

and under article 2728, which provides for the dissolution of the lease when the leased thing is lost.

The petition, on certain grounds, sets forth that the leased property has ceased to be fit for the purpose intended by the parties, and that it is totally destroyed as a sugar plantation. It is contended that the filling of draining ditches, and the total loss of the growing and seed cane, does not necessarily destroy the place as a sugar plantation, nor render it unfit for the purpose of being carried on as a sugar plantation. The court has no judicial knowledge on these points, but will have to rely upon proof to be made. The averments of the petition are taken to be true, and they seem to be full and positive enough to put the defendant on his defense.

Another view of this case has been presented by counsel for petitioner, based upon articles 2046, 2047, 2695, and 2729 of the Revised Civil Code, to the effect that the petitioner, as lessee, is without fault, and that the defendant, as lessor, has neglected to fulfill his engagements, and is in default, whereby the petitioner has the right to sue for a dissolution of the lease. The correctness of this view depends upon what obligations under the lease devolved upon the defendant, and this can better be determined when the lease and the facts of the case are brought before the court. At present we have only the allegations of the petition, the lease not being a part thereof, although a copy is among the papers on file.

With the distinct understanding that the court is passing upon the sole question whether the petition states a cause of action, the exception herein is ordered overruled.

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FRERICKS, for the use, etc., v. BERMES.

(Circuit Court, D. New Jersey. November 7, 1884.)

**NEW TRIAL—EXCESSIVE DAMAGES—PERSONAL INJURY.**

In an action for a personal injury caused by negligence, the damages cannot be measured by any fixed standard, but rest in the sound discretion of the jury; and that discretion cannot be interfered with by the court unless the damages allowed are so excessive as to warrant the belief that the jury must have been influenced by partiality or prejudice, or have been misled by some mistaken view of the case.

On Motion for New Trial.

*Gilbert Collins*, for the motion.

*Salomon & Randolph*, contra.

NIXON, J. Three grounds are alleged why the verdict in the above case should be set aside and a new trial granted: (1) Because the evidence for the plaintiff did not disclose a right of action; (2) be-

cause the verdict was against the weight of evidence; (3) because the damages were excessive. The first and second points go to the extent of challenging the propriety of any verdict for the plaintiff. The third, falling short of this, has reference only to the amount of damages. On the argument of the rule, the counsel of the defendant did not dwell upon the first and second, but laid much stress upon the third point.

We have given more than ordinary attention to the motion, (1) because if the court had been charged with the responsibility of setting the amount of the damages which ought to have been recovered it would probably have awarded a smaller sum than the jury gave; and (2) because the case is one where the defendant has no opportunity of invoking the aid of an appellate court to correct any errors of judgment which may be committed here; but, after a careful consideration of all the points, we have not been able to find any ground which will justify the court in disturbing the verdict. The suit was fairly tried by able and experienced counsel. There was no pretense that anything more than compensatory damages should be demanded or awarded. The real plaintiff was a child of tender years, who, it was alleged, was run over in one of the streets of the city of New York by a beer-wagon of the defendant, in consequence of the neglect and careless driving of his servant, and a compound fracture inflicted on the elbow of her left arm, which, the medical testimony went far to show, had not only occasioned much suffering in the past, but, by hindering a free use of the arm, would prove a life-long injury in the future.

It is not, therefore, one of the class of cases where a legal measure of damages exists, as where one sues in trespass for an injury to his freehold, and where no right is involved beyond a mere question of property. In such cases the rule to be applied is a fair compensation for the injury done, as shown by the evidence, and the verdict is under the control of the court. *Berry ads. Vreeland*, 1 Zab. 183. But the action in this case is for a personal tort, and the damages cannot be measured by any fixed standard; they rest in the sound discretion of the jury, and that discretion cannot be interfered with by the court in the exercise of its discretion. The rule here is that the judgment of the jury, and not the opinion of the court, must govern in the assessment of damages, unless they are so excessive as to warrant the belief that the jury must have been influenced by partiality or prejudice, or have been misled by some mistaken view of the merits of the case. See *Wood's Mayne, Dam.* 751.

The jury was an intelligent one, and there is no evidence that the jurors were influenced by any of these motives. The damages are not so excessive that the court would be warranted in inferring from their amount alone that they were thus influenced. The elements of injury which they were to consider in making up their verdict were carefully stated to them by the court, and we know of no legal measure

or criterion to which we may subject their judgment or determine its reasonableness.

The rule to show cause is discharged.

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UNITED STATES *v.* PAYNE and others.

(*District Court, D. Kansas. December 11, 1884.*)

1. CONSPIRACY TO COMMIT OFFENSE AGAINST THE UNITED STATES—SETTLEMENT ON AND RETURN TO INDIAN COUNTRY.

A conspiracy to make settlement on Indian lands and to return to the Indian country, after being removed therefrom, is not an indictable offense, within the meaning of the conspiracy clause of chapter 8, Supp. Rev. St. 484, or one that can be prosecuted by criminal proceedings.

2. SAME—PENALTY, HOW RECOVERED.

The proper proceeding in such a case is by action under Rev. St. § 2124, to recover the penalty prescribed for such offenses.

On Motion to Quash Indictment.

*J. R. Hallowell*, U. S. Atty., for the United States.

*J. W. McDonald*, for defendants.

FOSTER, J. The indictment in this case charges the defendants with conspiring and confederating together to commit an offense against the United States under chapter 8, Supp. Rev. St. 484. The offense alleged, in brief, is that the defendants conspired and confederated together among themselves and with other persons to enter upon and make settlement on certain lands belonging, secured, and granted by treaty of the United States to certain Indian tribes, and lying between the Canadian and north fork of the Canadian rivers, in the Indian Territory, and commonly known as the Oklahoma lands. And also having, before that time, been removed from the Indian country by the military forces of the United States, did conspire and confederate together, and with other persons, to return to said Indian country commonly known as the Oklahoma country, and also to enter upon lands known as the Cherokee strip or outlet in said Indian country; and charging defendants with certain overt acts to effect the object of said conspiracy, etc.

The law concerning the entering and making settlement on Indian lands is found in section 2118, Rev. St. p. 370, tit. 38, and reads as follows:

"Every person who makes a settlement on any lands belonging, secured, or granted by treaty with the United States to any Indian tribe, or surveys or attempts to survey such lands, or to designate any of the boundaries by marking trees, or otherwise, is liable to a penalty of one thousand dollars. The president may, moreover, take such measures and employ such military force as he may judge necessary to remove any such person from the lands."

The law concerning the removal of persons from the Indian country further provides as follows: