

in his book on Damages, devotes a chapter to the consideration of the same subject. *Vide* ch. 18, 477, and authorities in note, Sedgwick on Damages. There is an article which originally appeared in the Law Reporter of April, 1847, supposed to have been written by the late Judge Metcalf of Massachusetts. The same article makes an appendix to Mr. Sedgwick's book on Damages. The views of Metcalf are very similar to Prof. Greenleaf's. In the seventh edition of Vol. 1, of Chancellor Kent's Com. 618, sec. 618, Kent remarks upon this subject that the object of the review aforesaid was to show, that, in matters of tort, the cases where exemplary damages were given, on a strict examination and construction of the language of them, amount to authorities for going beyond compensatory damages. "But," continues he, "on the consideration of the whole subject, it appears to me that the conclusions in Mr. Sedgwick's treatise are well warranted by the decisions, and that the attempt to exclude all consideration of the malice and wickedness, and wantonness of the tort, in estimating a proper compensation for the victim, is impracticable, visionary, and repugnant to the fine feelings of our social sympathy and humanity." Many of the cases in support of this doctrine are quoted at length in the aforesaid chapter of Sedgwick, and in the brief of the counsel for plaintiff in this case. And the rule is also laid down, without qualification, that we are not to regard the possible punishment of the defendant by indictment and conviction by a State process. The criminal suit is no bar to the civil, at one and the same time. *Jones v. Clay*, 1 Bosanquet & P. 191; *Jacks v. Bill*, 3 Carr. & Payne, 316; *Cadily v. Barlow*, 1 Man. & Ryl. 275; *Cook v. Ellis*, 6 Hill, 466; *Roberts v. Mason*, 10 Ohio, 277. In order to set aside the verdict in this case, the defendant must show not only that the damages were excessive, but that the excess was so great that the court, for this reason, must infer the jury were influenced by improper motives of partiality, passion or corruption. *Rand v. Redington*, 13 N. H. 76; *Treaner v. Donahoe*, 9 Cush. 228.

We have not sufficient grounds set forth before us to justify us in setting aside this verdict. There must be

Judgment on the verdict.

STATE v. CHARLES TOWLE.

Justices of the peace, within their respective counties, are authorized to hear and determine finally prosecutions under the act regulating offences of the nature of wicked and malicious mischief, where the punishment by fine may not exceed ten dollars.

COMPLAINT for malicious mischief, brought to this court by appeal from a justice of the peace. It was alleged in the complaint that the defendant, "with force and arms wilfully and maliciously did kill seven chickens and five hens of the complainant, by then and there giving

said chickens and hens a large quantity of poison, the name of which is to the said Janvrin unknown."

The defendant moved to dismiss the complaint.

1. Because the justice of the peace before whom the respondent was examined assumed full jurisdiction over the offence charged against him in said complaint, and imposed a fine and costs upon him; when in fact said justice had no such jurisdiction over said offence, but had jurisdiction only so far as to examine the case, and if he found just cause, to order the respondent to appear at a higher court and answer for said offence.

2. Because this court has no jurisdiction over said offence in this form.

The court overruled the motion and defendant excepted.

Ordered that the case be reserved.

W. W. Stickney, for defendant.

Small, Solicitor, for State.

NESMITH, J. This was an appeal from a decision of a justice of the peace, who inflicted a fine and costs upon the respondent, upon the trial of a complaint of one Janvrin, for wilfully and maliciously destroying by poison five hens and seven chickens, the property of complainant. The main question now made is, whether the justice had final jurisdiction over this offence, or whether he should have so far investigated the case as to have found a crime had been committed, and then bound over the accused to a higher tribunal. Before the passage of the present statute law regulating this subject, offences of this nature were indictable at common law. *State v. Bucknam*, 8 N. H. 203. In order to convict of the offence of malicious mischief, the jury must be satisfied, that the injury was done, either out of a spirit of wanton cruelty, or of wicked revenge. 4 Black. Com. 244; *Com. v. Walden*, 3 Cush. 558; *Com. v. Cox*, 7 Allen, 578.

The 19th section of ch. 229 of the Compiled Statutes, among other things, provides "that if any person shall wilfully and maliciously commit any act, whereby the real and personal estate of another shall be injured, such person shall be punished by imprisonment in the common jail for a term not less than thirty days, nor more than one year, or by fine not exceeding one hundred dollars, or by both of said punishments in the discretion of the court."

The general jurisdiction of justices of the peace in this State in criminal cases, is defined by sec. 1, ch. 222 of the Revised Statutes. This section provides "that every justice of the peace is authorized to hear and determine prosecutions, and actions of a criminal nature, arising within his county, where the punishment is by fine not exceeding ten dollars." Under the third section of the last statute it is also provided, "that any justice of the peace may cause to be apprehended and bound over for trial at the higher court, all persons charged with offences beyond his jurisdiction to try."

