

the evidence of the first class and that of the second class was brought to the attention of the court. It was not made by the defendant below when it moved to strike out at the close of the case, according to the citation we have already made. Moreover, it was not brought to our attention at the argument of the case, the proposition then of the plaintiff in error with reference to Linton's testimony being merely as follows:

"If the testimony was admissible at all, it was merely to show that fire might have originated in this manner at that point. Of itself it would not show that it did so originate, and it could only be pertinent in connection with testimony tending to show its origin there. The defendant claims that there was no such evidence, and that, therefore, this testimony was irrelevant, and should have been stricken out."

But we find, as already stated, that there was such evidence; and this proposition is so far from touching on the distinction which we have pointed out between the two different classes of proof that it applies, and was made expressly to apply, in solido, to all those portions of the testimony of Linton and O'Connor to which objections were taken. It seems, therefore, that the only proposition of law which could have required the elimination of any of this testimony was not brought to the attention of the court below by the objections and exceptions; and therefore this alleged error cannot receive consideration.

The remaining alleged errors have not been brought to our attention in such way as to require investigation by us. On the whole, there seems to be nothing in the assignment of errors which would justify us in reversing the judgment of the circuit court. The judgment of the circuit court is affirmed, with the costs of this court for the defendants in error.

RIVINUS v. LANGFORD.

LANGFORD v. RIVINUS.

(Circuit Court of Appeals, Second Circuit. July 29, 1896.)

1. CONVERSION OF JUDGMENT—DAMAGES.

The fact that at the time of a conversion of a judgment the judgment debtors were insolvent does not necessarily limit the recovery to nominal damages, if thereafter such debtors became solvent.

2. SAME—EVIDENCE.

In an action by one against his partner for wrongfully satisfying a judgment standing in the name of the firm, but in reality belonging to the plaintiff, who had refused to satisfy it, evidence that one or more of the judgment defendants, though insolvent at the date of the satisfaction, became solvent a short time thereafter, is admissible to show what was the value of the judgment to plaintiff at the time of its satisfaction.

In Error to the Circuit Court of the United States for the Southern District of New York.

Action by David C. F. Rivinus against Thomas H. Langford for the conversion of a judgment. There was a judgment for plaintiff, and both plaintiff and defendant bring error.

Russell Duane and Morse & Griffin, for plaintiff.
Hamilton Odell, for defendant.

Before WALLACE and SHIPMAN, Circuit Judges, and TOWNSEND, District Judge.

TOWNSEND, District Judge. These are two writs of error,—one by the defendant to review a judgment for the plaintiff, rendered upon a verdict of the jury; and the other by the plaintiff to review certain rulings of the court directing the jury to bring in no verdict for the plaintiff, on account of certain expenses of the trial. Counsel for the plaintiff having stated that, in the event of an affirmance of the judgment, he would not press his claims, defendant's writ of error only has been considered.

The plaintiff herein, David C. F. Rivinus, and the defendant, Thomas H. Langford, were formerly partners, doing business under the firm name of Rivinus & Langford. On December 31, 1884, the partnership was dissolved, and it was then mutually agreed that the assets thereof should be owned and controlled solely by Rivinus. After said dissolution, a judgment for \$2,936.29 was obtained in favor of said partners against Henry W. Kane, William J. McCaffrey, George W. Kane, and Abraham Kane, co-partners, doing business under the firm name and style of the New York State Clothing Company. Defendant, Langford, without authority from plaintiff, accepted \$357.15 in payment of said judgment, and executed a satisfaction piece. Afterwards the \$357.15 was paid by defendant to plaintiff, under a stipulation that it should not affect plaintiff's right to sue for the balance. Defendant has admitted his want of authority to execute said satisfaction piece, and the only question for the jury in said action was as to the measure of damages for the conversion. The defendant claimed that as the judgment debtors were insolvent, and the judgment uncollectible at the time when it was satisfied, only nominal damages could be recovered. The court overruled this contention, and admitted evidence of the financial status and business prosperity of said judgment debtors, from November 1, 1891, up to that time, showing that, shortly after the execution of said satisfaction piece, one or more of the judgment debtors were solvent and able to pay said claim in full, and that the financial standing of said debtors had continued good up to the time of the trial of the action. Plaintiff also testified that one of the judgment debtors called on him in the month of October, 1891, and asked him whether he would accept 16 $\frac{3}{4}$ per cent., then 25 per cent., and then 33 $\frac{1}{4}$ per cent., in satisfaction of said judgment, and what sum he would accept, and that he refused to accept either of said sums, or any sum less than the principal and interest. The court also denied a motion to direct a verdict for the plaintiff for nominal damages, and charged the jury that the measure of damages was the value of the judgment to the plaintiff at the date of the conversion, and that, in determining what said value was, they might consider all the evidence in the case; that, at the date of the conversion, the judgment debtors were insolvent, and that, at a subsequent time prior to the trial, they were solvent, and able to pay said judgment; that neither of these circumstances was absolutely controlling, but that,

from the whole evidence, they were to determine what the judgment was actually worth to the plaintiff at the time of the conversion. The defendant excepted to said rulings and refusal to direct a verdict, and to said charge.

The defendant claims that evidence of the solvency of the parties at a period subsequent to said conversion was inadmissible for the purpose of determining the damage. But this evidence was not admitted to show the value of said note at such subsequent period. The jury were distinctly instructed on this point as follows:

"The defendant in this case is liable for the difference between what he paid, with the interest, and the amount that this judgment was actually worth to the plaintiff on October 19, 1891. You will determine what it was worth by determining from the evidence in this case what money would have been paid for that judgment if this defendant had not interfered and taken \$357.15."

