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REASONABLENESS OF RESTRICTIVE COVENANT IN CONTRACT FOR PERSONAL SERVICES.

The Court of Appeal in England in the recently decided case of *Eastes v. Russ*,[1] denied relief in an action by a pathologist conducting a large laboratory to restrain a former assistant, who, at the commencement of his employment, contracted not to engage in similar work within a distance of ten miles from the plaintiff's laboratory but after six years of service left the plaintiff's employ and established a laboratory of his own within the prohibited area, from carrying on or being engaged in that work. The area of ten miles covered the entire city of London. At the time the agreement was made the defendant was, and he still is, a young man. He admitted that during the time he was with the plaintiff he had many introductions to medical men; that where he had started practice he had opportunities of obtaining the plaintiff's clients, many of whom he had circularized; and that his opposition might be serious for the plaintiff in the course of time.

The points raised in the case were: First, that according to the true construction of the terms of the defendant's engagement he

[1] 110 Law Times, 296.

was only precluded from engaging in similar work during his employment with the plaintiff. Second, that if the defendant's construction of the terms of engagement was not correct, he was mistaken as to the meaning of the terms which were written by the plaintiff, and he ought to be relieved from the consequences of his mistake. Third, that the restriction is wider than reasonably necessary for the plaintiff's protection, and, therefore, void. The trial court thought that the restriction was not void as being unnecessarily wide, for the defendant could not set up an establishment within the restricted area without competing to a considerable extent with that carried on by the plaintiff, and furthermore the plaintiff might very likely desire to increase his establishment; but considered the words of the agreement to be at least fully satisfied by the imposition on the defendant of an obligation not to engage in similar work during the time he was employed by the plaintiff, and further, ambiguous within the doctrine of *Falck v. Williams*,[2] that where there is such an ambiguity in a document that it may be properly understood by the defendant in a sense different from that which the court does ultimately put upon it, and the ambiguity is caused by some want of care on the part of the plaintiff, recovery cannot be had by the latter even at law. Judgment dismissing the action was sustained by the Court of Appeal but the reasons above stated were disapproved. The obligation was considered by the entire court as imposed upon the defendant during his entire life. Following the doctrine of *Tamplin v. James*[3] and *Wilding vs. Sanderson*[4] the defendant was denied relief on the ground of mistake, there having been no misrepresentation and no ambiguity. Two members of the court, however, considered the restraint unreasonable in going beyond what was necessary for the protection of the plaintiff and, therefore, invalid upon the authority of *Mason v. Provident Clothing and Supply Co.*,[5] and earlier cases.[6] The third member of the court dissented on this point, contending that the burden of proving the restraint unreasonable is upon the defendant alleging it,

[2] 1900 A. C. 176.

[3] 43 Law Times 520; 15 Ch. Div. 215.

[4] 77 Law Times 57; 1897, 2 Ch. 534.

[5] 109 Law Times 449; 1913, A. C. 724.

[6] *Nordenfelt Case*, 71 L. T. 489; 1894, A. C. 535, 568; *Leng & Co. v. Andrews*, 100 L. T. 7; 1909, 1 Ch. 763; *Proctor v. Sargent*, 2 M. & G. 20, 33.

and cited several early cases to substantiate his contentions.[7]

It is a well-settled rule of construction that words will be construed most strongly against the party who used them.[8] In the case before us, the restrictive agreement was made at the commencement of defendant's term of service, which, as has been stated, was unspecified; there is no indication from the words used when the restriction was to apply; the defendant simply was "not to engage in similar work". True it is that it is a general rule that where no time has been specified for the duration of a restriction it has been held that the restriction shall operate for the lifetime of the covenantor;[9] nevertheless, in all the cases on the point which we have examined there has been some indication of when the restriction was to apply and that it was intended to hold the party for the remainder of his life; as, *e. g.*, "in the event of dissolution", "at any time thereafter", "after the termination of employment", etc.;[10] and we are led to agree with the trial court that the words of the agreement were fully satisfied by limiting the restriction to the period of employment. But even if the construction of the plaintiff is the proper one, the trial court is justified in its holding on the second point under the authority of *Higginson v. Clowes.*[11] In that case, where the conditions of a sale were likely to have misled the defendant, and the latter contended for a different construction from that of the plaintiff, the court offered the plaintiff the option of having his bill dismissed or of having the contract executed on the defendant's construction.

