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Damages - Punitive or Exemplary Damages Not Recoverable

J. B. D.

operates private passenger and freight lines, two hotels, a dairy, and a commissary.[15] In fact, it may be asserted as a general proposition that the Supreme Court has never declared a state tax upon a federal instrumentality valid because such instrumentality was not exercising a usual or ordinary governmental function.[16]

The complicated body of the law of the immunity of national banks from state taxation is not within the scope of this inquiry. However, it is interesting to note that in *State v. Whitney National Bank of New Orleans*[17] the Louisiana Supreme Court sustained a license tax on office buildings operated by a national bank, with respect to such parts of the buildings not used in banking but were rented to third parties, and that in *Parker v. Mississippi Tax Commission*[18] a state income tax upon an officer of the Federal Land Bank was upheld.

The principal case stresses the fact that in order for immunity to accrue it is necessary that the taxed function be indispensable to the maintenance of the government, and that the burden be not speculative, but direct and ascertainable. The burden falling on either government from taxation of the income of the employees of its corporations by the other government will be found in almost every instance to be speculative. Moreover, not many of such corporations can be found to be indispensable to the maintenance of government. It seems, therefore, that the tests of the *Gerhardt* case should certainly apply reciprocally, and that state attempts to tax the employees of the federal corporations which have entered fields traditionally private should be upheld.

J. D. M.

DAMAGES—PUNITIVE OR EXEMPLARY DAMAGES NOT RECOVERABLE—The plaintiff sent draperies to the defendant laundries to be cleaned. Certain of the articles were returned so damaged as to be unfit for further service. They had been in use by the plaintiff for seven years and during that time their value had

15. New York ex rel. Rogers v. Graves, 299 U.S. 401, 57 S.Ct. 269, 81 L.Ed. 306 (1937).
16. See Note (1936) 49 Harv. L. Rev. 1323.
17. 189 La. 211, 179 So. 84 (1938).
18. 178 Miss. 680, 174 So. 567 (1937).

diminished considerably. Despite this fact, plaintiff asked for a sum equivalent to the replacement cost of the goods. *Held,* replacement cost must be denied as constituting a claim for the allowance of punitive damages contrary to the rule in Louisiana. *Gugert v. New Orleans Independent Laundries, Inc.,* 181 So. 653 (La. App. 1938).

The French law does not allow punitive damages; recovery is limited to the exact loss sustained.[1] This limitation is based upon Articles 1382 and 1149-1151 of the French Civil Code which correspond to Articles 2315 and 1934 respectively of the Louisiana Civil Code of 1870. Nevertheless, the practice of allowing punitive damages was established at an early period in Louisiana, and this practice seems to have had its beginning in a case where the court allowed recovery for slander in the absence of a showing of special damages.[2] Subsequently the theory of this case was followed in an award of "smart money" or punitive damages for the illegal detention of a horse, the court feeling that punishment for the unlawful act was necessary.[3] Thereafter, the court stated that punishment of the guilty party may be used as a justification for an award of damages where the court desires to prevent the repetition of a tortious act.[4] Likewise the court has allowed exemplary damages for the malicious and illegal seizure of property[5] and also for injury resulting from gross carelessness or reckless indifference to the rights of others.[6] The preceding cases indicate that the doctrine of punitive damages was based upon the theory that the wrongdoer should be punished as a consequence of his malice, bad faith, or gross carelessness, in the absence of which it has frequently been held that recovery should be limited to the actual damages sustained.[7] That the punishment of the wrongdoer for his malice or bad faith is the basis of the recovery is likewise exemplified by the cases in which recovery has been refused

1. 6 Planiol et Ripert, Traité Pratique de Droit Civil Français (1930) 922, nº 681; 7 id. 159, nº 855.
2. Carlin v. Stewart, 2 La. 73 (1830).
3. Summers v. Baumgard, 9 La. 161 (1836).
4. See Black v. The Carrollton Railroad Co., 10 La. Ann. 33, 40, (1855).
5. Tiblier v. Alford, 12 Fed. 262 (C. C. E. D. La. 1882).
6. Eptstein v. Roux, 12 Orl. App. 313 (1915).
7. Stetson v. LeBlanc, 6 La. 266 (1834); Stinson v. Buisson, 17 La. 567 (1841); Biggs v. D'Aquin, 13 La. Ann. 21 (1858); Boulard v. Calhoun, 13 La. Ann. 445 (1858); Jackson v. Schmidt, 14 La. Ann. 806 (1859); Carter v. Tufts, 15 La. Ann. 16 (1860); Perrine v. Planchard, 15 La. Ann. 133 (1860); Massie v. Baily & Co., 33 La. Ann. 485 (1881); Kee v. Smith, 35 La. Ann. 518 (1883); Marin v. Scatterfield, 41 La. Ann. 742, 6 So. 551 (1889); Townsend v. Fontenot, 42 La. Ann. 890, 8 So. 616 (1890),

when the action was against the wrongdoer's estate, suit not having been brought before his death.[8]

