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## **Damages--Mental Anguish--Negligence--Telegraph Companies (Gibbs v. Western Union Tel. Co., 146 S.E. 209 (No. Car. 1929))**

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store. Two of them gave confessions which were used upon the trial, though they protested that they were involuntary. All were tried together after motions for separate trials were denied. Upon appeal from this denial and the alleged error in admitting the confessions. *Held*, granting of separate trials is discretionary with the trial judge and in the absence of abuse of that discretion, his decision will not be disturbed upon review. The question of whether the confessions were voluntary or not was properly submitted to the jury. *People v. Fisher*, 249 N. Y. 419, 164 N. E. 336 (1928).

The correctness of the ruling on admissibility of confessions is so well established that it merits little discussion. Here, as before,<sup>1</sup> it was held that the statute governed.<sup>2</sup> The trial court, after a preliminary hearing, may admit a confession, final decision as to its probative value being left to the jury. The main ground for appeal in the case rested on the denial of applications for separate trials. At common law, persons jointly indicted could be tried jointly or separately according to the discretion of the court. With enactment of the Revised Statutes of 1826, this rule was changed. A defendant so indicted could demand a separate trial or waive it and stand trial with his co-defendants. In 1926 the common law was restored,<sup>3</sup> so that abuse of discretion is the only ground for appeal.<sup>4</sup> The evidence in this case was so overwhelming that expediency and economy demanded a single trial. A dissenting opinion<sup>5</sup> disclaims the wisdom of this reasoning in view of one defendant's persistent denial of guilt.

DAMAGES — MENTAL ANGUISH — NEGLIGENCE — TELEGRAPH COMPANIES.—Plaintiff's son was mortally wounded and a telegram stating the seriousness of his condition was sent to her by his wife. It was promptly dispatched and received at the destination office of defendant which failed to deliver it until a time too late to permit her reaching her son before death. Plaintiff brought action for damages resulting from mental anguish. *Held*, for plaintiff. *Gibbs v. Western Union Tel. Co.*, 146 S. E. 209 (Sup. Ct., No. Car., 1929).

The matter of redressing mental anguish was the subject of frequent consideration by common law courts. It is the settled rule of those courts that such anguish, when unaccompanied by bodily injury is too intangible and remote to form a basis of recovery of damages. They are allowable only where there has been bodily injury causing physical pain and mental anguish cannot be dis-

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<sup>1</sup> *People v. Rogers*, 192 N. Y. 331, 85 N. E. 135 (1908); 193 N. Y. 46, 85 N. E. 809 (1908); *People v. Doran*, 246 N. Y. 409, 159 N. E. 379 (1927).

<sup>2</sup> Code Crim. Proc., Sec. 395.

<sup>3</sup> *Ibid.* at 391.

<sup>4</sup> *People ex rel. Flynn v. Woods*, 218 N. Y. 124, 112 N. E. 915 (1916); *Matter of Whitman*, No. 2, 225 N. Y. 21, 121 N. E. 485 (1918).

<sup>5</sup> By Lehman, *J.*, 249 N. Y. at 428, 164 N. E. at 339.

tinguished from the physical;<sup>1</sup> where there has been a malicious invasion of the rights of another, damages being allowed not alone as compensation but by way of punishment of the wrongdoer.<sup>2</sup> Courts in a few jurisdictions permit recovery for mental anguish caused by the negligence of telegraph companies in failing to deliver messages relating to sickness and death.<sup>3</sup> The reason for departure from the common law rule is that "the telegraph is a public utility of modern invention, endowed by the state with special privileges, and charged with public duties; that neglect by its managers and operators in the performance of these duties may cause mental anguish to those it is required to serve."<sup>4</sup>

EVIDENCE—CRIMES—ASSAULT—TRIAL.—Two of the defendants, Malkin and Franklin, were arrested immediately after a raid upon a fur store, and identified by their victims. The other defendants were arrested on information of one who had confessed his guilt and been convicted. The attack in question arose out of the fur strike of 1926, all defendants being members of the Joint Board Furriers' Union. Defendants appeal from a judgment of conviction, alleging that the District Attorney's conduct during trial was prejudicial. *Held*, as to all but Malkin and Franklin, decree reversed. *People v. Malkin*, 250 N. Y. 185 (1929).

The evident purpose of the prosecutor was to show that the defendants were men prone to violence, and who, for that reason had been condemned as a body by the American Federation of Labor. He offered no evidence of prior assaults by defendants,<sup>1</sup> yet he questioned as to previous acts and confronted them with seven silent witnesses propounding questions upon acts done in company with them. The relations of the defendants with the A. F. of L. and their expulsion therefrom were also a subject of examination by the prosecuting attorney. All this was done over proper objection.

<sup>1</sup> *Railway Commissioners v. Coultas*, 13 App. Cas. 222; *Lynch v. Knight*, 9 H. L. Cas. 577; *Hobbs v. London, S. W. Ry. Co.*, 10 Q. B. 122.

<sup>2</sup> *Larson v. Chase*, 47 Minn. 307, 50 N. W. 238 (1891); *Francis v. Tel. Co.*, 58 Minn. 252, 59 N. W. 1078 (1894); *Railroad Co. v. Stabler*, 62 Ill. 313 (1872).

<sup>3</sup> *So. Relle v. Western Union Tel. Co.*, 55 Tex. 308, 40 Am. Rep. 805 (1881). The first adjudication to promulgate the minority rule. Adopted in following states: Alabama, *Western Union Tel. Co. v. Henderson*, 89 Ala. 510, 7 So. 419 (1890); Iowa, *Mentzer v. Western Union Tel. Co.*, 93 Iowa 752, 62 N. W. 1 (1895); Kentucky, *Taliferro v. Western Union Tel. Co.*, 21 Ky. L. Rep. 1290, 54 S. W. 825 (1900); Nevada, *Barnes v. Western Union Tel. Co.*, 27 Nev. 438, 76 Pac. 931 (1904); North Carolina, *Young v. Western Union Tel. Co.*, 107 N. C. 370, 11 S. E. 1044 (1890); Tennessee, *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695, 8 S. W. 574 (1888).

<sup>4</sup> *Rowan v. Western Union Tel. Co.*, 149 Fed. 550 (C. C. N. D. Iowa 1907) at 552. This case along with the other cases in the Federal Courts and other jurisdictions holding to the majority rule have vigorously maintained that there is no sufficient reason for making an exception to the common law rule in the case of actions against telegraph companies.

<sup>1</sup> *People v. Molineux*, 168 N. Y. 264, 61 N. E. 286 (1901).