland Lumber Co.*, 54 Wis. 619, 12 N. W. 49; *McNamara v. Clintonville*, 62 Wis. 207, 22 N. W. 472; *Thomas, B. & W. Manuf'g Co. v. Wabash, St. L. & P. R. Co.*, 62 Wis. 642, 22 N. W. 827; see, also, *Richardson v. Chynoweth*, 26 Wis. 656. See, also, a very learned

and elaborate note on the rule in the principal case, in which a great number of cases are cited and discussed, in 1 *Sedgw. Dam.* 218-234. These rules can best be stated by a quotation from the opinion in the principal case by *Alderson, B.* He says: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i. e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases, not affected by any special circumstances from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case, and of this advantage it would be very unjust to deprive them."

Another rule having its foundation in natural justice should here be stated. In any case of a breach of contract the party injured should use reasonable diligence, and make all reasonable effort, to reduce to a minimum the damages resulting from such breach. The necessary expenses incurred by him in so doing may be recovered in an action for such breach. This rule was early laid down by this court in *Bradley v. Denton*, 3 Wis. 557, and has been followed since. For a full statement of the rule, and references to numerous adjudications sustaining it, see 1 *Suth. Dam.* 148. Under this rule, when the plaintiff was informed that the defendant could not give him possession of the store as he had covenanted to do, (which information was received by the plaintiff November 7th, being eight days before the commencement of his term,) it became his duty to use all reasonable efforts to procure another suitable place in which to carry on his business if the damages which otherwise would result from the breach of the defendant's covenant would be thereby diminished. We do not think, however, the plaintiff could

be lawfully required to take another store out of the vicinity in which he was doing business when he took the lease from the defendant. By removing to a remote part of the city, he might, and probably would, to some extent, at least, have lost the good-will of his business, which it is alleged he had carried on successfully for a series of years in the vicinity of the store No. 411 Broadway. Neither was he required to take another store not reasonably well adapted to his business.

From the foregoing rules, and the partial application of them already suggested, we think the following propositions are established: (1) The plaintiff is entitled to recover the sum he paid as rent when the lease was executed, and interest thereon; and also the necessary expense of removing some of his goods to the store, with defendant's consent, and taking them therefrom after he failed to get possession of the store. (2) If the defendant did not know, when he executed the lease, the purposes for which the plaintiff hired the store, or the uses to which he intended to put it, the measure of the plaintiff's damages for breach of the covenant for quiet enjoyment (in addition to the special damages just mentioned) would be that adopted by the trial judge; that is, the difference between the rent reserved in the lease and the actual rental value of the store, without regard to what it is used for, which the jury found to be \$200 per annum. All these are natural and proximate damages resulting from the breach. (3) If the defendant, then, knew that the plaintiff was carrying on the business stated in the complaint, and hired the store No. 411 Broadway for the purpose of continuing the same business therein, and if, in the exercise of reasonable diligence, the plaintiff might have procured another store, reasonably well adapted to his business and in the same vicinity, that is, in a location in which he could have preserved and retained substantially the good-will of his former business, the rule of damages, in addition to the special items first above mentioned, will be the difference between the rent reserved in the lease and the actual rental value of the leased store for the purpose of carrying on such business therein. In such case the actual rental value would ordinarily be measured by the amount of rent the plaintiff would be compelled to pay for another store equally well adapted to his business. If he could obtain another store for the same rent he was to pay the defendant, or less, of course he would suffer no general damages for the defendant's breach of covenant, and his recovery in that behalf would be confined to nominal damages, in addition to the special damages first above mentioned. If, however, the expenses of removing to another store would have been greater than they would have been in removing to the store No. 411 Broadway, such excess would

also be a proper item of damages. (4) If the plaintiff could reasonably have procured another suitable store for his business, he cannot recover for damages to his business, because by leasing, and continuing his business in, such other store, he might have avoided such damages. (5) But knowing that the plaintiff hired the store for the purpose of continuing his former business therein, (if he did know it,) and having executed the lease with knowledge that he could not put the plaintiff in possession of the store at the stipulated time because of his prior outstanding lease, the defendant took the risk of the plaintiff being able to procure another suitable store for his business, the inability of the latter to do so would render the defendant liable for the damages resulting to plaintiff's business by reason of the breach of covenant complained of. This is plainly within the rule of *Hadley v. Baxendale*, supra, because, under such circumstances, the parties may fairly be considered to have contemplated that the breach of covenant would necessarily destroy or greatly impair the value of plaintiff's business. It should be observed that, if the plaintiff recovers for damages to his business, he cannot also recover the value of his lease under the above second or third proposition, because such value is necessarily a factor in estimating the damages to the business. *Smith v. Wunderlich*, 70 Ill. 426, (433.) He may, however, in that case, recover the special damages mentioned in the first proposition, for these are not such factors.

It follows that the testimony which was offered by the plaintiff to show that the defendant knew, when he executed the lease to the plaintiff, that the latter was carrying on the business before mentioned in the same vicinity, and took the lease of the store for the purpose and with the intention of continuing such business therein, and that he was unable, in the exercise of due diligence, to find another store suitable for his business, was competent, and should have been received. Further, after the plaintiff makes a *prima facie* case entitling him to recover for damages to his business, proof should be received, under the pleadings, to show the value of such business.

We agree with Mr. Justice Paine, in *Shepard v. Gas-light Co.*, 15 Wis. 318, that to ascertain the value of a business an inquiry as to the profits thereof is necessary. Probable "value" and "net profits" are convertible terms as applied to a business. Yet the law in many cases gives damages for breaches of contracts, based on prospective profits, when they are fairly within the contemplation of the parties, are not too remote and conjectural, and are susceptible of being ascertained with reasonable certainty. If the plaintiff shows himself entitled to recover for damages to his business, the character, extent, and value of his established

business when the lease was executed, and before, will furnish a guide to the jury in assessing the prospective and probable value thereof, had the plaintiff been permitted to transfer it to the store No. 411 Broadway. Carried on in the immediate vicinity of the old stand, and by the same person, presumably the business would have been equally prosperous. This presumption may be rebutted by proof of facts and circumstances tending to show that the business would probably have been less remunerative had it been so continued.

It was said in argument that no case can be found which gives damages for the loss of anticipated profits, because a landlord fails to give possession at the time agreed upon. This is scarcely a correct statement. The case of *Ward v. Smith*, 11 Price, 19, cited by Mr. Justice Paine in *Shepard v. Gas-light Co.*, supra, seems to be just such a case. It is conceded that if the plaintiff had not a business already built up and established in the same vicinity, which, with its good-will, could have been transferred to the store No.

411 Broadway, there would be no basis upon which to estimate the prospective value of the business which the plaintiff would have done there had he obtained possession, and carried on the business therein. In such case, profits would probably be too conjectural and uncertain to be the basis of a recovery. Some of the cases refer to this distinction. In *Chapman v. Kirby*, 49 Ill. 211, the court, in speaking of the case of *Green v. Williams*, 45 Ill. 206, say: "In that case the lessee had not entered upon the term, had not built up or established a business, and had not suffered such a loss. There was not in that case any basis upon which to determine whether there ever would be any profits, or upon which to estimate them." In the present case the offer was to prove facts which would have shown a sufficient basis to determine whether there would be profits, and upon which they might be estimated.

For the errors above indicated, the judgment of the circuit court must be reversed, and the cause will be remanded for a new trial.

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COHN v. NORTON.

(18 Atl. 595, 57 Conn. 480.)

Supreme Court of Errors of Connecticut.
Sept. 13, 1889.

Appeal from court of common pleas, New Haven county; DEMING, Judge.

Action by Louis Cohn against Samuel L. Norton, for damages for breach of contract to deliver possession of premises leased to plaintiff. Judgment for plaintiff. Defendant appeals.

G. A. Fay, for appellant. *R. S. Pickett*, for appellee.

CARPENTER, J. On the 18th day of August, 1885, the defendant leased to the plaintiff a store and dwelling-house, for one year from the 1st day of September, with the privilege of renewing the lease for three years, at a monthly rent of \$50, payable in advance. One month's rent was paid. The defendant failed to put the plaintiff in possession. It appears that when the lease was executed the property was in the possession of one Alexander, under a prior lease, with the right to hold the same until February 1, 1890. He refused to surrender the possession. In an action to recover damages the plaintiff claimed to recover the sum of \$80, amount paid to clerks for release from contracts, and the sum of \$586.35, amount paid merchants to take back goods bought, and for depreciation on the goods. The defendant objected to the introduction of all evidence upon either of these claims. The court admitted the evidence, and allowed both items as damages.

Assuming that the plaintiff is correct in his claim that these were, or might have been, legitimate items of damage, still we think the testimony was objectionable, unless it further appeared that the sums paid were reasonable, and that the obligation to pay was entered into in good faith. The mere fact that the plaintiff paid them is not of itself sufficient to establish either proposition; and it does not appear that there was any other evidence tending to establish them, or either of them. If the clerks employed by the plaintiff had sustained no damage, or damage to a less amount, or if the plaintiff was under no legal obligation to pay, then the payment was unreasonable. The same is true of the money paid to the merchants. If these clerks were hired after he knew of the lease to Alexander, it can hardly be claimed that the plaintiff acted in good faith. How that was, we are not told. It appears that he had full knowledge of that lease on the 23d of August; and it is consistent with every fact found that all the clerks were subsequently hired. So, too, with respect to the purchase of the goods. Four days after the plaintiff had actual knowledge that Alexander could legally retain the possession, August 27th, he wrote the defendant as follows: "As I am now situated, I am on the fence, it being high time for me to buy goods, and I don't know what to do about it." On the same day he doubt-

less received the defendant's letter informing him that the prior lease had a year and five months longer to run. The evidence is strong, if not conclusive, that he purchased his goods after that. If so, in no event has he any legal or moral claim on the defendant.

But the great question is, what is the rule of damages in cases like this? Before considering that question we will briefly notice another claim that the defendant sets up, and that is, that it was the duty of the plaintiff, at his own expense, to take measures to gain possession of the property. Whatever may be the rule when a stranger wrongfully takes and holds possession, the principle contended for can have no application where a person holding rightfully under the lessor retains the possession. Nor are we prepared to sanction the claim that in this case the defendant is only liable for nominal damages. We can hardly say that a landlord who knows, or who has the means of knowing, that his property is incumbered with an outstanding lease, which may prevent his giving possession, acts in good faith in leasing unconditionally to another. We come back then to the question, what is the rule of damages? In *Hadley v. Baxendale*, 9 Exch. 341, the rule is laid down thus: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be either such as may, fairly and reasonably, be considered as arising naturally—that is, according to the usual course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it."

This rule has been criticised somewhat, as not being sufficiently definite; but we apprehend that any difficulty of that sort has necessarily arisen from the difficulty in applying the rule in given cases. It is not an easy matter, in many cases, to determine whether a given result is the natural consequence of a breach of a contract, or whether it arose from a matter which may reasonably be supposed to have been contemplated when the parties entered into the contract. Oftentimes it is a question on which men's minds may well differ. In that case the plaintiff was the owner of a steam-mill. He sent the parts of a broken shaft by the defendant, a carrier, to a mechanic, to serve as a model for making a new one. The carrier did not deliver the article within a reasonable time, by reason of which the plaintiff's mill stood still several days. In an action to recover damages the defendant pleaded by paying £25 into court. The case went to trial, and the plaintiff had a verdict for £25 more. A rule to show cause was argued, and the court promulgated the rule we have quoted. In that case it was contended that the loss of profits was the direct and natural consequence of the defendant's neglect. The court did not accept that view, but placed its decision on somewhat

different grounds. The court says: "Now, if the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendant, and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances, so known and communicated. But, on the other hand, if those special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and, in the great multitude of cases, not affected by any special circumstances from such a breach of contract; for, had the special circumstances been known, the parties might have especially provided for the breach of contract by special terms as to the damages in that case, and of this advantage it would be very unjust to deprive them." Thus the loss was attributed to the failure of the plaintiff to inform the defendant of the special circumstances, by reason of which he contributed to the loss; for, if the defendant had been fully informed, it may be assumed that there would have been a prompt delivery, and consequently no unnecessary loss, and because he was not so informed the court held that he was not liable for special damages. The essence of the rule seems to be that the defendant must, in some measure, have contemplated the injury for which damages are claimed. If it was the direct and natural result of the breach of contract itself, he did contemplate it; but if the injury did not flow naturally from the breach, but the breach combined with special circumstances to produce it, then the defendant did not contemplate it, and consequently is not liable, unless he had knowledge of the special circumstances. There may, however, be cases, growing out of the present methods of business, in which a promise may be implied, from the nature of the transaction, or the character of the business in which the party is engaged, to be prompt, and to use the utmost diligence in the performance of the duty undertaken. In such cases the law will not require the party to be specially informed, but will deem him to have contemplated the importance of the business, and hold him responsible accordingly.

