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GOVERNMENTAL REGULATION OF RATES UNDER THE FOURTEENTH AMENDMENT.

Among the numerous decisions which have been rendered by the Supreme Court of the United States in regard to the regulation of rates to be charged by public-service corporations, probably those recently rendered in the cases of *New York v. Consolidated Gas Company, N. Y. Law Journal,* Jan. 15, 1909; and *Knoxville v. Knoxville Water Company, N. Y. Law Journal,* Jan. 28, 1909; best evidence the care with which the Federal Court proceeds and the positive facts which they demand, prior to declaring the rates imposed by the legislature of the states as confiscatory under the Fourteenth Amendment. The points involved in both cases being very similar, it will only be necessary to examine the facts and decision of the case against the Consolidated Gas Company in New York, and apply them to the Knoxville Water Company case, in order fully to comprehend the situation. The legislature of New York during the year of 1905-1906, Chapt. 736 and 737, Laws of 1905, passed laws restraining corporations furnishing or selling illuminating gas in the city of New York from charging the city more than seventy-five cents, and consumers other than the city, more than eighty cents per one thousand cubic feet, also requiring them to have a specified illuminating power, a certain pressure at all distances from the place

of manufacture, and prescribing a heavy penalty for their breach. Soon after the statutes were passed the Consolidated Gas Company filed a bill to enjoin the enforcement of these acts on the ground that they were unconstitutional, because the rates fixed were so low as to be confiscatory, the penalties so oppressive as to be unconstitutional, and the proviso regulating pressure impossible of fulfillment under commercially possible conditions and therefore illegal. The preliminary injunction sought was granted, and it was on the constitutionalty of the above points, in an appeal from the Circuit Court to the Supreme Court for the prevention of the issuance of a perpetual injunction, that the Supreme Court held the provisions in regard to pressure and penalties as void on the alleged grounds; but that as the Gas Company had failed to sustain the burden cast upon it of showing, beyond a just or fair doubt, that the rates were confiscatory, within the Fourteenth Amendment of the Constitution of the United States, the bill would be dismissed without prejudice, for by actual operation under the statute, the company may be prevented from obtaining a fair return upon the actual value of the property at the time it is being used for the public, and it should then have another opportunity of seeking redress.

Ever since the case of *Munn v. Illinois,* 94 U. S. 113, was decided, it has not been disputed that the legislature of a state has the power to subject the rates to be charged by public-service corporations to governmental regulation. This can be done either by direct statutory enactment, by delegated authority to a municipal corporation as a political subdivision of the state, *Capital City Gas Company v. City of Des Moines,* 72 Fed. 818; or by a commission created by the legislature for the purpose of regulating the rates in a manner which will conform to the peculiar circumstances existing in each county, city, or town, *San Diego Land & Township Co. v. Jaspar,* 189 U. S. 439. This power, although usually exercised by the enactment of a maximum rate to be charged by the corporation, must be reasonably exercised in good faith, and consistently with the scope and objects of the incorporation, consequently the rates cannot be imposed without reference to what is just and reasonable as between the public and the corporation, for a state cannot by its agencies or under the guise of regulation, bring about a destruction and confiscation of property. *Stanislaus County v. San Joaquin Company,* 192 U. S. 201. The rates should be regulated in such a way as to

enable the company to maintain its existence, to preserve the property invested from destruction, and to receive from the capital actually and *bona fide* invested in the plant, a remuneration or dividend corresponding in amount to the ruling of interest, which is usually six per cent.

These rates, whether imposed by the legislature or the commission, are all presumed to be *prima facie* reasonable, and are the law of the land and must be submitted to both by the corporation and the parties with whom it deals, until an appeal has been made to the judiciary by a bill in chancery to have them declared void for unreasonableness. *Chicago, M. & St. P. Ry. v. Minn.*, 134 U. S. 418, 456. Thus, the burden of proof is cast upon the party alleging them not reasonable, and the judiciary should not interfere with the rates established, unless they are so plainly and palpably unreasonable, as to make their enforcement equivalent to the taking of property without such compensation as under all circumstances is both just to the owner and to the public; or in other words, judicial interference should never occur, unless the case presents clearly and beyond all doubt such a flagrant attack upon the rights of property under the guise of regulation, as to compel the court to say, that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for public use. Unless the plaintiff can show by a fair preponderance of proof that the rates so fixed are not reasonable and in fact so unreasonable as to justify the court in staying its operation, the decree must be for the defendant. *San Diego Land & Township Co. v. Jaspar*, 189 U. S. 439.

