

SUPREME COURT OF NOTRE DAME

CRANFORD vs. DRESSLER

No. 9.

Tort—Assault and Battery by Shooting—
Trespass—Charavari—Proximate Cause—
Condition—Instructions—Damages—Rule of
Proof.

1. Where, at a charavari of newly-weds, the wife, with the knowledge and at the direction of the husband, shot and injured the plaintiff, both husband and wife are liable in damages, although the plaintiff was at the time a trespasser on the premises and engaged in such unlawful charavari.

2. An answer or plea of charavari and trespass in such case is bad on demurrer, for such facts are not sufficient in themselves to constitute a defence to the action. To be good as a bar to liability it must appear from such pleading that the unlawful charavari and trespass contributed proximately to cause the plaintiff's injury. In this case they constituted a mere condition which does not preclude recovery.

3. An unlawful charavari and trespass on premises for that purpose do not, of themselves, justify the use of a deadly weapon, although reasonable force may be used to eject a trespasser. And an instruction to that effect is not erroneous where there is evidence of such trespass and the shooting of the trespasser.

4. Nor is such instruction made erroneous merely because the defendants have not specifically plead such trespass as a defence, for they cannot by their pleadings limit the theories of plaintiff's right of recovery, nor deprive plaintiff of any instruction that is reasonably applicable to the evidence of the case solely from the viewpoint of plaintiff's right of recovery.

5. Such instruction is not erroneous on the alleged ground that it nullifies an instruction given at defendants' request that "if the jury believe that the force used by (defendant) Nellie Cranford was such as in view of all the surrounding circumstances reasonably appeared to her to be necessary" to prevent plaintiff's wrongful entry into her home, they should find for the defendants. The two instructions are consistent, one applying to the plaintiff's theory of recovery as a trespasser, the other to the defendants' theory of bar of recovery because of plaintiff's unlawful attempt to enter her home.

6. To warrant the recovery of compensatory damages for alleged loss of time and decreased capacity to labor, the injured party must prove the value of such items, or facts on which an estimate of such value can be founded. And an instruction that the jury may award such damages is not erroneous if there is evidence in the case from which the jury may reasonably find the value of such lost time and decreased capacity to labor.

Action in tort for \$1000 damages for assault and battery by shooting

brought against Walter Cranford and Nellie Cranford, husband and wife, by Charles Dressler. From a judgment of \$1000 for plaintiff the defendants appeal. *Affirmed.*

James L. O'Toole and Joseph Rafter for Appellants.

Alden J. Cusick and Archibald M. Duncan for Appellee.

VURPILLAT, J. The appellants, Nellie Cranford and Walter Cranford, were married and were celebrating their honeymoon at the home of the bride's father, Andrew Rater. On the evening of August 1, 1919, the plaintiff and many neighbors of the newly-weds gathered about the Rater home for a charavari. While the serenade was at its height the appellee, plaintiff, was shot, and for the injuries sustained he brought action against the newly-married couple. By the amended complaint it is alleged that on August 1, 1919, the defendant, Nellie Cranford, in the presence and with the express consent and direction of her husband, Walter Cranford, did unlawfully, purposely assault and batter the plaintiff by aiming and shooting at plaintiff with a gun loaded with gun powder and leaden shot, said shot hitting plaintiff in the right arm, breaking and badly lacerating the hand and forearm, by reason of which the plaintiff continued sick, sore and disabled for two months, all the time suffering great pain; that he is permanently injured in this, that his hand and fore-arm are left stiff and inflexible to a degree making use of them difficult and awkward and greatly impairing his activity as a working farmer; that he was compelled to pay \$400 for surgical attendance and nursing, for all of

which he is damaged to the extent of \$1000.

The defendants answer in four paragraphs: first, general denial; 2nd, self-defense; 3rd, assault was committed to prevent the forcible entry of plaintiff into their home; and 4th, that plaintiff and divers other persons acting in concert came upon defendants' premises and conducted themselves in a loud, boisterous and unlawful manner, fired guns, beat on tins and pans, and made other bedlam noises, shouted threats against defendants and conducted a charavari against them, and refused to desist from the said unlawful acts although ordered and requested to do so; that the assault was committed to cause plaintiff to desist from the said unlawful acts and to depart from the premises.

Although this fourth paragraph of answer is not challenged by demurrer its sufficiency is clearly raised by the assignment of error that the verdict is contrary to law. For, if the facts here plead, namely, that there was an unlawful charavari and that the assault was committed to cause the plaintiff to desist therefrom and to leave the premises, are sufficient in law to bar plaintiff's recovery, than the verdict for the plaintiff is contrary to law, because these facts are firmly established by the record,—indeed they are not controverted by the plaintiff.

But the verdict is not contrary to law, for the reason that the fourth paragraph of answer does not state facts sufficient to constitute a defence in bar to the plaintiff's action. On this point the case of *Schultz vs. Paul*, reported in the April number, 1920, page 10, of the Notre Dame Law Reporter, is decisive. This was an action for damages for personal

injuries caused by an assault and battery by the plaintiff. The complaint was attacked on the ground that "facts are alleged which constitute plaintiff a trespasser, etc." Speaking to this point the Supreme Court of Notre Dame says: "But, assuming that facts are alleged in complaint which establish illegal conduct of plaintiff himself, it must appear that such illegal conduct was the proximate or contributing cause of the injury complained of. *Hall vs. Corcoran*, 107 Mass. 251, 9 Am. Rep. 30; *Koepkae vs. Pepper*, 155 Iowa 687, 136 N. W. 902, 41 L. R. A. (N. S.) 773; *Gilmore vs. Fuller*, 198 Ill. 130, 65 N. E. 84, 60 L. R. A. (N. S.) 326. In *Hall vs. Corcoran*, *supra*, it was said by the Supreme Court of Massachusetts: 'Whether the form of action is in contract or tort, the test in each case is whether, when all the facts are disclosed, the action appears to be founded in a violation of law in which the plaintiff has taken part.' Thus, where the plaintiff and defendant participated in a charavari party made illegal by the criminal code of Illinois, the plaintiff was shot and seriously injured by reason of the alleged carelessness of the defendant, it was held as a matter of law that plaintiff had no right of action. *Gilmore vs. Fuller*, *supra*. See also *Higgins vs. Minaghan*, 78 Wis. 602, 47 N. W. 941, 11 L. R. A. 138, 23 Am. St. Rep. 428. Where the parties are in *pari delicto*, that is, in equal fault, neither is in a position to ask relief of the court from a situation caused by his own wrong doing, whether it be his illegal contract or his tortious act. *Anson on Contracts* (4th Ed.) 262; *Chapin on Torts* 237; *Hall vs. Corcoran*, *supra*. But where the illegal conduct of the plaintiff, whether participated in by the de-

fendant or not, is not itself the proximate contributing cause of the injury inflicted upon plaintiff by defendant, the plaintiff may recover, notwithstanding such illegal conduct." In further support of this doctrine the court, in *Schultz vs. Paul*, cites the following cases: *Welch vs. Wesson*, 6 Gray (Mass.) 505; *Newcomb vs. Boston Protective Dept.*, 146 Mass. 596 (604), 16 N. E. 555, 4 Am. St. Rep. 354.

The unlawful conduct charged against plaintiff in appellants' 4th paragraph of answer did not directly or proximately contribute to cause the injury complained of by plaintiff, but constituted a mere condition or attendant circumstance to the shooting of plaintiff by appellants. Such a condition, even if plaintiff himself was responsible for it, does not preclude his recovery in this action. *Chapin on Torts*, 101.

The same reasoning and authorities, in large measure, dispose of another of appellants' assigned errors, namely: "giving the jury instruction No. 1 requested by the plaintiff, which instruction was as follows: 'The jury is instructed that though reasonable force may be used to eject a trespasser, the use of a dangerous weapon is not justified in repelling a trespass, whether such trespass could or could not have been prevented.'" This instruction is correct as stating an abstract proposition of law, and it is applicable to the facts of plaintiff's case as disclosed by the evidence. *Schriber vs. Beach*, 4 Denio (N. Y.) 448, 47 Am. Dec. 265; *Everton vs. Esgate*, 24 Neb. 235, 38 N. W. 794; *State vs. Montgomery*, 65 Iowa 484, 22 N. W. 639; *Duke vs. State*, 11 Ind. 557. Plaintiff is entitled to recover even if at the time of the alleged wrongful shooting by the appellants,

he was himself unlawfully upon appellants' premises as a trespasser; for the same reason, as we have seen, that he is entitled to recover notwithstanding the unlawful charavari he was at the time engaged in; for neither of these unlawful acts of plaintiff justified the commission of the unlawful shooting charged to appellants. In short, two wrongs do not make a right. See *Schultz vs. Paul*, *supra*. And since the facts in evidence disclose that plaintiff was, at the time of the wrong and injury complained of, a trespasser, it was essential to an intelligent determination of the case by the jury that they be instructed in the law of trespass as it affected the rights and liabilities of both parties to the case, plaintiff as well as defendants.