Apply these principles to this case. The store was hired for a clothing store. That seems to be all that the defendant knew about it. He did not request the plaintiff to hire clerks and purchase goods, nor was he advised that the plaintiff would do so. While he may have supposed that the plaintiff would make suitable preparations to occupy the store, yet he could not know what preparations were necessary. He may have needed no clerks, or they may have been previously engaged, and the necessary goods may have been then in his possession. As a matter of law, it cannot be said that the de-

fendant contemplated that the plaintiff would hire clerks and purchase goods under such circumstances as to incur heavy liabilities in case of failure for any cause. In no proper sense, therefore, was the defendant a party to those arrangements, had no interest therein, and had no right to interfere; consequently he cannot be held responsible. Again, if these liabilities were incurred after the plaintiff knew that it was doubtful whether he could have the store, as they probably were, then, as suggested in a former part of this opinion, they were incurred in bad faith, and he assumed the entire risk. The English rule, then, as we understand it, will not justify the measure of damages applied by the court below. The rule we have been considering prevails generally in this country. Closely allied to it is another principle, which has some application to this case, and that is, that profits which are in their nature doubtful or uncertain cannot be recovered as damages in such cases. But this principle does not exclude profits as such, but only those of a contingent nature. If they are definite and certain, and are lost by reason of the defendant's breach of his contract, they are in some cases recoverable. An instance of this is the case of *Booth v. Rolling-Mill Co.*, 60 N. Y. 487. The plaintiff had contracted to deliver to a railroad company 400 steel-capped rails at a given price. The defendant engaged with the plaintiff to manufacture them, but failed to do so. The plaintiff was allowed to recover the profits he would have made had he been able to deliver the rails. If a loss of profits may thus be compensated, we see no reason why a direct loss of money may not be compensated. In either event, however, the loss must be certain, not only as to its nature and extent, but also as to the cause which produced it, and must be capable of being definitely ascertained. In *Griffin v. Colver*, 16 N. Y. 489, the rule is thus stated: "The broad, general rule in such cases is that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained, and this rule is subject to but two conditions: The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract,—that is, must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed." Here we may concede that the loss sustained was sufficiently definite and certain as to the amount, but not so as to the cause from which it proceeded. As we have already seen, it is not probable that the violation of the contract caused these losses; but, on the other hand, the plaintiff himself needlessly subjected himself to them.

In an Illinois case cited by the plaintiff, (*Green v. Williams*, 45 Ill. 206,) it was held that necessary losses sustained might be recovered. The plaintiff's case will hardly stand that test. The failure is twofold,—in

respect to the necessity for hiring clerks, and purchasing goods, in the first instance, and also in respect to the payment of the sums paid. There is no finding, and the facts do not sufficiently indicate, that there was any necessity for either.

Thus far we have assumed that the damages recoverable in this case are the same as in ordinary cases of breaches of contract. The defendant, however, contends that the rule in actions on covenants in leases, express or implied, is that, where the plaintiff has paid no rent or other expense, only nominal damages can be recovered. Such a rule once prevailed. It was adopted in analogy to actions on covenants in deeds of real estate, and it now prevails to a limited extent in the state of New York. *Conger v. Weaver*, 20 N. Y. 140. In that case *DENIO, J.*, not regarding the rule with favor, with apparent reluctance considered that it was too firmly established in that state to be disturbed. In *Mack v. Patchin*, 42 N. Y. 167, *SMITH, J.*, says: "But this rule has not been very satisfactory to the courts in this country, and it has been relaxed or modified more or less, to meet the injustice done to lessees in particular cases." In *Pumpelly v. Phelps*, 40 N. Y. 59, it is declared that the rule should not be extended, but limited

strictly to those cases coming wholly and exactly within it. In both those cases the circumstances are enumerated which will take cases out of the operation of the rule. They are so numerous as to well nigh abrogate the rule itself. In England the rule has been repudiated, and such actions are placed upon the same footing with other actions on contracts. *Williams v. Burrell*, 1 Man., G. & S. 402; *Lock v. Furze*, 19 C. B. (N. S.) 96. In this state the rule has not been adopted, and we are not disposed to adopt it. We think it better to discard the rule, so as to be in a position to determine all such cases upon the general principles applicable to other contracts. In that way we think we shall be the better prepared to do justice in each case as it arises.

We suppose the correct rule to be that the plaintiff is entitled to recover the rent paid, and the difference between the rent agreed to be paid and the value of the term, together with such special damages as the circumstances may show him to be entitled to. *Trull v. Granger*, 8 N. Y. 115. The theory upon which the court below assessed damages being inconsistent with these principles, the judgment must be reversed, and a new trial ordered. The other judges concurred.

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KNOWLES v. STEELE.

(61 N. W. 557.)

Supreme Court of Minnesota. Dec. 21, 1894.

Appeal from district court, Hennepin county; Henry G. Hicks, Judge.

Action by Alfred H. Knowles against Franklin Steele, Jr., for damages for breach of contract. Judgment was rendered for defendant, and plaintiff appeals. Affirmed.

George R. Robinson, for appellant. Kitchel, Cohen & Shaw, for respondent.

MITCHELL, J. The following condensed statement of the facts will be sufficient for the purposes of this appeal: In 1881, the defendant, being the owner of the premises described in the complaint, executed a lease (in which his wife joined) to plaintiff for the term of 10 years at an agreed annual rent. This lease contained a covenant that if the lessee should desire to continue the lease for another 10 years he should have the privilege of doing so in the manner following. Not less than three months before the expiration of the original term the lessee should give to the lessors notice in writing of his election to continue the lease for an additional term, and in such notice name and appoint an appraiser on his part. Thereupon the lessors should appoint an appraiser on their part, and notify the lessee of such appointment. The two appraisers thus appointed were to appoint a third, and the three so chosen were to appraise the leased premises at their then fair market value, "and thereupon, without any further act, this lease shall thereupon be extended for the further term of ten years, upon the same terms and conditions as before, except that the annual rent for such second term shall be such sum as is equal to six per centum of such appraised valuation." In 1891 plaintiff seasonably gave defendant written notice of his election to continue to lease for a second term, and in such notice nominated an appraiser on his part to appraise the property for the purpose of fixing the amount of the rent for the additional term. On receipt of this notice defendant sent plaintiff a written communication, by which, in order to avoid the necessity of appointing appraisers, he proposed to fix the rent for the extended term at 6 per cent. on the then present assessed valuation of the property, \$31,000. Immediately on receipt of this proposition the plaintiff wrote to defendant, notifying him of his acceptance of it. The fact was, although unknown to plaintiff, that soon after the execution of the lease in 1881 the defendant had conveyed the premises, through the medium of a third party, to his wife, from whom he had no authority to make or accept the proposition referred to, and shortly afterwards she wrote plaintiff, notifying him that she declined to be bound by the act of her husband, and sug-

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gesting that, if they could not agree on the amount of the rent, they should resort to an appraisal of the property in accordance with the terms of the lease. Plaintiff having refused to accede to the proposition, Mrs. Steele brought an action against him to recover possession of the property, in which the court decided that the notice served on her husband was sufficient to bind Mrs. Steele, but that she was not bound by the proposition made by him fixing the rent; and in accordance with the stipulation of the parties to the action the court gave Mrs. Steele further time in which to appoint an appraiser on her part, which she did. The two thus appointed by her and the present plaintiff, respectively, selected a third, and the three appraised the market value of the premises at \$35,000, on which basis the rent for the second term was fixed at \$2,100 per annum, at which rate the plaintiff has since paid, whereas the rent, according to the proposition of the defendant and accepted by plaintiff, would have been only \$1,914 per annum. This action was brought to recover damages for defendant's breach of his contract fixing the rent on the basis of the assessed value of the property. No evidence was introduced as to the actual rental value of the premises, and, the ejectment suit between plaintiff and Mrs. Steele being *res inter alios acta*, nothing done or determined in that action is evidence against the defendant on that question.

The plaintiff contends that this is in the nature of an action for the breach of the covenant in the lease for the quiet enjoyment of the leased premises; that plaintiff had a right to purchase his right of possession from the true owner, and that his damages are what it cost him to secure this right, over and above the rent agreed on between him and defendant. The rule as to the measure of damages attempted to be invoked has no application to the case. Plaintiff's quiet enjoyment under the lease has not been disturbed. He has secured a second term on the exact terms upon which he was entitled to it under the terms of the lease. What he complains of is that, if defendant had been able to perform and had performed a certain other contract, he would have obtained the extension on better terms than he was entitled to under the original lease. He was not compelled to take a second term at all, still less to take it at a rent greater than the actual rental value of the premises. Therefore the measure of his damages, if he is entitled to any, is the loss of his bargain, viz. the difference between the rent agreed in the accepted proposition of the defendant and the actual market rental value of the premises at the time this agreement was made. Therefore, assuming that the proposition of the defendant and the acceptance of it by plaintiff constituted a binding contract, still the plaintiff was at most

only entitled, under the evidence, to nominal damages; and a new trial will not be granted for a failure to assess nominal damages where no question of permanent right is involved. *Harris v. Kerr*, 37 Minn. 537, 35 N. W. 379; *Hill*. New Trials, p. 572. This ren-

ders it unnecessary to consider any of the other questions discussed by counsel. Judgment affirmed.

GILFILLAN, C. J., absent, on account of sickness; took no part.

**76 SUMMERFIELD v. WESTERN UNION
TEL. CO.**

(57 N. W. 973, 87 Wis. 1.)

Supreme Court of Wisconsin. Jan. 30, 1894.

Appeal from superior court, Douglas county; Charles Smith, Judge.

Action by Fred G. Summerfield against the Western Union Telegraph Company for damages for delay in transmitting a message. Judgment for plaintiff. Defendant appeals. Reversed.

The other facts fully appear in the following statement by WINSLOW, J.:

Action for damages for delay in the delivery of a telegram. Plaintiff resided on a farm about 10 miles from the village of Iron River, Wis. His mother lived at Lisbon, N. D., with plaintiff's brother J. W. Summerfield. Defendant had an office at each of these places. October 23, 1892, J. W. Summerfield left at defendant's office at Lisbon a message addressed to plaintiff, care of Burt Clark, Iron River, reading as follows: "Mother is dying. Come immediately. J. W. Summerfield." The fees for the transmission of the message were paid, but the evidence tended to show that the message was negligently delayed, and was not delivered to Clark until October 28, 1892, and plaintiff did not receive it until after noon of that day. Plaintiff's mother died on the 26th day of October. Plaintiff claimed that he would have gone to his mother's bedside had he received the telegram in due time, and that, by reason of his failing to receive the message until after his mother's death, he was deeply "mortified, grieved, hurt, and shocked, and suffered intense anguish of body and mind, and was thereby thrown into a state of nervous excitement and tremor, which rendered him sick, and impaired his health and strength, and that he still suffers from the effect of the same." Upon the trial, objection was made to the reception of any evidence under the complaint, because it did not state facts sufficient to constitute a cause of action, which objection was overruled, and exception was taken.

The court charged the jury, among other things, as follows: "If you find that the message, in the exercise of ordinary diligence, considering all the circumstances of the case, was unreasonably delayed, and that, if it had been delivered with reasonable promptness, the plaintiff could and would have responded thereto, and reached his mother before her death, and that plaintiff suffered mental pain from a sense of disappointment, sorrow, chagrin, or grief at being deprived of being at his mother's deathbed, your verdict should be for the plaintiff in such sum as will fairly compensate him for his mental suffering and damages, if any, to his nervous system, caused by the shock of such mental suffering." A verdict for the plaintiff for \$652.50 was rendered, and, from judgment thereon, defendant appealed.

Catlin & Butler, Carl C. Pope, and La Follette, Harper, Roe & Zimmerman (Geo. H. Fearons, of counsel), for appellant.

Mental anguish alone, caused by the negligent failure of a telegraph company to promptly transmit and deliver a message, will not sustain an action for damages by the addressee. *Wyman v. Leavitt*, 71 Me. 227, 230; *Bovee v. Danville*, 53 Vt. 183, 190; *Canning v. Williamstown*, 1 Cush. 451, 452; *Paine v. Railway Co.*, 45 Iowa, 569, 573, 574; *City of Salina v. Trosper*, 27 Kan. 544, 564; *Keyes v. Railway Co.*, 36 Minn. 290, 293, 30 N. W. 888; *Clinton v. Laning*, 61 Mich. 355, 361, 28 N. W. 125; *Kennon v. Gilmer*, 131 U. S. 22, 28, 9 Sup. Ct. 696; *Ewing v. Railway Co.*, (Pa. Sup. 1892,) 23 Atl. 340; *Railway Co. v. McGinnis*, 46 Kan. 109, 113, 28 Pac. 453; *Commissioners v. Coultas*, 13 App. Cas. 222, 225.

McHugh, Lyons & McIntosh, for respondent.

"Mental anguish and suffering occasioned by the failure to deliver a telegraph message are proper elements of damage in an action against the telegraph company by the person injured, and constitute grounds for recovery, though no pecuniary loss is shown." *Telegraph Co. v. Newhouse*, (Ind. App.) 33 N. E. 800; 8 Suth. Dam. 260, 645; 37 Cent. Law J. 61; *Womack v. Telegraph Co.*, (Tex. Civ. App.) 22 S. W. 417; *Bell v. Railway Co.*, L. R. 26 Ir. 428; *Railroad Co. v. Griffin*, (Tenn.) 22 S. W. 737; *Beasley v. Telegraph Co.*, 39 Fed. 181; *Telegraph Co. v. Stratemeier*, (Ind. App.) 32 N. E. 871; *So Relle v. Telegraph Co.*, 55 Tex. 310; *Young v. Telegraph Co.*, 107 N. C. 370, 11 S. E. 1044; *Reese v. Telegraph Co.*, 123 Ind. 294, 24 N. E. 163; *Telegraph Co. v. Henderson*, 89 Ala. 510, 7 South. 419; *Wadsworth v. Telegraph Co.*, 86 Tenn. 605, 8 S. W. 574; *Chapman v. Telegraph Co.*, (Ky.) 13 S. W. 880; *Stuart v. Telegraph Co.*, 66 Tex. 580, 18 S. W. 351; *Willson v. Railroad Co.*, (Wash.) 32 Pac. 408.

