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The Civil Damage Act

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THE CIVIL DAMAGE ACT.

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CORNELL UNIVERSITY LAW SCHOOL.

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Doubtlessly no provision of our constitution will ever be more sacredly guarded than that portion of the Sixth Amendment whereby it has been declared that "No person shall be deprived of life, liberty or property, without due process of law." Inherited as it is from "Magna Charta" and the "Bill of Rights", it has been for so many decades recognized by the citizens of this country as, perhaps, the main bulwark of their liberty, that we might perhaps expect to find that our legislators would never presume to violate its provisions. Yet notwithstanding this we constantly find that the constitutionality of legislative acts is brought into question in courts of justice by reason of this very amendment.

It is true that, so far as I am aware, there has been no instance of any open and direct attempt by our legislators to deprive individuals of life or liberty without due process of law, yet in a civilized commercial nation like our own, wherein the rights of
property assume such wonderfully varied shapes, in many instances requiring legislative regulations in order that individual ambition, so valuable if properly directed, may not degenerate into a public injury, it may sometimes, nay in fact often does happen, that an injustice is done to individual property interests, and we frequently find that citizens who are dissatisfied with legislative enactments, seek aid from that department of our government which forms such an admirable check on hasty legislation and endeavor to prevent the execution of legislative acts through the instrumentality of this amendment. The regulation of the liquor traffic has been, doubtlessly, one of the most difficult questions with which the legislatures of our various states have been compelled to deal and in questioning the constitutionality of the "Civil Damage Act", which is undoubtedly but one form of regulation various classes of our citizens have afforded a specific and good illustration of the legal methods sometimes employed to escape, through the instrumentality of this famous "Sixth Amendment", the consequences of legislative
acts displeasing to themselves.

The "Civil Damage Act" passed in the legislature of the State of New York, the 29th of May 1873, declares that "Every husband, wife, child, parent, guardian, employee or other person who shall be injured in person, or property, or means of support, by an intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her name, against any person or persons, who shall have, by selling or giving away intoxicating liquors, caused the intoxication, in whole or in part, of such person or persons, and any person or persons, owning or renting, or permitting the occupation of any building or premises, and having knowledge that intoxicating liquors are to be sold therein, shall be liable, severally or jointly, with the person or persons, selling or giving, away the intoxicating liquors aforesaid, for all damages sustained, and for exemplary damages; and all damages recovered by a minor under this act shall be paid either to such minor or to his or her parents, guardian, or next friend, as the court shall direct; and the unlawful sale or
The constitutionality of this act, in so far as the right to bring an action against the owner of the real property in which the liquor was sold, is concerned, was early brought in question on the ground that it is a violation of the Sixth Amendment of the Constitution of the United States, heretofore cited, and a violation, as well, of the corresponding provision in the Constitution of the State of New York. The owners of the premises who were sued for damages under the statute claim that the effect of the statute was to deprive them of their property without due process of law and to transfer it to others through the agency of third persons and without their consent. While conceding that the legislature, when acting in the capacity of a protector of infants, lunatics, and persons incapacitated to act for themselves, might pass laws for the disposition of the property of such incapacitated persons when their interests so demanded and yet violate no provision of the
constitution, they denied that the legislature could pass such laws in cases wherein it appeared that the owners were not thus incapacitated.

A notable exception to this rule appears in the instance of the right of "Eminent Domain" wherein, upon the ground that "private interests must yield to public necessity", private property is allowed to be taken for public uses by act of the legislature, but under the imposition of a healthy restraint that such private property cannot be taken without the payment of a just and adequate compensation therefor. The opponents of the Civil Damage Act state, however, that this is very different from a legislative grant of the right to take or sell private property under the pretext of some public use and then to give the proceeds to some third person, which is, as they claim, the virtual effect of the Civil Damage Act.

The constitutional controversy to which I have but alluded, is a most interesting one and the claims of the opponents of the act are certainly not to be cast aside as unworthy of consideration. Chief Justice Story, in the
case of Taylor v. Porter (4 Hill 140), uses this language: "The security of life, liberty, and property lies at the foundation of the social compact; and to say that the grant of legislative powers to a senate and assembly includes the right to attack private property, is equivalent to saying that the people have delegated to their servants the power of defeating one of the great ends for which government was established." Our legislators then, if they do not wish their acts declared unconstitutional, must have a care that they do not violate the spirit of the Sixth Amendment.

Nor is it a sufficient answer to a claim that an act is unconstitutional to allege that the act itself does not directly deprive any individual of his property but that such property is only taken after "due legal process" and condemnation in courts of justice. The learned Chief Justice Story further states that the "law of the land" as used in Article VII Sec.1 of the New York Constitution wherein appears the phrase "No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citi-
zen thereof, unless by the law of the land or by the judgment of his peers," does not include mere legislative enactments but refers to judicial investigation conducted according to law. Yet to hold that a judgment is valid because all the proper forms of procedure in the courts of justice have been observed when the statute authorizing such procedure is valid would be absurd.

The opponents of the act alluded with great confidence to the celebrated case of Wynehamer v. The People (13 N.Y. 387), in which the prohibition of the sale of intoxicating liquors was declared to be unconstitutional, no discrimination having been made between liquors already purchased by dealers and the liquors which might be subsequently manufactured or imported. The court in that case sums up the whole argument in the statement that "theories of public good must give way to the rights of private property;" virtually holding that although the liquor traffic be conceded to be harmful yet inasmuch as the prohibition of the sale of property lessens its value and any such diminution of value is in effect a taking of property such act
would come within the prohibition of the constitution.

The general principles by the aid of which the constitutionality of the Civil Damage Act has been brought in question are themselves unquestioned, and it merely remains for us to consider whether or no they have in this instance been misapplied. That they are not to be narrowly construed courts have acknowledged and that an absolute taking of property is not necessary, as we have seen, to constitute a violation of the Sixth Amendment, for any act destroying in any measure its value, constitutes in itself such violation. As Judge Miller has said in Pumpelly v. Green Bay Company (13 Wallace 166), "There may be such serious interruption to the common and necessary use of property as will be equivalent to a taking within the meaning of the constitution!" However in all the arguments which we have touched upon thus far we have overlooked the "police power" of the state, by which is given to Congress, under the plea of protecting the public safety, health and welfare, the power to declare certain lines of conduct criminal. The "Slaughter House Cases" (16 Wallace 36), wherein we are told that under the title of "An Act
to protect the public health" Louisiana gave to a certain corporation the exclusive right to slaughter cattle within a certain territory, although other slaughter houses were in existence at the time in the prescribed territory, is suggestive of the fact that the liberality of construction in favor of the "Police" regulations, is no less marked than that which we have found in favor of the Sixth Amendment. In the language of Judge Field in the case above cited: "All sorts of restrictions and burdens are imposed under the police power, and when these are not in conflict with any constitutional prohibitions or fundamental principles, they cannot be successfully assailed in a judicial tribunal,............ but under the pretence of prescribing a police regulation, the state cannot be permitted to encroach upon any of the rights of the citizen which the constitution intended to secure against abridgment." All that the courts can do, then, is to scrutinize the acts of the legislature and be assured that our legislators have not under the guise of a mere health regulation, as in the Cigar Tenement House Case,
decided in the Court of Appeals in 1885, in reality passed an act which had no relation thereto.

