THE

AMERICAN LAW REGISTER

AND

REVIEW.

JUNE, 1893.

PUNITIVE DAMAGES.

By Lewis Lawrence Smith.

The damages intended to be described in this article are variously styled punitive, exemplary or vindictive; but either of the first two of these titles is preferable to the third, for the reason that such damages are allowed as a punishment to the defendant, or to make an example of him, rather than as a measure of revenge of the jury inflicting them. The doctrine allowing such damages is an old one, and as illogical and as inconsistent with other and more fundamental principles of law as its age is venerable; nevertheless, it is accepted in most of those jurisdictions to which we turn for the best exposition of the law. At the same time, more than one able jurist has set the stamp of his disapproval on a practice which he has found himself unable to reconcile with the broader principles that every lawyer is educated to accept with respect. The answer to the doctrine, however, is not to be based on attempts to show that the court meant something else when they apparently allowed it to prevail, such as were made by

Professor Greenleaf;[1] for it is an unquestionable fact in the Reports. Its nature furnishes its best refutation.

Punitive damages, then, are such as are given in civil actions, for torts committed with wilfulness, wantonness, gross negligence or malice; and wantonness and wilfulness may be assumed to include such forms of intentional acts as arouse in a properly constituted breast sentiments of horror, disgust or detestation. Seduction, assault, oppression and gross insult may be taken as examples. These acts may be positive crimes or mere ethical offences for which the legislature has not imposed a criminal penalty. As to the former, a civil jury is not only allowed, but may be called upon to impose a penalty vastly in excess of many of the pecuniary penalties inflicted by the Criminal Code; and the unfortunate defendant is not only not permitted to ask to have this anomalous crime, for such it amounts to, proved beyond a reasonable doubt, but is denied many other rights accorded to the lowest criminal. Men are sometimes wilful, wanton, negligent or malicious, but ordinary humanity forbids society to judge or to punish them except under forms of law established as the result of its most enlightened thought. The doctrine of punitive damages allows this and more. Not only does it allow the punishment of such a defendant as a criminal in a civil suit, without according him the benefit of a criminal's defense, but it also relegates to the passions of a jury, inflamed by all the eloquence of a man skilled in bending those passions to his will, the question of determining the amount of punishment to be inflicted. The idea of withdrawing the duty of determining sentences from the trial judge is not a new one, but its most earnest advocates have not suggested that it be transferred to the peers of an ordinary criminal at the close of a trial; and yet that is what is done in the case of punitive damages. Again, the essential idea of such damages being punitive, why is the jury not instructed to separate the damages, and give only the compensatory part to the plaintiff and the balance to the

[1] Evidence, Vol. II, § 253, n.

county?[1] The plaintiff is surely not entitled to them. Given a doctrine with anomalous qualities, it is not surprising that it has been described as "a sort of hybrid between a display of ethical indignation and the imposition of a criminal fine."[2]

The weaknesses of the theory of punitive damages are stated, after an exhaustive review of the authorities, by Judge FOSTER, of New Hampshire, with great clearness and candor, perhaps with a little of the energy of a proselyte, for an opinion of his Court, delivered some twenty volumes previously, had been taken as a bulwark of the defenders of the doctrine. In Fay *v.* Parker,[3] he says: "The true rule, simple and just, is to keep the civil and criminal process and practice distinct and separate. Let the criminal law deal with the criminal, and administer punishment for the legitimate purpose and end of punishment, namely, the reformation of the offender and the safety of the people. Let the individual whose right is infringed and who has suffered injury, go to the civil courts and there obtain full and ample reparation and compensation, but let him not there obtain the 'fruits' to which he is not entitled, and which belong to others. Why tolerate longer a false doctrine which, in its practical exemplification, deprives a defendant of his constitutional right of indictment or complaint on oath before being called into court; deprives him of the right of meeting the witnesses against him face to face; deprives him of the right of not being compelled to testify against himself; deprives him of the right of being acquitted, unless the proof of his offence is established beyond a reasonable doubt; deprives him of the right of not being punished twice for the same offence? Punitive damages destroy every constitutional safeguared within their reach. And what is to be gained by this annihilation and obliteration of fundamental

[1] The damages are required to be separated in some jurisdictions, Eviston *v.* Cramer, *et al.*, 57 Wis., 370; Redfield *v.* Redfield, 75 Ia., 435, but the plaintiff gets both parts.