WINSLOW, J., (after stating the facts.) The exact question presented by the instruction of the court to the jury is whether mental anguish alone, resulting from the negligent nondelivery of a telegram, constitutes an independent basis for damages. At common law it was well settled that mere injury to the feelings or affections did not constitute an independent basis for the recovery of damages. *Cooley, Torts*, 271; *Wood's Mayne, Dam.* (1st Amer. Ed.) § 54, note 1. It is true that damages for mental suffering have been generally allowed by the courts in certain classes of cases. These classes are well stated by Cooper, J., in his learned opinion in the case of *Telegraph Co. v. Rogers*, (Miss.) 9 South. 823, as follows: "(1) Where, by the merely negligent act of the defendant, physical injury has been sustained; and in this class of cases they are com-

pensatory, and the reason given for their allowance is that the one cannot be separated from the other. (2) In actions for breach of the contract of marriage. (3) In cases of willful wrong, especially those affecting the liberty, character, reputation, personal security, or domestic relations of the injured party." To this latter class belong the actions of malicious prosecution, slander and libel, and seduction, and they contain an element of malice. Subject to the possible exceptions contained in the second and third of the above classes, it is not believed that there was any case,—certainly no well-considered case,—prior to the year 1881, which held that mental anguish alone constituted a sufficient basis for the recovery of damages. In that year, however, the supreme court of Texas, in *So Relle v. Telegraph Co.*, 55 Tex. 308, decided that mental suffering alone, caused by failure to deliver such a telegram as the one in the present case, was sufficient basis for damages. The principle of this case has been followed with some variations, by the same court, in many cases since that decision, and its reasoning has been substantially adopted by the courts of last resort in the states of Indiana, Kentucky, Tennessee, North Carolina, and Alabama, in cases which are cited in the briefs of counsel. On the other hand, the doctrine has been vigorously denied by the highest courts in the states of Georgia, Florida, Mississippi, Missouri, Kansas, and Dakota, and by practically the unanimous current of authority in the federal courts. All of these cases will be preserved in the report of this case, and the citations need not be repeated here. The question is substantially a new one in this state, and we are at liberty to adopt that rule which best commends itself to reason and justice. It is true that it has been held by this court, in *Walsh v. Railway Co.*, 42 Wis. 32; that, in an action upon breach of a contract of carriage, damages were not recoverable for mere mental distress; but, as we regard this action as being in the nature of a tort action, founded upon a neglect of the duty which the telegraph company owed to the plaintiff to deliver the telegram seasonably, that decision is not controlling in this case. The reasoning in favor of the recovery of such damages is, in brief, that a wrong has been committed by defendant which has resulted in injury to the plaintiff as grievous as any bodily injury could be, and that the plaintiff should have a remedy therefor. On the other hand, the argument is that such a doctrine is an innovation upon long-established and well-understood principles of law; that the difficulty of estimating the proper pecuniary compensation for mental distress is so great, its elements so vague, shadowy, and easily simulated, and the new field of litigation thus opened up so vast, that the courts should not establish such a rule. Regarding, as we do, the Texas rule as a clear innovation upon the law as it

previously existed, we shall decline to follow it, and shall adopt the other view, namely, (that for mental distress alone, in such a case as the present, damages are not recoverable.) The subject has been so fully and ably discussed in opinions very recently delivered that no very extended discussion will be attempted here. We refer specially to the opinions in *Telegraph Co. v. Rogers*, (Miss.) 9 South. 823; *Connell v. Telegraph Co.*, (Mo. Sup.) 22 S. W. 345; *Telegraph Co. v. Wood*, 57 Fed. 471. See, also, Judge Lurton's dissenting opinion in *Wadsworth v. Telegraph Co.*, 86 Tenn. 695, 8 S. W. 574. In the last-named opinion the following very apt remarks are made: "The reason why an independent action for such damages cannot and ought not to be sustained is found in the remoteness of such damages, and in the metaphysical character of such an injury, considered apart from physical pain. Such injuries are generally more sentimental than substantial. Depending largely on physical and nervous conditions, the suffering of one under precisely the same circumstances would be no test of the suffering of another. Vague and shadowy, there is no possible standard by which such an injury can be justly compensated, or even approximately measured. Easily simulated and impossible to disprove, it falls within all of the objections to speculative damages, which are universally excluded because of their uncertain character."

Another consideration which is, perhaps, of equal importance, consists in the great field for litigation which would be opened by the logical application of such a rule of damages. If a jury must measure the mental suffering occasioned by the failure to deliver this telegram, must they not also measure the vexation and grief arising from a failure to receive an invitation to a ball or a Thanksgiving dinner? Must not the mortification and chagrin caused by the public use of opprobrious language be assuaged by money damages? Must not every wrongful act which causes pain or grief or vexation to another be measured in dollars and cents? Surely, a court should be slow to open so vast a field as this without cogent and overpowering reasons. For ourselves we see no such reasons. We adopt the language of Gantt, P. J., in *Connell v. Telegraph Co.*, supra: "We prefer to travel yet awhile super antiquas vias. If, in the evolution of society and the law, this innovation should be deemed necessary, the legislature can be safely trusted to introduce it, with those limitations and safeguards which will be absolutely necessary, judging from the variety of cases that have sprung up since the promulgation of the Texas case."

It was argued that under chapter 171, Laws 1885, (Sanb. & B. Ann. St. § 1770b.) damages for injuries to feelings alone might be recovered. This law provides that telegraph companies shall be liable for all damages occasioned by failure or negligence or

their operators, servants, or employees in receiving, copying, transmitting, or delivering dispatches or messages. We cannot regard this statute as creating, or intended to create, in any way, new elements of damage. Whether its purpose was to obviate the difficulties which were held fatal to a recovery in the case of *Candee v. Telegraph Co.*, 34 Wis. 471, or to effect some other object, is not a question which now arises; but it seems clear to us that, had a radical change in the law relating to the kinds of suffering which should furnish a ground of damages been contemplated, the act would have expressed that intention in some unmistakable way. We see nothing in the law to indicate such intention.

Finally, it is said that verdicts for injuries

to the feelings alone have been sustained in this court, and the following cases are cited: *Wightman v. Railway Co.*, 73 Wis. 169, 40 N. W. 689; *Craker v. Railway Co.*, 36 Wis. 657; *Draper v. Baker*, 61 Wis. 450, 21 N. W. 527. Without reviewing these cases in detail, it is sufficient to say that there was in all of them the element of injury or discomfort to the person, resulting either from actual or threatened force, and they cannot be relied upon as precedents for the allowance of damages for mental sufferings alone.

It follows from these views that the instruction excepted to was erroneous. Judgment reversed, and action remanded for a new trial.

CASSODAY, J., dissents.

7 / CAHILL v. MURPHY. (No. 14,047.)

(30 Pac. 195, 94 Cal. 29.)

Supreme Court of California. March 26, 1892.

Commissioners' decision. Department 2. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Action by Mary Cahill against Daniel Murphy for slander. From a judgment for plaintiff, and from an order denying his motion for a new trial, defendant appeals. Affirmed.

Frank McGowan, for appellant. J. H. G. Weaver, for respondent.

FITZGERALD, C. This is an action for slander. The complaint alleges, in substance, that on or about the 21st day of September, 1889, and for a long time prior thereto, plaintiff, with her children, occupied certain rooms in an hotel of which the defendant was owner and proprietor; that one of these rooms was situated on the ground floor of the hotel, and used by her for the purpose of carrying on and conducting a general merchandising business; that on said last-mentioned date, the soot in the chimney leading from the room used as a store became ignited, causing an alarm of fire to be given; and it is further alleged, upon information and belief, that the fire was communicated to the soot in the chimney from a fire in the stove situated in said store. The slanderous words, out of which this action arose, are alleged to have been falsely and maliciously spoken by the defendant of and concerning the plaintiff, and are laid as follows: "This is twice you [the plaintiff meaning] have tried to burn us [the said hotel meaning] out to get your fourteen hundred dollars insurance. But I will report you [the said plaintiff meaning] to the insurance company to-morrow morning, and have your insurance taken away from you." It is further alleged that the defendant, by the use of these words, intended to convey the meaning that the plaintiff willfully and maliciously communicated the fire to the soot in said chimney, and that by so doing she was guilty of an attempt to commit the crime of arson, and that they were so understood by those in whose presence they were uttered, to the damage of plaintiff's character and business in the sum of \$10,000. A demurrer was interposed to the complaint, which, upon the grounds stated, was properly overruled. Defendant thereupon answered, specifically denying the material allegations of the complaint, and, upon the issues thus joined, plaintiff had verdict and judgment for \$1,200.

The only error complained of, which we deem it necessary to consider, relates to the ruling of the court upon defendant's objection to the following question propounded to plaintiff on her examination in chief as a witness, and after she had testified, without

objection, that she had "a family of four children." "Question. How many of them are dependent upon you for support?" (Objected to on the ground that the question 'is incompetent and immaterial.' The objection was overruled by the court, and defendant excepted.) Answer. Three are dependent upon me at present." It is claimed that the effect and purpose of this testimony was to arouse the sympathies and sentimental feelings of the jury, to the prejudice of defendant's case, by the introduction of an element that did not belong to it, and which the jury could not properly consider in the assessment of damages. In *Rhodes v. Naglee*, 66 Cal. 681, 6 Pac. 863, the ruling of the court below permitting the plaintiff, against defendant's objection, to prove that he was a married man, and had a family, was held not to be erroneous. And in *Dixon v. Allen*, 69 Cal. 527, 11 Pac. 179, the mother of the plaintiff was allowed to testify as to the number of her children, their ages, and the death of her husband. The rule laid down by this court in those cases rests upon the principle (although not stated) that, as mental suffering entitled the plaintiff to compensation in cases of this character, such suffering may be increased, and the damages consequently enhanced, by the fact that the members of the plaintiff's family would suffer by reason of the disgrace visited upon her by the slanderous charge. It was therefore competent in this case, on the question of damages, to prove the number and ages of plaintiff's children; but that they were dependent on her for support was irrelevant, and not within the issues raised by the pleadings; therefore erroneous. But was it such a material error as would justify a reversal? The rule in this state is well settled that injury will be presumed from error unless the record affirmatively shows to the contrary. It was competent, as we have stated, for the plaintiff to prove the number and ages of her children, and, if it appeared from the evidence that they were minors, the presumption would be that they were naturally and legally dependent on her for support. The effect, therefore, of such evidence would be the same as if proven by direct testimony. The evidence upon which the verdict was founded shows that the slanderous words charged were spoken wantonly and maliciously. The plaintiff was therefore entitled to recover of the defendant exemplary or punitive damages, and the assessment of such damages was almost entirely in the discretion of the jury. In view, therefore, of the enormity of the charge, and the situation of the parties, the plaintiff being a defenseless woman, coupled with the amount of damages awarded by the jury as compared with the sum sued for, we are satisfied that the jury was not influenced by this evidence prejudicially to the defendant's case. The verdict might well have been for a much larger sum, and yet not obnoxious to the ob-

jection that it was excessive. In this case we think the evidence immaterial, and its admission by the court a mere technical error. *People v. Flick*, 89 Cal. 144, 26 Pac. 759. The judgment and order should be affirmed, and we so advise.

We concur: TEMPLE, C.; FOOTE, C.

PER CURIAM: For the reasons given in the foregoing opinion the judgment and order are affirmed.

Hearing in bank denied.

Q. d. d.

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BECK v. DOWELL.

(20 S. W. 209, 111 Mo. 506.)

Supreme Court of Missouri, Division No. 2.
Sept. 20, 1892.

Appeal from circuit court, Lewis county;
Benjamin E. Turner, Judge.

Action by Jennie Beck, by her next friend,
Oliver Beck, Sr., against Elijah Dowell, ex-
ecutor. From a judgment for plaintiff, de-
fendant appeals. Affirmed.

Blair & Marchand and M. McKeag, for ap-
pellant. Clay & Ray, F. L. Schofield, and J.
C. Anderson, for respondent.

GANTT, P. J. This cause was appealed from the circuit court of Lewis county to the St. Louis court of appeals. That court, in an opinion by Judge Rombauer, affirmed the judgment of the circuit court, (40 Mo. App. 71;) but Judge Biggs being of the opinion that the conclusion reached by the majority, that evidence of the financial condition of the plaintiff, in an action when the evidence will justify the jury in awarding exemplary or punitive damages, was admissible, is in conflict with and opposed to two decisions of this court, to wit, Overholt v. Vleths, 93 Mo. 422, 6 S. W. 74, and Stephens v. Railroad Co., 96 Mo. 207, 9 S. W. 589, the cause was, under the constitution, certified to this court.

1. When the cause was heard in the court of appeals, the instructions were not in the record. No efforts were made to supply them in that court, and that court rightly proceeded on the assumption that the trial court had correctly declared the law to the jury. Since the case has reached this court, a certified copy of the instructions has been filed with the record. The propriety of considering these declarations of law by this court, under these circumstances, suggests itself at once. While this court obtains jurisdiction to "re-hear and determine a cause so certified to us by either of the appellate courts, as in cases of jurisdiction obtained by ordinary appellate process," there is nothing in the constitution that justifies parties in assuming that we will or can take cognizance of matters not in the record. When a record is deficient in any material respect, the practice is uniform that the party desiring the absent record should suggest the diminution, and apply for a writ of certiorari, or file stipulations in this court, supplying the record. In this case nothing of the kind has been done, but from the brief of the appellant, we take it he assumes that these instructions are properly before us. There is no hardship in requiring parties to govern themselves by the rules of procedure, established for the disposition of causes. For the purposes of this appeal, these instructions are no part of the record, and the cause will be determined on the presumption that the trial court correctly instructed the jury. Parties must pur-

sue legal methods in perfecting their transcripts, and in the proper courts, and in proper seasons.