The constitutional controversy has therefore not been an unnatural one but it has been cut short and the whole matter set at rest by the decision of the Court of Appeals in the case of Bertholf v. O'Reilly (74 N.Y. 509) wherein our highest court has distinctly recognized the constitutionality of the act. Referring to the case of Wynehamer v. The People, which we have already cited, they state that the power of the legislature to absolutely prohibit the sale of liquor, with due regard to the vested rights of property, has been distinctly recognized, and they deny that a law requiring an owner of property to refrain from renting his property to be used for the sale of liquor so diminishes the value of such property as to constitute a taking within the prohibition of the Sixth Amendment; but on the contrary it can be considered no deprivation to the owner of property that he being required to refrain from the renting of his property for such purposes, or if he do so lease his property he must be considered
The sale of intoxicating liquors, as is evidenced by the title applied to the "Civil Damage Act" by the legislature, is recognized as a fruitful source of pauperism and crime and consequently the legislature by reason of its delegated police powers possesses the right to limit the business in any way which it may see fit and it is no hardship that one who conducts the same or in any way assists should be bound by any such restrictions as a legislature may see fit to impose out of a due regard for the public welfare.

The other main objection which, under the authority of Ryan v. N.Y. Central R.R. Co. (35 N.Y. 209), has been raised against the constitutionality of the act in so far as it imposes a liability upon the owner of the premises for the acts of the individual to whom his lessee has sold liquor is to be found in the fact that the damages are not the necessary and proximate consequences of the act of such owner but are the remote and indirect consequences of this act. This, however, is
of little consequence because of the fact the legislature is not restricted in its enactments by the rules of the common law in the same way that it is by the national and state constitution but may at any time alter such rules. Bertholf v. O'Reilly (74 N.Y. 509)

In considering the liability imposed upon the liquor dealer himself rather than upon the owner of the premises upon which the liquor was sold, it, at first, seemed to me a little incongruous that one should be licensed by the state to sell liquor and afterwards be held liable for damages, indirectly suffered by the performance of a lawful and licensed act. This question appears to have been raised in one of the first cases litigated under the act, that of Baker v. Pope (2 Hun 556), wherein the defendant, a licensed liquor dealer, claimed that the "Civil Damage Act" was unconstitutional for the reason that it impaired the validity of the contract between the excise board and himself. In writing the opinion of the court, Judge Boardman suggested that the act refers equally to licensed and unlicensed liquor dealers and but forms a part of the general excise law so that one buying a license must be construed to have consented to procure the same subject to any
restrictions which might be imposed by the legislature for the public welfare and in the shape of excise restrictions. The reasoning of Judge Boardman was soon after approved in the case of Franklin v. Schermerhorn (8 Hun 112) wherein the court suggested that "While the legislature has provided in the general excise law for granting license for the sale of intoxicating drinks it has superadded in legal effect in this statute that such license shall be given, taken and received subject to the qualifications contained in this act." Again in a late Massachusetts's case the court while arriving at the same conclusion denies that a license is a contract and asserts that it is "simply an authority to sell according to law, and subject to all the limitations, restrictions and liabilities which the law imposes". Moran v. Goodwin (130 Mass. 158, 160).