Directly involved in plaintiff's case were the issues of law whether, as a trespasser, he could recover at all, or whether, as such trespasser, he could recover if defendants used unreasonable or unnecessary force to repel his trespass, or used a deadly and dangerous weapon to repel such trespass. Since the *law is* that in either of these cases plaintiff may recover, and since the *evidence is* that plaintiff was a trespasser and that defendants used a dangerous weapon and shot plaintiff, and since the jury's verdict must be based on the *law and the evidence*, it was the court's duty to instruct the jury as he did, whether upon request of plaintiff or of his own motion. The instruction tendered and given was in support of plaintiff's affirmative right of recovery in view of the evidence affecting him as a trespasser; and in this view he was entitled to such instruction.

It matters not "that this theory (trespass) was not set up or relied upon by the defendants below", as

complained in appellants' brief; for the defendants cannot by their pleading limit the theories of right of recovery which plaintiff may have under the law and the evidence. Nor can they justly complain of any correct instruction upon the law supporting any theory upon which plaintiff may recover on his own pleadings and the evidence in the case. If, as we are led to infer, appellants contend that the instruction complained of is erroneous simply because it does not conform to the issues as tendered by them alone, they are in error; for both parties are entitled to such instructions, in view of their own pleadings and the evidence, as tend to sustain their respective theories of right of recovery or bar to recovery. I *Blashfield on Instructions*, Sec. 145. Thus defendants sought to avoid liability for the alleged shooting on the theory advanced in their third paragraph of answer that they deemed the shooting reasonably necessary to prevent plaintiff's wrongful entry into their dwelling house; and, although plaintiff by general denial controverted the existence of such facts, the trial court, at defendants' request, gave to the jury the following instruction: "The court instructs the jury that a person is entitled to use reasonable force to prevent a wrongful aggressor from entering the dwelling house occupied by the former. If you find that the defendant, Nellie Cranford, assaulted the plaintiff while he was engaged in attempting to wrongfully enter the dwelling house occupied by her, you shall find for the defendants, providing you believe that the force used by her was such as in view of all the surrounding circumstances reasonably appeared to her to be necessary." "This instruction," as appel-

lants say, "correctly stated the law applicable to the theory plead," and we may add, was therefore given by the court. Had the jury found the facts to be as here assumed by appellants, then the jury would have applied the law as stated in this instruction, and their verdict would have been for appellants. But the plaintiff replied by general denial to the plea, as also to the plea of self-defence, and in support of such denial had a right to maintain that the evidence in the case did not establish the facts alleged by appellants in their pleas,—that they did the shooting complained of to prevent the plaintiff from entering their home or in self-defence.

The plaintiff's theory of right of recovery, as based on his complaint and denials to defendants' pleas, was that the shooting by the appellants was unlawful, that it was not justified as alleged by appellants, and that he was therefore entitled to recover from defendants in the action, even if the jury should find that he was a trespasser upon the appellants' premises at the time, for, as stated by the court in the instruction complained of, "though reasonable force may be used to eject a trespasser, the use of a dangerous weapon is not justified in repelling a trespass, whether such trespass could or could not have been prevented." The jury, having found the facts for the plaintiff, was required to apply the law applicable to such facts. The instruction, which is admitted by appellants to be a correct statement of the law, was therefore necessary as well as applicable to the facts as found by the jury. There was no error in giving this instruction. Indeed, it would have been reversible error to have rejected an instruction so obviously applicable to the issues arising from the pleadings

as well as the evidence in the case. *St. Joseph Loan & Trust Co. vs. First National Bank of Chicago*, Nov., 1920, N. D. Law Rep., page 15; *Bank of Metropolis vs. New England Bank*, I Howard 234, II L. Ed. 234.

We may not pass this point without noting another objection raised to the instruction in question. Appellants complain that, though the court instructed the jury to find for them providing they believed that the force used by Nellie Cranford was such as in view of all the surrounding circumstances reasonably appeared to her to be necessary to prevent plaintiff from entering her home, yet, "in the instruction to which exception is taken, the jury was told that the use of a dangerous weapon can never be considered as reasonable force." No such statement appears in the instruction complained of. By this misstatement of the letter as well as the spirit of that instruction, appellants seek to make it appear that such instruction nullifies the other instruction given at their request. This attempt to discredit the trial court's instructions has not even the merit of ingeniousness, for it is a resort to a palpable distortion of one of the court's instructions, admitted to be correct as applied to the theory of force that may be used against a trespasser, to be misapplied to the instruction upon the theory of such force as may seem reasonably necessary to one seeking to prevent another's wrongful entry into his home. Both instructions are correct statements of the law; both are equally applicable to the facts in evidence as the jury might find them; they relate to entirely different legal propositions, applicable to entirely different states of facts; are neither inconsistent nor related in themselves, and

are so necessary to the issues raised by the pleadings and the evidence that to have refused either of them would have constituted reversible error. *Parker vs. State*, 136 Ind. 284, 35 N. E. 1105; *Spaulding vs. Adams*, 63 Iowa 437, 19 N. W. 341; *Tupper vs. Houston*, 46 Wis. 646, 1 N. W. 332; *O'Callaghan vs. Bøeing*, 72 Mich. 669, 40 N. W. 843; *Pa. Ry. Co. vs. Zebe*, 33 Pa. St. 18; *Lytle vs. Boyer*, 33 Ohio St. 506.

Appellants assign that the verdict of the jury is excessive, and, assuming that exemplary damages were awarded by the jury, counsel present a noteworthy argument against the recovery of exemplary (punitive or vindictive) damages for a tortious wrong which also constitutes an indictable offense. There are but few states in which this rule operates as an absolute bar to the recovery of exemplary damages in actions for tort. *Austin vs. Wilson*, 4 Cush. (Mass.) 273, 50 Am. Dec. 766; *Lucas vs. Mich. Cent. Ry. Co.*, 98 Mich. 1, 39 Am. St. Rep. 517; *Boyer vs. Barr*, 8 Neb. 68, 30 Am. Rep. 814; *Fay vs. Parker*, 53 N. H. 342, 16 Am. Rep. 270; *Spokane Truck Co. vs. Hofer*, 2 Wash. 45, 26 Am. St. Rep. 842. But even in these jurisdictions facts in aggravation of the wrong done are permitted to heighten the damages recoverable for mental suffering. *Raynor vs. Nims*, 37 Mich. 34, 26 Am. Rep. 493; *Bixby vs. Dunlep*, 56 N. H. 456, 22 Am. Rep. 475.

Despite the rule against punitive damages laid down in the case of *Tabor vs. Hutson*, 5 Ind. 322, 61 Am. Dec. 96, where nothing more appears than the fact that the wrong complained of is also an indictable offense, the true rule in Indiana, as in England, the United States and nearly all the states, "is that where

malice, fraud, or gross negligence or recklessness enters into commission of a tort exemplary damages are recoverable." 12 Am. & Eng. Encyc. of Law 13; Binford vs. Young, 115 Ind. 174, 16 N. E. 142; Citizens St. Ry. Co. vs. Willooby, 134 Ind. 563, 33 N. E. 627; Moore vs. Crose, 43 Ind. 30; Ziegler vs. Powell, 54 Ind. 173. Counsel for appellee are therefore grievously in error in their stated deduction that "Indiana law is fundamentally unsound, and contrary to the overwhelming weight of American authority. In Indiana the recovery of exemplary damages may be had where matters in aggravation of the wrong are plead and proven which particularly affect the injured party. And this, we subgenerally obtaining, for there has never been any just reason assigned for inflicting double punishment for an offence committed, one at the hands of the state, and the other to enure to the benefit of a private citizen who is no more affected by the commission of the crime than the general public, except for actual damages sustained for which he is fully compensated in the civil action.

In Pennsylvania it is held that conviction of crime may be shown in mitigation, but not in bar, of exemplary damages for tort. Wirsing vs. Smith, 222 Pa. 8, 70 Atl. 906; Rhodes vs. Rodgers, 151 Pa. St. 634, 24 Atl. 1041. The weight of authority, however is that the indictable character of the offence operates neither to bar nor mitigate the exemplary damages recoverable for the tort. Bauer on Damages 121; I Sedgwick on Damages, Sec 38; 12 Am. and Eng. Encyc. of Law 8. Nor is this unconstitutional as putting one twice in jeopardy for the same offence. Brown vs.

Evans, 8 Sawy. (U. S.) 492; Brown vs. Swinford, 44 Wis. 287, 28 Am. Rep. 582; Charles vs. Drake, 2 Metcf. (Ky.) 171, 74 Am. Dec. 406.

However, in appellant's case there is no warrant for the assumption that the verdict includes exemplary damages. No facts in aggravation are plead, and no demand for such damages was made. That no such damages were awarded is conclusively established by the trial court's instruction which contains no direction to the jury as to the element of exemplary damages. It is obvious, therefore, that the verdict is not excessive as containing exemplary damages. It is not argued that it is otherwise excessive. That the verdict is not excessive may be seen from an examination of the following cases of personal injuries to farmers: Ballon vs. Mo. P. Ry. Co., 172 Mo. 92, 72 S. W. 530; Meacles vs. Doun, 64 Wis. 323, 25 N. W. 412; Galveston Ry. Co., vs. Eaton (Tex.) 44 S. W. 562; C. R. I. R.R. Co vs. Burns (Tex) 104 S. W. 1081; Gale vs. N. Y. Ry. Co., 76 N.Y. 594; Play vs. Sonnette, 169 Ill. App. 494.