The rule was laid down in the *Nordenfelt Case*[12] that it is for the employer to satisfy the court that the restriction goes no further than is reasonable for the protection of his business and not for the servant to show that it is unreasonable; and this rule was

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[7] *Hitchcock v. Coker,* 6 Ad. & El. 438; *Chesman v. Nainby,* 2 Str. 739; *Mallan v. May,* 11 M. & W. 653; *Mumford v. Gething,* 7 C. B. N. S. 305.

[8] *Fowkes v. Assurance Ass'n,* 3 B. & S. 925.

[9] *Jacoby v. Whitmore,* 49 L. T. N. S. 335; *Hauser v. Harding,* 126 N. C. 295; *Carll v. Snyder,* 26 Atl. 977 (N. J.).

[10] *Hitchcock v. Coker, supra; Price v. Green,* 16 M. & W. 346; *Jacoby v. Whitmore, supra; Bunn v. Guy,* 4 East 190; *Rakestraw v. Lanier,* 104 Ga. 188; *Mandeville v. Harman,* 42 N. J. Eq. 185; *Turner v. Abbott,* 116 Tenn. 718.

[11] 15 Vesey 516.

[12] *Supra.*

approved by the House of Lords very recently.[13] The earlier cases in so far as they are contrary to this must be considered as overruled, notwithstanding the fact that they were not specifically mentioned.

If we concede that the agreement not to engage in similar work was to be binding upon the defendant during his lifetime, then we agree with the Court of Appeal that the restriction is void because not reasonably necessary for the protection of the plaintiff. "The true view at the present time * * * is this. The public have an interest in every person's carrying on his trade freely; so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions; restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and, indeed, it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favor it is imposed, while at the same time it is in no way injurious to the public."[14]

In arriving at the conclusion that the prohibition for life over so large an area—the entire city of London—was larger than was necessary for the protection of the plaintiff, the court hinted at a distinction between contracts of service and contracts of sale of good-will, saying that in the former the employer "is only entitled to a covenant so limited as to time and place as to deprive the employee of any and every benefit which might accrue to him in the way of connection or reputation or personal knowledge of the customers and so strip him bare of all advantage and put him on the same level as a stranger." This would seem to be simply an attempt to define what is reasonable protection and we are unable to distinguish between the two classes of contracts in this respect. Each case should be determined upon the peculiar circumstances existing therein. An examination of cases on the point shows that there is no unanimity of opinion in the matter.[15]

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[13] *Supra.*

[14] *Nordenfelt Case, supra* at page 565; quoted with approval in the *Mason Case, supra,* at page 733.

[15] For general reasonableness of restriction in particular cases, see Williston Wald's *Pollock on Contracts,* 3rd ed., 362; also note 10, *supra.*

In the case at hand the defendant was a young man embarking in a new branch of the medical profession and his term of employment was uncertain. For these reasons the restriction was unnecessarily large and the Court of Appeal properly held it to be void.

LIABILITY FOR FORGED SIGNATURE ON TRAVELER'S CHECK.

In the case of *Sullivan v. Knauth,* 146 N. Y. S. 583, the Appellate Division of the Supreme Court of New York recently dealt with a question concerning commercial paper entirely novel in some respects. The plaintiff had purchased traveler's checks of the defendant through its agent, the amounts of which the defendant promised to pay through its correspondent against the checks when countersigned by the plaintiff. The checks were lost and, the plaintiff's countersignature having been forged, the defendant paid them. In an action to recover the amount of the checks paid, the court allowed a recovery, basing its decision on the ground that the countersignature performed the same function as to that instrument which the name of the payee of an order check does when placed on the back of it, in which latter case the bank is liable if it pays when the indorsement is a forgery.

The business of selling traveler's checks is of recent origin, having been developed as a result of the necessities of the extensive travel of late years. By resorting to their use the traveler obviates the necessity of carrying a large amount of money with him and escapes its attendant danger of loss and yet is enabled to procure money as he needs it in any state or foreign country by simply writing his name in the place for his countersignature just as he wrote it in the space for the "holder's" signature when he made the purchase.

The decision of the principal case simply involved the application of a familiar principal of law to an entirely novel set of facts which presented one of the numerous recent commercial developments. It is well settled that if *A* draws a check payable to *B* and delivers it to *B*, and *C* forges *B*'s indorsement and gets the money, *B* can recover from the bank if the amount has been charged to the drawer.[1] The reason for this is that the bank has a check the title to which is still in *B*, because a forged indorsement does not operate to pass title to a check. Hence *B*

[1] *Welsh v. German American Bank,* 73 N. Y. 424.

can sue the bank in an action sounding in tort for the conversion of his check. It is equally well settled that if *A* draws a check payable to *B* and *B* presents it to the bank for payment, *A* having sufficient funds at the time, and payment is refused, *B* cannot sue the bank. There is no privity of contract between *B* and the bank and the check does not operate as an assignment to *B* of so much of the money which the bank owes to *A*.[2] It is held everywhere, however, that *A* has a right of action against the bank. Between him and the bank there is privity of contract. When *A* became the bank's depositor it undertook to make payment according to his order so long as he had funds enough. In refusing to make payment accordingly a right of action accrues to *A*.[3]

With these observations in mind, let us examine some of the statements of the court in the principal case. Clarke, J., says: "The plaintiff procured these checks from the defendant's agents, hence, from them. In my opinion a relation cognate to that of depositor and banker should be considered to have been established between the plaintiff and these defendants. If that is not the effect of the transaction, the traveler obtains little advantage from these so-called traveler's checks and might as well carry bills or gold. The basis of his purchase is protection by reason of the double signature. * * * It seems to me, therefore, that it must be held that it is the second signature which gives the paper final currency. It is in the precise situation of a check payable to the order of a designated payee unindorsed by said payee. That being so, the countersigned signature must be treated as the ordinary indorsement of a payee upon an ordinary check; that is, the bank is responsible if it pays on a forgery." Certain words in the check in question, "Knauth, Nachod & Kuhne, New York, through their correspondent will pay against this check out of their balance," leave the precise relation of the correspondent to the defendants to some extent a matter of conjecture. The traveler's check issued by the American Express Company reads, "The American Express Company at its paying agencies will pay", etc. Let us suppose first that the correspondent of the defendants bears to them the same relation as the paying agency of the Express Company; that is, it is simply one of their offices, a component part of the defendant and under the direction of its

[2] *Bank of the Republic v. Millard,* 10 Wall. 152; *Hopkinson v. Foster,* L. R. 19 Eq. 74; *National Commercial Bank v. Miller,* 77 Ala. 168.

[3] *Hopkinson v. Foster, supra.*

directors. (The first part of the quotation above indicates that the Court considered this to be the relation.) Then we will suppose that the correspondent holds funds of the defendant so that the same relation exists as in the case of the ordinary bank and one who deposits money with it.

In the first case the defendant itself undertakes to pay directly. Suppose now that *A* has an uncountersigned traveler's check which he has purchased of a bank and suppose that *B* at the same time holds an ordinary check drawn by *A* in his favor on the same bank. Between *A* and the bank there is a contract relation but between *B* and the bank there is none. If *A* countersigns his traveler's check and the bank refuses to pay it, he has a right of action for breach of contract. If *B* indorses his check and payment is refused he has no right of action because the bank has broken no contract with him and has denied him nothing which legally belongs to him, the check not operating as an assignment. If *A*'s countersignature is forged and the bank pays the forger, *A* can sue in assumpsit for the breach of the contract to pay to his order. If *B*'s indorsement is forged and payment is made by the bank, he can demand his check to which the bank has acquired no title, and, if it is refused, he may sue for its conversion. In the first case the action is in contract; in the second it is in tort. Prior to countersignature the holder sustains such a relation to the bank that by countersigning he can make an order on the bank and recover damages if they refuse to obey it. The payee of the check cannot by indorsing make an order on the bank which will entitle him to damages if payment is refused. Hence, if the relation of the defendant's correspondents to them conformed to the supposition we here make there would be a vital difference between the situation of a holder of an uncountersigned traveler's check and that of the payee of an order check who holds it still unindorsed. It would be more accurate to say that the countersignature on the traveler's check here is the drawer's signature on the ordinary check.

Let us now deal with the situation under the second supposition, namely, that the defendants sustained the relation of depositor to the bank called its correspondent. *A* now holds a so-called traveler's check which is in the nature of a draft. The bank selling is the drawer, the correspondent is the drawee, and the purchaser is the payee. Now it can be seen that there is no privity of contract between *A* and the correspondent bank any

more than there is between *B* and the bank on which the order check he holds is drawn. *A* countersigns and *B* indorses and payment is refused both. Neither *A* nor *B* can sue the bank because there is no privity of contract. Let us now suppose that *A*'s countersignature and *B*'s indorsement are forged and payment is made. Both have a right of action in tort for the conversion of their property, demand having been made upon the bank. Hence, if in fact the relation of the correspondent to the defendant in the principal case was as supposed here, the Court is accurate in its statements.

From what has been said it will be seen that it makes no difference under the facts of the principal case whether the countersignature on the check in question be the signature of a drawer or of an indorser. The bank is liable in both cases if it pays when such signature is forged. It is clear, however, that if the first supposition we have made is the real situation in the principal case the holder of the uncountersigned traveler's check is not "in the precise situation of the payee of an order check who holds it still unindorsed."

No authority directly in point can be found, but two decisions noticed are of interest.

The Supreme Court of Michigan refused to allow the plaintiff to recover on a traveler's check where the countersignature had a line drawn through it by the purchaser whose name appeared in the upper space.[4] The Court said, "Checks of a like character to this one have come into very general use, especially by travelers. They are an ingenious, safe, and convenient method by which the traveler may supply himself with funds in almost all parts of the civilized world, without the hazard of carrying the money on his person. The company has the right to refuse to pay the check when it does not bear the countersign agreed upon. The owner of the check also has the right to insist that it shall not be paid when it is not countersigned as agreed. This check was not so countersigned, and for that reason the plaintiff cannot recover."

The Code of California provides that, "One who writes his name on a negotiable instrument other than as maker or acceptor and delivers it with his name thereon to another person is called an indorser and his act is called indorsement."[5] In *People v.*

[4] *Samberg v. Adams Express Company,* 136 Mich. 639, 99 N. W. 879.

[5] *Civil Code,* Sec. 3108.

Prather, which arose under that statute, the information alleged that the defendant feloniously made and forged "a certain indorsement" of a traveler's check "by then and there indorsing thereon the name of A. Thompson." It was proved on trial that the defendant had written the name of A. Thompson on a traveler's check in the lower space left blank for the countersignature of the purchaser. It was held that this was an indorsement and that there was no variance.[6]

PROXIMATE CAUSE IN CIVIL ACTIONS.