[2] Haines *v.* Schultz, 50 N. J. L., 484.

[3] 53 N. H., 342.

aw? The sole object in its practical results seems to be to give a plaintiff something which he does not claim in his declaration. If justice to the plaintiff required the destruction of the constitution, there would be some pretext for wishing the constitution destroyed. But why demolish the plainest guaranties of that instrument, and explode the very foundation upon which the constitutional guaranties are based, and for no other purpose than to perpetuate false theories and develop unwholesome fruits? Undoubtedly this pernicious doctrine has become so fixed in the law, to repeat the language of Judge CAMPBELL, of Michigan, 'that it may be *difficult* to get rid of it.' But it is the business of courts to deal with difficulties, and this heresy should be taken in hand without favor, firmly and fearlessly."

The reply to such attacks is by way of confession and avoidance, namely, that although the theory has its weaknesses, yet society demands the punishment of malefactors. The reply is true enough, but society has established tribunals especially for that purpose.

Punitive damages must be clearly distinguished from compensatory damages in which indeterminate elements may exist. In the former the jury are directed that they may, in a proper case, go as far beyond compensation as their consciences will permit, and punish the defendant for his wicked intentions, so that others of his kind may be deterred from similar acts (thus touching the keynote of criminal punishment); in the latter they have nothing to do with the intention itself, but base their verdict on the effect of the intention, that is, on the injury done the plaintiff.

That this oftentimes involves elements of great uncertainty, for the measurement of which no suitable yard-stick can perhaps be found, and that the estimation of such elements frequently involves, in the mind of a juryman, something that is punitory, is true; but the distinction between compensation to the plaintiff and punishment to the defendant is a practical one, and has an important bearing on the

size of the verdict. These uncertain elements are such as mental and physical suffering and loss of earning capacity and reputation, and have no correlative in money values.

So long as the distinction between punitive and compensatory damages is understood to be the difference between punishment for evil intentions and compensation for the results of those intentions, it is an almost unvarying one. In some few jurisdictions, however, expressions have been used which would seem to concede the propriety of permitting the jury to consider the evil intent, that is, the quality of the act, as a source of aggravation to the plaintiff. Thus, in Massachusetts, it was held that in an action for a wilful injury to the person, the manner and manifest motive of the wrongful act might be given in evidence as affecting the question of damages; for when the merely physical injury is the same, it may be more aggravated in its effects upon the mind if it is done in wanton disregard of the rights and feelings of the plaintiff, than if it is the result of mere carelessness; but the wantonness must be such as to cause additional suffering.[1] The same position is clearly set forth in an able dissenting opinion in a case in Pennsylvania, where the doctrine of punitive damages seems to be regarded by the Court with mingled suspicions of its worth, and reverence for its ancient origin.[2] The point, however, is not a clear one, and does not prevail generally.

Whatever may be the propriety of allowing punitive damages at all, it is a fact, which cannot be successfully controverted, that in all but a very few jurisdictions in the United States such damages are recoverable, in a proper case, against the wrong-doer himself, although some States, like Tennessee and Pennsylvania, seem restive under the rule.[3]

The doctrine of punitive damages has flourished as long as it has been confined to actions against the person

[1] Hawes *v.* Knowles, 114 Mass., 518.
[2] Cornelius *v.* Hambay, 150 Pa. St., 359.
[3] Cox *v.* Crumley, 5 Lea, 529; Cornelius *v.* Hambay, *supra*.