The courts are not authorized to revise or change the rates imposed by the legislature or the commission, or to determine what under all circumstances would be a fair or reasonable rate, but their power is merely to determine whether the rates so established are unreasonable and confiscatory and when this has been completed their jurisdiction ceases. At times it is very difficult to determine whether or not rates are confiscatory for there are so many factors, and the application of general principles so strongly differ, as the peculiar circumstances and conditions differ, that there is no special unfailing test or standard of measurement. *Capital City Gas Company v. Des Moines*, 72 Fed. 829. The basis of all calculations, however, as to the reasonableness of rates to be charged by a public-service corporation, such

as a railroad, turnpike, gas, or water company, must be the actual value of the property at the time it is being used for the public. *Smyth v. Ames,* 169 U. S. 466, 547; *San Diego Land Company v. National City,* 174 U. S. 739, 757. In ascertaining that value the courts take many things into consideration. In the above-mentioned companies, the value of the franchise, and the original cost of construction as compared with the present cost, are usually among the first considered. The original cost cannot be taken as representing the actual value, as the company may have made injudicious contracts, had poor engineering, or the materials may have had an unreasonably high cost. Nor can the cost of reproduction always be a fair measure of the present value of a plant which has been used for some years, as the constituent parts depreciate in value from year to year in a varying degree. Then the amount expended in permanent improvements, the amount and market value of its stocks and bonds, the probable earning capacity of the property under the particular rates which have been prescribed by statute, and the sum required to meet the operating expenses are taken into consideration and given such weight as may be just and proper in each case. *Smyth v. Ames,* 169 U. S. 466, 547; *City of Knoxville v. Knoxville Water Co., supra.*

Should the courts, after considering the various elements, find the rates confiscatory, they will be declared unconstitutional, for if the company has been deprived of its right of charging a reasonable rate for the use of its property in the absence of judicial investigation, it is deprived of its lawful use, and thus in substance and effect of the property itself without due process of law, and in violation of the Fourteenth Amendment of the Constitution of the United States, which declares that "no person shall be deprived of life, liberty, or property without due process of law,"—and in so far as it is thus deprived, while others are permitted to receive reasonable profits from their invested capital —the company is deprived of equal protection of the law. *Chicago, M. & St. P. Ry. v. Minn,* 134 U. S. 418, 458; *New Memphis Gas Light Company v. City of Memphis, 72* Fed. 952.

In accord with these principles, the Supreme Court in *Ragan v. Farmers' Loan & Trust Co.,* 154 U. S. 362, where the property was worth more than its capitalization and the prescribed rates would not pay one-half the interest on the bonded debt, and in *Covington Turnpike Company v. Sandford,* 164 U. S. 578; where

the prescribed rates would not pay even the operating expenses, has declared rates unconstitutional where they were clearly confiscatory. But in cases such as *New York v. Consolidated Gas Company, supra;* and *Knoxville v. Knoxville Water Company, supra,* where the evidence was not clear and convincing and where the court had neither actual experience nor adequate proof by which to judge of the confiscatory nature of the rates, they are to be commended for the caution with which they proceeded before declaring the rates illegal. In both equity and justice the contested rates should be given an actual test prior to the final consideration of the question of the issuance of the permanent injunction, and the Supreme Court by refusing to sanction federal intervention without clear proof of unreasonableness is establishing a precedent which should encourage such a trial of the rate laws, prior to the attempt to have them declared unconstitutional.

MALICIOUS PROSECUTION.. CRIMINAL PROCEEDINGS DISMISSED ON ACCOUNT OF LAPSE OF TIME.

Is the dismissal of a criminal proceeding, obtained by the flight of the defendant from the jurisdiction of the court and remaining absent therefrom, for a sufficient period of time to enable him to procure the dismissal of said proceeding solely on account of lapse of time, such a termination of the action as will support a suit for malicious prosecution? This new and interesting question was decided in the negative by the New York Court of Appeals in the case of *Siegmund E. Halberstadt v. New York Life Insurance Company,* Vol. XL, *New York Law Journal,* No. 86.