When a person has committed a wrongful act he is responsible for all the damage which is the natural and probable consequence of the wrongful act, whether such damage was in fact foreseen or not.[1] All other damage is said to be remote and no liability attaches to the wrongdoer for such other damage, for the reason aptly stated in the case of *Hoag v. Lake Shore, etc., Ry. Co.,* 85 Pa. St. 293, 298, that "a man's responsibility must stop somewhere". Damage is natural and probable when under the same or similar circumstances such a result was to have been reasonably expected by an ordinarily prudent man.[2]

Some of the courts have attempted to make a distinction between remote and proximate cause dependent upon whether or not the chain of events leading from the wrongful act to the damage complained of was broken by the intervention of some new and independent agency.[3] The better doctrine and that supported by the weight of authority is that no such distinction should be drawn. The only difference which an intervening agency brings into the case is a greater complication in the facts. If the damage would not have resulted but for the new agency, then the original wrongdoer is not responsible unless he should have reasonably anticipated the intervention of such agency and the resulting damage. In other words, if the intervening agency

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[6] 139 Pac. 664.

[1] *Hill v. Winsor,* 118 Mass. 251; *Wetmore v. Lyman,* 2 Root (Conn.) 484; Randall v. Newson, 2 Q. B. D. 102.

[2] *Atkinson v. Goodrich Tr. Co.,* 60 Wis. 141, 50 Am. Rep. 352; *Marble v. Worcester,* 4 Gray (Mass.) 395.

[3] A proximate cause is one which, in natural sequence, undisturbed by any independent cause, produces the result complained of. *Behling v. S. W. Penn. Pipe Lines,* 160 Pa. St. 359, 28 Atl. 777, 40 Am. St. Rep. 724.

with the resulting damage was a natural and probable outcome of the original wrongful act, the original wrongdoer is liable.[4]

Whether the damage complained of was a natural and probable consequence of the defendant's act is a question of fact for the jury,[5] but whether there is any reasonable evidence of its being so, to go before the jury, is a preliminary question of law for the judge.[6]

The Illinois Appellate Court for the First District, in the recent case of *Hartner v. Boston Store,*[7] held that the sale of a small rifle by the defendant to a boy fifteen years of age, in violation of an ordinance, was not the proximate cause of an injury to the plaintiff resulting from the discharge of the rifle by the boy. The court affirmed the action of the lower court in giving a peremptory instruction in favor of the defendant.

Similar cases have arisen in Iowa and Indiana. In the case *Poland v. Earhart,* 70 Iowa 285, the defendant in violation of a statute, sold a revolver to the plaintiff's son, fifteen years old. The son by accident shot himself through the hand, and the plaintiff sued for the loss of his services. The defendant demurred to the petition and the court sustained the demurrer, holding as a matter of law that the defendant could not reasonably have anticipated that an accident would result from the handling of the revolver from the fact alone that the person to whom he sold it was a minor. In the case of *Binford v. Johnston,* 82 Ind. 426, the complaint alleged that the defendant, in violation of a statute, sold to two sons of the plaintiff, aged ten and twelve years, ball cartridges for use in a toy pistol; that the boys left the pistol loaded with one of the cartridges on the floor of their home,

[4] *Scott v. Shepard,* 2 W. Bl. 892, the "Squib Case"; *Clark v. Chambers,* 3 Q. B. D. 327; *Lowry v. Manhattan Ry. Co.,* 99 N. Y. 158, 1 N. E. 608; *Lane v. Atlantic Works,* 111 Mass. 136; *Pittsfield Cottonware Mfg. Co. v. Pittsfield Shoe Co.,* 72 N. H. 546, 58 Atl. 242.

[5] *Chapman v. Kirby,* 49 Ill. 211; *Hill v. Winsor, supra; Ehrgoth v. New York,* 96 N. Y. 264 48 Am. Rep. 622.

[6] *Hoag v. Lake Shore, etc., Ry. Co.,* 85 Pa. St. 293; *Gudfelder v. Pittsburgh, etc., Ry. Co.,* 207 Pa. St. 629; *Goodlander Mill Co. v. Standard Oil Co.,* 63 Fed. 400; *Cooley on Torts,* 3rd. Ed., p. 111; Salmond, *Law of Torts,* p. 114. But see *Henry v. St. Louis, etc., Ry. Co.,* which holds that where the facts are undisputed, the question whether a certain act is the proximate cause of the injury is one of law for the court.

