

The use of Wewatta street is therefore a right of property in plaintiff, which if not "taken" is certainly "damaged," within the meaning of the constitution, by the act of defendant in building its road through that street. This point did not arise in the case of the present plaintiff against the Colorado Central Railroad Company, reported in 4 Colo. 154, and that case is not controlling. The question is discussed in *Rigney v. Chicago*, 102 Ill. 64, with the result now suggested. That case is very significant, showing that a change in the phraseology of the constitution of the state of Illinois was intended to enlarge the remedy.

Of this opinion was the court, (HALLETT, D. J.,) and the jury was advised that the plaintiff was entitled to damages, and after deliberating they returned a verdict of \$1,850.

Several questions relating to the measure of damages are to be considered on motion for new trial

MORSE, Petitioner, v. DUNCAN, Receiver, etc.*

(Circuit Court, S. D. Mississippi. November 29, 1882.)

1. RAILROADS—DUTY OF EMPLOYEES IN CHARGE.—It is the duty of those in charge of a railway train, on approaching a station where such trains stop, upon being flagged so to do, to be on the alert and look out for such signal, and stop when it is given.
2. SAME—DAMAGES—PERSONAL INJURY—SHOWING REQUIRED.—In the absence of gross negligence, recklessness, willfulness, malice, insult, or inhumanity, actual damages can only be allowed.
3. SAME—RECOVERY.—No recovery can be allowed for inconvenience or even physical hardship when the same are voluntarily undertaken.
4. SAME—GENERAL RULE.—The general rule is "that pain of mind is only the subject of damages when connected with bodily injury; it must be so connected in order to include it in the estimate, unless the injury is accompanied by circumstances of malice, insult, or inhumanity."

W. G. Grace, for petitioner.

E. L. Russell and *B. B. Boone*, for respondent.

HILL, D. J. This is a petition claiming \$1,000 damages of the defendant for the alleged default of his employes in neglecting to stop defendant's passenger trains at Marion, a flag station on the Mobile & Ohio Railroad, of which defendant is receiver, to take peti-

*Reported by B. B. Boone, Esq., of the Mobile, Alabama, bar.

tioner on board said trains and transport him to Scooba, on said road. The allegations of the petition are denied.

The proof shows that petitioner went to the station at Marion on the morning of December 29, 1881, to take the train for Scooba; that the train passed the usual place for stopping to put off and take on passengers, and that after remaining some four or five minutes it passed on; that before stopping the whistle was blown to give notice of the coming of the train and the intention to stop; that passing the usual place of stopping was for the purpose of transferring a lady and her children, with their baggage, from the train to a freight train, to be returned to Meridian, where she had gotten on the train by mistake; that not being flagged, or having any notice that any one wished to get on the train at that place, the train passed on. There is no allegation in the petition, or any proof, that the train was flagged that morning. The petitioner was advised by an employe of the postmaster at Marion that the train would back down to the usual place of stopping, and he did not attempt to get on the train and was left. This was a misfortune to the petitioner, but without fault on the part of the conductor or other employes of the defendant; hence no recovery can be had for this misfortune. The proof by the petitioner and another young man who designed to take the train on the same morning, as well as by the employe of the postmaster, who took the mail to the train and received it, and who was in the habit of giving signals for the stoppage of the train, is that on the thirtieth inst. he did flag it for the purpose of stopping the train to enable the petitioner and the other witness to get on the train, and that it passed on without stopping. The conductor and the engineer in charge of the train testify that their uniform custom is to look for the signal at that place, and that none was given that morning. I presume that the witnesses on the behalf of the petitioner testify truly, and that the signal was given, and must believe that defendant's witnesses testify truly in stating that they did not see the signal, and can only reconcile the conflict by holding that they were mistaken in their opinion that they noticed or looked for the signal sufficiently to discover it, and which it was their duty to have done.