2. The point in this record, then, is that upon which the court of appeals divided. Is evidence of the financial condition of the plaintiff admissible in an action for damages, when there are circumstances of oppression or malice? That exemplary damages may be recovered in actions for trespass or personal torts accompanied by circumstances of malice or oppression is no longer open to question in this state. Buckley v. Knapp, 48 Mo. 152. Nor is it controverted that it is perfectly competent to show the financial ability of the defendant in such a case. The case of Stephens v. Railroad Co., 96 Mo. 214, 9 S. W. 589, was an action for compensatory damages alone, and the learned judge who wrote the opinion expressly says: "There is nothing in the case to justify the giving of exemplary damages, and the damages should be confined to compensation for the injuries sustained." The case of Overholt v. Vleths, 93 Mo. 422, 6 S. W. 74, had no element in it justifying exemplary damages, and this court held that it was not improper to exclude evidence of the mother's financial condition in a suit for the death of her child which had been drowned in a pond, "in view of the fact that she had been allowed to state her condition in life, and that she did her own housework and had no servant." We do not think either of these cases can be considered as decisive of the point in this case. Exemplary damages are allowed, not only to compensate the sufferer, but to punish the offender. Franz v. Hilterbrand, 45 Mo. 121; Callahan v. Caffarata, 39 Mo. 137. The evidence in this case tended to show that the plaintiff was a girl about 16 years old; that her father was a tenant of defendant; that on the day she was shot by defendant her father and his sons were trying to water a cow in a lot of the defendant; that a difficulty ensued, —a general fight; that she was standing in the lot looking on, unarmed, when the defendant turned upon her, and shot her through the thigh. In other words, the defendant, with a deadly weapon, shot an unarmed girl without lawful provocation. We think there was ample evidence from which the jury could find willful, wanton injury. In 1 Suth. Dam. p. 745, it is said: "In actions for torts, the damages for which cannot be measured by a legal standard, all the facts constituting and accompanying the wrong should be proved; and though there be a legal standard for the principal wrong, if aggravations exist they may be proved to enhance damages; and every case of personal tort must necessarily go to the jury on its special facts. These embrace the res gestæ and the age, sex, and status of the parties; this, whether the case be one for compensation only, or also for exemplary damages, when they are allowed." In Bump v. Betts, 23 Wend. 85, the supreme court of New York, on a question of excess-

ive damages, pointed to the fact that the defendant had the command of great wealth, and that the plaintiff was a poor man. In *McNamara v. King*, 7 Ill. 432, in an action for assault and battery, the court permitted the plaintiff to show he was a poor man with a large family. The supreme court of Illinois, in affirming that ruling, said: "We are also of the opinion that the circuit court decided correctly in admitting the evidence and giving the instruction. (In actions of this kind, the condition in life and circumstances of the parties are peculiarly the proper subjects for the consideration of the jury in estimating the damages. Their pecuniary circumstances may be inquired into.) It may be readily supposed that the consequences of a severe personal injury would be more disastrous to a person destitute of pecuniary resources, and dependent wholly on his manual exertions for the support of himself and family, than to an individual differently situated in life. The effect of the injury might be to deprive him and his family of the comforts and necessities of life. It is proper that the jury should be influenced by the pecuniary resources of the defendant. The more affluent, the more able he is to remunerate the party he has wantonly injured." In *Grable v. Margrave*, 4 Ill. 372, in an action for seduction, the trial court admitted evidence to show plaintiff was a poor man. The supreme court, on appeal, said: "The court therefore decided correctly in admitting evidence showing the pecuniary condition of the plaintiff. This evidence does not go to the jury for the purpose of exciting their prejudices in favor of the plaintiff because he is a poor man, but to enable them to understand fully the effect of the injury upon him, and to give him such damages as his peculiar condition in life and circumstances entitle him to receive." In *Gaither v. Blowers*, 11 Md. 536, in an action for assault and battery, the trial court having admitted evidence for the plaintiff, with a view of increasing his damages, that he was a laboring man and had a wife and children to support, the supreme court, after quoting the language of *McNamara v. King*, 7 Ill. 432, says: "This is good sense, and is sustained by the decisions in most of the states. An injury done to a person not dependent on manual labor for the support of himself and family is in no wise as great

as one to a person so situated." In *Reed v. Davis*, 4 Pick. 215, the supreme court of Massachusetts, in an action for trespass in forcibly evicting plaintiff from his home, says: "One of the defendants stated to a witness, in answer to his inquiry whether he thought the plaintiff could not make him suffer, that 'the plaintiff had been to jail, and sworn out, and was not able to do anything.' Now, that circumstance was to be taken into consideration by the jury. There is nothing more abhorrent to the feelings of the subjects of a free government than oppressing the poor and distressed under the forms and color, but really in violation, of the law." "It is found that the dwelling house was small, but the damages are not to be graduated by the size of the building. The plaintiff also was poor. He had seen better days, but had been reduced in his circumstances. He was thought not to be able to do anything in vindication of his rights at the law." In *Dalley v. Houston*, 58 Mo. 361, this court said: "It is next insisted that the court improperly told the jury that, in the estimation of damages, they might take into consideration the 'condition in life of plaintiffs, and their pursuits and nature of their business.' There is no doubt but that, in estimating damages in such cases, the jury may properly take into consideration the pecuniary condition of the parties, their position in society, and all other circumstances tending to show the vindictiveness, or atrocity or want of atrocity, in the transaction, and which tend to characterize the assault." This decision of Judge Vories was concurred in by all the judges. It has never, to our knowledge and so far as we can ascertain, been questioned, denied, or criticised. It is in harmony, as we have seen, with the decisions of other courts of great ability. It is in harmony with the tendency of the courts to place before the triers of facts, whether court or jury, every fact that will aid them in arriving at a correct verdict. It is evident in this case its effect was not to create prejudice or passion. There is nothing that smacks of either in the verdict. Accordingly we affirm the judgment of the court of appeals, as indicated by the opinion of the majority of the judges of that court, on this as well as all other points ruled in the case, and it will be so certified to that court. All concur.

73 HAYNER v. COWDEN.

(27 Ohio St. 292.)

Supreme Court of Ohio. Dec. Term, 1875.

Error to district court, Miami county.

James Murray, J. T. Janvier, and H. G. Sellers, for plaintiff in error. Conover & Craighead and Morris & Son, for defendant in error.

WRIGHT, J. The slander alleged in the petition consists in falsely charging plaintiff, a minister of the gospel, with drunkenness. It is also averred that the words were spoken of and concerning him in his ministerial profession and pastoral office. The demurrer admits all that is averred, and thus this question is raised: Are words which charge a minister of the gospel with drunkenness, when spoken of him in his profession or calling, actionable per se? We answer that they are. We understand the rule to be, that words spoken of a person tending to injure him in his office, profession or trade are thus actionable. 1 Starkie, Sland. 9; Townsh. Sland. & L. § 182; 2 Add. Torts, 957 (section 2, c. 17, Edition of 1876 of this book, has a large collection of authorities on the subject); 1 Am. Lead. Cas. 102; Foulger v. Newcomb, L. R. 2 Exch. 327; Demarest v. Harding, 6 Cow. 76.

Calling a clergyman a drunkard was held actionable in *McMillan v. Birch*, 1 Binney, 176; *Chaddock v. Briggs*, 13 Mass. 251.

Such words are actionable because they tend to deprive him of the emoluments which pertain to his profession, and may prevent his obtaining employment. It is not, as counsel seem to suppose, that giving a clergyman this right of action is because his office is higher than that of his fellow men. It is a right which belongs to all who have professions or callings, and in this clergy-men are not different from others.

This principle is entirely different from that upon which proceeded the cases of *Hollingsworth v. Shaw*, 19 Ohio St. 430; *Dial v. Holter*, 6 Ohio St. 228; *Alfele v. Wright*, 17 Ohio St. 238. In all these, the words imputed a criminal offense, and did not relate to profession or calling.

Upon the trial of the case, it was insisted by defendant that the words were not spoken of the plaintiff in his character as a minister. The court fairly left this to the jury, and said if they were not so spoken, they would find for defendant. The jury find this issue for the plaintiff, and in the face of that finding, it is impossible for us, sitting as a court of error, to say that they were not spoken of the plaintiff in his character or capacity as a clergyman. If they were as we have seen, they are actionable.

In the cases cited by defendant—*Lumly v. Allday*, 1 Tyrw. 217; *Brayne v. Cooper*, 5 Mees. & W. 249; *Ayre v. Craven*, 2 Adol. &

E. 2; *Buck v. Henly*, 31 Me. 558; *Redway v. Gray*, 31 Vt. 292; *Van Tapel v. Capron*, 1 Denio, 250—it was held that the words spoken did not touch the plaintiffs in their various trades or employments. But to charge a minister with drunkenness does have such an effect. Congregations would not employ clergymen with intemperate habits, and the development of such a vice would be cause for speedy removal from office. When the question is reduced to a mere matter of dollars and cents, the purity, the integrity, the uprightness of a minister's life is his capital in this world's business.

Against the objection made, plaintiff offered evidence of the wealth of the defendant, and in the charge the court said this evidence might be considered in connection with the question of exemplary damages. We see no error in the admission of the evidence or the charge of the court upon the subject. That punitive or exemplary damages in a proper case may be given is not an open question in Ohio. In *Roberts v. Mason*, 10 Ohio St. 277; *Smith v. Pittsburg, Ft. W. & C. Ry. Co.*, 23 Ohio St. 10, the court allowed the jury to consider the wealth of defendant in connection with the question of punitive damages. If, then, punishment be an object of a verdict, a small sum would not be felt by a defendant of large wealth. The vengeance of the law would scarcely be appreciated, and he could afford to pay and slander still. There are cases which put the admission of the evidence upon this ground. *Alpin v. Morten*, 21 Ohio St. 536, intimates that the reason is to enable the jury to determine how much plaintiff has been injured. This case collects the authorities on both sides of the question, to which might be added *McBride v. Laughlin*, 5 Watts, 375; *Wagoner v. Richmond*, Wright, 173; *Sexton v. Todd*, Id. 320; 2 Greenl. Ev. 249; 1 Am. Lead. Cas. 190, note 6; *Horsley v. Brooks*, 20 Iowa, 115; *Buckley v. Knapp*, 48 Mo. 153. We see no error in the admission of the evidence, or the charge of the court on the subject.

There are some other questions raised by counsel, to which we briefly allude:

The defendant asked the court to charge the jury: "If they find that the words spoken by the defendant of and concerning the plaintiff were untrue, and that the defendant has not reasonable cause to believe them to be true, yet, if they are satisfied from the evidence that the defendant did believe them to be true, such state of facts would not warrant a verdict for punitive or exemplary damages, but for compensatory damages only." With which request the court refused to comply, but, on the contrary, charged the jury that such was not the law, to which the defendant then and there excepted.

We do not understand the law of slander to be, that it is a defense that the slanderer believed his words to be true, when he had

no grounds for so believing. Belief must have a foundation in something. Take away the foundation, and what can be left? The charge seems to us a solecism. Belief can only be claimed as a defense, or in mitigation, where it is based upon such facts or reasons as would incline a reasonable person so to believe. Inasmuch as this charge was asked in reference to exemplary damages, and there was evidence tending to show that the words had been spoken under circumstances indicating wantonness and recklessness, the charge was properly refused.

It appears to be seriously argued that in a minister of the gospel a single act of intox-

ication is not a fault, and therefore a charge of that kind cannot be injurious. We can hardly assent to this proposition. In a religious teacher one offense of the kind must be considered a grave departure from propriety and duty; and to say that the act has been committed is calculated to impair usefulness.

As to the question of excessive damages: The verdict was large; still we do not think defendant can complain, in view of all the circumstances of the case.

Judgment affirmed.

SCOTT, C. J., and WHITMAN and JOHN-SON, JJ., concurred. DAY, J., dissented.

74 GOLDSMITH'S ADM'R v. JOY.

(17 Atl. 1010, 61 Vt. 488.)

Supreme Court of Vermont. Bennington.
June 13, 1889.

Exceptions from Bennington county court;
POWERS, Judge.

Trespass for an assault and battery, committed on one Goldsmith, brought by Goldsmith's administrator against Moses Joy, Jr. Defendant did not deny that he made the assault. It appeared, however, that at the time, and just before, hot words had passed between the parties, and defendant claimed that he committed the wrong under the influence of the passion induced by the insulting and unjustifiable language of plaintiff's intestate, and that this fact should be considered by the jury in reduction both of the actual and exemplary damages. Defendant was the superintendent and general manager of the construction of a system of water-works in the city of Bennington, and in that capacity had in his employ about 100 men, mostly or all foreigners. It was in reference to the treatment of these men by defendant that the intestate used the alleged insulting language. He was suffering from Bright's disease at the time of the affray, and subsequently died of it. It was claimed that his death was materially hastened by the assault.