[7] No. 18804, March 9, 1914, reported in the 48 *National Corporation Reporter,* 345.

where a younger child, aged six years, picked it up and discharged it, inflicting a wound on one of the other boys from which he died. The plaintiff sued for loss of services, and expenses incurred in trying to save the wounded boy. The complaint was held good on demurrer, and the court held as a matter of law that the defendant was liable.

The conflict in these decisions, coupled with the fact that the prohibition of such sales by statute shows a realization that accidents are at least of possible occurrence, raises a doubt as to the wisdom of the court in the recent Illinois case and in the Iowa case in withdrawing the matter from the jury and deciding as a question of law that an accident is not the natural and probable consequence of such a sale. The very fact that there is a statute prohibiting such sales shows that in the judgment of those who made the statute such sales were so great a source of danger that the public welfare demanded their suppression; and the same question of public welfare would seem to sanction the courts in taking the position that a jury might find that the defendant should have reasonably foreseen such an accident, and the existence of such a statute seems sufficient to make the question one of fact for the jury.

MENTAL SUFFERING AS AN ELEMENT OF DAMAGE FOR BREACH OF CONTRACT.

In the recent case of *McConnell v. United States Express Co.*, decided by the Supreme Court of Michigan in March, 1914, the following facts were found:[1] The plaintiff, a middle-aged woman who was just recovering from a long sickness, had planned to join a party of Cook tourists in New York, and with them to make the trip to Naples, principally for the purpose of restoring her health. She went to the defendant's office in Pontiac, Michigan, and arranged with the defendant's agent, one Burgis, to have her trunk, which contained her entire wardrobe for the trip, transported to the pier in New York, in ample time to catch the boat. Burgis promised to have it there on time, and knew of the character of the trip, and that it was very important that it should arrive, but it did not appear that he knew of plaintiff's recent illness or her specific purpose in making the voyage, or those mental

[1] 146 N. W. 429.

and physical peculiarities, upon which considerable stress is laid in the opinion. The trunk did not arrive in time, and the plaintiff was found to have suffered considerable physical inconvenience on the voyage over, as well loss of pleasure and mental anxiety and annoyance, as a consequence. The trial court allowed the jury to award damages for this mental suffering, and on appeal its judgment was affirmed by an evenly divided court, four judges voting for affirmance, and four for reversal. The precise point of contention was as to whether or not such damages were in the contemplation of the parties at the time of making the contract, and the judges who voted for affirmance held that they were. In order to appreciate the significance of this holding, a somewhat extended review of the cases becomes necessary.

Any analysis of the elements of damage recoverable in actions for breach of contract must start with the case of *Hadley v. Baxendale,* which defined the damages to be "such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it", and which has universally been recognized as laying down the proper rule.[2] Annoyance, vexation, and mental suffering, however, were at first, with only one exception, never held to have been in the contemplation of the parties. This exception was made in breach of promise cases, and the reason given was that such contracts dealt primarily with the feelings and sensibilities of the parties.[3] Then it began to be felt that certain other classes of contracts also dealt primarily with the feelings, or at least that this element was sufficiently prominent to justify the courts in holding that here, too, mental suffering was fairly within the contemplation of the parties. Chief among these were the so-called "social telegram" cases, where either the sender or sendee was suing *ex contractu* for breach of duty in failing to transmit a death message with sufficient promptness. It should be noted here that all the cases of this class which are quoted later were cases where the cause of action was treated by the court as contractual, although in some of them the sendee of the message was suing. One or two treated the sender as the agent of the sendee to deal with the company, while others seemed to regard the sendee as the real party in interest, or beneficial plaintiff. In

[2] 9 Exch. 341.

[3] *Coolidge v. Neat,* 129 Mass. 146.

all of them, however, the damages were assessed under the rule in *Hadley v. Baxendale.* The following are the principal American decisions which have extended the recovery of damages for mental suffering to contracts other than those of betrothal.

