

It is contended that this does not mean that such statement shall be prima facie evidence in an action upon the bond; that "no such contingency was in the minds of the parties," and that it only refers to a consideration by the company of the question whether it will pay without suit; that it only indicates in what way the preliminary proof of a loss shall be made to the company. But neither the phraseology of the clause nor its collocation with the rest of the bond thus restricts its meaning. It is certainly open to the construction put upon it by the trial judge. Such construction is a most natural one. Nor is there anything extraordinary or startling in an agreement by the company that it will pay upon proof in a prescribed form being made to it, nor in its agreeing to accept such proof as prima facie sufficient to entitle the insured to a recovery in case of default. Conceding that it is also open to a construction which would confine it as plaintiff in error contends, it would be at least ambiguous; and it is elementary law that all obscurities and ambiguities in a policy of insurance are to be resolved against the underwriter, who has himself drafted the instrument. There was no error, therefore, in the charge in the particular complained of. The judgment of the circuit court is affirmed.

BERRY v. LAKE ERIE & W. R. CO.

(Circuit Court, D. Indiana. February 27, 1896.)

No. 9,277.

DAMAGES—AMOUNT—PERSONAL INJURIES.

In an action by an infant of the age of seven years, brought by her next friend, against a railway company, to recover damages for personal injuries resulting in the loss of plaintiff's right leg below the knee, the jury gave plaintiff a verdict for \$1,100. There was no proof of any expense incurred, or pecuniary loss. *Held*, that the amount of the verdict, though less than the court would have approved, did not afford such evidence of bias, passion, prejudice, or mistake as to justify setting it aside as inadequate.

See decision on motion to strike out part of answer in 70 Fed. 679.

Duncan, Smith & Hornbrook and Conner & McIntosh, for plaintiff.
W. E. Hackedorn, John B. Cockrum, and Miller, Winter & Elam, for defendant.

BAKER, District Judge. This was an action by Pearlie Berry, an infant of the age of seven years, by her next friend, Addie Berry, against the defendant, to recover damages for personal injuries resulting in the loss of her right leg below the knee. A trial was had, resulting in a verdict for her against the railroad company, assessing her damages at \$1,100. The plaintiff asks the court to grant a new trial, solely on the ground that the damages are inadequate. No exception was taken to any ruling of the court during the trial, nor did either party except to any portion of the instructions given by the court to the jury. The verdict of the jury settled—and, I think, cor-

rectly—that the injury arose wholly from the negligence of the defendant, without contributory fault on the part of the plaintiff.

When an action sounds in tort, for the recovery of unliquidated damages, to the admeasurement of which no fixed rule of law can be applied, the court ought not to set aside the verdict of a jury simply because the damages are, in its opinion, inadequate or excessive, unless it clearly appears that the verdict is so grossly inadequate or excessive as to afford evidence of bias, passion, or prejudice, or of mistake and oversight, in failing to take into consideration the proper elements of damage in assessing the amount of recovery. The present case does not seem to fall within this rule. A brief review of the cases cited and relied upon by the plaintiff will make this apparent.

It has been correctly said that:

“A verdict for a grossly inadequate amount stands upon no higher ground, in legal principle, nor in the rules of law or justice, than a verdict for an excessive or extravagant amount. It is doubtless true that instances of the former occur less frequently, because it is less frequently possible to make it clearly appear that the jury have grossly erred. But, when the case does plainly show such a result, justice as plainly forbids that the plaintiff should be denied what is his due as that the defendant should pay what he ought not to be charged.” *McDonald v. Walter*, 40 N. Y. 551, 554.

This case was an action brought by a vendor against a purchaser to recover damages for breach of contract in refusing to receive and pay for personal property sold, in which the jury returned a verdict for the plaintiff for a far less sum than the amount of damages he was entitled to recover, upon any construction of the evidence, if he had any cause of action whatever. It was held that the plaintiff was entitled to a new trial, on the ground that the verdict totally disregarded the evidence of the damages sustained. This was a case in which the plaintiff, if he had any cause of action, was entitled to recover as damages the difference between the contract price and the market price at the time and place fixed for the delivery of the property sold, and this rule of law was totally disregarded by the jury.

The case of *Robbins v. Railroad Co.*, 7 Bosw. 1, was an action to recover damages for personal injuries. The plaintiff was so much injured that he remained insensible through the day on which the accident happened, and was laid up for nearly five months, most of the time confined to the house. The jury returned a verdict for the plaintiff, assessing his damages at six cents. The court, in affirming the action of the trial court in granting a new trial, said of this verdict, “It is contrary to the clear and uncontradicted evidence, to the law of the case, and to the charge of the court in that behalf.” Such a verdict, for such serious injuries, was calculated to shock the moral sense, and, if permitted to stand, to bring reproach on the administration of justice.