Appellants complain of the trial court's instruction on the measure of damages which is as follows: "The court instructs the jury that if you find for the plaintiff * * * you will allow such damages as seem to you to be right and proper under all the facts and circumstances in evidence, not exceeding \$1,000 the amount asked. In estimating the damages, you have a right to consider bodily and mental pain, if any, endured by the plaintiff, loss of time caused by the assault, and his diminished capacity for labor resulting directly from the defendant's wrongful acts. You may also take into consideration the surgical bills, if any. It is not necessary

that the amount of damages resulting from personal injuries should be actually proved by witnesses, but it is to be determined by you from your own knowledge and experience as applied to the facts and conditions established by the evidence." In reference to the elements of damage alleged in the complaint and mentioned in the court's instruction, appellee, says: "Here (plaintiff) is setting up four items on which he asks compensation, to-wit: loss of time, pain and suffering, decreased capacity for labor, and \$400 paid out for surgical attendance and nursing. It is not the contention of the appellants that an assault and battery does not entitle plaintiff to recover on any and all of these items. But it is necessary for him not only to specify in what respects he was damaged but also to prove with reasonable certainty the existence and extent of the damage." In effect appellant's contention is that the trial court erred in instructing the jury that if they found for plaintiff they might assess damages for loss of time and decreased capacity for labor, because "plaintiff has failed to introduce sufficient evidence to allow the jury to award any damages on (these items)." This objection resolves itself into a question of fact rather than one of law. If there was no evidence at all to sustain an award upon any item of damages sought, the court should not have instructed the jury that damages for such item might be assessed. If, however, there was any evidence upon which the jury might reasonably have estimated such damages, it would have been error for the court not to have given the instruction. Appellants cite 8 Am. and Eng. Encyc. of Law (2nd Ed.) 557 as authority for their statement that "Where loss of time is

claimed as an item of damage for a personal injury, if the plaintiff *fail to prove the value of the time lost* only nominal damages can be recovered." The rule as actually stated by that authority is "Where loss of time is claimed as an item of damages for personal injury occasioned by negligence, if plaintiff fails to prove the value of the time lost, *or facts on which an estimate of such value can be founded*, only nominal damages for that item can be given." It is not therefore necessary in every case to prove in dollars and cents the actual value of the time lost in order to recover damages therefor. Indeed, there are many cases in which this is practically impossible, and appellee's case is of that character. "Mere impossibility," says a modern text writer, "of computing damages with the utmost accuracy does not prevent the recovery of substantial damages; if either party is to be placed at a disadvantage by reason of such impossibility, it should be the defendant, whose wrongful conduct has rendered the inquiry as to damages necessary." Bauer on Damages 73; Welch vs. Ware, 32 Mich. 77; Browning vs. Jones 52 Ill. App. 597. "It is true," says the Court of Appeals of Missouri, "that there was no specific evidence as to the value of time lost, nor was it necessary." Gerdes vs. Foundry Co. (Mo.) 25 S. W. 557. The rule is that facts on which an estimate of such value can be founded are sufficient to sustain an award of damages for time lost. In appellants' case there is ample evidence on which to base the estimate of the value of the time proven to have been lost, as well as of the value of the decreased capacity to labor. Appellee was thirty-five years of age, a farmer of moderate means, working for himself, de-

pendent upon his own farm labor for a livelihood for himself and family of wife and three small children. He was shot on August 1st, 1919, and was confined to the hospital during August and September, and prevented from carrying on his usual avocation and was forced to lose whatever of value his work on his own farm might have been to him at that time of year. Less evidence than this was held sufficient to justify submitting to the jury the question of damages for the loss of time to a farmer working his own farm, in the case of *Mayberry vs. Cape G. & J. Gravel R. Co.* (Mo.) 69 S. W. 394. It is said by the court in the case of *Railroad Co. vs. Borm*, 72 U. S. 90, that "the damages in these cases * * * must depend very much on the good sense and sound judgment of the jury upon all the facts and circumstances of the particular case." And so to the same effect is the language of the court in the case of *Harmon vs. Old C. Ry. Co.* 168 Mass. 337, 47 N. E. 100.

The evidence also warrants the assessment of damages on account of the decreased capacity to labor. By the shooting appellee's right arm was broken, the fore-arm and hand lacerated and shattered, as a result of which he is permanently injured to the extent that his arm and hand are stiff and inflexible, making their use difficult and greatly hampering his activity as a working farmer. The evidence discloses that the appellee was unable to work and did not work on his farm from the time of the injury to the day of trial. In this case is the value of the decreased capacity to labor also impossible of actual proof, and again the rule for determining such damage must be the estimate of such value to be based by the jury upon the particular facts and

circumstances proven. To the appellee's case may well be applied the language of the court in the case of *Petrie vs. The Ry Co. (S. C.)* 7 S. E. 515: "There are certain employments so extensively followed and so intimately blended with the customary life of our people and within everyone's experience that the law wisely declines to exact specific proof of them, deeming it expedient to trust rather to the general source of information which all men have access to, since exact proof is unobtainable in any event."

Appellants rely on the cases of *Leeds vs. Metropolitan Gas Light Co.* 90 N. Y. 26, and *Stahl vs. Grand St. N. R. Co.*, 107 N. Y. 625, 13 N. E. 624. That neither of these cases bears any analogy to appellant's case nor lends any support to their contention clearly appears from the opinion of the Court of Appeals in the latter case. The court says: "There was proof that the plaintiff was a fresco painter, and that for some time before his injuries he had been employed by a person who was engaged in the business of painting. No special damages, and no pecuniary losses past or future, were alleged in the complaint. There was no proof whatever as to plaintiff's circumstances in life, except that before the injury his 'general health was good.' There was no proof touching his age, habits, capacity, ability to work, skill in his trade, his wages or his earnings, or the compensation he was able to earn, or his chances of getting work. There was not even any proof that he was able to earn a livelihood." The trial court, though recognizing the rule laid down in the case of *Leeds vs Gas Light Co.* 90 N. Y. 26, erroneously instructed the jury that damages might be awarded for future loss of time.

Continuing the Court of Appeals says: "This charge was clearly in conflict with the rule laid down in the case cited. In that case we held that where loss of time is claimed as an item of damages in such a case as this if plaintiff fails to prove the value of the time lost, or facts on which an estimate of such value can be founded only nominal damages can be given. There it was proved that the plaintiff was engaged in business at the time of the injury, and that he had not been able to attend to his business since, but it was not shown what his business was, or the value of his time, or any facts as to his occupation from which the value could be estimated."

In both these cases there was such an utter lack of proof not only as to the value of the time lost, but also as to facts upon which to base an estimate of that value, that it was erroneous to instruct that damages might be awarded at all. In the case of *People ex. rel. vs. Mus. Mut. Protective Union*, 118 N. Y. 101, 23 N. E. 129, also cited by appellants, the Court of Appeals itself clearly distinguishes the *Leeds vs. Gas Light Co.* case. In this case the jury's award of damages for lost time was sustained in these words; "There was evidence upon which to base their estimate, and the question in this re-

spect differed from that of *Leeds vs. Gas Light Co.*, 90 N. Y. 26. The appellant's case also differs from the *Leeds* case in this respect. Of the other two cases cited by appellants, the case of *Manistee vs. Hodley*, 165 Ala. 211, 51 So. 871 is also one in which there was no evidence on which to base an estimate of the value of damages; and *Railroad vs. Minogue* (Ky. 12 S. W. 357 merely decides that the verdict of \$10,000 is excessive for the permanent injuries that were actually proven.

There was no error in giving the instruction as to the elements of damage to be awarded by the jury in appellants' case, for there appears sufficient evidence in the record upon which the jury might reasonably have estimated the value of the damages for appellee's loss of time, and his incapacity to labor at least to the time of trial; and the assessments of damages for these elements, together with that for \$400 actually expended for surgical aid, and that for the pain and suffering endured, might well have exceeded \$1,000, the amount of the verdict, to say nothing of the damages for the permanent character of the plaintiff's injuries.

Finding no error in the record, the trial court's judgment is in all things affirmed.

**BRIEF OF JAMES L. O'TOOLE IN CASE OF
CRANFORD vs. DRESSLER.**

In the Supreme Court of Notre Dame
Nellie Cranford and Walter Cranford
Appellants,

vs.

Charles Dressler,
Appellee.

Brief for Appellants.

NATURE OF THE ACTION

This was an action for damages for personal injuries resulting from an alleged assault and battery committed on Charles Dressler, the plaintiff below, by Nellie Cranford, "in the presence and with the express consent and direction of her husband, Walter Cranford," the co-defendant below.