In the recent Alabama case of *Browning v. Fies,* the action was for breach of contract to provide a hack for the transportation of plaintiff and his family to the church where his bride was waiting.[4]

The Iowa case of *Mentzer v. Western Union Tel. Co.,* which was an action for failure to deliver a death message, although sounding in tort, indicated clearly, by way of dictum, that the result would have been the same had the action been contract.[5]

The Louisiana case of *Lewis v. Holmes* was an action for the breach of contract to furnish a trousseau for a bride.[6]

The New York case of *Aaron v. Ward* was an action of assumpsit, for revocation of a license to enter defendant's bathhouse and expulsion of plaintiff therefrom.[7]

The Tennessee case of *Wadsworth v. Telegraph Co.* was another of the actions for breach of contract to deliver a death message.[8]

The Texas case of *J. E. Dunn & Co. v. Smith* was an action for breach of contract to provide an adequate coffin for one of plaintiff's family.[9]

In all these, as well as in the principal case, the jury was allowed to consider the element of mental suffering in assessing damages. But if we compare the gist of the action in each of the above cases with that in the principal case, we shall see that every one of them except the New York decision of *Aaron v. Ward,* is far more intimately concerned with the feeling and sensibilities of the plaintiff, *prima facie* at least, than the delivery or non-delivery of a trunk. And it is with the *prima facie* aspect of the contract that we have to deal, in the absence of proof that the defendant in the principal case had notice of the plaintiff's convalescent condition, and her specific purpose in making the trip. Assuming that Burgis knew that her entire wardrobe for

[4] 58 So. 931.
[5] 93 Ia. 752.
[6] 109 La. 1030.
[7] 253 N. Y. 351.
[8] 86 Tenn. 695.
[9] 74 S. W. 576.

the trip was contained in this trunk, and that its arrival was therefore of extreme importance, it is still safe to say that the plaintiff's feelings and sensibilities were not involved nearly so obviously here, as in any of the cases cited above. Certainly it cannot be said to have been a contract which dealt primarily with the emotions. But in other states there is an equally decided tendency not to extend the recovery of damages for mental suffering. It may be helpful to cite a few of these decisions.

The United States Circuit Court of Appeals case of *Wilcox v. Railroad Co.* was an action for the breach of contract to furnish plaintiff a special train, in order that he might reach a sick parent.[10]

The Missouri case of *Trigg v. Railroad Co.* was an action for the breach of contract in failing to allow plaintiff to alight at her station, and in carrying her by.[11]

The later Missouri case of *Connell v. Western Union Tel. Co.* was an action for breach of contract to deliver a death message.[12] The decision here was squarely opposed to the Texas and Tennessee cases.

In the Washington case of *Turner v. Great Northern Ry. Co.* the cause of action was the sale by defendant of a through ticket which was not honored by the connecting carrier.[13]

In the Wisconsin case of *Walsh v. Railway Co.* the action was for breach of contract to furnish a special train to enable plaintiff and others to attend the laying of a cornerstone.[14]

The Federal case and the second Missouri case seem to be contrary to the weight of reason and of authority, since in both the contract dealt primarily with the feelings ,and mental sufferings ought reasonably to have been contemplated as the result of any breach. But the other decisions cited above, as refusing damages for mental suffering, show clearly that the true distinction lies between contracts which deal primarily with the emotions, and those in which the vexation and mental suffering are incidental to the loss of the principal object of the bargain, as understood by both parties. The principal case would seem to fall more properly within the second class, inasmuch as the primary object of

[10] 52 Fed. 264.
[11] 74 Mo. 147.
[12] 116 Mo. 34.
[13] 15 Wash. 213.
[14] 42 Wisc. 23.

the contract was, *prima facie,* the prompt transportation of property. The breach of almost any contract entails a certain amount of vexation, which varies widely according to the plaintiff's temperament, and it would seem contrary to sound policy, as well as unjust to the defendant, to attempt the assessment of this element of damage.