The court instructed the jury to award plaintiff actual damages at any rate, no matter what the provocation which led to the assault might have been. Upon the subject of exemplary damages the charge was as follows: "Now, then, as to the other question of damages. In actions of this kind under the laws of this state, the jury is permitted (not compelled, but permitted) in their discretion to allow to the plaintiff, in addition to the ordinary compensatory damages, such damages as in their judgment the character of the assault requires, in order that their verdict may serve as a terror to evil-doers. This is called 'exemplary damages,'—damages that are awarded by way of example; a verdict that the community can look upon as the wise judgment of the jury, exercised in a case where it will be calculated to restrain attacks of this kind in the future. I have said, gentlemen, that the allowance of the damages is permitted to the jury. They are not awarded in any case unless the trespass—unless the assault and battery—was of such a wanton, malicious, or aggravated character as leads the jury to think that an example ought to be made of the case. Oftentimes an assault is committed by one man upon another under such circumstances that the jury can see honestly that there was no malice; that there was no wantonness; that there were no high-handed acts that would justify the awarding of more than compensatory damages. On the other hand, many cases exist where the attack is of a wanton character, where it is inexcusable, where it is of a high-handed nature, and the

jury, looking at all the facts in the case, wisely say that the public are entitled to have an example made in the particular case, in order that in the future not only the defendant himself, but that other persons who get into affrays, shall be restrained from making these high-handed, inexcusable, and wanton attacks upon another. So that, gentlemen, this question, then, is one that addresses itself to your wise discretion. Do you think, in view of what is shown here, that this attack was of such a character as warrants you in awarding exemplary damages? If you do, then the amount of these damages rests wholly in your wise discretion. Whether it shall be a small sum or a large sum, you are to judge of; but in any event, gentlemen, if you award damages of this nature, you are to do it because you think that this assault upon Mr. Goldsmith was, under the circumstances, wholly inexcusable and wanton on the part of the defendant. Now, then, in respect to that question, mere words made use of by one person to another are no legal excuse whatever for the infliction of personal violence. It makes no difference how violent the language used may be, no man has the right to use personal violence upon another when he is induced to simply by the use of words. That is no defense to the action. But when you come to the question of whether a particular case is one that deserves the awarding of exemplary damages, then you are to consider all the circumstances in the case; the provocation, if any, that the defendant had; and everything that is calculated on the one hand to aggravate his act, and on the other hand to palliate his act, is to be considered. As I have already said on the main question of compensatory damages, there is no defense here whatever. No matter what was said, no matter how much provocation the defendant had, he is bound to answer for the compensatory damages, at any event. As to exemplary damages, in the exercise of a wise discretion you will not allow them unless you are satisfied that the act of the defendant was high-handed, wanton, and inexcusable, and in determining that question you are to take into view all the provocation that he had. Now, then, gentlemen, if the provocation was slight, it is quite different, and it should have less weight in determining the question whether you shall award exemplary damages than it would have if the provocation was great. Then, again, you may look at the parties themselves. If Goldsmith was a feeble old man, in poor health, and physically unable to compete with the defendant in a personal encounter, and the defendant without any provocation that you in your judgment say warrants an assault,—a violent assault,—if he then makes an assault that is altogether undue, uncalled for, in view of the special circumstances existing, why, then, it would be a case that the jury might award exemplary damages. The law takes notice of the hot passions that people fall into when they

are engaged in disputes, not by way of making a complete defense to an action for damages, but by way of raising a doubt in the minds of the jury respecting the awarding of exemplary damages. And in determining that question the jury are justified in looking at the parties as they stand before them. Take an ignorant class of men that we have in every community,—men who have by their education and bringing up had less opportunities to come within the circle of good order and of good behavior,—the jury might well say that as to that class of men, if they fall into disputes and come to blows, there would be less occasion for setting an example than there would be if the parties occupied a higher and more prominent position in society. The influence of an example in a case of this kind oftentimes depends quite largely upon the character of the parties involved. You can cast about you in your mind's eye, in the community, and pick out men who, if they should fall into an affray of this kind, would draw away very far from the moorings of good citizenship and good behavior, and then an example would be demanded, if one inflicted an assault upon another." Verdict and judgment for plaintiff. Exceptions by defendant.

Martin & Archibald, J. L. Martin, and J. C. Baker, for plaintiff. Batchelder & Bates and W. B. Sheldon, for defendant.

TYLER, J. The court instructed the jury that there was no defense to the claim for actual or compensatory damages; that words were no legal excuse for the infliction of personal violence; that, no matter how great the provocation, the defendant was bound in any event to answer for these damages. It is a general and wholesome rule of law that whenever by an act which he could have avoided, and which cannot be justified in law, a person inflicts an immediate injury by force, he is legally answerable in damages to the party injured. The question whether provocative words may be given in evidence under the general issue to reduce actual damages in an action of trespass for an assault and battery has undergone wide discussion. The English cases lay down the general rule that provocation may mitigate damages. The case of *Fraser v. Berkeley*, 7 Car. & P. 621, is often referred to, in which Lord ABINGER held that evidence might be given to show that the plaintiff in some degree brought the thing upon himself; "that it would be an unwise law if it did not make allowance for human infirmities; and, if a person commit violence at a time when he is smarting under immediate provocation, that is matter of mitigation." TINDAL, C. J., in *Perkins v. Vaughan*, 5 Scott, N. R. 881, said: "I think it will be found that the result of the cases is that the matter cannot be given in evidence where it amounts to a defense, but that, where it does not amount to a defense, it may be given in mitigation of damages." *Linford v. Lake*, 3

Hurl. & N. 275; 2 Add. Torts, § 1393, recognizes the same rule. In this country, 2 Greenl. Ev. § 93, states the rule that a provocation by the plaintiff may be thus shown, if so recent as to induce a presumption that violence was committed under the immediate influence of the passion thus wrongfully excited by the plaintiff. The earlier cases commonly cited in support of this rule are *Cushman v. Ryan*, 1 Story, 100; *Avery v. Ray*, 1 Mass. 12; *Lee v. Woolsey*, 19 Johns. 319; and *Maynard v. Beardsley*, 7 Wend. 560. The supreme court of Massachusetts has generally recognized the doctrine that immediate provocation may mitigate actual damages of this kind. *Mowry v. Smith*, 9 Allen, 67; *Tyson v. Booth*, 100 Mass. 258; and *Bonino v. Caledonio*, 144 Mass. 299, 11 N. E. Rep. 98. It is also said in 2 Sedg. Dam. (7th Ed.) 521, note: "If, making due allowance for the infirmities of human temper, the defendant has reasonable excuse for the violation of public order, then there is no foundation for exemplary damages, and the plaintiff can claim only compensation. It is merely the corollary of this that where there is a reasonable excuse for the defendant, arising from the provocation or fault of the plaintiff, but not sufficient entirely to justify the act done, there can be no exemplary damages, and the circumstances of mitigation must be applied to the actual damages. If it were not so, the plaintiff would get full compensation for damages occasioned by himself. The rule ought to be and is practically mutual. Malice and provocation in the defendant are punished by inflicting damages exceeding the measure of compensation, and in the plaintiff by giving him less than that measure." In *Burke v. Melvin*, 45 Conn. 243, PARK, C. J., held that the whole transaction should go to the jury. "They could not ascertain what amount of damage the plaintiff was entitled to receive by considering a part of the transaction. They must look at the whole of it. They must ascertain how far the plaintiff was in fault, if in fault at all, and how far the defendant, and give damages accordingly. The difference between a provoked and an unprovoked assault is obvious. The latter would deserve punishment beyond the actual damage, while the damage in the other case would be attributable, in a great measure, to the misconduct of the plaintiff himself." In *Bartram v. Stone*, 31 Conn. 159, it was held that in an action for assault and battery the defendant might prove, in mitigation of damages, that the plaintiff, immediately before the assault, charged him with a crime, and that his assault upon the plaintiff was occasioned by "sudden heat," produced by the plaintiff's false accusation. See, also, *Richardson v. Hine*, 42 Conn. 206. In *Kiff v. Youmans*, 86 N. Y. 324, the plaintiff was upon defendant's premises for the purpose of committing a trespass, and the defendant assaulted him to prevent the act, and the only question was whether he used unnecessary force. DANFORTH, J., said: "It

still remains that the plaintiff provoked the trespass; was himself guilty of the act which led to the disturbance of the public peace. Although this provocation fails to justify the defendant, it may be relied upon by him in mitigation even of compensatory damages. This doctrine is as old as the action of trespass, * * * and is correlative to the rule which permits circumstances of aggravation, such as time and place of an assault, or insulting words, or other circumstances of indignity and contumely, to increase them." In *Robison v. Rupert*, 23 Pa. St. 523, the same rule is adopted, the court saying: "Where there is a reasonable excuse for the defendant arising from the provocation or fault of the plaintiff, but not sufficient entirely to justify the act done, there can be no exemplary damages, and the circumstances of mitigation must be applied to the actual damages." In *Ireland v. Elliott*, 5 Iowa, 478, the court said: "The furthest that the law has gone, and the furthest that it can go, while attempting to maintain a rule, is to permit the high provocation of language to be shown as a palliation for the acts and results of anger; that is, in legal phrase, to be shown in mitigation of damages." In *Thrall v. Knapp*, 17 Iowa, 468, the court said: "The clear distinction is this: Contemporaneous provocations of words or acts are admissible, but previous provocations are not. And the test is whether 'the blood has had time to cool.' * * * The law affords a redress for every injury. If the plaintiff slandered defendant's daughters, it would entirely accord with his natural feeling to chastise him; but the policy of the law is against his right to do so, especially after time for reflection. It affords a peaceful remedy. On the other hand, the law so completely disfavors violence, and so jealously guards alike individual rights and the public peace, that, 'if a man gives another a cuff on the ear, though it costs him nothing, no, not so much as a little *diachylon*, yet he shall have his action.' Per Lord Holt, *Ashby v. White*, 2 Ld. Raym. 955." The reasoning of the court seems to make against his rule that provocations such as happen at the time of the assault may be received in evidence to reduce the amount of the plaintiff's recovery.

In *Morely v. Dunbar*, 24 Wis. 183, DIXON, C. J., held "that, notwithstanding what was said in *Birchard v. Booth*, 4 Wis. 75, circumstances of provocation attending the transaction, or so recent as to constitute a part of the *res gestæ*, though not sufficient entirely to justify the act done, may constitute an excuse that may mitigate the actual damages; and, where the provocation is great and calculated to excite strong feelings of resentment, may reduce them to a sum which is merely nominal." But in *Wilson v. Young*, 31 Wis. 574, it was held by a majority of the court that provocation could go to reduce compensatory damages only so far as these should be given for injury to the feelings; DIXON, C. J., however, adhering to

the rule in *Morely v. Dunbar* that it might go to reduce all compensatory damages. But in *Fenelon v. Butts*, 53 Wis. 344, 10 N. W. Rep. 501, and in *Corcoran v. Harran*, 55 Wis. 120, 12 N. W. Rep. 468, it was clearly held that personal abuse of the assailant by the party assaulted may be considered in mitigation of punitive, but not of actual damages, which include those allowed for mental and bodily suffering; that a man commencing an assault and battery under such circumstances of provocation is liable for the actual damages which result from such assault. In *Donnelly v. Harris*, 41 Ill. 126, the court instructed the jury that words spoken might be considered in mitigation of damages. WALKER, C. J., in delivering the opinion of the supreme court, remarked: "Had this modification been limited to exemplary damages, it would have been correct, but it may well have been understood by the jury as applying to actual damages, and they would thus have been misled. To allow them the effect to mitigate actual damages would be virtually to allow them to be used as a defense. To say they constitute no defense, and then to say they may mitigate all but nominal damages, would, we think, be doing by indirection what has been prohibited from being done directly. To give to words this effect would be to abrogate, in effect, one of the most firmly established rules of the law." See, also, *Ogden v. Claycomb*, 52 Ill. 366. In *Gizler v. Witzel*, 82 Ill. 322, the court said, in reference to the charge of the court below: "The third instruction tells the jury, among other things, that the plaintiff, in order to recover, should have been guilty of no provocation. This is error. It is wholly immaterial what language he may have used, so far as the right to maintain an action is concerned, and even if he went beyond words and committed a technical assault, the acts of the defendant must still be limited to a reasonable self-defense." In *Norris v. Casel*, 90 Ind. 143, this precise question was not raised, but the court said, in reference to the instructions of the court below, that the first part of the charge, that the provocation by mere words, however gross and abusive, cannot justify an assault, was correct, and that a person who makes such words a pretext for committing an assault commits thereby not only a mere wrong, but a crime, and the person so assaulted is not deprived of the right of reasonable self defense, even though he used the insulting language to provoke the assault against which he defends himself; but, whatever may have been his purpose in using the abusive language, it cannot be made an excuse for the assault. *Johnson v. McKee*, 27 Mich. 471, was a case very similar to the one at bar, and was given to the jury under like instructions. The supreme court said: "In regard to provocation, the court charges, in effect, that if plaintiff provoked defendant, and the assault was the result of that provocation, he could recover nothing beyond his actual dam-

ages and outlays, and would be precluded from claiming any damages for injured feelings or mental anxiety. In other words, he would be cut off from all the aggravated damages allowed in cases of willful injury, and sometimes loosely called 'exemplary damages.' As there is no case in which a party who is damaged, and is allowed to recover anything substantial, cannot recover his actual damages, the rule laid down by the court was certainly quite liberal enough, and if any one could complain it was not the defendant." The court said in *Prentiss v. Shaw*, 56 Me. 436: "We understand that rule to be this: A party shall recover as a pecuniary recompense the amount of money which shall be a remuneration, as near as may be, for the actual, tangible, and immediate result, injury, or consequence of the trespass to his person or property. * * * If the assault was illegal and unjustified, why is not the plaintiff in such case entitled to the benefit of the general rule, before stated, that a party guilty of an illegal trespass on another's person or property must pay all the damages to such person or property, directly and actually resulting from the illegal act? * * * Where the trespass or injury is upon personal or real property, it would be a novelty to hear a claim for reduction of the actual injury based on the ground of provocation by words. If, instead of the owner's arm, the assailant had broken his horse's leg, * * * must not the defendant be held to pay the full value of the horse thus rendered useless?" The learned judge admits that the law has sanctioned, by a long series of decisions, the admission of evidence tending to show, on one side, aggravation, and on the other mitigation of the damages claimed, but he holds the law to be that mitigant circumstances can only be set against exemplary damages, and cannot be used to reduce the actual damages directly resulting from the defendant's unlawful act. In a learned article on "Damages in Actions ex Delicto," 3 Amer. Jur. 287, it is said: "If the law awards damages for an injury, it would seem absurd (even without resorting to the definition of damages) to say that they shall be for a part only of the injury." "It is a reasonable and a legal principle that the compensation should be equivalent to the injury. There may be some occasional departures from this principle, but I think it will be found safest to adhere to it in all cases proper for a legal indemnification in the shape of damages." *Jacobs v. Hoover*, 9 Minn. 204, (Gil. 189); *Cushman v. Waddell*, Baldw. 57;¹ and *McBride v. McLaughlin*, 5 Watts, 375,—are strong authorities in support of the rule that provocative language used by the plaintiff at the time of the battery should be given in evidence only in mitigation of exemplary damages, and that un-

less the plaintiff has given the defendant a provocation amounting in law to a justification he is entitled to receive compensation for the actual injury sustained.

