STEVENSON v. SMITH et al.

(28 Cal. 103.)

Supreme Court of California. April, 1865.

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 superadded 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.)

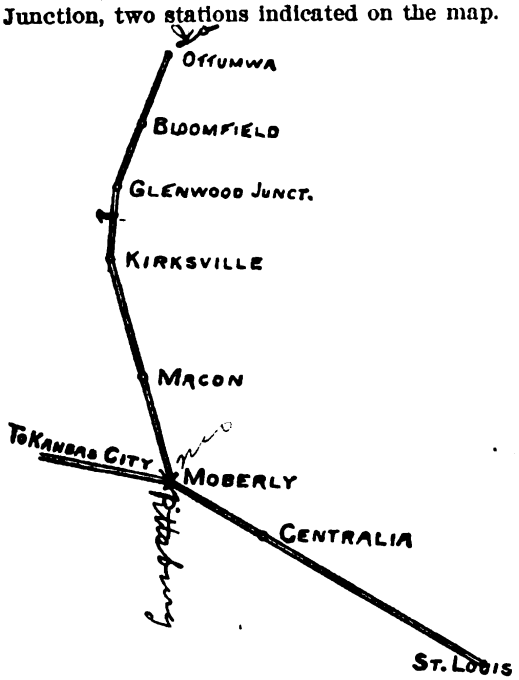
Supreme Court of Illinois. March 24, 1892.

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 1867. 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 plaintiff proved that he was in a stage from Worcester to Boston, and that he arrived at Boston the coach was upset 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. 128, 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 Ottumwa. 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. 160. 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.