The case of *Whitney v. City of Milwaukee*, 65 Wis. 409, 27 N. W. 39, was an action to recover damages for personal injuries sustained by reason of the unsafe and defective condition of a cross walk in the defendant city. The plaintiff was very much injured, and he suffered from the injury very much pain for a considerable time. He was compelled to carry his arm in a sling for two months, and was unable

to use his arm, as before the injury, in his business. The verdict of the jury was for the plaintiff, and they assessed his damages, all told, consisting of the cost of medical attendance and other expenses of cure, loss of time, and pain and suffering, at \$24.27. Having failed to recover \$50, the defendant was entitled to recover of the plaintiff the costs of the action, amounting to \$30.47; so that the result of the trial was that the plaintiff was \$6.20, besides his attorney's fee, worse off than before it took place. The court said this verdict, on its face, was perverse; that it was trifling with a case in court, and public justice, and was justly calculated to cast odium on the jury system.

The case of *Mariani v. Dougherty*, 46 Cal. 27, was an action to recover damages caused by the careless and reckless taking of the decedent's life, in which the jury returned a verdict of \$200 as a just and fair compensation for the damages sustained by the death of the plaintiff's intestate. The decedent was a house painter and paper hanger by trade, about 56 or 57 years of age, industrious and temperate. He found employment about three-fourths of the time, and made, when at work, from \$4 to \$7 per day. He had four sons and one daughter, all of whom had reached the age of majority, except one, and he was 10 or 11 years of age, living with and dependent upon his father for support. The court below granted a new trial because it seemed a mockery of justice to assess such an insignificant sum as a just and fair compensation, or for damages resulting from the reckless taking of a human life. The supreme court said, if the defendant was liable at all, the damages awarded were altogether disproportionate to the injury.

The case of *Bennett v. Hobro*, 72 Cal. 178, 13 Pac. 473, was an action to recover damages for injuries sustained by the plaintiff by falling through a trapdoor alleged to have been left open by the servants of the defendant. The evidence showed that the injuries sustained by the plaintiff were severe, resulting in long confinement, with a reasonable apprehension that they would permanently disable her. The jury found a verdict for the plaintiff, and assessed her damages at \$200. The trial court set the verdict aside as unreasonable and grossly inadequate. The supreme court, in affirming the decision of the court below, said, "Under such circumstances, the court may well have concluded that the sum awarded her was insignificant in proportion to the injury received."

The case of *Phillips v. Railway Co.*, 29 Eng. R. 177, was an action to recover damages for personal injuries sustained through the negligence of the defendant. The plaintiff was a physician in Grosvenor Square, London, who was making from his profession an income of between six and seven thousand pounds per annum at the time of his injury. He was an active, energetic man, in the prime of life, who was reduced to "a powerless helplessness, with every enjoyment of life destroyed, and with the prospect of a speedy death." The jury awarded him a verdict for £7,000. This verdict was set aside on the ground that the amount of damages given by the jury was so small as to show that they must have left out of consideration some of the cir-

cumstances which ought to have been taken into account. This ruling was affirmed in the court of appeal. The court of appeal placed stress upon the fact that the verdict gave no more than the loss of income for a single year. At the time of the trial more than a year had elapsed since the injury happened.

None of these cases furnish a warrant for granting a new trial in this case. The damages awarded are substantial, although less than the court thinks ought to have been given. From the youth of the plaintiff, there had been no loss from inability to labor. There was no proof of any expense incurred for medical or surgical attendance or care; and, aside from pain and suffering arising from the injury, her damages were entirely prospective, and incapable, in the nature of things, of any certain admeasurement. The case was tried fairly and dispassionately, and received the careful and patient consideration of the jury. While the court would have been better satisfied if a larger verdict had been returned, I feel, as Lord Denman once expressed himself, that a new trial on a mere difference of opinion between the court and jury as to the amount of recovery in an action of tort for unliquidated damages ought not to be granted. Something more must be disclosed to warrant interference, where substantial damages have been returned. Nothing more is shown in this case, and the motion for a new trial will therefore be overruled.

In re SCHALLENBERGER.

(Circuit Court, N. D. California. December 9, 1895.)

