LIFE TIMERS GET A CHANGE OF LOCATION

THE COUNTRY'S BUTTONHOLE ORNAMENTS ARE PUT ON NEW LAPELS, AND ONLY ONE NEW FLOWER FINDS A PLACE.

Washington, Aug. 8.—Sweeping changes in the diplomatic service which have been reported as contemplated for some time were confirmed today when nominations affecting practically every important station except that at the court of St. James were sent to the senate.

The shake up comes as a result of the resignation of Dr. David Jayne Hiss, ambassador to Germany. John G. A. Leishman, present ambassador to Italy, has been chosen to fill the post, and wholesale transfers in the diplomatic service are listed in order to bring this about. Leishman's nomination for the Berlin post, headed the list sent in.

Another one of importance is the transfer of Thomas J. O'Brien, now ambassador to Japan, to take the place vacated by Leishman.

Charles Page Bryan, minister to Belgium is promoted to the rank of ambassador by the nominations, and is slated to succeed O'Brien at Tokio.

C. P. Anderson, attached to the embassy at London, will become minister to Belgium. John R. Carter, minister to Roumania, Servia and Bulgaria, will become minister to the Argentine Republic. John B. Jackson, minister to Cuba, succeeds him as minister to the Balkan states.

Arthur M. Beaupre, minister to The Netherlands, is assigned to Cuba. Lloyd Bryce, of New York, is nominated to The Netherlands legation. Bryce formerly was a congressman and is the only man among the appointees not now in the diplomatic service. He formerly was editor and owner of the North American Review and achieved distinction in the literary world by critical and political writings. Bryce is known as a deep student of international politics. Bryce is known as a deep student of international politics. He served in congress from 1887 to 1889, being elected as a Democrat.

CONGRESS MAY ADJOURN NEXT WEEK

Washington, Aug. 8.—Both Democratic and Republican leaders in both branches of congress today are predicting that the extra session will end next week. Various dates between August 15 and 19 are named but all are agreed that the session will close within a very short time after the wool and free list bills have been finally disposed of.

Stick to your business, but don't be a stick in it.

OREGON SUPREME COURT DICISIONS

(Continued from Page 2.)

overreaching forfeiture. The defendant, however, suggests that he has paid some taxes since the institution of this suit that should be taken into the account and the plaintiff states that the defendant has encumbered the land with a mortgage for $2,000 which ought to be abated from the balance of the purchase price necessary to be paid on the strict foreclosure decreed by this court.

Without comment upon this phase of the already complicated situation the decree here will be entered as already directed on rehearing but with leave to either party to apply to the circuit court for permission to file supplemental pleadings and to take further proceedings not inconsistent with the opinion rendered on rehearing.

Stark v. Epler and Epler, Multnomah County.

Mary A. Stark, respondent, v. John H. Epler and Sabrina J. Epler, appellants. Appeal from the circuit court for Multnomah county. Hon. Earl C. Bronaugh, judge. Argued and submitted July 6, 1911. Gammans & Malarkey for respondent. Cleeton & Graham and Wm. D. Fenton for appellants. Burnett, J. Affirmed.

The plaintiff, complaining of the defendants, who were husband and wife, alleged: "That on or about September 20, 1907, in the City of Portland, county of Multnomah, state of Oregon, the defendants herein and each of them wrongfully, violently, ferociously and maliciously assaulted the plaintiff herein by striking and beating her upon the hands, arms, shoulders and body with their fists and with a hand hatchet or axe or hammer held by the defendant John H. Epler and by pushing, throwing and crowding the plaintiff against the door casing thereby cutting, bruising and wounding the plaintiff on and about the body, shoulders, arms and side, causing her body, shoulders, arms and side to be crushed, bruised, lacerated, lame and sore."

The complaint contains other allegations more particularly setting forth the alleged resulting injuries and special damages incurred by the plaintiff and closes with a prayer for special damages amounting to $1,000 and further damages in the sum of $10,000 for great mental and bodily pain alleged to have been suffered by the plaintiff. The answer consists of denials, either positive or upon information and belief, of all the allegations of the complaint. On the trial there was a verdict and consequent judgment in favor of the plaintiff for $4,500. The defendants' motion for a new trial having been overruled, they have appealed.

Burnett, J. The testimony tends to show that the defendants were keeping a rooming house in Portland. The plaintiff, with her husband and children, had rented rooms from the defendants and paid a week's rent in advance. At the end of the week the plaintiff and her family were preparing to leave, when the defendant, Sabrina Epler, appeared upon the scene and seized a roll of bedding belonging to the plaintiff. A scuffle ensued, each contending for the bedding, when Mrs. Epler called for her husband who appeared armed with a hatchet. In the melee consequent upon these actions, the plaintiff received the injuries of which she complains. At the trial the plaintiff also gave evidence of some quarrels between herself and Mrs. Epler concerning plaintiff's children and about Mrs. Epler rummaging in plaintiff's trunk.

One thing of which the appellants complain is that in his closing argument to the jury counsel for plaintiff used the following language: "And this action arose out of a crime and these people were tried down in the municipal court, a few days after this thing happened, for a crime. We don't know how that trial turned out—they objected to us showing it, but they were tried for a crime." The defendants, by their counsel, objected to this language but no ruling of the court was called for and none made as to this conduct of plaintiff's counsel. There was testimony on both sides given without objection about criminal prosecution of the defendants in the municipal court. There was abundant testimony, also, tending to prove an assault made by the defendants upon the plaintiff. An assault is a crime, and the comment of the counsel upon the action of the defendant characterizing it as a crime, was legitimate discussion of the evidence. In our judgment no error is shown in this respect.

The action of the court in permitting plaintiff to give evidence about the difficulties occurring between herself and Mrs. Epler over the plaintiff's children is also assigned as error. This testimony was admitted on the acquiescence of defendant's counsel for the purpose of showing malice on the part of the defendant, Mrs. Epler, and having thus concurred, the defendants are in no position to object here on that point. The same reason, that of proving malice, will justify the admission of heated words used on the occasion of the plaintiff's discovering Mrs. Epler rummaging in plaintiff's trunk.

Appellants further urge that the court was at fault in allowing the plaintiff to show what Mrs. Epler said at the trial in the municipal court about whether the plaintiff and her husband owed the former any room rent at the time she undertook to seize plaintiff's bedding. This was admissible for the purpose of showing that her action in taking the property was without justification and that her accompanying assault upon the plaintiff was devoid of excuse. The plaintiff was also allowed to show that at the trial in the municipal court the judge asked Mrs. Epler, after she admitted that the plaintiff did not owe her anything: "Well then, what did you want to take the goods for?" and Mrs. Epler answered that she wanted to take it so that if they did owe her anything she would have it. Of this the appellants complain on the ground that it was irrelevant and immaterial. They claim that the language of the judge had nothing to do with the dispute in this case, but it is permissible under Sec. 729, subdivision 3, L. O. L., to show the declaration or act of another in the presence and in the observation of a party and his conduct in relation thereto. This conversation between the judge and Mrs. Epler was clearly proper to show that her conduct with reference to the bedding and the accompanying assault was inexcusable.