If provocative words may mitigate, it follows that they may reduce the damages to a mere nominal sum, and thus practically justify an assault and battery. But why, under this rule, may they not fully justify? If, in one case, the provocation is so great that the jury may award only nominal damages, why, in another, in which the provocation is far greater, should they not be permitted to acquit the defendant, and thus overturn the well-settled rule of law that words cannot justify an assault. On the other hand, if words cannot justify they should not mitigate. A defendant should not be heard to say that the plaintiff was first in the wrong by abusing him with insulting words, and therefore, though he struck and injured the plaintiff, he was only partly in the wrong, and should pay only part of the actual damages. If the right of the plaintiff to recover actual damages were in any degree dependent on the defendant's intent, then the plaintiff's provocation to the defendant to commit the assault upon him would be legitimate evidence bearing upon that question; but it is not. Even lunatics and idiots are liable for actual damages done by them to the property or person of another, and certainly a person in the full possession of his faculties should be held liable for his actual injuries to another, unless done in self-defense, or under reasonable apprehension that the plaintiff was about to do him bodily harm. The law is that a person is liable in an action of trespass for an assault and battery, although the plaintiff made the first assault, if the defendant used more force than was necessary for his protection, and the symmetry of the law is better preserved by holding that the defendant's liability for actual damages begins with the beginning of his own wrongful act. It is certainly in accordance with what this court held in *Howland v. Day*, 56 Vt. 318, that "the law abhors the use of force either for attack or defense, and never permits its use unnecessarily." Exemplary damages are not recoverable as matter of right, but as was stated by *WHEELER, J.*, in *Earl v. Tupper*, 45 Vt. 275, they are given to stamp the condemnation of the jury upon the acts of the defendant on account of their malicious or oppressive character. *Boardman v. Goldsmith*, 48 Vt. 403, and cases cited; *Mayne*, Dam. 58-65; *Voltz v. Blackmar*, 64 N. Y. 440. The instructions to the jury upon this branch of the case were in substantial accordance with the law as above stated. As exemplary damages were awardable in the discretion of the jury, the charge was also correct that the influence of an example in a case of this kind depended on the character and standing of the parties involved. We find no error in the charge, and the judgment is affirmed.

¹ Fed. Cas. No. 3,516.

75 LOUISVILLE, N. A. & C. RY. CO. v. SNYDER.

(20 N. E. 284, 117 Ind. 435.)

Supreme Court of Indiana. February 21, 1889.

Appeal from circuit court, Clinton county; Joseph C. Suit, Special Judge.

Action by James B. Snyder against the Louisville, New Albany & Chicago Railway Company, for personal injuries. Judgment for plaintiff, and defendant appeals.

S. O. Bayless and W. H. Russell, for appellant. T. H. Palmer, W. F. Palmer, B. K. Higginbotham, and M. Bristow, for appellee.

ELLIOTT, C. J. The appellee was a passenger on one of the appellant's trains, which, by the falling of a bridge, was precipitated into White river, and the appellee severely injured.

Dr. Bowles, an expert witness called by the appellant, gave an opinion as to the nature and extent of the injury sustained by the appellee, and on cross-examination it was developed that his testimony was in part based on statements made to him by the appellee. Waiving all questions of practice, and deciding the appellant's motion to strike out as if it were properly restricted to the alleged incompetent part of the testimony, we have no hesitation in deciding that the trial court did right in overruling the motion. As we have often decided, the physical organs of a human being cannot be inspected by the eyes of a surgeon, and the statements of the sufferer must, of necessity, be taken by the surgeon. It is not possible for any surgeon, by a mere external examination, to always discover the character of an injury, and properly describe or treat an injured man; and for this reason, if for no other, the statements of the injured person descriptive of present pains or symptoms are always competent, although narratives of past occurrences are inadmissible. On this point our own decisions are harmonious, and they are right upon principle, and are well supported by authority. *Railroad Co. v. Newell*, 104 Ind. 264, 3 N. E. 836; *Railway Co. v. Falvey*, 104 Ind. 409, 3 N. E. 389, and 4 N. E. 908; *Railway Co. v. Wood*, 113 Ind. 544, 14 N. E. 572, and 16 N. E. 197; *Board v. Leggett*, 115 Ind. 544, 18 N. E. 53; *Hatch v. Fuller*, 131 Mass. 574; *Railroad Co. v. Johns*, 36 Kan. 769, 14 Pac. 237; *Qualfe v. Railroad Co.*, 48 Wis. 513, 4 N. W. 658. From these decisions we shall not depart.

The fact that the appellee was suffering from Bright's disease at the time he was injured does not impair his right of recovery. The rule is this: "Where a disease caused by the injury supervenes, as well as where the disease exists at the time of the injury, and is aggravated by it, the plaintiff is entitled to full compensatory damages." *Railroad Co. v. Hecht*, 115 Ind. 443, 17 N. E. 297; *Railway Co. v. Wood*, supra; *Railroad Co.*

v. Pitzer, 109 Ind. 179, 6 N. E. 310, and 10 N. E. 70; *Railroad Co. v. Buck*, 96 Ind. 346; *Ehrgott v. Mayor*, 96 N. Y. 264; *Jucker v. Railroad Co.*, 52 Wis. 150, 8 N. W. 862; *Railway Co. v. Harris*, 122 U. S. 597, 7 Sup. Ct. 1286; *Railway Co. v. Rosenzweig*, 113 Pa. St. 519, 6 Atl. 545; *Railway Co. v. Leslie*, 57 Tex. 83.

The rule we have stated is thus expressed in one of our best text-books: "Though the plaintiff be afflicted with a disease or weakness which has a tendency to aggravate the injury, the defendant's negligence will still be held to be the proximate cause." 2 *Shear. & R. Neg.* (4th Ed.) § 742.

The instructions clearly and properly state the law on this subject.

The court did not err in instructing the jury as to the degree of care required of the appellant; at least, not as against the appellant. The rule is well settled that carriers are bound to use the highest practicable degree of care to secure the safety of passengers.

There was no evidence of contributory negligence on the part of the appellee, and the court might well have refused any instruction at all upon that point. Where a passenger is in his proper place in the car, and makes no exposure of his person to danger, there can be no question of contributory negligence. Decisions like that of *Railway Co. v. Greene*, 106 Ind. 279, 6 N. E. 603, in cases of persons injured at a railroad crossing, are not applicable to such a case as the one at our bar. The law is, as the jury were told, that carriers of passengers are liable for the slightest negligence. Any negligence on their part is actionable. *Railroad Co. v. Rainbolt*, 99 Ind. 551.

The law will not tolerate any negligence on the part of carriers, although they are not insurers of the safety of their passengers. The burden of overcoming the presumption of negligence arising from evidence of the occurrence of an accident and injury to a passenger is upon the carrier. *Packet Co. v. McCool*, 83 Ind. 392; *Railroad Co. v. Buck*, 96 Ind. 346; *Railroad Co. v. Newell*, supra; *Railroad Co. v. Rainbolt*, supra; *Anderson v. Scholey*, 114 Ind. 553, 17 N. E. 125.

In *Railroad Co. v. Pedigo*, 108 Ind. 481, 8 N. E. 627, the rule was applied in a case growing out of the same occurrence as that in which the appellee was injured. The twenty-second instruction asked by the appellant, and refused, reads thus: "The court further instructs you that by 'negligence,' when used in these instructions, is meant either the failure to do what a reasonable person would ordinarily have done under the circumstances of the situation, or doing what such person would not have done under the existing circumstances." This instruction was properly refused. It is not proper in such a case as this to define negligence as it is defined in this instruction. In a case of this character, the omission to exercise the

highest degree of practicable care constitutes negligence, but in other cases the failure to exercise ordinary care constitutes negligence. Counsel are greatly in error in asserting, as they do, that the instruction correctly furnishes the standard for the government of the jury. The appellant was, as we have substantially said, bound to do more than prudent men would ordinarily do, since it was bound to use a very high degree of care.

The duty of a railroad company engaged in carrying passengers is not always discharged by purchasing from reputable manufacturers the iron rods or other iron-work used in the construction of its bridges. The duty of the company is not discharged by trusting, without inspecting and testing, to the reputation of the manufacturers, and the external appearance of such materials. The law requires that before the lives of passengers are trusted to the safety of its bridges, the company shall carefully and skillfully test

and inspect the materials it uses in such structures. This duty of inspection does not end when the materials are put in place, but continues during their use; for the company is bound to test them, from time to time, to ascertain whether they are being impaired by use or exposure to the elements. *Manser v. Railway Co.*, 3 Law T. (N. S.) 585; *Railroad Co. v. Suggs*, 62 Tex. 323; *Stokes v. Railway Co.*, 2 Fost. & F. 691; *Robinson v. Railroad Co.*, 9 Fed. 877; *Richardson v. Railroad Co.*, L. R. 10 C. P. 486, L. R. 1 C. P. Div. 342; *Ingalls v. Bills*, 9 Metc. 1; *Frink v. Potter*, 17 Ill. 406; *Bremner v. Williams*, 1 Car. & P. 414; *Hegeman v. Railroad Corp.*, 13 N. Y. 9; *Alden v. Railway Co.*, 26 N. Y. 102.

The decision in the case of *Railroad Co. v. Boyd*, 65 Ind. 527, is not in conflict with this doctrine, for in that case an inspection was made.

Judgment affirmed.

LAW DAM.—16

76 DILLON et al. v. HUNT.
(16 S. W. 516, 105 Mo. 154.)

Supreme Court of Missouri, Division No. 2.
June 2, 1891.

Appeal from St. Louis circuit court;
AMOS M. THAYER, Judge.

This is an action for damages caused by the negligent pulling down of a brick wall upon the building in which plaintiffs' stock of goods was stored in the city of St. Louis on November 17, 1877. The petition in this case was passed upon by this court in this cause in 82 Mo. 150, and held good on demurrer. The answer is as follows: "Defendant, for answer to the petition of Thomas E. Dillon, Martha Jessel, and Joseph Jessel, plaintiffs—*First.* Denies that Joseph Jessel, as husband of said Martha Jessel, is a necessary or proper party to this action, and says objection to him as a party herein will at all times be made. *Second.* Denies that said Martha Jessel and said Thomas E. Dillon were partners, as alleged, and denies said alleged firm or said plaintiffs, or either of them, was or were owners of or in possession of any of the goods, wares, or chattels in the petition mentioned, at the place mentioned, or engaged in the business alleged, or that said chattels were of the value alleged, or of any value. *Third.* Defendant admits that Charles L. Hunt was the owner of the building and lot in the petition described, but denies the same was adjoining any store-room or building occupied by plaintiffs. *Fourth.* Defendant admits a fire, which defendant says was accidental, and occurred in his absence, and was beyond control before it was discovered, did occur, and his building was in great part destroyed thereby, but defendant denies defendant knew, as alleged, said walls and chimneys left standing were in unsafe, insecure, and dangerous condition, or a nuisance, or liable to fall, as alleged, and denies that it was defendant's duty to abate the same. *Fifth.* Defendant denies he was in possession of said premises, walls, or chimneys, as alleged, or had full or any control or direction of the same, and he denies he allowed or permitted, either knowingly, negligently, or in any way, certain or any persons or person to enter upon said premises for the purpose alleged, or any purpose, or that their action injured to defendant's benefit. *Sixth.* Defendant denies that any person or persons negligently or unskillfully pushed or threw or caused said walls, or portions thereof, to fall, as alleged, or that the same did so fall, or that said house was crushed and destroyed, or the chattels contained therein were covered with the *débris*. *Seventh.* Defendant denies he either knew or had good reason to know that said person or any persons either undertook to tear down said walls, or intended to adopt or did adopt the method alleged in the petition, or that defendant neglected his duty as alleged, or permitted the work to be proceeded with as alleged. *Eighth.* Defendant denies any portions of said goods were mutilated or otherwise injured either in the sum as alleged or any other sum, or that fixtures were damaged as alleged or in sum

alleged, or that said firm expended the sum alleged, or any sum, for clearing away *débris*, or that said firm had a lease as alleged, or had paid rental as alleged, or lost the use of said store-room, or that the pretended unexpired term of said lease was of the value alleged, or any value, or that said firm expended the sum alleged, or any sum, in recovering, handling, preserving, or removing said chattels, or that the plaintiffs were damaged in the sum of three thousand dollars, or any other sum, as alleged. And defendant asks to be hence dismissed with his costs."