1. TARIFF LAWS—CONSTRUCTION—GENERAL PURPOSES.

The general purpose of the so-called "McKinley Tariff Law" of October 1, 1890, to protect and foster American industries, is not to override a plain provision contained therein, which, in a particular instance, fails to carry out such purpose, or operates in contravention of it. The particular intent must prevail over the general intent.

2. SAME—REIMPORTATION OF AMERICAN GOODS—ALLOWANCE OF DRAWBACK.

In paragraph 493 of the act of 1890, providing for the free reimportation of certain American goods, among which are casks, bags, etc., the proviso that "this paragraph shall not apply to any article upon which an allowance of drawback has been made, the re-importation of which is hereby prohibited except upon payment of duties equal to the drawbacks allowed," applies to bags of jute burlap upon which drawbacks were allowed, notwithstanding that they are reimported filled with nondutiable merchandise, such as canary seed.

This was an appeal by L. E. Schallenberger from a decision of the board of general appraisers affirming the action of the collector of the port of San Francisco in assessing a duty on certain reimported American bags upon which a drawback had been allowed.

Fox, Kellogg & Gray, for importers.
Samuel Knight, Asst. U. S. Atty.

McKENNA, Circuit Judge (orally). The appellant made two importations of canary seed into the port of San Francisco, Cal., the seed being inclosed in double bags. The outer coverings of the seed

were certain returned bags, upon which an allowance of drawback had been made on their exportation, for the reason that they were jute burlaps, dutiable at 1½ cents per pound, under paragraph 364, Act 1890. They were assessed for duty, under paragraph 493, at an amount equal to the drawbacks allowed, less 1 per cent. thereof, by the collector, under instructions of the secretary of the treasury, and this ruling was affirmed by the board of general appraisers. The object of the appeal to this court is to review the decision of the board of general appraisers. Before the board of appraisers no proof was made that the bags were the ordinary and usual commercial coverings of canary seed. The omission, however, does not appear to have determined the decision of the board. In this court, on a reference for that purpose, testimony has been taken which, it is admitted, shows that the double covering was usual, and suitable for the transportation of the seed. The controversy turns upon the strict application of paragraph 493, which is as follows:

"Articles the growth, produce, and manufacture of the United States, when returned after having been exported, without having been advanced in value or improved in condition by any process of manufacture or other means; casks, barrels, carboys, bags, and other vessels of American manufacture exported filled with American products, or exported empty and returned filled with foreign products, including shooks when returned as barrels or boxes; also quicksilver flasks or bottles, of either domestic or foreign manufacture, which shall have been actually exported from the United States; but proof of the identity of such articles shall be made, under general regulations to be prescribed by the secretary of the treasury; and if any such articles are subject to internal tax at the time of exportation such tax shall be proved to have been paid before exportation and not refunded: provided, that this paragraph shall not apply to any article upon which an allowance of drawback has been made, the re-importation of which is hereby prohibited except upon payment of duties equal to the drawbacks allowed; or to any article manufactured in bonded-warehouse and exported under any provision of law: and provided further, that when manufactured tobacco which has been exported without payment of internal revenue tax shall be re-imported, it shall be retained in the custody of the collector of customs until internal revenue stamps in payment of the legal duties shall be placed thereon."

It is admitted by the district attorney that generally free goods make free coverings, but he claims that this does not apply to goods described in paragraph 493, the explicit language of which requires the imposition of a duty equal to the drawbacks which had been allowed. Appellant asserts contra:

"That neither the first proviso of nor anything contained in the said paragraph 493 has any application to this matter: (1) Because this proviso can only operate as a limitation upon the exemption from duty (if any there be already laid affecting a given case) afforded by the preceding portion of the paragraph, and cannot operate as a limitation upon exemption from duty afforded by reason of other and additional facts; or, in other words, this proviso is a subsidiary part of a paragraph, and the paragraph, taken altogether, including the proviso, and after giving the utmost force and effect that (under the true rules of construction is possible) can be given to the proviso, does not create a duty or obligation, but only gives an exemption if such duty or obligation already exists. (2) Because, even if the principle contended for under (1) is not sound, and even if it be true that the first proviso of this paragraph is to be taken as laying a duty, instead of merely limiting the extent of an exemption from such duty as in a given case

may be applicable by reason of other provisions of the tariff act, still the rule that free goods bring in free their ordinary, usual, and commercial coverings is not modified or affected by this proviso."