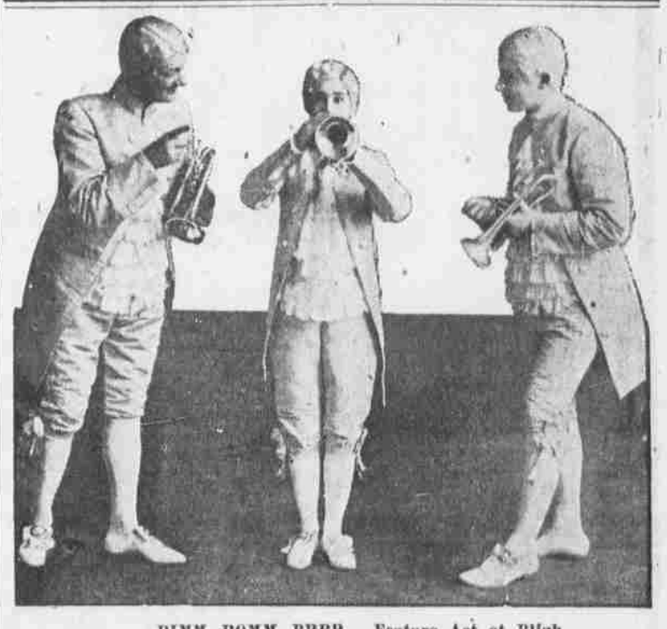
The principal contention of the defendants is that the court erred in submitting to the jury the question of exemplary damages. Defendants maintain that the complaint does not state facts sufficient to authorize an investigation of that question by the jury and that it gives no notice to the defendant that such a claim would be made at the trial. On principal, a complaint must allege facts sufficient to authorize giving the relief sought by the plaintiff. "To entitle the plaintiff to exemplary damages, he must not only prove the elements that enter into and make up this cause of action, but he must in the first place in his complaint set up distinctively, the elements that made up his cause of action, and if he fails to do so, his complaint should be dismissed." Samuels v. Railroad company, 35 S. C. 493, 501. The rules of pleading do not require that the allegations relating to exemplary damages should be set out separately from the other averments of the complaint. Special damages must be grounded upon separate allegations, but exemplary damages are so intimately connected with general damages that if the general allegations are sufficient to show the wrong complained of was inflicted with malice or oppression or other like circumstances, the complaint will be sufficient to authorize the infliction of punitive or exemplary damages. Shoemaker v. Sonju, 15 N. D. 518, 524.

The question then is, does this complaint contain allegations sufficient to justify the infliction of punitive damages? It is text book learning that an assault is an intentional attempt by force to do violence to the person of another and that a battery is the actual application to such person of the attempted force and violence. The complaint avers that the defendants not only assaulted the plaintiff, but also that they actually applied the threatened violence to her person with the consequences mentioned. Ex vi termini, the term assault advises the defendants that they are accused of a malicious and guilty intent which is the basis of punitive damages. Our code, L. O. L., Sec. 798, subdivision 2, conclusively presumes "a malicious and guilty intent form the deliberate commission of an unlawful act for the purpose of injuring another."

An assault by that name is an unlawful act as well as the consequent battery. Hence, by these words in the complaint, the defendants were notified that malice would be imputed to them on the trial and that if the acts alleged were proven, the court would be authorized to submit the question of exemplary damages to the jury. The evidence is ample to show that both defendants joined in the assault. The evidence of quarrels with the plaintiff in which Mrs. Epler is said to have engaged is merely cumulative as tending to show malice on her part and the proof of the assault and the participation of the defendant, John Epler therein was sufficient to make manifest such a state of mind on his part. Having joined in the assault and battery each defendant was liable for the consequences resulting therefrom and the evidence is ample to show they both were actuated by malice from the very fact of their having participated in the assault. Consequently, being joint tort feasors, each would be liable for damages, both actual and exemplary, resulting from the assault. Reizenstein v. Clark, 104 Iowa 287.

The defendants also urge that the court erred in overruling their motion for a new trail, but as said by Justice Moore in First National Bank v. McCullough, 50 Or. 508, 515: "The rule is settled in this state that the action of a court in granting or denying a motion for a new trial is not a final order from which an appeal lies. This principle has so often been announced that it is unnecessary to cite the cases which uphold the doctrine." The doctrine of that case in that respect is not disturbed by L. O. L. Sec. 548 as to orders denying new trials for that section only makes appealable orders granting new trials and does not refer to refusals to rehear any case.

The judgment is affirmed.



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