ISSUES PRESENTED

The complaint was in one paragraph, alleging that at three o'clock on the afternoon of August 1st, 1919, the defendant, Nellie Cranford, in the presence and with the express consent and direction of her husband, Walter Cranford, did then and there unlawfully, wilfully, and purposely assault and batter the said plaintiff, doing him great bodily harm; that she committed said assault and battery by then and there unlawfully, willfully, and purposely aiming and shooting at said plaintiff with a certain gun, then and there loaded with gun powder and leaden shot, said shot hitting plaintiff in the right fore-arm, breaking the arm and badly lacerating the hand and fore-arm and by reason of all of which the plaintiff continued sick, sore and disabled for two months during all of which time he suffered great pain; that he is permanently injured in this, that his hand and fore-arm are

left stiff and inflexible to a degree making use of them difficult and awkward and greatly hampering his activity as a working farmer; that he was compelled to pay and did pay out \$400 for surgical attendance and nursing for all of which he is damaged to the amount of \$1,000. The defendant's answer was in four paragraphs; general denial, self-denial, prevention of a wrongful and forcible entry of the dwelling house occupied by the defendants, and that the plaintiff, together with divers other persons acting in concert, came upon and about the premises occupied by the defendants and conducted themselves in a loud, boisterous, and unlawful manner, fired guns, beat on tins and pans, and made other bedlam noises, shouted threats against the defendants and conducted a charavari against them and refused to desist from these unlawful acts although ordered and requested to do so, that the assault was committed to cause the plaintiff to desist from the said unlawful acts and to depart from the premises. The plaintiff filed a general denial to the second, third and fourth paragraphs of answer. Trial was had by jury and a verdict for \$1,000 was returned for the plaintiff and against both defendants. The defendants filed a motion for a new trial, which motion was over-ruled. Judgment being entered against them, they take this appeal.

ASSIGNMENT OF ERRORS

1. The verdict of the jury is excessive.
2. The verdict of the jury is not sustained by sufficient evidence.
3. The verdict of the jury is contrary to the law and the evidence.

4. The court erred in giving the jury instruction No. 5, requested by the plaintiff, which instruction was as follows: "The court instructs the jury that if you find for the plaintiff under the instructions heretofore given, you will allow such damages as seem to you to be right and proper under all the facts and circumstances in evidence, not exceeding \$1,000, the amount asked. In estimating the damages you have a right consider bodily and mental pain, if any, endured by the plaintiff, loss of time caused by the assault, and his diminished capacity for labor resulting directly from the defendants' wrongful acts. You may also take into consideration the surgical bills, if any. It is not necessary that the amount of damages resulting from personal injuries should be proved by witnesses, but it is to be determined by you from your own knowledge and experience as applied to the facts and conditions established by the evidence."

5. The court erred in giving the jury instruction No. 1, requested by the plaintiff, which instruction was as follows: "The jury is instructed that though reasonable force may be used to eject a trespasser, the use of a dangerous weapon is not justified in repelling a trespass, whether such trespass could or could not have been prevented."

6. The court erred in overruling defendant's motion for a new trial.

POINTS AND AUTHORITIES

1. The plaintiff can recover, if at all, only compensatory damages, exemplary damages not being allowable for a tortious wrong which also constitutes an indictable offense. *Taber vs. Hutson*, 5 Ind. 322; *Humphrey vs. Johnson*, 20 Ind. 190; *Struble vs.*

Nodwife 11 Ind. 64; *Butler vs. Mercer*, 14 Ind. 479; *Nosman vs. Rickert* 18 Ind. 350; *Stewart vs. Maddox*, 63 Ind. 51; *Farman vs. Lauman*, 73 Ind. 568; *Boyer vs. Barr* (Neb.) 30 Am. Rep. 814; *Fay vs. Parker*, N. H. 16 Am. Rep. 270; *Taylor vs. Carpenter*, 2 Woodb. & M. 22; *Huber vs. Tueber*, 3 McArth. 484; *Koerner vs. Oberly*, 52 Ind. 284; *Shaefer vs. Smith*, 63 Ind. 226; *Murphy vs. Hobbs*, 7 Colo. 541, 5 Pac. 119; *State vs. Stephens*, 103 Ind. 55; *Louisville, etc., R. Co. vs. Wolfe*, 128 Ind. 347; *Austin vs. Wilson*, 4 Cush. 273; *Whitney vs. Hitchcock*, 4 Denio. 461.

2. To warrant substantial damages, evidence must be given where the subject matter is from its nature capable of proof. The value of one's time is capable of such proof, and in the absence of such proof the jury may not consider the loss of time as an item for which compensation can be given. *Leeds vs. Metropolitan Gas Light Co.*, 90 N. Y. 26; *Mitchell vs. Hudson River R. Co.* 2 Hun. 535; *Owen vs. O'Rielly*, 20 Mo. 603; *Brantingham vs. Fay*, 1 Johns Cas. 255; *Lienan vs. Dinsmore*, 3 Daly 365; *Allen vs. Suydam*, 20 Wend. 327; *Bersiegel vs. N. Y. C. R.R. Co.* 40 N. Y. 10; *McIntyre vs. N. Y. C. R.R. Co.* 37 N. Y. 287; *Walker vs. Erie R. Co.* 63 Barb. 260; *Wade vs. LeRoy*, 20 How. 34; *Nebraska City vs. Campbell*, 2 Black, 590; *Masterson vs. Mt. Vernon*, 58 N. Y. 590.

3. If the court erred in charging that the plaintiff could recover for the value of his time where no value was proved, the judgment must be reversed, no matter how much evidence may be upon other points to sustain it, for this court is unable to estimate how much damage the jury awarded for this item. *Staal vs. Grand Street & N. R. Co.* 13 N. E.;

Sperly vs. Miller, 16 N. Y. 407; Vanderslice vs. Newton, 4 Id. 130.

4. The plaintiff can recover only such damages as he has proven, he having the burden of establishing with reasonable certainty, the extent and nature of the loss sustained by him. *Manistee Mill Co. vs. Hadby*, 51 So. 871; *Louisville etc., R. Co., vs. Minogue*, 14 S. W. 357; *Royan vs. Patterson et al*, 1 S. W. 103; *Owen vs. O'Rielly*, 20 Mo. 603; 8 A. & E. Enc. of Law 557; *Baker vs. Manhattan R. Co.*, 22 Johns & S. 394; *Hale on Damages*, sec. 96-97; *Baker vs. Railroad*, 118 N. Y. 537; *Woods vs. City of Watertown*, 58 Hun. 298.

5. The court erred in giving the first instruction request by the plaintiff, such instruction having no application to the theories of defense brought out in the pleadings or the evidence.

THE EVIDENCE IN BRIEF

The plaintiff and others, neighbors of the parties to the action, testified that on August 1. 1919, they engaged in a charavari at the home of Andrew Rater, the father of the defendant Nellie Cranford; that the charavari took the form of a mock serenade consisting of the shooting of guns, beating on pans, shouting and other bedlam noises; that the plaintiff Charles Dressler was one of the serenaders, and while so engaged in the charavari, was shot and injured by the defendant Nellie Cranford; that at the time the shot was fired the plaintiff was standing in the yard beside the Rater home, Nellie Cranford firing at him from a window on the first floor; that at the time the shot was fired the witnesses say the defendant Walter Cranford, together with Andrew Rater in the room with

Nellie Cranford. The plaintiff himself testified that he spent two months in the hospital as a result of the injury thus received and that he was required to pay out \$400 in hospital charges and for medical attendance. He introduced Dr. Rice who testified that he had treated the injured arm and had been paid \$—— for his services. Dr. Rice failed to qualify as an expert and did not give any testimony as to the nature and extent of the injury, other than that it was a gun-shot wound. He gave no testimony as to the probable results of the injury as to disability of the plaintiff. There was no other evidence introduced by the plaintiff as to the damages he had sustained.

The defendants sought to prove by several witnesses that Walter Cranford was not in the room with Nellie Cranford at the time the shot was fired; that the shot was fired by Nellie Cranford in self-defense, the plaintiff being about to assault her with a shot gun; that at the time he was shot, the plaintiff was attempting to climb through the window of the bedroom in which Nellie Cranford was hiding; that the plaintiff and others were engaged in a riot on the premises occupied by the defendants and that the shot was fired in order to cause them to desist from their unlawful acts. Mr. Barry was introduced by the defendants and testified that he was a neighbor of the plaintiff and since the injury had seen him engaged in pitching horse shoes, playing croquet, and working in his garden hoeing potatoes.

There was no evidence in rebuttal and the jury being instructed found for the plaintiff and against both defendants.

ARGUMENT

It is the first contention of the appellants that the damages awarded the plaintiff are excessive, that he is entitled to recover only for actual losses, past or future, which he has established by a preponderance of the evidence. This is not a case in which exemplary damages may be awarded the injured party, even though he should prove circumstances exceedingly aggravating. Assault and battery, such as the one complained of by the plaintiff, besides making the defendant liable in a civil action for damages, subjects him to a criminal prosecution and punishment. It is accordingly in that category of cases in which punitive damages cannot be awarded, cases which are at the same time civil wrongs and criminal offenses. This rule is based upon the theory that the allowance of punitive damages for a tort punishable criminally is contrary to the fundamental principles of the common law as the express constitutional provisions prohibiting double punishments. This danger of double punishment is readily apparent. A criminal prosecution is no bar to an action for damages for the same offense, nor does the award of damages to the injured party ever prevent the defendant being punished in the proper criminal proceedings.

Nor does the idea of double punishment furnish the only reason for refusing punitive damages for a tort which is also a crime. To attempt, in a civil action, to punish a criminal offense by allowing punitive or exemplary damages "deprives the defendant of his constitutional right of indictment or complaint on oath, before being called into court; deprives him of his right of meeting the witnesses against him face to face; de-

prives him of his right of not being required to testify against himself; deprives him of his right of being acquitted unless the proof of his offense is established beyond a reasonable doubt; deprives him of his right of not being punished twice for the same offense. Punitive damages destroy every constitutional safeguard within their reach." *Foster, J. Fay vs. Parker*, 16 Am. Rep. 270.