Under these circumstances petitioner is only entitled to the actual pecuniary damages he has shown he sustained by reason of his failure to get upon the train that morning. He alleges, but does not prove, that he had to procure a private conveyance and go with his trunk to Meridian to get on the train. He does not prove that he paid anything for this conveyance; but presuming that he did, and had to

pay for his night's lodging and for supper, five dollars would cover the amount, including loss of time. He further proves that when he arrived at Scooba the conveyance which was there the day before had left, and that he had to walk through the mud a distance of 12 miles and procure a wagon next day and return for his trunk, for which his brother-in-law charged him \$2.50, which was certainly a full price for a brother-in-law; but, if he had chosen so to do, he could doubtless have procured a conveyance from Scooba for five dollars that would have taken both himself and trunk home the day he arrived, and saved himself that muddy walk. Inasmuch as this muddy walk was undertaken voluntarily by the petitioner, no compensation can be allowed him therefor, (*Francis v. St. Louis Transfer Co.* 5 Mo. App. 7; *Trigg v. St. Louis, K. C. & N. R. Co.* 6 Am. & Eng. R. R. Cas. 349;) so that five dollars for his actual damages at this end of the line will be full compensation, unless we consider the extreme anguish of mind he endured. If he is not more fortunate than most men, he will meet many as severe anxieties in life without a thought of compensation. The general rule is that "pain of mind is only the subject of damages when connected with bodily injury; it must be so connected in order to include it in the estimate, unless the injury is accompanied by circumstances of malice, insult, or inhumanity." *Pierce, R. R.* (Ed. 1881,) 362; *I. B. & W. Ry. Co. v. Birney*, 71 Ill. 391; *Francis v. St. Louis Transfer Co.* 5 Mo. App. 7. Had the engineer or conductor seen the signal and disregarded it, then punitive damages might have been awarded; but as the signal used was one of danger—a red light—it is not to be presumed either of them saw it, and disregarded it so that its non-observance was more an accident than otherwise, for which, as already stated, none but actual damages can be awarded. *Nelson v. A. & P. R. Co.* 68 Mo. 593; 2 *Redfield, Railw.* (5th Ed.) 262; *Milwaukee R. Co. v. Arms*, 91 U. S. 489; *C., St. L. & N. O. R. Co. v. Scurr*, 59 Miss. 456.

The receiver will pay the petitioner the sum of \$10; and, as there is no proof that this sum was tendered, will also pay the costs of this proceeding.

SMITH and others v. COLORADO FIRE INS. Co. and others.

(Circuit Court, D. Colorado. October 10, 1882.)

1. PLEADING—JOINT ACTION AGAINST CORPORATION AND STOCKHOLDERS.—Under section 201 of the chapter relating to corporations in the state of Colorado, a joint action may be maintained against a corporation and the owners of unpaid capital stock thereof, and a count in a complaint based upon this section is not demurrable for misjoinder of parties.
2. SAME—MAKING REPORT.—A joint action cannot be maintained against the officer of a corporation and the corporation itself for failure to comply with section 206 of the chapter relating to corporations, requiring a report to be made stating the amount of its capital, existing debts, etc.
3. SAME—FAILURE TO ORGANIZE LEGALLY.—When persons get together and assume to be a corporation, without complying with the terms of the statute in regard to organization of corporations, they may be severally and jointly liable as individuals for the debts contracted in the corporate name, but they cannot be made *joint defendants with such corporation* in an action.

Ruling on Demurrer.

HALLETT, D. J. James P. Smith and two people called Sargent sue the Colorado Fire Insurance Company, S. Eldridge Smith and William A. Ellis and George C. Glass, upon a policy of insurance issued by the Colorado Company. After describing the policy and the destruction of the premises by fire, and so on, plaintiffs allege in the first count that the defendants Smith, Ellis, and Glass were the owners of equal parts of the capital stock of the insurance company, which is wholly unpaid by them, and they seek apparently in that count to recover the amount of the policy from the defendant company, and from these natural persons, the owners of the stock, jointly.

Section 201 of the chapter relating to corporations declares that the stockholders shall be liable for the debts of the corporation to the extent that may be unpaid of the stock held by them, to be collected in the manner herein provided. Whenever any action is brought to recover any indebtedness against the corporation, it shall be competent to proceed against any one or more of the stockholders at the same time to the extent of the balance * * * by them respectively, whether called in or not, as in cases of garnishment.

I do not understand that the defendants made any objection to that count; it appears to be based upon the section of the statute, and to be within its provisions.

In the second count plaintiffs set up the same policy of insurance, and the destruction of the premises by fire, and aver that at the time of the execution and delivery of the policy the corporation had not, nor