The action was brought to recover damages for an alleged malicious prosecution for the crime of embezzlement, claimed to have been instituted in Mexico by an agent of the defendant company against the plaintiff. A warrant for the arrest of the plaintiff was issued by the Criminal Court of the City of Mexico, but it was never executed for the reason that plaintiff avoided arrest by leaving the country and remaining away until a dismissal of the proceeding was procured in accordance with the laws of Mexico, on account of mere lapse of time.

No cases were found which are directly in point and the argument of the plaintiff was founded chiefly on *dicta.* In the case of *Clark v. Cleveland,* 6 Hill 344, the court said: "I by no

means accede to the doctrine inadvertently advanced by some judges, that all right to prosecute for the offence must be terminated by a technical acquittal. Nor can it be essentially necessary that there should be an adjudication by the magistrate, or, indeed, any judicial decision upon the merits, by any court, as seems to be supposed by some." This doctrine is much broader than the facts and circumstances of the case required, and as the court decided against the plaintiff on the ground that there had not been a sufficient termination of the prosecution to support an action for malicious prosecution, the force of the rule is greatly lessened.

The case of *Coffey v. Myers,* 84 Ind. 105, is also much relied on by the plaintiff. The facts bear a striking resemblance to those in the present case, in that the defendant in the criminal proceeding avoided arrest by escaping from the state. But in that case, the criminal charge was the result of a conspiracy to injure the defendant, and was known to be false. The charge was bastardy and the flight of the defendant was not due to his guilt but to the fear of his inability to establish his innocence.

In *Robbins v. Robbins,* 133 Ind. 597, it was said: "It cannot in reason make any difference how the criminal prosecution is terminated, provided it is terminated, and at an end." Here also we find that such a broad rule is not supported by the actual decision. The plaintiff was arrested upon a police warrant and after a hearing discharged upon her promise not to further molest the defendant.

The other cases cited by the plaintiff are readily distinguishable from the case at bar, in that the prosecutions were terminated, either by the entry of a *nolle prosequi,* or the abandonment of the criminal charge.

To support an action for malicious prosecution the termination of the proceeding must, in general, be a final acquittal. *Bacon v. Towne,* 4 Cush. 217. This general proposition is held by a long line of cases, but perhaps as good a statement of the law on the subject as can be found is that laid down by the court in *Lowe v. Waterman,* 47 N. J. Law 413. "A criminal prosecution may be said to have been terminated where there is a verdict of not guilty; where the grand jury ignore a bill; where a *nolle prosequi* is entered, and where the accused has been discharged from bail or imprisonment."

The court in its opinion discussed a number of cases which sub-

stantiate the above doctrine, but no cases are cited in which the dismissal of the proceedings was due to technical statutory reasons, as in the case at bar. This very question arose in the case of *Sears v. Hathaway,* 12 Cal. 277. The defendant had caused the plaintiff to be arrested on the charge of concealing property with intent to defraud and delay creditors. The statute provided that in such cases the fraud must be evidenced by writing and in the absence of such evidence the accused was acquitted. The court in its decision said: "A party who stands before a jury in such a case as this on pure technical law, for a defense against an act of moral turpitude, and claiming a discharge because his prosecutor has not pursued a statutory mode of proof to convict him of a crime punishable by the statute, may congratulate himself that the precautions of the law have availed him to escape its merited penalty; but he certainly ought not to have in addition to this immunity, a right to claim a small fortune from his victim for having mistaken the remedy, or not having been as well versed as himself in technicalities which sometimes shield guilt from public justice." Here we have an action which was terminated by a jury's verdict of not guilty. Still the court held that it was not such a termination as would support a suit for malicious prosecution except perhaps to the extent of the amount actually expended by the accused in defending the action.

Another question presented was whether or not the mere issuance of a warrant on a criminal charge constitutes such a prosecution as will give rise to a right of action in the party claimed to have been injured. The courts of the several states are in conflict on this question. The New York court, in sustaining this right, has adopted the rule which is probably supported by the weight of authority and which as the court says should be adopted "if for no other reason than to satisfy the principle of law which demands an adequate remedy for every legal wrong." However, the court was divided on this question, and Justice Vann filed a strong dissenting opinion. All the justices concurred in the result.

WHEN FEDERAL COURTS MAY ENJOIN STATE TRIBUNALS.