We are unable to perceive any error in the admission of said evidence, or in the charge. The single question at issue was the value of the judgment to the plaintiff at the date of its conversion. The plaintiff insisted upon his right to hold the judgment until he could obtain full satisfaction. He was entitled to show the subsequent solvency of the partners, as bearing upon the question of actual value, and as tending to show what the judgment was worth to him. Such facts furnish the best, if not the only, satisfactory evidence of the most remunerative use for which the judgment was adapted. Sedg. Dam. § 252. The general rule of damages in cases of conversion, in the absence of special circumstances, is the value of the property at the time of the conversion, with interest thereon. *Ormsby v. Mining Co.*, 56 N. Y. 623; *Mechanics' & Traders' Bank v. Farmers' & Mechanics' Bank*, 60 N. Y. 52; *Cattle Co. v. Mann*, 130 U. S. 79, 9 Sup. Ct. 458. Where the value of the property is fluctuating, the value may be fixed at the time the owner is deprived of his property, or within a reasonable time thereafter for replacing it. *Baker v. Drake*, 53 N. Y. 211, 66 N. Y. 518; *Wehle v. Haviland*, 69 N. Y. 448; *Wright v. Bank*, 110 N. Y. 237, 18 N. E. 79; *Barnes v. Brown*, 130 N. Y. 372, 29 N. E. 760; *Galigher v. Jones*, 129 U. S. 193, 9 Sup. Ct. 335. The market value at the time of conversion is ordinarily a satisfactorily accurate means of estimating plaintiff's loss. The underlying principle applicable to all cases is that stated in *Baker v. Drake*, supra, as follows:

"An amount sufficient to indemnify the party injured for the loss which is a natural, reasonable, and approximate result of the wrongful act complained of, and which a proper degree of prudence on the part of the plaintiff would not have averted, is the measure of damages which jurors are usually instructed to award except in cases where punitive damages are allowable."

In the case of the conversion of a chattel, where the market value fails to furnish the true measure of damages, the plaintiff may show, by any appropriate evidence, the actual injury from the loss of the possession of the chattel; and evidence of the value of such property prior or subsequent to the conversion is admissible to prove actual value at the time of conversion. *Suydam v. Jenkins*, 3 Sandf. 614; *Parmenter v. Fitzpatrick*, 135 N. Y. 190, 31 N. E. 1032; *Sturges v. Keith*, 57 Ill. 451; *Peck v. Derry*, 37 Ch. Div. 541.

In support of his contention, defendant cites *King v. Ham*, 6 Allen, 298, and *Kellogg v. Tompson*, 142 Mass. 76, 6 N. E. 860. In *King v. Ham* the maker of a note became insolvent upward of two years after the conversion, and while the note was still in the hands of the defendant. In *Kellogg v. Tompson* the note was converted before maturity, and defendant offered to show the financial condition of the maker at maturity, several months after conversion. The evidence of subsequent insolvency was in each case held to be inadmissible. In each of these cases the maker was apparently solvent at the time of the conversion, and plaintiff might presumably have sold the note for its face value. Under such circumstances, the court properly so applied the rule as to indemnify the plaintiff against loss. In cases of doubt as to what disposal plaintiff would have made of the note, the doubt should be resolved against the wrongdoer, and in favor of the injured party.

The judgment is affirmed.

AETNA LIFE INS. CO. v. CITY OF BURRTON.

(Circuit Court, D. Kansas, Third Division. September 15, 1896.)

No. 407.

1. MUNICIPAL BONDS—VALIDITY—AID TO RAILROADS—CITIES AND TOWNSHIPS.
The Kansas statute of 1871 (chapter 60), providing for the organization and government of cities of the third class, declares, in section 4, that all cities subject to the act "shall be and remain a part of the corporate limits of the municipal townships in which the same is situated for all township purposes of electing justices of the peace, constables, for the purpose of building bridges, and subscribing stock in aid of constructing railroads." *Held*, that under this section, when a township came to act upon the subject of subscribing stock in aid of railroads, the people and territory of a city of the third class situated therein were to be considered as included in the township, but that said section, when considered with other parts of the statute, did not deprive the city itself of power to subscribe independently, under the authority given to all incorporated cities by Act 1876, c. 107, § 1.
2. SAME.
The Kansas act of 1887 (chapter 183) amended section 1 of the act of 1876, which authorized incorporated cities to subscribe in aid of railroads, providing that the total county, township, and municipal subscriptions did not exceed \$4,000 per mile of road constructed in the county, by reducing the amount to \$2,000 per mile, with a proviso that the amendment should not affect accrued rights or any aid voted or election pending prior thereto. *Held*, that where a subscription had been voted, and the railroad company was engaged in constructing the road pursuant to the terms thereof prior to the amending act, the limitation to \$2,000 per mile did not apply.
3. SAME—OVERISSUES.
Where township and city subscriptions in aid of a railroad exceeded the total amount allowed by law per mile of road, but the city bonds were first issued and delivered, *held*, that their validity was not affected by the overissue subsequently made by the issuance and delivery of the township bonds.

This was an action at law by the Aetna Life Insurance Company against the city of Burrton, in the county of Harvey, Kan., to recover upon interest coupons attached to railroad aid bonds.