Any other interpretation, counsel urges, and strongly urges, militates against the policy of the act and the purpose of drawback, both of which, it is claimed, are encouragement to American industries, and will present the anomaly of bags made of foreign materials by foreign labor being admitted free as coverings, while bags made of foreign materials, by American labor, used for like purpose, are charged a duty. It may be admitted that one of the purposes of the McKinley act was protection to American industries, and that it sought to accomplish this purpose, both by duties upon imports and the allowance of drawbacks upon exports; but, considering the many things a tariff law must accommodate, it is not strange that a rigid, logical application of principle should not be made, and, because not made, it does not follow that plain provisions should be disregarded. The purpose of an act is, undoubtedly, the light by which its provisions are to be construed, but we may not assume that any provision is idle. It may be an exception to the general purpose, and the first presumption is that it means something. A particular intent will prevail over a general intent. Section 2 of the act provides as follows:

"On and after the 6th day of October, 1890, unless otherwise specially provided for in this act, the following articles when imported shall be exempt from duty; * * * 493. * * * Casks, barrels, carboys, bags, and other vessels of American manufacture exported filled with American products, or exported empty and returned filled with foreign products. * * * Provided, that this paragraph shall not apply to any article upon which an allowance of drawback has been made, the re-importation of which is hereby prohibited except upon payment of duties equal to the drawbacks allowed. * * *"

The appellant's bags are within the description of the paragraph. They were exported, and have been returned filled with foreign products. They also fulfill the condition of the proviso. An allowance of drawback had been made to them, and the prohibition of the proviso applies, unless it is prevented by other facts. The fact which it is claimed prevents it is that the bags are coverings for free goods, which are exempt by law as well as the goods. There is no explicit provision of law which declares that free goods make free coverings. If true at all, it is only as an inference from section 19 of the administrative act of 1890, which, after providing that the duty of imported merchandise subject to an ad valorem duty shall include the value of all cartons, cases, crates, boxes, sacks, and coverings of any kind, provides that, "if there be used for covering or holding imported merchandise whether dutiable, or free, any unusual article or form designated for use otherwise than in the bona fide transportation of such merchandise to the United States, additional duty shall be levied and collected upon such material or article at the rate to which the same would be subject if separately imported." It may be inferred from this that usual coverings are exempt from duty. Granting the inference, and if we construe the provision as universal, is there anything for paragraph 493 to operate on, as far as casks,

barrels, carboys, and sacks are concerned? If returned filled with foreign products, it must be as coverings suitable for such products. It would seem, therefore, this exemption from duty was unnecessary, as this was already done by section 19 of the administrative law; that is, a law of which free coverings on free goods is but a part, and that the only substantial part of paragraph 493 is the proviso which not only limits the exemption, but prohibits importation, except upon payment of duties equal to the drawback which had been allowed. This is not necessarily repugnant to the purposes of the act; but, if it is, it was competent for congress to make an arbitrary exception, and, if it intended to do so, it is not clear how language more apt to accomplish it could have been employed. The proviso contains another example of the same kind. It exempts from privilege of return or reimportation without duty articles manufactured in bonded warehouses, and exported under any provision of the law. The exception is more complete than in the case of sacks. On the latter the duty is fixed at the amount of drawback allowed. No duty, therefore, is put on the value given by American labor. On the former—that is, on articles manufactured in bonded warehouses—the duty shall be the same rate as if originally imported. Section 22. A duty, therefore, is put on the value given by American labor. This is a more repugnant exception to the general policy of the act than that of which appellant complains. The usual purpose of a proviso is to limit that which precedes it, but it may do more, and, however the intention of the lawmaker is expressed, it must prevail. If the proviso to paragraph 493 stopped by exempting from it articles upon which an allowance of drawback had been made, there would have been some reason for claiming it a limitation merely; but it goes further, and says “the reimportation of which is hereby prohibited, except upon payment of duties equal to the drawbacks allowed.” Language could not well be clearer or more positive. It forms a class of articles of those upon which drawbacks had been allowed. Thus construed, the paragraph and proviso have an intelligent purpose.

Appellant, in support of his claim, makes a distinction between the word “returned,” in the body of the paragraph, and the word “reimportation,” in the proviso. It is manifest, however, to accomplish the purpose of the paragraph, that they must be construed as having the same meaning. It follows from these views that the decision of the board of appraisers must be, and it is, affirmed.

In re GARDNER et al.

(Circuit Court, N. D. California. December 16, 1895.)

CUSTOMS DUTIES—CLASSIFICATION—BONES.

Bones which have been crushed and screened must be regarded as “otherwise manufactured,” within the meaning of paragraph 511 of the act of 1890 (26 Stat. 604), and therefore are not admissible free of duty under that paragraph, but are subject to duty as “manufactures of bone,” under paragraph 460 (26 Stat. 602).