In sustaining the action of the Circuit Court, the Supreme Court of the United States placed a new interpretation upon the Act of Congress which protects state courts that have acquired

jurisdiction from interference by the Federal judiciary. In *Prentiss v. Atlantic Coast Line*, 211 U. S. 67, the court holds that this immunity is not absolute and at all events, but that it applies only to proceedings in which the state court is acting as a court,—in other words, that it is the character of the proceedings and not the character of the tribunal, that determines the immunity. The statute in question, Rev. Stat., Sect. 720, is as follows: "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any courts of a state, except where such injunction may be authorized by any proceedings in bankruptcy."

This case arose from the fixing of passenger rates to be charged by the various steam railroads within the state of Virginia. The corporation commission gave notice by publication to all parties interested to show cause why certain maximum rates should not be adopted. The railroad companies appeared and a hearing was had under all the rules of procedure governing a judicial inquiry, and after the roads had announced that they had no more testimony to offer, the commission took the whole matter under consideration and after a delay of several months announced its findings in which it declared that certain named rates would thereafter be in force, and further that these rates had been found just, reasonable and not confiscatory. Before the order could be published, the railroads went into the Circuit Court of the United States and applied for an injunction on the ground that the rates proposed to be enforced deprived them of property without adequate compensation. An injunction *pendente lite* being granted, the commission entered its special appearance in which it objected to the jurisdiction of the court, demurred on the ground that it was protected by the statute above mentioned, and further entered a plea of *res judicata,* on the theory that these rates had been judicially investigated by the commission, which was a court of competent jurisdiction, and found just, reasonable and not confiscatory. All of their defenses being overruled they declined to answer further and the bills were taken *pro confesso* and a perpetual injunction entered. The matter was then appealed to the Supreme Court of the United States.

In sustaining the grant of the injunction, the Supreme Court points out the distinctions that separate the various functions of this Commission. In arriving at a proper understanding of the powers of this Commission they adopt the interpretation placed by the Supreme Court of Appeals of that state upon the sections

of the Constitution of Virginia which created it. In *Norfolk v. Commonwealth,* 103 Va. 295, that court said: "In this commonwealth the State Corporate Commission is the instrumentality through which the state exercises its governmental powers for the regulation and control of public service companies. For that purpose it has been clothed with legislative, executive and judicial powers."

It will be seen from this that the Commission has the powers of the court, and in addition thereto, the powers usually delegated to the other two branches of government. While this is unusual, it has been held constitutional, and is not without precedent. The separation of the three great departments of government is obligatory upon the nation and not the individual states. *Dreyer v. Illinois,* 187 U. S. 71. In *Calder v. Bull,* 3 Dallas 386, the Supreme Court of the United States had before it a case in which the legislature of Connecticut had granted a new trial in a private litigation. It was claimed that this was an invasion of the powers of the judiciary. This was not denied, and the court held that this did not violate any provision of the Constitution of Connecticut and that there was not any federal question involved. There are numerous other instances in the reports where one department of a state has exercised functions of another department.

Admitting that the commission is to some extent a court and that the uniting of powers is constitutional, the next inquiry must be as to the character of the proceedings brought into question. It was the determination and publication of certain railroad rates, and the making of rates is a legislative function. The Supreme Court so held as far back as 1876, *Munn v. Illinois,* 94 U. S. 133; *Chicago etc., Railway Co. v. Iowa,* 94 U. S. 153; and these cases were reviewed and sustained in the famous case of *Smythe v. Ames,* 66 U. S. 466. This settles the question that in prescribing what rates are to be in force, the state, through its commission, was exercising its legislative and not its judicial function.

But even admitting that rate-making is absolutely a legislative function, the Commission contended that a full and complete hearing had been held, in which the railroads had been fully represented and heard, and that in finding that the proposed schedule of rates was just, reasonable, and not confiscatory, the Commission had acted judicially, that there had been due process of law, that the matter was therefore *res judicata,* and the pro-

ceedings in question those of a court such as is protected by the statute under discussion, and in this contention they are sustained by the Chief Justice with whom Justice Harlan concurred. The majority of the court holds that in making the order enjoined, the commission was exercising its legislative functions, and before the matter could become *res judicata,* and attain the dignity and protection of a judicial inquiry, there must first be a valid law, a failure to obey it, and then an inquiry as to whether or not the law had been violated or was constitutional. They rest their conclusion in part upon the decision of the courts of Virginia in *Winchester Railway Co. v. Commonwealth,* 106 Va. 281, a portion of that opinion being the following: "When in the exercise of its legislative function it (the Commission) has in obedience to the laws of the state summoned persons, natural or artificial, before it, to protect their rights, it has done what is not required to be done by the Fourteenth Amendment to the Constitution of the United States, and what it might have omitted to do, so far as that instrument is concerned. But when it comes to enforce its rules and regulations, this right to be summoned to answer is not satisfied by the antecedent summons and appearance before the commission. The Commission may exercise legislative and judicial functions but cannot confuse and blend them in one proceeding."