While there may be found authority for allowing punitive damages in cases where circumstances such as gross negligence, wantonness, or malice are sufficiently aggravating to demand that the offender be punished for the sake of public example, the better rule, and the one founded on "the principle inculcated in every well regulated system of government, viz, that each violation of the law should be followed certainly by one appropriate punishment and no more", is found in the leading case of *Tabor vs. Hutson*, 5 Ind. 322. Davidson, J., in giving the decision of the Supreme Court of Indiana, said, "Where the defendant is sued for the commission of a tort, such as slander, an offense not the subject of criminal punishment, the rule that gives damages 'to punish the offender' may, with some degree of propriety, be applied because it is the only mode in which, by public example, the various rights in the community to personal security and private property can, under the sanction of the law, be protected from injury and outrage. In such cases there is wisdom in allowing the jury to 'blend together the interest of society and the aggrieved individual.'"

But there is a class of offenses, the commission of which, in addition to the civil remedy allowed the injured

party, subjects the offender to a state prosecution. To this class the case under consideration belongs, and if the principle of the instruction be correct, Tabor may be twice punished for the same assault and battery. This would not be in accord with the spirit of our institutions. The constitution declares that "no person shall be twice put in jeopardy for the same offense" and though that provision may not relate to the remedies secured by civil proceedings, still it serves to illustrate the fundamental principle inculcated in every well regulated system of government, viz., that every violation of the law be followed certainly by one appropriate punishment and not more.

The state has undertaken to vindicate her own wrongs and can there be any valid reason why such vindication should be the result of a suit in favor of a private individual. It matters but little to the offender in what form he pays the penalty so that he pays it but once; but the rules of pleading do not permit a judgment like the present to be set up as a bar to a state proceeding. Hence the defendant still remains liable to be tried and convicted for a public offense. Though liable to be punished, it is true that a criminal proceeding may not be instituted against him; but that contingency does not affect the principle involved because the penalty which he has incurred belongs to the state, and her failure to sue for it would furnish no reason for its recovery in this action."

In *Austin vs. Wilson*, 4 Cush. 273, which was an action for libel, the court said, "If exemplary vindictive or punitive damages can ever be awarded as an example to deter others, or as a punishment to the de-

fendant, they cannot be recovered in an action for an injury which is also punishable by indictment, as libel or assault and battery. If they could be, the defendant might be punished twice for the same act." These cases are followed by a formidable host of decisions, some of which are cited above under Points and Authorities, 1. In one of these cases, *Keorner vs. Oberly*, 56 Ind. 284, a statute providing that punitive damages might be had in a civil action for a wrong which also constituted an indictable offense, was held to be unconstitutional.

The plaintiff, then is entitled only to compensatory damages, damages which are calculated to compensate him for the injuries which he has sustained by reason of the appellant's alleged wrongful act, by reason of which "the plaintiff continued sick, sore, and disabled for two months, during which time he suffered great pain; that he is permanently injured in this, that his hand and forearm are left stiff and inflexible, making use of them difficult and awkward and greatly hampering his activity as a working farmer; that he was obliged to pay and did pay out \$400 for surgical attendance and nursing, for all of which he is damaged to the amount of \$1,00." Plaintiff's complaint herein. He is entitled to recover only on such items of damage as he specifies in his complaint. Here he is setting up four items on which he asks compensation. to wit: loss of time, pain and suffering, decreased capacity for labor, and \$400 paid out for surgical attendance and nursing. It is not the contention of the appellants that an assault and battery does not entitle a plaintiff to recover on any or all of these items. But it is necessary for

him not only to specify in what respects he was damaged but also to prove with reasonable certainty the existence and extent of the damage. In this case, the allegations of the plaintiff's complaint were covered by a general denial by the appellants. They denied that he was damaged to the extent alleged or in the respects set out. The burden of proving the facts alleged by him was thus put on the plaintiff, and before he can recover in this action he must prove by a preponderance of the evidence all the facts alleged in his complaint. He is required to prove not only that the injury was inflicted in the manner alleged but also that it resulted in damage to him in the amount asked. In short, he can recover no damages which he has not proved and the jury can award no damages which are not fixed with reasonable certainty by the evidence.

Let us consider whether the plaintiff has shown any damage in the items specified. The first consideration urged in his complaint is loss of time. In order for him to recover for time lost he must prove not only that he lost time, and how much, but also what the time was worth. The value of time lost is found by determining what the injured party would have earned during the period shown if the injury had not been inflicted, and in order to recover, the plaintiff must prove his loss of earnings with reasonable certainty as to the amount. In this case he has failed to do so. There is nothing in the evidence to show what he was earning before his disability or how much less he earned by reason of the disability. The general denial of the defendants denied that the plaintiff lost anything and placed the burden on him of showing

what he did lose, if anything. He has failed to support this burden for the record discloses that there is no evidence whatsoever as to the amount of his loss, or in fact, that there was any loss of earnings. Accordingly, he cannot be compensated on this first item. Where loss of time is claimed as an item of damage for a personal injury, if the plaintiff fails to prove the value of the time lost, only nominal damages can be recovered. 8 Am. & Eng. Enc. of Law 557. It is a well established rule that to warrant substantial damages, evidence must be given where the subject matter is from its nature capable of proof. The value of one's time is capable of such proof and therefore its absence is not excused.

In *Leeds vs. Metropolitan Gas Light Co.*, 90 N. Y. 26, which was an action to recover for personal injuries, the plaintiff set up loss of time in consequence of his confinement to the house and disability to labor, as an item of damage. On the trial no evidence was introduced as to the amount which the plaintiff was earning before the injury, or what he lost by reason of the confinement for the period shown. The Court of Appeals of New York held, "the element of damage which consists of loss of time is purely pecuniary and for such only fair and just compensation can be given and the jury has no arbitrary discretion but must be governed by the weight of evidence. The rule of recovery is compensation. Where the loss is pecuniary and is present and actual and can be measured, but no evidence is given showing its extent or from which it can be inferred, the jury can allow nominal damages only. *Sedg. Dam.*, Chap. 2, p. 47, *Brantingham vs. Fay*, 1 Johns Cas.

264; *New York Dry Dock Co. vs. McIntosh*, 5 Hill 290. In the present cause the jury knew simply that time was lost by reason of the injury and the incapacity to labor. They were bound to consider it of some value, but they could not go beyond nominal damages and give compensation for it on an arbitrary standard of their own. Among the elements of damage is the cost of cure, the bill and expenses of medical attendance. Suppose the bare fact was shown that the plaintiff had a doctor but the length of his attendance was not given, the amount of his charge not proven, would it do to permit the jury to give compensation for the cost of cure upon their own guess or speculation as to the amount? Where actual pecuniary damages are sought, some evidence must be given showing their nature and extent. If this is not done, the jury cannot give an arbitrary estimate of their own."

Likewise in *People ex rel. vs. Mutual Protective Union*, 118 N. Y. 109, which was an action to recover for loss of earnings as a teacher, such loss being sustained by reason of incapacity resulting from personal injury, it was held that as there was no evidence as to what the plaintiff had been receiving as salary for her services as a teacher in the public schools, or what she had been receiving as wages for services as a private teacher of music, she could recover only nominal damages for loss of time.

Our next consideration will be the damages which the plaintiff is entitled to recover by reason of his alleged decreased capacity to labor. It is the contention of the appellants that on this point also the plaintiff has failed to introduce sufficient evi-

dence to allow the jury to award any damages on this item. The rule in respect to decreased earning capacity is similar to that governing compensation for loss of time and earnings. The loss must be shown with reasonable certainty before the jury can be allowed to compensate for it. In addition to showing that there was a wrongful act on the part of the defendants, the plaintiff must show that the wrongful act resulted in an injury which is permanent; that the injury interferes with or prevents his activity in the occupation in which he was formerly engaged. He must show the period of time for which this condition may be reasonably expected to continue, and fix with reasonable certainty the amount by which his earnings are thereby decreased. Until he has done this the jury cannot consider decreased capacity to labor as an item of compensation.

An examination of the record fails to disclose any evidence tending to prove these material facts. Dr. Rice who testifies that he treated the injury, and who accordingly must have been familiar with its nature and extent, gave no testimony to the effect that the injury was permanent or that it would permanently incapacitate the plaintiff. The plaintiff himself while on the stand gave no evidence that would lead anyone to believe that his injury would permanently incapacitate him or cause any decrease in his earning power. There is also an utter lack of evidence going to show the earning power of the plaintiff before the injury was inflicted. This fact is very important and the plaintiff's failure to prove it would alone be sufficient to prevent the award of compensatory damages for decreased earning capacity even

though he should show by a preponderance of the evidence a complete disability to engage in his former occupation. The jury is never permitted to guess at, or speculate on, damages which are in their nature pecuniary and capable of being fixed with reasonable certainty by the evidence.