guilty of the wilfulness, wantonness, gross negligence, or malice—those in which the legal positions of the parties have been so proximate and the offense so immediately present to the Court, that its sense of constitutional rights and guaranties has been blunted by its desire to emphasize the abhorrence with which the offense was regarded by society. Great difficulty was naturally felt, however, in applying the doctrine to cases of wrong perpetrated by servants acting in the line of their employment. Should masters be held liable for the wicked intentions of their employees? As has been stated already, it is the intention which is the basis of punishment, and it makes little difference, so far as this phase of the question is concerned, whether the act results from an actual intent, or because it is done under circumstances in which it will probably cause some harm which the law seeks to prevent.[1] Notwithstanding the enormous logical difficulty of holding a master liable for acts which he could neither have intended nor foreseen, an astonishingly large number of courts have succeeded in overcoming it. The demagogic argument of punishing somebody because a wrong has been done has been borrowed from the plaintiff's attorney and incorporated into the solemn decision of the judge. One might well suppose it to be sufficient to state the basis of the doctrine of punitive damages to make it impossible to punish an innocent master for his servant's wrong, but it has not been so.

The liability of a master for compensatory damages for the act of his servant rests on an entirely different basis. There is no question, in such a case, of intent. In the execution of his duties the servant acts for his master; they are to that extent one person, and if for no other reason, the rule that where one of two innocent persons must suffer, the one who has made it possible for the wrong to occur must bear the loss, would require the master to make the injured party whole. How entirely different that is from the case of punishing the master for an intention

[1] Holmes on The Common Law, p. 75.

which he did not have, in order to pay to a man money which he does not claim, must be apparent.

The States which have been most responsible for this extended application of the doctrine of punitive damages are Maine, Pennsylvania, Ohio, New Hampshire (where it is now abandoned), Mississippi and Maryland. A decision of the United States Supreme Court has also been erroneously supposed to uphold the doctrine. In Goddard *v.* The Grand Trunk Ry.,[1] a passenger was assaulted by a brakeman. In deciding the case, the Court said: "A corporation is an imaginary being. It has no mind but the mind of its servants, it has no voice but that of its servants, and it has no hands with which to act but the hands of its servants. All attempts to distinguish between the guilt of the servant and that 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, are sheer nonsense. . . . Neither guilt, malice nor suffering is predicable of this ideal existence called a corporation." The remedy, it was added, was that the corporation should select careful agents. A forceful dissenting opinion was filed. That a corporation has a mind distinct from its hands in just as real a sense as it has an existence was not thought possible. The functions of the corporate mind are executive; of its hands, ministerial.[2] If careful agents are to be selected, who selects them? On the theory of that case they would select themselves.

In Pennsylvania, until within a very recent period, the "heresy" of Judge FOSTER has been held as the straitest orthodoxy. From the time of Hazard *v.* Israel,[3] in which that eminent jurist, Chief Justice TILGHMAN, held that a sheriff was liable in punitive damages for the wanton wrong of his deputy, almost to the present time, the doctrine has been practically unquestioned. In Lake Shore & Mich. So. Ry. Co. *v.* Rosenzweig,[4] the defendant cor-

[1] 57 Me., 202 (1869).
[2] R. R. *v.* Prentice, 147 U. S., 101–114.
[3] 1 Binn., 240.
[4] 113 Pa. St., 519.

poration was punished to the extent of $48,750 because a conductor had insisted on a passenger leaving the train on a dark night, although the latter offered to pay what additional fare should be proper. The only authority cited, curiously enough, is Milwaukee & St. Paul Ry. Co. *v.* Arnes,[1] in which punitive damages were refused. In Cornelius *v.* Hambay,[2] the jury was instructed that it might find damages (*a*) to make compensation to the plaintiff for the injury he had sustained; (*b*) to deter the defendant from committing the like crime in time to come; (*c*) to deter other persons from committing the same crime; (*d*) to punish the defendant for the crime. The majority of the Court affirmed this direction. Justices WILLIAMS and GREEN dissented, however, and the former filed an able opinion showing the impropriety of allowing punitive damages even as against a wrong-doer. This leaven, together with the recent demonstration that the one authority cited does not decide what the learned Court supposed,[3] may be regarded, perhaps, as an indication of change of heart on the question.