Pursuing further this line of reasoning the court holds that the final act accomplished determines the nature of the entire proceeding, and in this case the final act was legislative. The previous hearing, while termed by the Chief Justice as a judicial inquiry preceding legislative action, is held by the majority of the court to be only that investigation which to some extent should precede all legislation. It holds that legislation and adjudication cannot be part of one and the same proceeding, and further, that by no process of reasoning can a judicial inquiry take place and litigation result before the law is put into effect. "A judicial inquiry investigates, declares and enforces liabilities, as they stand on present and past facts, under laws supposed already to exist. Legislation on the other hand looks to the future, and changes existing conditions by making a new rule to be applied thereafter. * * * * The establishment of a rate is the making of a rule for the future, and therefore is an act legislative and not judicial in kind. See *Interstate Commerce Com. v. Cincinnati etc., Railway,* 167 U. S. 479 to 505.

Furthermore, it has already been held, in a case involving the North Carolina Railroad Commission, that proceedings legislative in nature are not proceedings in a court within the meaning of Rev. Stat. 720, no matter what may be the general or dominant character of the body. *Southern Ry. Co. v. Greensboro Ice & Coal Co.*, 134 Fed. Rep. 82, affirmed, 202 U. S. 543. Had this been a proceeding to enforce an order of the commission already promulgated, it could not have been interfered with by injunction, but "litigation cannot arise until the moment of legislation is past." See *Southern Railway Co. v. Com.*, 107 Va. 771; 60 S. E. 70.

MENTAL ANGUISH AS DAMAGE IN DELAYED TELEGRAMS.

There have been many conflicts in decisions between the different state courts but it is doubtful whether there is any subject upon which the cases are so positively opposed to each other as that mentioned above.

The Supreme Court of Tennessee in *Western Union Telegraph Co. v. Potts*, 113 S. W. 789, is the most recent case to hold that mental anguish is an element of damage recoverable for delay in delivering a telegram announcing a death. When Shearn and Redfield published their work on the *Law of Negligence*, they expressed the opinion that delay in the announcement of a death may often be productive of an injury to feelings which cannot easily be estimated in money, but for which a jury should be at liberty to award fair damages. No authorities were cited to support the proposition and it passed unnoticed until the case of *So Relle v. W. U. Telegraph Co.*, 55 Tex. 308 (1881). In this case the court adopted the suggestion of Shearn and Redfield, and for the first time in the history of the common law, damages were awarded for mental suffering caused by the delay of a telegram. The opinion said that the natural consequence of a failure to transmit and deliver a so-called death message was to produce the keenest sense of grief and inflict upon the mind the sorest sorrow for which justice required the balm of damages. Hitherto, no jurisdiction allowed a recovery for injury to feelings except in a few isolated breach of promise suits, or in cases where the injury was wilful and malicious. But this case has been the precursor of a number of others holding the same way and may be considered responsible for the great division of opinion now existing. At the time the decision was rendered it is doubtful

