defendant; but the same was tacitly conceded, and the court so instructed the jury. The defendant did not ask for any special instruction to the jury, nor take any exceptions to the charge as given them by the court, but was content with the presentation and argument of its case to the jury upon the question of fact, that the stay-laths were not used or intended to be used for scaffolding, and therefore the plaintiff was guilty of negligence in attempting, as he did, to use one of them for that purpose. And in this connection, the court said to the jury:

"This case must turn upon the question, was the negligence in regard to the stay-lath the negligence of the defendant or the plaintiff, or was the injury the result of an accident for which neither party is to blame. If you find that the injury sustained by the plaintiff was caused by the negligence, in this respect, of the defendant, your verdict should be for the plaintiff; but if you find that such injury was caused by the negligence of the plaintiff, or that it was the result of accident, then your verdict should be for the defendant."

On the proposition that the stays were not used or intended to be used as scaffolding, the case, on the evidence, was clearly against the defendant; and a verdict for the plaintiff on that issue ought not to be disturbed by the court. But it appears to me that the question of whether this injury was the result of accident is not so clear. And if the defense had been made to the jury on that ground the verdict might have been different. But in the consideration of the question, weight must be given to the fact that the defendant, with the apparent ability to show the actual condition of the stay at the time of the fall, failed to do so or give any excuse therefor. And then, ought the court to grant a new trial to enable the defendant to submit the case to another jury upon the proposition that the injury was the result of accident, notwithstanding it might have done so on the former trial? It may be, if there was no room for doubt or difference of opinion on this question, that the court ought to grant a new trial upon the condition that the defendant pay the cost of the former one, in which it was fairly cast upon the case as then presented by it. But it does not appear that the case is so clearly one of accident that it would be the duty of the court to instruct the jury to find a verdict for the defendant on that ground. For if possible, it is highly improbable, that a fir pole or tree, at least four inches in diameter, broke off or split down close to the cap of the bent simply with the plaintiff's weight, unless it was originally defective or had since been injured in some way. And in either case, the injury might be the result of accident or the negligence of the plaintiff or defendant. For instance, if the defective condition of the stay could not have been known and provided against by the defendant, by the exercise of ordinary prudence and diligence, the fall of the plaintiff therefrom was so far an accident for which the defendant is not responsible. But if the defendant could, by such means, have prevented the injury, then it is liable therefor. And if the defect was so apparent that the plaintiff, by the

exercise of ordinary prudence and diligence, under the circumstances, ought to have observed it, and not gone upon the stay, then his negligence contributed to the result, and the defendant, however negligent, is not liable to him for the injury. So that it cannot be said upon the evidence that this is a clear case of accident. The most that can be said is that a jury might find it so, but probably would not. And upon the consideration of the defense of accident, the further question would arise, ought not the defendant to have provided a safer and better kind of scaffolding than it did? In my judgment there ought at least to have been a timber or plank like the one called the gang-plank, laid across from bent to bent in each of the three spaces between the posts, instead of only one and those few round poles or stays. This would only have given four feet in width of scaffold to 20 feet in width of operation. I know the witnesses said that this bridge was scaffolded, in this respect, in the same way that the other bridges were that were built on the road, but that does not settle the question by any means, of what is sufficient scaffolding; and, in as simple a matter as this, the court and jury can see for themselves that the scaffolding in this case was insufficient in both character and quantity.

The only ground upon which this motion can be allowed was correctly stated on the argument by the counsel for the defendant. It is this: The motion must be allowed, if upon the trial the court, at the request of the defendant, would have been bound to instruct the jury to find for it, for the reason that it appeared beyond a question, from the evidence, that the injury to the plaintiff is the result of accident and not the negligence of the defendant. But in my judgment the case is open to question on this point, and the court must have refused the instruction and submitted the question to the jury.

The defendant having chosen to put the case to the jury on the ground that the plaintiff was guilty of negligence in attempting to use the stay-lath as a scaffold, under any circumstances, and it not appearing certain that a different result would follow from a trial in which the defense would rely on the proposition that the injury to the plaintiff was the result of accident, the motion for a new trial is denied.

BOYLE *v.* CASE and others.

(*Circuit Court, D. Oregon.* November 28, 1883.)

1. COMPENSATORY DAMAGES—ELEMENTS OF, STATED.
   A person receiving a willful injury from another is entitled to recover compensatory damages therefor irrespective of the motive of the wrong-doer, or his own calling or condition in life.
2. PUNITIVE DAMAGES.
   When allowed in addition to compensatory damages, and what for.
3. VIGILANCE COMMITTEE.
   No plea of the public good or safety can justify a voluntary assemblage of people in inflicting a personal injury upon any individual, but in an action to recover damages therefor, the jury, in considering whether the plaintiff is entitled to punitive damages or not, may and ought to take into account the causes or motives which led the defendants to do the wrong complained of.

Action to Recover Damages for Personal Injury.

A. H. Tanner, Robert Bybee, and *W. Carey Johnson,* for plaintiff.

George H. Williams, Rufus Mallory, and *W. Lair Hill,* for defendants.

DEADY, J., (*charging jury orally.*) You have heard the allegations of the parties, the evidence offered in support of them, and the argument of the respective counsel. It now remains for you to determine the issue between them, under the instructions of the court. The plaintiff claims that the defendants in this action, in connection with others, unlawfully arrested him at Astoria on the sixth of July last and confined him in jail; that they pretended to try him, and sentenced him to receive 25 lashes on his bare back, and, in pursuance of said sentence, caused him to be blindfolded, gagged and taken from the jail during the following night, onto the hill back of the town, where he was first tantalized or tortured by the information that he was to be hung, and then to receive 200 lashes, and finally was whipped on the bare back with a cat-o'-nine-tails,—five men giving him five lashes each,—when he was sworn upon his knees never to reveal what took place on that occasion, nor to harm any one engaged in the transaction; that he was then taken back to the jail, where he was left until morning, when he was taken in irons to the Portland steam-boat and sent away on her, for which he brings this action to recover $25,000 damages. These facts are substantially admitted by the defendants; and, of course, there is no absolute defense to this action, and none is attempted to be made.

The burden of the defense is that the acts of which the plaintiff complains were done under circumstances that will not warrant or justify you in giving him what are called punitive or exemplary damages; and that he ought not to recover more than nominal damages. It is admitted that he is entitled to what are called compensatory damages, and therefore you must find a verdict for the plaintiff in some amount. In this respect you have no discretion. You must