The aforesaid two sections seem to define clearly the jurisdictional line and duties of the justice of the peace. All crimes committed in the State may in the first instance be examined or investigated by him, and if any are found within the limits of his statute jurisdiction, he may punish the offender by inflicting a fine not exceeding ten dollars; all persons who may have committed offences of a more aggravated nature, are recognized to appear at the higher tribunal.

In prosecutions for assault and battery, a justice of the peace is authorized by the statute to punish by fine not exceeding ten dollars for common assaults; but, if in his opinion the assault be an aggravated one, he may bind over the accused party for trial at the higher court. In cases of larceny, the justice of the peace has the additional duty conferred upon him to find the value of the property stolen. He assesses the fine not exceeding ten dollars upon the offender, and when the property is not restored to the owner, he ascertains its value, and makes his order in relation thereto, as required by the statute. Some other statutes impose express or specific duties upon the justice who tries the cases arising under them.

Our statute, regulating the punishment of acts of wicked and malicious mischief, is of modern origin, and does not expressly designate the tribunal to try the offences committed under it. By the language of the act, it appears to us that it was the intent of the legislature to apportion the penalties according to the aggravation of the several offences committed under it. We cannot believe it to have been the purpose of the law-making power to ordain that the minor offences under this act should be sent, in the first instance, to the grand jury for their investigation, rather than to the justices of the peace in the several counties where they were committed.

It seems to us that the malicious act involved or implied in destroying by poison twelve hens or chickens, may with entire propriety, under the general law regulating the jurisdiction of justices of the peace, be investigated, and finally settled, and punished under the decision of a justice of the peace. It is manifest, that, under the general law, the magistrate could apprehend the respondent and bring him before him; he could hear the evidence, so far as to ascertain whether a crime had been by him committed. Then under his own sense of right, and in the exercise of a sound discretion and his own good judgment, he could well determine whether the respondent, if found guilty, should pay a fine of ten dollars or some sum less than that or be recognized to the higher court.

The magistrate having his bounds assigned to him by the statute, cannot exceed them. The statute prescribes imprisonment, as one kind of penalty, or mode of punishment. The magistrate may not resort to this. The statute then speaks of a fine not exceeding \$100. The punishment may be imprisonment or a fine. It may be one or both. The maximum punishment may be one year's imprisonment and a fine of \$100; or, it may be part of both, and it may be reduced to a merely nominal sum in the form of a fine of any sum less than \$100, according to the character of the offence.

It appears clear to us, that the legislature did not intend, by their silence as to the tribunal which should try the offences created by this statute, to thereby take away the ordinary jurisdiction conferred by law upon our justices of the peace.

When a statute creates a right, and gives no special remedy, a party may resort to the usual legal remedy. 2 Salked, 415; *Almy v. Harris*, 5 John. 175. A statute to expedite litigation, and prevent a delay of justice, is remedial, and should be liberally construed. *People v. Tibbetts*, 4 Cowen, 384. A statute should be so construed as to make it effective, rather than to destroy it. 6 Hill 616; 2 Rolls. Abridg. 127. We think, therefore, the legislature intended that the magistrate should have full jurisdiction of this offence, and that he has exercised his power in a judicious manner. We, therefore, remand the case to the trial term for further proceedings there.

JACOBS & CO. *v.* SHOREY & MATHES.

Where two or more jointly attempt to commit a fraud, the declarations of one of them, made during the progress, and in the prosecution of the joint undertaking, or in explanation of acts done in furtherance of it, are evidence against the others.

A letter of credit, addressed to a third party by one of the defendants, was admissible, as tending to show the means in fraudulently obtaining the goods of the plaintiffs in prosecution of their general fraudulent purpose, and to show collusion and a conspiracy on the part of the defendants.

Proof of a custom of merchants will be received, when shown to be reasonable in itself, and so well established, and uniformly acted upon, and so well settled, as to raise a fair presumption that it is generally known by all contracting under its operation.

The relation of a witness to a party in a cause, whether of peculiar friendship or hostility is a fact material to the issue, and may be shown, either by the testimony of the witness himself, or by other evidence.

When goods are obtained by fraud, and the vendors sue for the price, thus affirming the original contract, they will recover only what was due at the commencement of their suit. If the verdict of the jury embraces a larger sum, a remittitur may be entered.

Hatch for plaintiff.

Wheeler, Frink & Hackett for defendants.

ASSUMPSIT on two notes, and for money had and received, and for goods sold. The defendants were A. J. Shorey and N. F. Mathes. Shorey was defaulted, and was a witness for plaintiffs. The principal question was, whether Mathes was a partner with Shorey, March 8th and April 12, 1866, when Shorey bought goods of plaintiffs in New York, and gave therefor the notes in suit. Shorey brought the goods to Portsmouth, and put them in a store, and failed without having paid for them.