A leading report on this point is *Staal vs. Grand St. and N. R. Co.*, 13 N. E. which was an action for personal injuries. There was no proof touching the age, habits, capacity, ability to work, skill in his trade, the wages or the earnings of the plaintiff, or the compensation he was able to earn, or his chances of getting work. The trial court, recognizing the rule laid down in *Leeds vs. Metropolitan Gas Light Co.*, supra, charged that the proof did not authorize the jury to award any damages for the inability of the plaintiff to work and earn wages prior to the trial. But he charged that they could award such damages for the future, that is, they could take into account, as a distinct item if damages, the plaintiff's pecuniary loss on account of the injury caused by the diminution of his ability to earn a livelihood and "the chances of what money he would make but for the injury." The Court of Appeals of New York held that the charge was clearly in conflict with the case cited. In commenting on the *Leeds* case, the court said: "There it was held that if the value of the time lost, or facts on which an estimate of such value can be founded, are not given, only nominal damages can be awarded. There it was shown that the plaintiff was engaged in a business at the time of the injury and that he was not able to attend to the business since the injury, but it was not

shown what the business was or the value of his time, or any facts as to his occupation upon which the value could be determined. The charge that the plaintiff was "entitled to recover compensation for the time lost in consequence of his confinement to the house, in consequence of his inability to labor from the injury sustained," was held to be erroneous as the jury was left to guess at, or speculate upon the value of the lost time, without any basis in that respect for their judgment to rest upon. It is true that the charge there related to past loss; but if a jury cannot, without any adequate basis, guess at or speculate in such action as to the pecuniary loss suffered by the plaintiff before the trial, we can perceive no reason for not applying the same rule to future losses. Before damage for future pecuniary loss can be awarded, there should be some proof, such as a party can always give, of his circumstances and condition in life, his earning power, skill, or capacity. So much is left to the arbitrary judgement of juries in this class of cases, that the rule which requires such proof of pecuniary losses should not be relaxed."

The case at bar is exactly in point with *Staal vs. Grand Street & N. R. Co.* It is true that in the present case the plaintiff testified that he was a farmer by occupation. But such proof alone is not sufficient to take the case outside the rule. There are farmers and farmers. There are citizens who derive enormous incomes from agricultural pursuits while other tillers of the soil are failing to secure the necessities of life from their agrarian endeavors. What is there in the record to show what measure of material success crowns the efforts of the plaintiff. How can

the jury determine his earning capacity except by pure guess or vague speculation.

Aside from the deficiency above pointed out, the plaintiff's case is defective in that he has failed to show the nature and extent of his future loss. And this short-coming is in itself fatal to his right to recover compensatory damages on this item. Here, again, the burden was on the plaintiff, and here, likewise, he has failed to support it. The rule in such case is clear. In *Manistee Mill Co. vs Hodby*, 51 So. 871, another action for personal injuries, the court in reversing the judgment, said, "In the present case the plaintiff testifies that he was incapacitated to do saw-mill work, that is, the physical part of it, but as it is evident that he is still capable of doing something for a livelihood, the burden was on the plaintiff to show the difference between his earning capacity before and that since the injury." In *Railroad vs. Minogue*, 14 S. W. 357, the court held, "while absolute certainty as to the result of the injury should not be required, yet a mere conjecture, or even a probability, does not warrant the giving of damages for a future disability which may never be realized. The future effect of the injury should be shown with reasonable certainty to authorize damages on the score of permanent injury." Attention is called to the words "or even a probability does not warrant the giving of damages for future disability," these words emphasizing the rule that where a loss is purely pecuniary, and there is a failure of evidence tending to determine it, the jury cannot be permitted to consider such item of loss in awarding compensation for the injury.

The above arguments and authorities are presented to demonstrate the validity of our contention that the trial court erred in instructing the jury that in determining the measure of damages, they might consider the plaintiff's loss of time and earnings, and his decreased capacity for labor. We maintain that before they might consider such items, the plaintiff was required to furnish them with evidence sufficient to determine with reasonable certainty the amount of such loss. He has failed to do so and the instruction allows the jury to compensate the plaintiff for purely pecuniary losses which, in the trial of the case, he did not even attempt to establish. An instruction which does this is clearly erroneous.

The appellants also took exception to the first instruction requested by the plaintiff below and which was given by the court. The instruction is as follows: "The jury is instructed that though reasonable force may be used to eject a trespasser, the use of a dangerous weapon is not justified in repelling a trespass, whether such trespass could or could not be prevented." We do not attempt to show that this instruction does not state the law but we base our objection to it on the grounds that it does not state law which is applicable to this case. It deals with assaults committed for the purpose of removing a trespasser from premises occupied by the defendants. This theory of defense was not set up or relied upon by the defendants below. They plead that the assault was committed to prevent the wrongful entry of a dwelling house, which pleading presents an entirely different theory than that dealt with in the instruction. While it may be the law that it

is never permissible to use a dangerous weapon in order to remove a mere trespasser, yet such force may often be applied in order to prevent his wrongful entry of a dwelling house. It is bootless to contend that since the instruction has no application to the theories of defense plead by the defendants, they could not have been prejudiced by it being given. While to a lawyer this irrelevance might be obvious, to a jury of laymen it is in no wise palpable. Nor do the other instructions cure the error committed in giving the one in question. The ninth instruction requested by the defendants and given by the court, it as follows: "The court instructs the jury that a person is entitled to use reasonable force to prevent a wrongful aggressor from entering the dwelling house occupied by the former. If you find that at the defendant, Nellie Cranford, assaulted the plaintiff, while he was engaged in attempting to wrongfully enter the dwelling house occupied by her, you shall find for the defendants providing you believe that the force used by her was such as in view of all the surrounding circumstances reasonably appeared to her to be necessary." This instruction correctly stated the law applicable to the theory plead, but in the instruction to which exception is taken, the jury was told that the use of a dangerous weapon can never be considered as reasonable force. Their conclusion must be that in shooting the plaintiff the defendant was not acting within the privileges allowed her by the law, as set forth in instruction No. 9, given above.

CONCLUSION

In closing the appellants wish to point out the grounds on which they base their contention that the judgment should be reversed. We have endeavored to show that the plaintiff can recover in an action of this kind, if anything, only compensatory damages; that to warrant substantial damages, evidence must be given where the subject matter is, from its nature, capable of proof; that the value of one's time or the extent of his loss of earning capacity is capable of such proof and in the absence of such proof, the jury cannot be permitted to consider these items in awarding damages. The trial court accordingly erred in charging that the jury might consider loss of time and decreased capacity for labor, for the record shows that the plaintiff has introduced no evidence on either of these items. The instruction in order to repel a trespasser was erroneous in that it had no application to the pleadings or evidence in the case and misled the jury as to the merits of the theory of defense advanced by the defendants.

Wherefore the appellants pray that the learned Supreme Court of Notre Dame will remand the case to the trial court with instructions to grant the appellants a new trial.

Respectfully submitted to the Honorable, the Supreme Court of Notre Dame.

JAMES L. O'TOOLE.

Attorney for Appellants

**BRIEF OF ALDEN J. CUSICK IN CASE OF
CRANFORD vs. DRESSLER.**

In the Supreme Court of Notre Dame
Nellie Cranford and Walter Cranford
Appellants

vs.

Charles Dressler,

Appellee

Brief for Appellee

Appeal from Notre Dame Circuit
Court.

RECORD.

The appellant counsel's statement of the facts and record is correct, except that plaintiff filed a general denial to the second, third and fourth paragraphs of the defendant's answer instead of to the first, second and third paragraphs.

A more detailed statement of facts and record appears on page 29, February issue, Notre Dame Law Reporter, 1921.

EVIDENCE.

The learned counsel for the appellant has, with but few exceptions, transcribed the evidence with verity. I shall here consider only those omissions and errors vital to this appeal.

Brief for the appellant states that at the time Nellie Cranford fired the shot which resulted in the injury to Charles Dressler, according to testimony of plaintiff's own witnesses, the said Charles Dressler was "standing in the yard beside the Rater home." According to Charles Dressler's own testimony, corroborated by that of Clyde Walsh, Gerald Craugh, Joseph Sanford and Mike Burns, all neighbors to both the appellants and the appellee and members of the party which was serenading the appellants at the time of the assault herein complained of, the plaintiff, Charles Dressler, was standing in an alley-

way not less than nine feet from the window through which the shot was fired; that at no time did he leave the alley-way and enter upon the four-foot lawn before the window. How then, could he have attempted to climb through this window, as alleged by the appellants? The overwhelming testimony on this point, therefore, becomes of great importance in considering assignment of error five relating to the use of a deadly weapon to resist a trespass.

As bearing upon the probable conduct of those engaged in the serenade, it is also important to consider the fact attested by no less than five witnesses, that each of the above "trespassers" who were engaged in an "unlawful riot" was accompanied by his wife and children. This fact was verified by the co-defendant, Nellie Cranford, and her boarder and sympathetic witness, William Fitzgerald.

Now let us review the evidence bearing on the extent of Charles Dressler's injury and the damage thereby occasioned. Doctor Rice, a graduate of Rush Medical College and a bone specialist of ten years' experience, explained in detail the nature of Charles Dressler's injury as revealed by exterior diagnosis before and after removal of shot, and also by three X-ray examinations. Doctor Rice testified that the plaintiff's "right arm was broken and his hand and forearm badly lacerated and that said arm and forearm are permanently injured to the extent that they will ever remain stiff and inflexible." Dr. Rice also testified that he had received from the plaintiff, Charles Dressler, \$200.00 in full payment for

professional service relative to injury herein at issue.

