

WALKER, J. The finding of the court that the damages are excessive was fully sustained by the evidence, and authorized the inference that the jury "were influenced by prejudice or unwittingly fell into a plain mistake." It follows that the verdict was properly set aside so far as the damages are concerned. But the court also found from the facts that the error or misconduct of the jury in their assessment of the damages was so great, and the consideration they gave to the case was so brief, that they did not fairly consider the issue of liability. This finding presents no error and justified the order setting aside the verdict on both issues. It does not "clearly appear that the effect of the error did not extend to all the issues tried." *McBride v. Huckins*, 76 N. H. 206, 213; *Doody v. Railroad*, 77 N. H. 161.

Exception overruled.

All concurred.

Grafton, }
Dec. 2, 1919. }

PATRICK J. HOGAN v. JAMES FINN.

CASE, for false warranty in the sale of a spring. The action was defaulted but the default was afterwards stricken off upon the defendant's agreement not to contest the question of liability. Trial by the court, who found a verdict for the plaintiff.

The plaintiff claimed to have been deceived by the defendant as to the title to the spring, but the court found he was not deceived and that his damages sounded in covenant and not in tort. The plaintiff moved for a certificate upon the execution under s. 12, c. 236, P. S. The motion was denied and the plaintiff excepted. Transferred by *Branch, J.*, from the May term, 1919, of the superior court.

George W. Pike, for the plaintiff.

Harry M. Morse and Drew, Shurtleff, Morris & Oaks, for the defendant.

Per Curiam. "If the cause of action, in any action of trespass, or trespass on the case, has arisen from the wilful and malicious act or neglect of the defendant, the court or justice before whom

the action is tried shall cause a certificate thereof to be made on the back of the execution." P. S., c. 236, s. 12.

As the court found the plaintiff's cause of action did not arise from the wilful and malicious act or neglect of the defendant but was founded in contract, the plaintiff was not entitled to the certificate.

Exception overruled.

Coös, }
Dec. 2, 1919. }

JOHN T. QUINN, *Adm'r*, v. GORHAM.

CASE, transferred from the April term, 1919, of the superior court by *Branch, J.*, on an agreed statement of facts.

Sullivan & Daley and *Harry G. Noyes* (*Mr. Sullivan* orally), for the plaintiff.

Drew, Shurtleff, Morris & Oakes, Alfred R. Evans and *Jesse F. Libby* (*Mr. Oakes* orally), for the defendant.

Per Curiam. This is an action for the death of the plaintiff's intestate caused by his being thrown over a defectively railed embankment while a traveler upon a state-aided highway. The accident occurred in August, 1914. The court dismissed the action, and the plaintiff excepted. In view of the decisions in *Grace v. Belmont*, 78 N. H. 112 and in *Kelsea v. Stratford*, *ante*, 273, the exception must be overruled.

Carroll, }
Jan. 6, 1920. }

STEPHEN BROCK v. ELLSWORTH H. ROLLINS.

TROVER, for certain articles of personal property sold as a part of the farm in controversy in *Rollins v. Brock*, 78 N. H. 456. Trial by the court and verdict for the defendant. Transferred from the May term, 1918, of the superior court by *Marble, J.*, on the plaintiff's exception to the verdict.