The following is a concise statement of the facts disclosed by the record which raise the questions now presented to this court for determination, to-wit: The plaintiffs as copartners occupied, with a stock of general merchandise, the first floor of a three-story building numbered 110 North Fourth street, in the city of St. Louis, and the defendant's testator, Charles L. Hunt, owned a five-story building immediately adjoining it on the south. On the night of the 13th day of November, 1877, the Hunt building caught fire, and all the interior combustible portions of it burned, which left the north wall and a partition wall running east and west standing, but in a very dangerous condition, and liable at any time to fall over upon the building occupied by plaintiffs. Plaintiffs' stock of goods was considerably damaged by the fire and water on the night of November 13th. A day or two after the fire, chief of the fire department Sexton, notified Hunt that the standing walls were dangerous, and that he would have to remove them. After this notice, Hunt knowingly permitted others to go upon his premises for the purpose of taking the walls down, and while these persons were so engaged, on the 17th of November, they negligently threw portions of the north wall mentioned above over upon the building occupied by plaintiffs, by means whereof the latter building was crushed, and the plaintiffs' stock of goods damaged still more. This action is for the recovery of the latter damage. Plaintiffs had several policies under which their stock of goods was insured against damage by fire and water. After the fire on the 13th, and before the fall of the wall on the 17th, the loss under these policies, excepting one, resulting from fire, were adjusted, and the policies canceled; and after the fall of the wall, and before the institution of the suit, plaintiffs settled with the company which issued the remaining policy for a portion of the losses occurring thereunder. There was evidence to sustain the allegations of the petition. Mr. Hunt died after the suit was brought. One of the principal issues at the trial was whether or not Hunt authorized or permitted the parties who negligently threw the walls down to go upon his premises for the purpose of taking them down; and during the progress of the trial Fred C. Ziebig was permitted to testify, over the objections and exceptions of plaintiffs, that he, as the agent of Mr. Hunt, had made no arrangement with anybody for taking down the walls; that he did not at the time know the walls were being taken down, or that anybody had

been working on them. John W. Munson, another witness for defendant, was also permitted to testify, over the objections and exceptions of plaintiffs, to the effect that he had a conversation with Mr. Hunt about the walls after the notice from the chief of the fire department, and that he had told Mr. Hunt not to do anything with the walls at all that would affect his (Hunt's) or the insurance companies' interest; that he told Hunt not to do anything with the pulling down of the walls until later. Walter C. Butler, another witness on behalf of defendant, was permitted to testify, over the objections and exceptions of the plaintiffs, to the effect that the plaintiffs had \$6,000 insurance on their stock of goods, and that the plaintiff Dillon made claim to him orally for damages under the policies. The court also admitted in evidence, over plaintiffs' objections and exceptions, a written or printed claim made by plaintiff Dillon to one of the insurance companies for loss on plaintiffs' stock of goods. This, with Butler's statement and other evidence, tended to show that plaintiffs had received some compensation from the insurance companies under their policies for damages resulting from the fall of the walls. Upon this last point the court gave the following instruction on behalf of the defendant: "(2) The jury are instructed, if they find from the evidence that the plaintiffs, under the name of T. E. Dillon, had insured the stock of goods injured by the falling of the walls of Hunt's building, and claimed and collected from the insurance companies, or any of them, damages to such stock caused by the falling of the walls as a result of the fire, then the jury are authorized and directed to deduct from the gross damage, if any, which the jury may believe plaintiffs have sustained in consequence of the falling of the wall, the amount of such damages as plaintiffs are shown to have collected from said insurance companies occasioned by the falling of the wall." After the jury had been out some time, considering of their verdict, they sent to the court the following written communication: "To the Honorable Judge of the Circuit Court, Room No. 5: The instructions of the court seem to have blended the damage suit with the insurance. We wish to know if the parties having received insurance bars them out from damage from other parties. Please give us the law upon this subject." Whereupon the court, over the objection and exceptions of the plaintiffs, gave to the jury the following additional instruction: "If the jurors believe that after the walls fell the plaintiffs claimed damages from the insurance companies that were occasioned by the falling of the walls of the Hunt building, as well as for damages caused by water, and that the insurance companies paid plaintiffs for any part or portion of the damages so occasioned by the falling of the walls, as well as for damages occasioned by water, then, in estimating plaintiff's damages in this case, you should deduct whatever damages occasioned by the falling of the walls he has already received from the insurance companies. In other words, the court instructs you that plaintiff is not entitled to recover damages from

the defendant occasioned by the falling of the walls that have already been paid by the insurance companies. At the same time the court instructs you that, if any part of plaintiff's damages occasioned by the fall of the walls has not been paid, he is entitled to recover in this action such part as has not been paid, whatever you may find such amount to be; providing, under the other instructions, you find that defendant is liable in this action for the acts of the persons who took down the wall." The jury thereupon returned a verdict for defendant. Plaintiffs filed their motion for a new trial, saving the several points mentioned above, which being overruled, they filed their bill of exceptions, and afterwards brought the case here by writ of error.

C. P. & J. D. Johnson, for plaintiffs in error. *Noble & Orrick*, for defendant in error.

GANTT, P. J., (*after stating the facts as above.*) When this cause was here on the former appeal, this court affirmed the judgment of the St. Louis court of appeals in reversing the judgment of the St. Louis circuit court. Without repeating at length the grounds upon which the court of appeals held plaintiffs would be entitled to recover, it is sufficient to state that it was then held and supported by the authorities that, where a proprietor undertakes to do that upon his land which is in its nature dangerous to adjoining proprietors, he must use reasonable care to work no trespass upon their possession, and it is immaterial in such a case whether the work be done by the proprietor or by an independent contractor. *Dillon v. Hunt*, 11 Mo. App. 246. So on the trial of this cause the court instructed the jury that if plaintiffs' goods were destroyed by the falling of a brick wall then standing on the adjoining lot of Charles L. Hunt, the present defendant's testator; that said wall was caused to fall upon the store-room in which plaintiffs' goods were by and through the negligence of certain persons who went upon said premises for the purpose of taking down said wall by and with the knowledge and consent of said Hunt; and that said Hunt then and there had the custody and control of the premises upon which said wall stood,—then plaintiffs were entitled to recover of said Hunt's estate. It will be seen at once that one of the most material facts necessary to plaintiffs' recovery was the privity of Hunt with the parties who were pulling down the wall, and plaintiffs offered the direct evidence of Mr. Sexton, the chief of the fire department, tending to show his official notice to Mr. Hunt of the dangerous condition of the wall, and directing him to have it taken down, and of Mr. Fruin of Mr. Hunt's desire to have him bid on the work of removing the wall, and his recollections of the men who did the work. On the part of the defendant the court permitted Fred Ziebig to testify that he was Hunt's agent for the collecting of the rents, etc., of this building, and that he (Ziebig) made no contract with anybody to remove the wall, and that he did not know the walls were being taken down. To this evidence

plaintiffs objected at the time, and saved their exceptions. It was clearly incompetent. It was wholly irrelevant whether Ziebig knew anything about the matter. Mr. Hunt was the owner. It was shown beyond a peradventure that he was in the city the day after the fire; talked with Sexton in the immediate view of the wall; was notified then by Sexton at the time to have it removed on account of its danger. In Hunt's absence, notice to Ziebig might under some circumstances have become notice to Hunt; but notice to Hunt need never have become notice to Ziebig, as under the facts it was wholly immaterial whether Ziebig had notice. Again, the court, over the objection of plaintiffs, permitted Munson, the insurance agent, to testify that he told Hunt not to pull down the wall. This conversation, as to plaintiffs, was "*res inter alios acta*." It had nothing to do with plaintiffs' rights, nor could it in the least affect Hunt's responsibility. The admission of this evidence of Ziebig and Munson, tending to show want of notice in Hunt, was clearly erroneous.

But the most serious error committed on the trial was the giving of the second instruction on behalf of defendant, set forth in full in the statement of this cause, and the subsequent instruction reiterating the same idea given by the court of its own motion. That instruction permitted the jury, in assessing plaintiffs' damages, to reduce the same by the amount of any insurance money they might believe from the evidence plaintiffs had received for losses occasioned by the falling of the wall on their goods. If plaintiffs' goods were damaged by the negligence of Hunt or his employees, it was no concern of theirs that plaintiffs were insured, and all the evidence of this insurance was irrelevant and incompetent, and the instructions allowing this insurance as mitigating the damages of plaintiffs were erroneous. Few

propositions have been so universally accepted and settled as this. Sutherland on Damages lays down the rule as follows: "There can be no abatement of damages on the principle of partial compensation received for the injury, where it comes from a collateral source, wholly independent of the defendant, and is as to him *res inter alios acta*. A man who was working for a salary was injured on a railroad by the negligence of the carrier. The fact that the employer did not stop the salary of the injured party during the time he was disabled was held not available to the defendant sued for such injury in mitigation. Nor will proof of money paid to the injured party by an insurer or other third person, by reason of the loss or injury, be admissible to reduce damages in favor of the party by whose fault such injury was done. The payment of such moneys not being procured by the defendant, and they not having been either paid or received to satisfy in whole or in part his liability, he can derive no advantage therefrom in mitigation of damages for which he is liable. As has been said by another, to permit a reduction of damages on such a ground would be to allow a wrong-doer to pay nothing, and take all the benefit of a policy of insurance without paying the premium." 1 Suth. Dam. (1882,) p. 242. And he is sustained by the following authorities: Cunningham v. Railroad Co., 102 Ind. 478, 1 N. E. Rep. 800; Weber v. Railway Co., 35 N. J. Law, 412; Connecticut Mut. Life Ins. Co. v. New York & N. H. R. Co., 25 Conn. 265; Hayward v. Cain, 105 Mass. 213; Briggs v. Railroad Co., 72 N. Y. 26; Insurance Co. v. Boshier, 39 Me. 255, and many other cases.

That these errors contributed largely to the verdict for the defendant is almost self-evident; and, to the end that they may be remedied in another trial, the judgment is reversed and the cause remanded. All concur.

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WRIGHT v. BANK OF THE METROPOLIS.

(18 N. E. 79, 110 N. Y. 237.)

Court of Appeals of New York. October 2, 1888.

Appeal from supreme court, general term, Fourth department.

About the 7th of January, 1878, one Henry C. Elliott received from his correspondent in Rome, N. Y., (B. Huntington Wright,) his check for \$2,000, payable to the order of Elliott, with a request from Wright that he (Elliott) would meet some drafts Wright would draw on him, and obtain payment from the check. He accordingly honored the drafts, and, having indorsed the check, procured its discount by the defendant. It was not paid when presented, and Elliott being unable to learn the reason, went to Rome to see the drawer of the check. He then learned that the drawer had made a general assignment for the benefit of his creditors, and stated his inability to do anything for Elliott. Finally, Elliott succeeded in obtaining a number of shares of stock in different railroad companies, as collateral security to the check then lying protested in the hands of the defendant. The history of the interview resulting in the procuring of the stock by Elliott as given on the trial is contradictory, but the verdict of the jury shows that they believed that which was given on the part of the plaintiff. From the evidence thus given it appears that the stock was in reality the stock of Benjamin H. Wright, the father of B. Huntington Wright, and that it was delivered by him to Elliott voluntarily, and for the purpose of being used as a collateral to his own note at six months, which was to be used to take up the check; but the stock was not to be sold for six months, as it was then selling in market much below what the father thought the stock was really worth. The stock was owned by Mr. Wright, as he said, for an investment, and he had no idea of selling it; but he allowed Elliott to take it because he felt sorry for his situation, and wanted to help him, as far as he reasonably could, out of the difficulty he was in. Elliott took the stock and went to New York, and had a talk with the cashier and vice-president of the defendant, who reserved their decision as to whether they would take the note and the stock. Subsequently, and on the 17th of January, the cashier wrote that the stock being non-dividend paying, and the note six months paper, it would be impossible to get it through the board; and he suggested it would be much better to obtain Mr. Wright's consent to sell the stock, and to make his (Elliott's) account good in that way. Elliott inclosed this note to Mr. Wright in a letter addressed to "B. H. Wright;" and in response, and on the 22d day of January, Benjamin H. Wright, the owner of the stock, wrote Mr. Rogers, the

cashier of defendant, refusing to sell the stock, or to permit of its being sold. Mr. Rogers had never seen either of the Messrs. Wright, and did not know there were two; and subsequently, and about the 29th of January, Elliott told him that Mr. Wright authorized the sale of the stocks, and they were immediately sold, less commission for \$2,261.50. On the part of the plaintiff it was claimed that Mr. Wright, the true owner of the stocks, never gave any such authority to sell them, and that he was unaware that they had been sold until May 9, 1878. February 14, 1881, the stock reached the highest price, down to the day of trial, selling on that day for \$18,003. This action was commenced October 7, 1879. Mr. Wright, the owner of the stock, was about seventy-six years of age in May, 1878, and in the latter part of that year went south, and returned early in the year 1879. On the 9th of May, 1878, he made a demand upon the defendant for the stocks, and tendered to it the amount of the check and interest, being something over \$2,000. The cashier stated the stocks had been sold by the authority of the owner thereof, as he supposed, given through Mr. Elliott, and refused to deliver them or their value. The original plaintiff died since the first trial of the case, and the present one was duly substituted. The court charged the jury that if they found for the plaintiff he was entitled to recover the highest price at which the stocks could have been sold in the market between the date of their actual conversion and a reasonable time thereafter, and that the jury should fix the reasonable time, not arbitrarily or through sympathy or prejudice; but they were to say what, under all the circumstances, would be a reasonable time within which to commence this action, and also, it may be, reasonable diligence in prosecuting it; because if the action were commenced in fact within a reasonable time after the conversion of the stock, and had been prosecuted with reasonable diligence since, then the plaintiff was entitled to recover the highest market price that the stock reached between the date of the conversion and the time of the trial, less the amount of the check and interest, and with interest on the balance. This charge was duly excepted to. The jury found a verdict for \$3,391.25. There is no evidence which shows when the stock reached that value. Upon the rendition of the verdict both parties moved to set it aside, the plaintiff on the ground that he was entitled, under the charge, to the highest value of the stock down to the trial, and the defendant on the ground that the damages were excessive and contrary to evidence. The court granted the motion of the plaintiff, and set the verdict aside on the ground stated, and denied the motion of the defendant. The defendant appealed to the general term from both of such orders. That court reversed the order setting aside the

verdict, and ordered judgment thereon, and affirmed the order made on defendant's motion, refusing to set aside the verdict. Judgment was then entered upon the verdict of the jury, and from that judgment both sides appeal to this court, and they also appeal from the orders of the general term upon which the judgment was entered.