Appellant's counsel state that there was no evidence on damage other than that "plaintiff suffered from gunshot wound." As the record will show, this is a gross misstatement of fact. In addition to testimony that he was "sick, sore and disabled for a period of two months during all of which time he was under treatment at the St. Joseph Hospital, South Bend, Indiana, and suffered great bodily and mental pain, the plaintiff, Charles Dressler, also said that he was thirty-five years of age at the time of the assault and was a hard-working farmer of very moderate means and compelled to "depend on his work on the farm for a livelihood for himself and family of wife and three small children"; that he had always plowed his acreage prior to the injury and that he was no longer able to handle a plow. The only evidence introduced by the defendants to controvert this testimony was that of Norman Barry, a back-door neighbor, who claimed to have seen the plaintiff after the accident "playing horseshoe and croquet and on one occasion hoeing potatoes in his garden." We may admit all of these facts without impeaching in the least the decreased capacity of the plaintiff to "plow and work his farm as he had always done prior to the injury." But we ask that the testimony of Norman Barry be weighed in light of his sworn statement that, in this cold climate when potatoes are first planted in the spring, Mr. Barry saw the plaintiff *hoeing the stalks*. Further, Clyde Walsh, next-door neighbor to the plaintiff, testified that not once since the assault has he seen Charles Dressler working his farm; not even "hoeing potatoes." It seems to us

that our testimony on this point is most convincing. A hard-working farmer before the assault in issue, has by this assault and battery, been deprived in great part of the capacity to work his farm. This evidence is important as bearing upon the damages (\$600) awarded by the jury in addition to the \$400 proved to have been actually paid out by the plaintiff for medical attention. We elaborate on this point in the argument.

POINTS AND AUTHORITIES.

I. Punitive damages may be recovered in addition to compensatory damages in the great majority of American states regardless of whether tort constitutes an indictable offense. We admit that Indiana decisions affirm the contrary, but contend that they are unsound and should be reversed.

Brown vs. Evans, 17 Fed. 512; supported by the following: 44 Wis. 282; 76 Cal. 532; 20 Am. Rep. 668; 13 How. 371; 33 Mich. 49; 20 Am. Rep. 668; 64 N. Y. 440; 45 Vt. 289; 19 Fla. 117; 120 Ill. 83; 29 N. W. 802; 18 N. W. 473; 21 Ia. 379; 26 Ia. 185; 29 Ala. 628; 36 Ia. 587; 2 N. W. 1079; 27 Minn. 308; 23 Miss. 61; 18 Mo. 71; 6 Hill 466; 87 N. Car. 303; 10 Ohio St. 277; 91 U. S. 493; 27 Am. Dec. 689; 43 Me. 163; 24 Wis. 292; 81 Ill. 70; 6 Tex. 266; 27 Miss. 68; 23 Miss. 598; 114 Mass. 518; 45 Cal. 337; 27 Ohio St. 277; Vol. I Sedgwick on Damages 53, 174, 323 and note 335, 344; Field on Damages 700; Greeleaf on Evi. No. 267, Vol. II; Am. & Eng. Ency. of Law, Vol. 5, page 22.

II. One thousand dollars damages in this case not excessive: Mo. Pa. R. R. vs. Ray, 26 S. W. 768; Smith vs. Whittier, 30 Pac. 529; 31 Pac. 411; 53 Fed. 843; 21 S. W. 313; 30

Pac. 601; 6 Ind. App. 332; 32 Pac. 307; 53 N. W. 982; 76 N. Y. 594; 92 S. W. 530; 27 N. E. 937; 44 S. W. 262; 169 Ill. App. 494; 61 Tex. 149; 85 Ind. 165; 61 Wis. 450; 88 Ill. 312.

III. Courts will not disturb the verdict of a jury on the grounds that damages awarded were excessive, unless it is clearly evident that the jury acted with prejudice, partiality or corruption: 141 Ind. 533; 34 Ind. 462; 21 Ind. App. 397; 84 Ind. 189; 100 Ind. 181; 11 Ind. 156; 108 Ind. 548; 120 Ind. 397; 8 App. 606; 19 App. 368; 19 App. 535; 21 App. 397; 26 App. 307; 32 App. 569; etc.

IV. The trial court did not err in charging the jury instruction number 5; namely that plaintiff may recover value of his time where no definite value proved. Hence no grounds for reversal of judgment: *Mabrey vs. Cape Girardeau & Jackson Gravel Road*, 67 S. W. 394; *Harmon vs. R. R.*, 168 Mass. 337; also 7 S. E. 515; 47 N. E. 100; 68 Am. Dec. 553; 21 N. E. 598.

ARGUMENT.

In the excellent brief submitted by counsel for the appellants, great stress and much argument is brought to bear upon the theory that exemplary damages cannot be awarded in a civil action for an offense which is also criminal in its nature. The jury were not instructed that they might give exemplary damages. Such damages were not claimed by the pleadings or by the evidence, and we cannot conceive how an intelligent jury could be led off upon that field of investigation. All of the instructions made by the learned trial court contain correct propositions of law, and if the appellants thought that there was any danger that the jury might enter

upon the question of exemplary damages they ought to have requested the court to instruct the jury, in making up their verdict, to disregard all claims or supposed claims on account of exemplary damages. So plainly, the question of exemplary damage is beside the issues presented by this case.

However, since the point is raised we shall meet it and point out to the learned court wherein appellants' argument is fallacious. We admit that Indiana courts have repeatedly asserted that exemplary damages cannot be recovered for a tort which is also an indictable offense, but exhaustive search has revealed the fact that Indiana is supported in this view by not more than two states, and that a great majority of the other states have considered the question and decided that exemplary damages may be recovered in addition to compensatory.

The United States Circuit Court in *Brown vs. Evans*, 17 Fed. 912, stated in unmistakable terms that "It may be laid down as a general proposition of law, elementary in character, that in cases of personal torts such as assault and battery, slander, etc., where the elements of fraud, malice, gross negligence, cruelty, oppression, brutality or wantonness intervene, exemplary or punitive damages may be recovered from the defendant. An examination of a few of the authorities will establish the fact that it has been the settled rule and law of this country for more than one hundred years and that such is now the law in nearly every state in the Union." For further authority on this point we refer the learned court to page 3, par. 1, of this brief.

And again, in the words of Justice Grier of the United States Supreme

Court in *Day vs. Woodworth*, 13 How. 371, we read: "It is a well established principle of the common law that in actions of trespass and all actions on the case for torts a jury may inflict what are called exemplary, punitive or vindictive damages upon a defendant, having in view the enormity of his offense rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument. By the common, as well as by statute law, men are often punished for aggravated misconduct or lawless acts, by means of a civil action and the damages inflicted by way of penalty or punishment given to the party injured."

And once again we find this principle reiterated in a Wisconsin case. "Exemplary damages are not designed as a substitute for the ordinary penalty imposed by the criminal laws upon the wrong committed, nor are they intended solely to supply the want of such a penalty for acts not punishable criminally. There is nothing inconsistent in allowing both remedies where the act complained of is criminal. No reasonable objection can be urged against subjecting one who has committed a crime, which is also a private wrong, to the penalty of damages graduated by the turpitude of the act, as compensation to the party injured, and as warning to other evil-doers, notwithstanding the fact that the same act as a public offense is amenable to criminal punishment." *Brown vs. Swineford*, 44 Wis. 282.

The appellants vigorously contend

that the recovery of exemplary damages in a civil case subjects the tortfeasor to double punishment, but this view is as unsound as their statement of the general law is falacious. "The maxim of the common law that no one shall be twice vexed for the same cause, when it applied at all, prevented a second prosecution as well as a second punishment, and if it applied to civil damages would cover the whole, and not merely what is assumed to be a part of them. But there is no analogy between civil and criminal remedies. The punishment by civil prosecution is for private redress while the criminal remedy is for the grievance of the public." *Elliot vs. VanBuren*, 33 Mich. 49; 20 Am. Rep. 608.

In further support of their contention appellants flaunt before us the constitutional provision that "no person shall be twice put in jeopardy for the same offense." The words are correct, but their interpretation wrong. This clause does not apply to civil proceeding. In a case almost identical with the one at bar (civil action for assault and battery) and reported in 44 Wis. 287, *Ryan, C. J.*, said: "It would have been no subject of regret to the court if the obligation of the constitution called upon to abridge the application of this rule. But the court is unable to hold that the constitutional provision has any controlling bearing upon this question. The constitution only re-enacted what was the general if not literally universal rule at common law. The word 'jeopardy' is therefore used in the constitution in its defined technical sense at the common law; and in this use it is applied only to strictly criminal proceedings by indictment, information or otherwise." This same interpretation may be

found in innumerable decisions and texts chief of which are: 44 Wis. 285; 60 N. Y. 440; Sedgwick on Damages, page 38; 1 Bishop Crim. Law, N. 1012; 3 Greenleaf on Evidence No. 37; 1 Alb. Law Digest, 650.