In Atlantic & Great Western Ry. Co. *v.* Dunn,[4] punitive damages were allowed against a railroad company because one of its passengers had been ejected by a train official. The Court said: "A corporation may be subjected to exemplary damages for torts of its servants in all cases where natural persons, acting for themselves, if guilty of like tortious acts, would be liable to such damages," and held that the legal unity of master and servant required that rule. The opinion rests on the case of P., W. & B. R. R. Co. *v.* Quigley,[5] where the tortious act complained of was directed by the railroad at a corporate meeting.

One of the most remarkable cases of the application

[1] 91 U. S., 489.
[2] 150 Pa. St., 359.
[3] R. R. *v.* Prentice, 147 U. S., 101–114.
[4] 19 Ohio, 162 (1869).
[5] 21 How., 202.

of the doctrine of punitive damages is to be found in N. O., J. &. G. N. R. R. Co. *v.* Hurst,[1] where a gentleman was carried some distance beyond his station and put down without violence on the side of the track. He suffered scarcely any actual damages, even of the most indeterminate sort, but a verdict of punishment for $4500 was allowed to stand. The absurdity of the thing struck the Court, but could not swerve it from its preconceived idea.

There are, of course, many other cases throughout the country where this doctrine has been upheld, and a reference to the more important of them will be found in a note.[2]

In addition to the few States where the doctrine of punitive damages has never been accepted, or has been repudiated,[3] a large number of jurisdictions have declined to extend its anomalies to cases where masters are sought to be reached through the intentional wrongs of their servants, and that whether the masters are corporations or private individuals.[4] The exemption from such liability,

[1] 36 Miss., 660 (1859).

[2] R. R. Co. *v.* Larkin, 47 Md., 155; R. R. Co. *v.* Rector, 104 Ill., 296; Singer Mfg. Co. *v.* Holdfort, 86 Ill., 455; but see Rosencrans *v.* Barker, 115 Ill., 331, and Chicago *v.* Kelly, 69 Ill., 475; R. R. Co. *v.* Rogers, 38 Ind., 116; Williamson *v.* Storage Co., 24 Iowa, 171; Higgins *v.* R. R. Co., 64 Miss., 80; R. R. Co. *v.* Steele, 42 Ark., 21; Ga. R. R. Co. *v.* Olds, 77 Ga., 673; Wheeler & Wilson Mfg. Co. *v.* Boyce, 36 Kan., 350; R. R. Co. *v.* Ballard, 85 Ky., 307; but see R. R. Co. *v.* Dills, 4 Bush, 593; Travers *v.* R. R. Co., 63 Mo., 421; Knowles *v.* R. R. Co., 102 N. C., 59; Quinn *v.* R. R. Co., 29 S. C., 381; R. R. Co. *v.* Garret, 8 Lea, 438; R. R. Co. *v.* Guinan, 11 Lea, 98; Murphy *v.* R. R. Co., 29 Conn., 499.

[3] Barnard *v.* Poor, 21 Pick., 378; Lothrop *v.* Adams, 133 Mass., 471; Hawes *v.* Knowles, 114 Mass., 518; Beck *v.* Thompson, 31 W. Va., 459; Stilson *v.* Gibbs, 53 Mich., 280 (COOLEY, C. J.); Wilson *v.* Bowen, 64 Mich., 133; Fay *v.* Parker, 53 N. H., 342; Riewe *v.* McCormick, 11 Neb. 261; R. R. Co. *v.* Yeager, 11 Cal., 345 (changed by Code, St. Ores *v.* McGlashen, 74 Cal., 148).