In 1917 the Supreme Court of Louisiana rejected the early rule and held that, under the provisions of the Civil Code, recovery must be limited to the extent of the loss suffered.[9] In arriving at this decision the court relied on Article 2315 of the Louisiana Civil Code of 1870, which provides that a person through whose fault damage is caused shall "repair" it, and Article 1934 (par. 2) which limits recovery, even where fraud and bad faith are present, to damages which are foreseeable. The principle of this case has been consistently followed and is now a thoroughly ingrained principle of our law.[10] Nevertheless, it is questionable whether the doctrine of punitive damages has entirely disappeared from our jurisprudence.[11] In those cases where punitive damages had been allowed in the past, it often became customary to consider the financial ability of the defendant in determining the measure of damages to be awarded.[12] Apparently, the basis of this consideration was that the same monetary judgment would not operate with equal effect upon rich and poor alike. The principle of considering the defendant's ability to pay has been reaffirmed once by the Supreme Court[13] and twice by the Court of Appeals[14] after the allowance of punitive damages had been discontinued. This consideration of the financial ability of the defendant appears to be inconsistent with the present rule which limits recovery to damages actually sustained. Although this consideration may be a judicial expression of the theory that social costs should be borne in proportion to the wrongdoer's ability to pay, and may not be a holdover of the practice of awarding punitive damages, yet such a theory can hardly be justified under the provisions of

8. Edwards v. Ricks, 30 La. Ann. 926 (1878); Johnson v. Levy, 122 La. 118, 47 So. 422 (1908).

9. Vincent v. Morgan's Louisiana & T. R. & S. S. Co., 140 La. 1027, 74 So. 541 (1917).

10. Serio v. American Brewing Co., 141 La. 290, 74 So. 998 (1917); Mente & Co. v. Kaplan, 146 La. 678, 83 So. 895 (1920); Douglas, Burt & Buchanan Co. v. Texas & Pacific Ry. Co., 150 La. 1038, 91 So. 503 (1922); Trenchard v. Central Laundry Co., 154 La. 1003, 98 So. 558 (1923); Spearman v. Toye Bros. Auto & Taxicab Co., 164 La. 677, 114 So. 591 (1927); McCoy v. Arkansas Natural Gas Co., 175 La. 487, 143 So. 383 (1932).

11. This phase of Louisiana jurisprudence has thrice merited comment: Marr, The Punitive Damages Heresy (1917) 2 So. L. Q. 1; Janvier, Punitive Damages in Louisiana (1929) 10 Loyola L. J. 26; McMahon, Damages Based Upon What the Traffic Will Bear (1930) 11 Loyola L. J. 115.

12. Loyacano v. Jurgens, 50 La. Ann. 441, 23 So. 717 (1898); Daly v. Kiel, 106 La. 170, 30 So. 254 (1901).

13. Jackson v. Briede, 156 La. 573, 100 So. 722 (1924).

14. Gallman v. Young, 6 La. App. 137 (1927); Perez-Sandi v. Berges, 12 La. App. 191, 125 So. 185 (1929).

the Civil Code and is open to the further objection that, unless the financial status of the plaintiff be also considered, the desired end may not result. It is submitted that this apparent inconsistency between the doctrine disallowing exemplary damages and the rule allowing recovery based upon the financial ability of the wrongdoer may well be resolved by an abandonment of the latter doctrine.

J. B. D.

PRACTICE OF LAW—USE OF STANDARD LEGAL FORM BY REAL ESTATE BROKER PROHIBITED—A real estate broker selected from a published legal form book and filled out a contract blank for two customers to be used in the completion of a real estate transaction. *Held,* that this constitutes the practice of law and such person must be duly licensed. *In re Gore,* 58 Ohio App. 79, 115 N.E. (2d) 968 (1937).

There is general agreement that the practice of law embraces a wider field than the preparation of pleadings and court procedure. It also includes the drawing of various legal instruments and the giving of advice upon legal matters.[1] Borderline cases usually involve the preparation or selection of instruments of a legal character, and in solving such problems some courts seek to determine whether the practice in question is a major portion of the business engaged in or is only a necessary incident thereof. Under this rule it has been held that the preparation of a bill of sale for customers was incidental to the business, notwithstanding that a fee was charged for the service.[2] Other cases seem to lay more emphasis on whether or not the alleged offender holds himself out as doing legal work—thus a trust company has been held to be engaged illegally in the practice of law where it advertised that it specialized in drawing contracts, deeds and mortgages.[3] Again, whether or not the defendant is making profit on the "law business" has also been used as a test.[4] In whatever words the test may be stated the cases generally seem to recog-

1. National Savings Bank of the District of Columbia v. William H. Ward, 100 U.S. 195, 199, 25 L.Ed. 621, 623 (1880); In re Opinion of the Justices, 289 Mass. 607, 194 N.E. 313 (1935).

2. People v. Title Guarantee and Trust Co., 227 N.Y. 366, 125 N.E. 666 (1919); reargument denied, 228 N.Y. 585, 127 N.E. 919 (1920).

3. In re Eastern Idaho Loan & Trust Co., 49 Idaho 280, 288 Pac. 157 (1930), and cases therein cited.

4. State v. St. Louis Union Trust Co., 355 Mo. 845, 74 S.W. (2d) 348 (1934) ("valuable consideration" test—promise for promise was sufficient).