

may be that the goods were misused in the course of the seizure, and that the sale was improperly conducted; but the defendants are not responsible for such misconduct if there were such in this action.

The action, though for trespass and conversion, yet is not a case of bare tort. The complaint of the plaintiff really is that the defendants in breach of the terms of the bill of sale entered and seized without allowing a reasonable time to elapse between demand and entry and seizure. We think that in such a case the measure of damages is the loss which the plaintiff has actually sustained by being deprived of the possession of the goods during the interval between demand and the expiration of such a time thereafter as was under the circumstances reasonable for permitting the plaintiff to comply with the demand.

In *Brierly v. Kendall and others*, 21 L.J., Q.B., 161, the Court, leave being reserved, reduced the damages to a nominal amount. That was an action of trespass and conversion for an entry and seizure under a bill of sale, without sufficient notice. In *Chinnery v. Viall*, 29 L.J., Exch. 184; *Johnston v. Stears*, 33 L.J., C.P., 132; and *Donald v. Suckling*, 38 L.J., Q.B., 240, per Shee, J., the principle of the decision in *Brierly v. Kendall* is explained as being that though the action was for a trespass, yet it was in substance for a breach of contract, and that in such a case the measure of damage is the loss which the plaintiff had really sustained by being deprived of the possession of the goods. See also *Toms v. Wilson*, 32 L.J., Q.B. 33, per Blackburn, J., where he intimates that in such a case as the present the damages must ordinarily be only nominal. In *Brighty v. Norton*, 32 L.J., Q.B. 39, where the jury gave about the value of the goods as damages, no question was raised as to the measure of damages, or as to the amount given by the jury.

In *Massey v. Sladen*, 38 L.J., Exch. 34, the Court apparently were of opinion that, but for the agreement at the trial as to the amount of damages, it would have been difficult to establish a right to more than nominal damages.

In the present case nominal damages were perhaps all that the jury should have given.

If, indeed, the jury had given somewhat more than nominal damages we should not have been disposed to disturb the verdict, but the amount found by the jury on the second count is so excessive that we think there must be a new trial of the second count. This will involve a new trial of all the issues framed thereon and on the pleadings, thereby including the first and second issues, so far as they apply to the stock-in-trade.

No objection was made by the defendants on the ground that the bill of sale contains no stipulation for quiet enjoyment by the plaintiff of the stock-in-trade till default. We therefore give no opinion whether, in the absence of such a stipulation, the plaintiff had such an interest in the stock-in-trade as to enable him to recover damages for the seizure of them by the defendants.

The question of the costs of the first trial must be reserved till after the new trial, but, as the defendants have succeeded in this rule, the plaintiff must pay the costs of the rule.

APPENDIX C.—CHARGE 9.

HAIR v. BOROUGH OF WANGANUI.

Between Jane Hair, plaintiff, and the Mayor, Councillors, and Burgesses of the Borough of Wanganui, defendants.

DECLARATION.—On Friday, the 23rd day of March, 1877.

THE plaintiff, by Henry Hamersley Travers, her solicitor, saith,—

1. That she is in the lawful possession of a parcel of land covered with water, forming part of Sections numbered respectively 16 and 17, in the Wanganui District, in the Provincial District of Wellington, on the right bank of the Wanganui River, and commonly known as Virginia Water, and which is surrounded by other parts of the said Sections numbered respectively 16 and 17, a plan of which said land so covered with water is hereunto annexed.

2. That at a distance of about two hundred and three chains from Virginia Water aforesaid is a lake named Westmere, the waters of which flow to the sea without passing into Virginia Water.

3. That the water of Virginia Water is pure and wholesome water, but the water of Westmere Lake is foul and impure, and is resorted to by horses, cattle, and swine, and other animals.

4. That the defendants have threatened to construct an aqueduct from Westmere Lake aforesaid to Virginia Water for the purpose of carrying water from Westmere Lake aforesaid into Virginia Water, whereby the level of Virginia Water will be much increased in height, and the water thereof will be polluted.

5. That the defendants have prepared specifications for the construction of such aqueduct, and have, by advertisement published in newspapers published and current in the Town of Wanganui, called for tenders for the execution of the said works, and the following is a portion of the specification for public tender by the defendants:—

“The work required to be done consists of the forming and filling in of a channel from a peg on the southern bank of the Westmere Lake, about a chain east of its outlet, to one on the edge of Virginia Water at its south-eastern extremity, a total distance of two hundred and three chains, and laying a line of six-inch glazed socket pipes therein.

“He will have to commence the work within three days after notice that the first lot of tiles are ready, and must complete the work within sixty days from the date of the commencement, under a penalty of five pounds for each week or part of a week during which he fails to complete the work. Should the work be completed within the sixty days a bonus of two pounds per day will be paid for every day within the time above mentioned.

“The pipes for the work will be supplied by the Wanganui Borough Council, and will be delivered to the contractor at the Corporation Wharf or other place in town determined by the Council.”

6. That the plaintiff has not granted to the defendants any right, title, license, or authority whatsoever to bring or run the waters of the Westmere Lake, or any other waters, into Virginia Water,