[4] R. R. Co. *v.* Prentice, 147 U. S., 101; Kirksey *v.* Jones, 7 Ala., 629; Bank *v.* Jefferies, 73 Ala., 183; Cleghorn *v.* N. Y. C. & H. R. R. R. Co., 56 N. Y., 44; Hagan *v.* Prov. W. R. R. Co., 3 R. I., 88; Staples *v.* Schmid, 26 Atl. Rep., 193 (R. I.); Boulard *v.* Calhoun, 13 La. Ann., 445; Eviston *v.* Cramer, *et al.*, 57 Wis., 570; Haines *v.* Schultz, 50 N. J. L., 481; Sullivan *v.* R. R. Co., 12 Ore., 392; Clark *v.* Newsham, 1 Exch., 131; R. R. Co. *v.* Garcia, 70 Tex., 207; Wardrobe *v.* Storage Co., 7 Cal., 118; McCoy *v.* R. R. Co., 5 Houst., 599.

however, as the logic of the case demands, extends only to masters who are innocent of any evil intention, either actual or arising from necessary implication. The position is well stated by CHURCH, C. J., in Cleghorn *v.* N. Y. C. & H. R. R. R. Co.[1] "For injuries," he says, "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 clearly established. Corporations may incur the liability as well as private persons. If a railroad company, for instance, 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 an 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." It will be observed that, by conduct "reckless and of a criminal nature," is meant the conduct of the corporation or of an executive branch of it, as distinguished from similar conduct of a subordinate agent. Thus the corporation may be guilty of such conduct when, at a corporate meeting, it directs the publication of a libel;[2] or where its executive officers take part in an assault.[3] Under

[1] 56 N. Y., 44.
[2] R. R. Co. *v.* Quigley, 21 How., 202.
[3] R. R. Co. *v.* Harris, 122 U. S., 597.

the opposite rule, inasmuch as the innocent master is punished for the good of society, and he is a member of that same society, he is made to undergo a sort of martyrdom for his own benefit.[1]

The advocates of the doctrine of punitive damages, as extended to innocent masters, have hitherto derived some solace from the decisions of the United States Supreme Court in the Quigley and Armes cases, based on an apparently erroneous conception of the principles which underlay them. Whatever doubts, however, there may have been on the subject have been quieted by Mr. Justice GRAY, in a most masterly opinion rendered in The Lake Shore & Mich. So. Ry. Co. *v.* Prentice,[2] in which the defendant corporation had the long-deferred satisfaction of obtaining a decision at direct variance with that by which it suffered so severely in the Rosenzweig case.[3] The plaintiff appears to have been very badly used. The Circuit Court of Illinois charged the jury among other things: "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 toward the defendant." The jury found $10,000.

Mr. Justice GRAY, after stating that the question, like others affecting the liability of a railroad corporation as a common carrier, was one of general jurisprudence, not of local law, and that, therefore, the Court would, in the absence of express statute, exercise its own judgment in the matter, proceeded with a critical discussion of the authorities. He admitted the doctrine that punitive damages were recoverable against a defendant wrong-doer,

[1] Hagan *v.* R. R. Co., 3 R. I., 88.
[2] 147 U. S., 101.
[3] 113 Pa. St., 519.

but that from the decision in "The Amiable Nancy,"[1] they had never been allowed in that Court against a master who was innocent of ill intention, or who had never approved the wrongful act of his servant, and that in this respect there was no difference between corporations and individuals. "No doubt," he said, "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.[2] But the question before the Court, on which its decision is unequivocal, is that such damages are not allowed against the master where there is no evidence to show that he knew his servant to be an unsuitable person, or that he in any way participated in, approved or ratified the act of the servant.

The most approved positions, therefore, on the question of punitive damages, would seem to be as follows:

(1) Punitive damages, however objectionable in theory, may be recovered where the defendant himself is guilty of wilfulness, wantonness, malice or gross negligence.

(2) Where such defendant is a corporation, the act complained of must be the act of the corporation, not of its subordinate agent.

(3) Such damages may not be recovered against a master, whether corporate or individual, unless he has recklessly employed improper servants, or has approved or ratified the wrongful act.

While it is true that a decision of the United States Supreme Court is not binding on the State Courts, and is, perhaps, not so persuasive on this subject as on a question of commercial law, yet it is entitled to the utmost respect alike from the *personnel* of the Court and the studious care with which its decisions are prepared, and should pave the way for the harmonizing of the law of this much-disputed question.

PHILADELPHIA, May, 1893.

[1] 3 Wheat., 546.

[2] Bell *v.* Midland Ry. Co., 10 C. B. N. S., 287.