And so we conclude, that though Indiana law on the question of exemplary damages has been correctly stated by counsel for appellants, this law is fundamentally unsound and contrary to the overwhelming weight of American authority. But we neither asked for exemplary damages in the case at issue nor were the jury instructed to consider them; so for disposition of this case the law on that subject is immaterial.

The second, third and fourth points submitted by appellants may be considered together, since they all directly relate to the trial court's instruction permitting the jury to consider loss of time and decreased capacity to labor, in light of alleged insufficiency of evidence.

The complaint specifically states that the plaintiff was confined in the hospital for a period of two months on account of injuries sustained by the assault and battery at bar, and plaintiff introduced evidence to show that he has been unable to do manual labor since that time, and that he was thirty-five years of age and a hard-working farmer of very moderate means and compelled to "depend on his farm work for a livelihood for himself and family of wife and three small children;" that he had always plowed his acreage prior to the injury but has never been able to handle a plow since. "It is true that there was no specific evidence as to the value of time lost, nor was it necessary that there should be." as was stated in *Gedes vs. Foundry Co.*, 25 S. W. 557.

It is a general doctrine of the law of damages that plaintiff is required to produce the best evidence of the amount of damages sustained which the nature of the case permits. A person will not be denied compensation for a certain loss which he has sustained because there is no absolute way to measure such loss. So the law commends the solution of such problems to juries. Quoting from *R. R. Co. vs. Baron*, 72 U. S. 90, "The damages in these cases when the suit is in the name of the injured party must depend very much on the good sense and sound judgment of the jury upon all the facts and circumstances of the particular case."

In *Mabrey vs. Cape Girardeau & Jackson Gravel Road Co.*, 69 S. W. 394, the plaintiff received injuries whereby he sued for damages and loss of time. The only evidence tending to prove the value of the plaintiff's time was that of his occupation, farming. The court held in this case, that evidence in a personal injury action, that the plaintiff was a farmer working his own farm was sufficient to justify submission to the jury of his loss of time. Also, in the words of the court: "In an action for personal injuries if plaintiff would recover for loss of time he must establish it by the best evidence that the nature of the case permits. In many instances no such proof is possible for the employment which the injured party follows yields no certain, fixed income, yet such person will not be denied all redress for the loss of time because of his inability to prove exactly what the loss was any more than he would be deprived of compensation for his pain and anguish, because those sufferings cannot be measured by money."

In the case of *Harmon vs. the R. R.*

Co., 168 Mass. 337, the court said: "It is a matter of common knowledge that average jurors in countries where agricultural pursuits are followed have a fair general opinion of the loss sustained by a farmer being laid up for a month or more due to personal injuries. They possess such information without being enlightened by expert testimony, as the experts themselves would have to be gathered from the same class of men that usually constitute the juries."

The appellants greatly stress the fact that we did not prove the earning capacity of our appellee before the assault and battery and the decrease in that capacity for his life expectancy after the injury, as determined by standard mortality tables. In the case of a hard-working farmer "of very moderate means" these facts are incapable of ascertainment. Every case cited by the appellants has to do with those who are on salary or have regular and definite incomes; not one applies to a farmer working his own farm for the livelihood of himself and family." In *Petrie vs. the R. R. Co.*, 7 S. E. 515, the court says: "There are certain employments so extensively followed and so intimately blended with the customary life of our people and within everyone's experience that the law wisely declines to exact specific proof of them, deeming it expedient to trust rather to the general source of information which all men have access to, since exact proof is unobtainable in any event." The following citations support this contention: 101 U. S. 453; 38 S. W. 162; 15 L. Ed. 812; 7 S. E. 512; 47 N. E. 100; 68 Am. Dec. 553; 21 N. E. 598; 23 S. W. 760; 116 Mo. 269; 14 S. W. 756; 67 U. S. 592.

The appellants tell us that "There

are farmers and farmers. There are citizens who derive enormous incomes from agricultural pursuits while other tillers of the soil are failing to secure the necessities of life from their endeavors. What is there in the record to measure what material success crowns the effort of the plaintiff? How can the jury determine his earning capacity except by pure guess or speculation?" They may determine this information, as in this case they did determine it, by their general knowledge and observation of "hard-working farmers of very moderate means compelled to depend on their work on the farm for the support of a wife and three small children. That the plaintiff was in this category, was proved by his own testimony supported by that of at least two witnesses, and there was no evidence introduced by the appellant to controvert the fact. We agree that where capable of ascertainment, earning capacity must be proved. But the income of a farmer is dependant on so many variable factors that definite determination of income is impossible and approximate certainty is best arrived at by a jury "composed of ordinary men of ordinary experience."

So, it is evident that the learned court did not err in charging the jury that they might consider loss of time and decreased capacity for labor, on the grounds of insufficiency of evidence, because in the case at bar definite proof is unnecessary and impossible. Hence the second, third and fourth points considered by the appellants are unsound and untenable.

But we may even concede that the court erred in permitting the jury to consider loss of time and decrease capacity to labor, and still uphold our

\$1000 verdict, on physical and mental suffering together with the \$400 proved to have been actually expended for medical attention. It will be noted that appellants studiously evade the item of physical and mental suffering. In *Reddin vs. Gates*, 2 N. W. 623, we read "That pain and suffering constitute an element of compensatory damages has never been doubted." And in 10 S. W. 288, we have authority that "mental suffering will be inferred from severe physical injury without direct proof that such suffering ensued." And for authority that compensation for this pain and suffering may be left to the discretion of a jury we refer the learned court to *Hale on Damages*, p. 70: "Pain and suffering, injury to the feelings and the like cannot be measured by arithmetical rule; and of necessity the compensation for such injuries is left to the sound discretion of a jury." Hence the \$600 in question may be recovered in compensation for physical pain and mental suffering, which is implied from the injury. The \$400 for medical expense is not questioned.

We refer the court to authorities cited under point 11, Page 3, of this brief for proof that \$600 is not excessive to cover the above items of damage.

The fifth contention of the appellant is that the court erred in granting plaintiff's instruction number 5, namely "The jury is instructed that though reasonable force may be used to eject a trespasser, the use of a dangerous weapon is not justified in repelling a trespass, whether such trespass could or could not have been prevented." This instruction was conformable to OUR theory of the case. The appellants object to it because it disagrees with THEIR

theory of the case. But since the jury rendered a verdict to the plaintiff, and to the full amount asked, it must be presumed that the appellant's theory is no longer material. Plaintiff proved by not less than four witnesses that he was at no time within nine feet of the window which the appellant claimed that he opened and partially entered. Hence there was no "breaking and entry" as determined by the jury, so the above instruction as applying to an ordinary trespass was correct.

Before closing, we wish to remind the learned court that appellants have not even contended that the damages awarded by the jury are so excessive as to indicate that they acted from prejudice, partiality or fraud, and this must be proved under *Indiana Statute Vol. 1, 585*, before a court will overthrow a verdict. We conclude this point in the words of *Hale (Hale on Damages, p. 233)*: "Tortious injuries to the person are without precise pecuniary measure. The law has, therefore, committed the determination of the amount of damages to be awarded to the experience and good sense of jurors. And where the verdict rendered by them may reasonably be presumed to have resulted from an honest and intelligent exercise of judgment upon their part, the policy of the court is, and necessarily must be, not to interfere with their conclusion." *Walker vs. R. R. Co.*, 63 Barb 260-267. And as stated by the Supreme Court of *Indiana in Louisville, New Albany & Chi. R. R. Co. vs. Miller*, 141 Ind. 533: "Since nothing appears to induce the belief that the jury must have acted from prejudice, partiality or other improper motive in the assessment of the damages we cannot disturb their verdict. It was their

exclusive province to determine the amount of compensation to be awarded for the injury sustained by the plaintiff, and having determined it, so far as we can judge, upon the evidence without the intervention of improper motives, the court cannot interfere." And again: "Besides the trial judge had vastly better opportunities of weighing the evidence than we have, if we even had the authority to do so, and it was his duty, if he thought the damages were excessive, to promptly grant a new trial and the legal presumption is that he courageously did his duty. Therefore by refusing the new trial he has said to us that, after carefully reviewing the evidence he is of the opinion that the damages are not excessive." Supported by *Cincinnati R. W. Co. vs. Madden*, 34 Ind. 462.

CONCLUSION.

In conclusion the appellee wishes to point out the grounds on which he asks the learned court to sustain his verdict for \$1000. This sum covers only compensatory damages, to-wit: \$400 medical expense, loss of time,

decrease capacity to labor, physical and mental suffering. Appellants grant that \$400 damage recoverable. Loss of time, present and future, is impossible of ascertainment in the case of a "hard-working farmer of very moderate means," by any definite rule. Dr. Rice testified that injury is permanent and neighbors asserted that they have never since the injury seen the plaintiff plowing and working his farm as he always did before, therefore proving beyond a doubt that the plaintiff's capacity to labor has been decreased. The injury was proved and therefore physical and mental pain is presumed without proof. This latter alone is sufficient to support the whole verdict of \$1000. Instruction No. 1 was correct.

Wherefore the appellee prays that the learned Supreme Court of Notre Dame will sustain the verdict of the trial court and jury.

Respectfully submitted,

ALDEN J. CUSICK,

Attorney for Appellee.