W. E. Scripture, for plaintiff. Joseph H. Choate and John Delahunty, for defendant.

PECKHAM, J., (after stating the facts as above.) This case comes before us in a somewhat peculiar condition. As both parties appeal from the same judgment, which is for a sum of money only, it would seem as if there ought not to be much difficulty in obtaining its reversal. It is obvious, however, that a mere reversal would do neither party any good, as the case would then go down for a new trial, leaving the important legal question in the case not passed upon by this court. This, we think, would be an injustice to both sides. The case is here, and the main question is in regard to the rule of damages, and we think it ought to be decided. By this charge the case was left to the jury to give the highest price the stock could have been sold for, intermediate its conversion and the day of trial, provided the jury thought, under all the circumstances, that the action had been commenced within a reasonable time after the conversion, and had been prosecuted with reasonable diligence since. Authority for this rule is claimed under *Romaine v. Van Allen*, 26 N. Y. 309, and several other cases of a somewhat similar nature, referred to therein. *Markham v. Jaudon*, 41 N. Y. 235, followed the rule laid down in *Romaine v. Van Allen*. In these two cases a recovery was permitted which gave the plaintiff the highest price of the stock between the conversion and the trial. In the *Markham* case the plaintiff had not paid for the stocks, but was having them carried for him by his broker (the defendant) on a margin. Yet this fact was not regarded as making any difference in the rule of damages, and the case was thought to be controlled by that of *Romaine*. In this state of the rule the case of *Matthews v. Coe*, 49 N. Y. 57-62, came before the court. The precise question was not therein involved; but the court, per Church, C. J., took occasion to intimate that it was not entirely satisfied with the correctness of the rule in any case not special and exceptional in its circumstances; and the learned judge added that they did not regard the rule as so firmly settled by authority as to be beyond the reach of review whenever an occasion should render it necessary. One phase of the question again came before this court, and in proper form, in *Baker v. Drake*, 53 N. Y. 211, where the plaintiff had paid but a small percentage on the value of the stock, and his broker,

the defendant, was carrying the same on a margin, and the plaintiff had recovered in the court below, as damages for the unauthorized sale of the stock, the highest price between the time of conversion and the time of trial. The rule was applied to substantially the same facts as in *Markham v. Jaudon*, supra, and that case was cited as authority for the decision of the court below. This court, however, reversed the judgment and disapproved the rule of damages which had been applied. The opinion was written by that very able and learned judge, Rapallo, and all the cases pertaining to the subject were reviewed by him, and in such a masterly manner as to leave nothing further for us to do in that direction. We think the reasoning of the opinion calls for a reversal of this judgment. In the course of his opinion the judge said that the rule of damages, as laid down by the trial court, following the case of *Markham v. Jaudon*, had "been recognized and adopted in several late adjudications in this state in actions for the conversion of property of fluctuating value; but its soundness as a general rule, applicable to all cases of conversion of such property, has been seriously questioned, and is denied in various adjudications in this and other states." The rule was not regarded as one of those settled principles in the law as to the measure of damages, to which the maxim *stare decisis* should be applied. The principle upon which the case was decided rested upon the fundamental theory that in all cases of the conversion of property (except where punitive damages are allowed) the rule to be adopted should be one which affords the plaintiff a just indemnity for the loss he has sustained by the sale of the stock; and, in cases where a loss of profits is claimed, it should be, when awarded at all, an amount sufficient to indemnify the party injured for the loss which is the natural, reasonable, and proximate result of the wrongful act complained of, and which a proper degree of prudence on the part of the complainant would not have averted. The rule thus stated, in the language of Judge Rapallo, he proceeds to apply to the facts of the case before him. In stating what in his view would be a proper indemnity to the injured party in such a case, the learned judge commenced his statement with the fact that the plaintiff did not hold the stocks for investment; and he added that, if they had been paid for and owned by the plaintiff, different considerations would arise, but it must be borne in mind that we are treating of a speculation carried on with the capital of the broker, and not of the customer. If the broker has violated his contract or disposed of the stock without authority, the customer is entitled to recover such damages as would naturally be sustained in restoring himself to the position of which he has been deprived. He certainly has no

right to be placed in a better position than he would be in if the wrong had not been done. The whole reasoning of the opinion is still based upon the question as to what damages would naturally be sustained by the plaintiff in restoring himself to the position he had been in; or in other words, in repurchasing the stock. It is assumed in the opinion that the sale by the defendant was illegal and a conversion, and that plaintiff had a right to disaffirm the sale, and to require defendants to replace the stock. If they failed, then the learned judge says the plaintiff's remedy was to do it himself, and to charge the defendants with the loss necessarily sustained by him in doing so.

Is not this equally the duty of a plaintiff who owns the whole of the stock that has been wrongfully sold? I mean, of course, to exclude all question of punitive damages resting on bad faith. In the one case the plaintiff has a valid contract with the broker to hold the stock, and the broker violates it and sells the stock. The duty of the broker is to replace it at once, upon the demand of the plaintiff. In case he does not, it is the duty of the plaintiff to repurchase it. Why should not the same duty rest upon a plaintiff who has paid in full for his stock, and has deposited it with another conditionally? The broker who purchased it on a margin for the plaintiff violates his contract and his duty when he wrongfully sells the stock, just as much as if the whole purchase price had been paid by the plaintiff. His duty is in each case to replace the stock upon demand, and, in case he fails so to do, then the duty of the plaintiff springs up, and he should repurchase the stock himself. This duty it seems to me is founded upon the general duty which one owes to another who converts his property under an honest mistake, to render the resulting damage as light as it may be reasonably within his power to do. It is well said by Earl, J., in *Parsons v. Sutton*, 66 N. Y. 92, that "the party who suffers from a breach of contract must so act as to make his damages as small as he reasonably can. He must not by inattention, want of care, or inexcusable negligence permit his damage to grow, and then charge it all to the other party. The law gives him all the redress he should have by indemnifying him for the damage which he necessarily sustains." See, also, *Dillon v. Anderson*, 43 N. Y. 231; *Hogle v. Railroad Co.*, 28 Hun, 363,—the latter case being an action of tort. In such a case as this, whether the action sounds in tort or is based altogether upon contract, the rule of damages is the same. Per Denio, C. J., in *Scott v. Rogers*, 31 N. Y. 676; and per Rapallo, J., in *Baker v. Drake*, supra. The rule of damages as laid down in *Baker v. Drake*, in cases where the stock was purchased by the broker on a margin for plaintiff, and where the matter was evidently a speculation, has

been affirmed in the later cases in this court. See *Gruman v. Smith*, 81 N. Y. 25; *Colt v. Owens*, 90 N. Y. 368. In both cases the duty of the plaintiff to repurchase the stock within a reasonable time is stated. I think the duty exists in the same degree where the plaintiff had paid in full for the stock, and was the absolute owner thereof. In *Baker v. Drake* the learned judge did not assume to declare in a case where the pledgor was the absolute owner of the stock, and it was wrongfully sold, the measure of damages must be as laid down in the *Romaine Case*. He was endeavoring to distinguish the cases, and to show that there was a difference between the case of one who is engaged in a speculation with what is substantially the money of another and the case of an absolute owner of stock which is sold wrongfully by the pledgee. And he said that at least the former ought not to be allowed such a rule of damages. It can be seen, however, that the judge was not satisfied with the rule in the *Romaine Case*, even as applied to the facts therein stated. In his opinion he makes use of this language: "In a case where the loss of probable profits is claimed as an element of damage, if it be ever allowable to mulct a defendant for such a conjectural loss, its amount is a question of fact, and a finding in regard to it should be based upon some evidence." In order to refuse to the plaintiff in that case, however, the damages claimed, it was necessary to overrule the *Markham Case*, which was done. Now, so far as the duty to repurchase the stock is concerned, I see no difference in the two cases. There is no material distinction in the fact of ownership of the whole stock, which should place the plaintiff outside of any liability to repurchase after notice of sale, and should render the defendant continuously liable for any higher price to which the stock might rise after conversion and before trial. As the same liability on the part of defendant exists in each case to replace the stock, and as he is technically a wrong-doer in both cases, but in one no more than in the other, he should respond in the same measure of damages in both cases; and that measure is the amount which, in the language of Rapallo, J., is the natural, reasonable, and proximate result of the wrongful act complained of, and which a proper degree of prudence on the part of the plaintiff would not have averted. The loss of a sale of the stock at the highest price down to trial would seem to be a less natural and proximate result of the wrongful act of the defendant in selling it when plaintiff had the stock for an investment, than when he had it for a speculation; for the intent to keep it as an investment is at war with any intent to sell it at any price, even the highest. But in both cases the qualification attaches that the loss shall only be such as a proper degree of prudence

on the part of the complainant would not have averted, and a proper degree of prudence on the part of the complainant consists in repurchasing the stock after notice of its sale, and within a reasonable time. If the stock then sells for less than the defendant sold it for, of course the complainant has not been injured, for the difference in the two prices inures to his benefit. If it sells for more, that difference the defendant should pay.

It is said that as he had already paid for the stock once, it is unreasonable to ask the owner to go in the market and repurchase it. I do not see the force of this distinction. In the case of the stock held on margin, the plaintiff has paid his margin once to the broker, and so it may be said that it is unreasonable to ask him to pay it over again in the purchase of the stock. Neither statement, it seems to me, furnishes any reason for holding a defendant liable to the rule of damages stated in this record. The defendant's liability rests upon the ground that he has converted, though in good faith, and under a mistake as to his rights, the property of the plaintiff. The defendant is, therefore, liable to respond in damages for the value. But the duty of the plaintiff to make the damage as light as he reasonably may rests upon him in both cases; for there is no more legal wrong done by the defendant in selling the stock which the plaintiff has fully paid for than there is in selling the stock which he has agreed to hold on a margin, and which agreement he violates by selling it. All that can be said is that there is a difference in amount, as in one case the plaintiff's margin has gone, while in the other the whole price of the stock has been sacrificed. But there is no such difference in the legal nature of the two transactions as should leave the duty resting upon the plaintiff in the one case to repurchase the stock, and in the other case should wholly absolve him therefrom. A rule which requires a repurchase of the stock in a reasonable time does away with all questions as to the highest price before the commencement of the suit, or whether it was commenced in a reasonable time, or prosecuted with reasonable diligence; and leaves out of view any question as to the presumption that plaintiff would have kept his stock down to the time when it sold at the highest mark before the day of trial and would then have sold it, even though he had owned it for an investment. Such a presumption is not only of quite a shadowy and vague nature, but is also, as it would seem, entirely inconsistent with the fact that he was holding the stock as an investment. If kept for an investment, it would have been kept down to the day of trial; and the price at that time there might be some degree of propriety in awarding, under certain circumstances, if it were higher than when it was converted. But to

presume in favor of an investor that he would have held his stock during all of a period of possible depression, and would have realized upon it when it reached the highest figure, is to indulge in a presumption which, it is safe to say, would not be based on fact once in a hundred times. To formulate a legal liability based upon such presumption I think is wholly unjust in such a case as the present. Justice and fair dealing are both more apt to be promoted by adhering to the rule which imposes the duty upon the plaintiff to make his loss as light as possible, notwithstanding the unauthorized act of the defendant, assuming, of course, in all cases, that there was good faith on the part of the appellant. It is the natural and proximate loss which the plaintiff is to be indemnified for, and that cannot be said to extend to the highest price before trial, but only to the highest price reached within a reasonable time after the plaintiff has learned of the conversion of his stock within which he could go in the market and repurchase it. What is a reasonable time when the facts are undisputed, and different inferences cannot reasonably be drawn from the same facts, is a question of law. See *Colt v. Owens*, 90 N. Y. 368; *Hedges v. Railroad Co.*, 49 N. Y. 223.

We think that beyond all controversy in this case, and taking all the facts into consideration, this reasonable time had expired by July 1, 1878, following the 9th of May of the same year. The highest price which the stock reached during that period was \$2,795, and, as it is not certain on what day the plaintiff might have purchased, we think it fair to give him the highest price it reached in that time. From this should be deducted the amount of the check and interest to the day when the stock was sold, as then it is presumed the defendant paid the check with the proceeds of the sale. In all this discussion as to the rule of damages we have assumed that the defendant acted in good faith, in an honest mistake as to its right to sell the stock, and that it was not a case for punitive damages. A careful perusal of the whole case leads us to this conclusion. It is not needful to state the evidence, but we cannot see any question in the case showing bad faith, or indeed any reason for its existence. The fact is uncontradicted that the defendant sold the stock upon what its officers supposed was the authority of the owner thereof given to them by Elliott. The opinion delivered by the learned judge at general term, while agreeing with the principle of this opinion as to the rule of damages in this case, sustained the verdict of the jury upon the theory that, if the plaintiff had gone into the market within a reasonable time, and purchased an equivalent of the stocks converted, he would have paid the price which he recovered by the verdict. This left the jury the right to fix what was a reason-

able time, and then assume there was evidence to support the verdict. In truth there was no evidence which showed the value of the stock to have been anything like the amount of the verdict, for the evidence showed it was generally very much less, and sometimes very much more. But fixing what is a reasonable time ourselves, it is seen that

the stock within that time was never of any such value. The judgment should be reversed, and a new trial granted, with costs to abide the event.

EARL, FINCH, and GRAY, JJ., concur.
RUGER, C. J., and ANDREWS and DAN-
FORTH, JJ., dissent.

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