whether the court realized the great influence it would have upon many similar cases subsequently arising not only in Texas, but in other states. Other courts were not long in seizing upon the doctrine expressed, and when once they adopted it, except in the case of Indiana, have tenaciously retained it. In *Cowan v. The Western Union Telegraph Co.*, 122 Ia. 379, it was strongly urged that the case of *Mentzer v. Telegraph Co.*, 93 Ia. 752, which followed the Texas decision, be overruled because the authority mainly relied upon in the Mentzer case (*Reese v. Western Union Telegraph Co.*, 123 Ind. 294) had since been overruled by the Indiana courts, but the judges expressed themselves as well satisfied with the principles stated in that case, and hence we find the law of Iowa will still be the same. While the doctrine is of comparatively recent origin it has steadily gained strength, although many judges continually characterize it as being contrary to the common law. But it possesses much inherent merit and after it was first announced rapidly obtained favor with a number of the courts and in some instances with legislatures. The legislature of South Carolina has provided by statute for the recovery of such damages—23 Stat 748, Code 1902, Vol. I, Sect. 2223. This act was held to be constitutional in *Simmons v. Telegraph Co.*, 63 S. C. 425. Prior to its passage, however, South Carolina had adhered to the old common law rule. *Lewis v. Western Union Telegraph Co.*, 57 S. C. 325. The Louisiana Civil Code, Sect. 1934, says where the contract has for its object the gratification of some intellectual enjoyment whether in religion, morality or taste, or some convenience or other legal gratification, although these are not appreciated in money by the parties, yet damages are due for their breach. In *Graham v. Western Union Telegraph Co.*, 109 La. 1070, it is said that in view of this it is difficult to see why a breach of contract which leads to the infliction of positive mental suffering should remain without a legal remedy. While all the courts agree that the legislature may pass such an act, it is remarkable to note the number of cases holding there can be no recovery at common law because the damages are too speculative, and therefore impossible of computation, and yet at the same time intimate that a legislative enactment would afford relief. If it is impossible to determine damages in the absence of a statute, it is questionable whether an act which merely gives a right of action will remedy such a fault.

Until recently the tendency of the Alabama courts was to admit

the rule in its entirety, but with the case of *Western Union Telegraph Co. v. Blocker,* 138 Ala. 484 (1903), it was subjected to the modification that damages will not be allowed for mental anguish unless shown to be accompanied by other damage resulting from the wrong. Nebraska and Nevada, however, have adopted the rule as stated in *So Relle v. Telegraph Co.* (*supra*); *Western Union Telegraph Co. v. Church,* 90 N. W. 878; *Barnes v. Rd.,* 76 Pac. 931.

Despite the number of courts permitting a recovery, upon examining the cases it is apparent that the weight of authority is opposed to this doctrine. But Mr. Sutherland in his treatise on *Damages* (Vol. III, Sect. 980), is of the opinion that the weight of authority favors it. This work was published in 1893, and as the law has undergone many changes since then, it is probable that at the present time the author's opinion would be changed. Some severe strictures have been passed upon the So Relle case by those who incline toward the opposite view. In *Chapman v. Telegraph Co.,* 88 Ga. 763, it is said that the case adopts as law a bare suggestion made by text writers, and that the cases referred to in the opinion were actions for physical injuries of which mental anguish forms an inseparable component. A remark to the same effect is also made in *International Ocean Tel. Co. v. Sanders,* 32 Fla. 434. The justice of the doctrine seems to be fully recognized by the courts holding the negative view, but they are unwilling to part from the idea that there could be no such recovery at common law and that while courts may extend the application of common law rules to the new conditions of advancing civilization, they may not create a new principle unknown to the common law nor abrogate a known one. *Western Union Tel. Co. v. Ferguson,* 157 Ind. 64, overruling *Reese v. Telegraph Co.* 123 Ind. 294. New York follows the majority, and holds that an injury to feelings is not in a judicial sense a proximate consequence of the negligent act. *Curtin v. Co.,* 42 N. Y. Supp. 1109. Arkansas, Mississippi and Missouri all unite in repudiating the Texas rule. See *Peary v. Telegraph Co.,* 64 Ark. 538; *Western Union Telegraph Co. v. Rogers,* 68 Miss. 748; *Connell v. W. U. T. Co.,* 116 Mo. 34. The conflict is sharp and well-defined, for there are no fine distinctions attempted to be drawn in the opinions on either side. The arguments and principles of law applicable are comparatively few and simple, but yet there is almost an even balance of opinion upon each one. The

fundamental objection is that it is impossible to estimate the damages in this class of cases because the injury is of too vague a character to have a pecuniary value. But on the other hand it is claimed that it is as possible to estimate the damages as it is in actions where the mental suffering is incidental to a bodily injury. While there are many strong opinions to be advanced on both sides of the question, it is doubtful whether the doctrine will ever obtain a permanent foothold in the majority of states for there are so many difficulties surrounding its practical application that it will probably never have the support of the weight of authority. It is worthy of notice, however, that those courts enforcing the rule deny that there are any difficulties in the way of its successful application. There are no English cases countenancing such law, for in England the question has evidently been considered not even debatable. It will be interesting to note whether in the future other courts will support it, for it needs but very little authority to shift the weight in its favor.