Having, as fully as the limits of our thesis will permit, considered the constitutionality of the act it may be well for us to consider what the opponents of the act consider as logical objections thereto, although they may not be sufficient as constitutional objections. It is to be noted in the first place that the "Act to Sup-
press Intemperance, Pauperism, and Crime" constituting Chapter 646 of the Laws of New York State passed in 1873, is like the similar act in Massachusetts, more severe than the corresponding "Civil Damage Acts" in most of the other states. In so far as it, in effect, imposes a penalty upon a lawful as well as upon an unlawful sale of intoxicating liquors. In fact the penalty exists independently of any act of carelessness or violation of the law on the part of either the seller or the owner of the premises upon which liquor is sold. This can no more conclusively and concisely be shown than by quoting the language used by the court in the case of Bertholf v. O'Reilly (74 N.Y. 513): "The liability of the landlord said the learned judge in that case,"is not made to depend upon the nature of the act of the tenant but exists irrespective of the fact whether the sale or giving away of the liquor was lawful or unlawful; that is, whether it was authorized by the license laws of the state or was made in violation of that law. Nor does the liability depend upon any question of negligence of the landlord in the selection of the tenant, or of the tenant in selling the liquor. Although
the person to whom liquor is sold is at the time apparently a man of sober habits, and so far as the vendor knows, one whose appetite for strong drink is habitually controlled by his reason and judgment, yet if it turns out that the liquor sold causes or contributes to the intoxication to whom the gift or sale is made, under the influence of which he commits an injury to person or property, the seller and his landlord are by the act made jointly and severally responsible. The element of care or diligence on the part of the seller or landlord does not enter into the question of liability." To one, therefore, who considers the sale of intoxicating beverages perfectly legitimate from a moral as well as from a legal standpoint, the act appears to be one of great injustice because it imposes a burden and liability irrespective of the care and discretion exercised by the vendor or the landlord, the only discrimination made between the extremely careful and the reckless vendor arising in the insertion of the provision which gives the recovery of exemplary damages in certain cases.
The act therefore is in reality in the nature of a prohibitory act being an act which is designed to discourage and to impose burdens upon the general liquor traffic. In fact, notwithstanding an opinion which I have somewhere read to the contrary, the act, to my mind, makes every liquor dealer, to a certain limited extent, the guarantor of the discretion which shall be exercised by others who may be engaged in the same business in which he is engaged, in which he is engaged, inasmuch as the man who sells the first glass of liquor contributing to the intoxication, may be subjected to a liability under the act as well as he who at another time and place under more aggravating circumstances has sold the liquor which finally makes the drinker intoxicated and but for which the intoxication would not have existed.

The intention of the legislator to place a ban on the sale of liquor in the nature of a penalty further appears from the construction which has been placed upon the statute by the Court of Appeals. In the case of Neu v. McKehnia (95 N.Y. 632) the court held that
it was not a necessary incident to the liability of a liquor dealer that he should have been able at the time of the sale to foresee the probable result of his act, and that it was "not necessary that the act which caused the injury should be the natural, reasonable, or probable consequence of the intoxication," but that it was sufficient that the acts complained of were committed while the drinker was intoxicated, in whole or in part, by liquors sold by the defendant.

The "Civil Damage Act" is in effect, very similar to an act relative to the preservation of game, which was passed in this state and referred to in the case of Phelps v. Races (60 N.Y. 110). The statute in that case provided in substance that any person killing, or selling, or having in his possession any game birds after they were dead, during certain periods of the year should be punished in certain ways therein provided. The courts held that the prohibition was absolute and that it constituted no defense to show that they were killed before the prohibited period or that they had been imported from outside of the state limits.
"The measures best adapted to this end", said the court in referring to the preservation of game, "are for the legislature to determine, and the courts cannot review this decision. If the regulations operate in any respect, unjustly or oppressively, the proper remedy must be applied by that body. Some of the provisions may be unnecessarily severe, but we cannot say that those involved in this action are foreign to the objects sought to be obtained, or outside of the wide discretion vested in the legislature." The "Civil Damage Act" is, to my mind, almost strictly analogous to this case, as are the remedies to be pursued analogous to those hinted at, violating no provision of the constitution if any injustice be discovered in the act itself the only remedy is to be found in further and more appropriate action by the legislature in the wise discretion of which the act was considered essential for the proper regulation of the traffic which experience has taught to be in many instances damaging to the public welfare.

The idea of giving a right of action against any person selling strong or spirituous liquors in favor of persons injured thereby, is no novel one, for as early as
the year 1857 we find that by Section 28 of Chapter 628 the legislature of this state created such a right of action, but only as against those who made such sales unlawfully. In fact all previous acts of this nature in this state, like, those now in force in New Hampshire and Vermont and in most of the other states, have been in the nature of penalties for unlawful sales and the novelty, if any, appears in the imposition of a restriction on the liquor traffic as a business, without regard to the lawfulness or unlawfulness of the particular sales. Another instance of what we may call the severity of this act, as compared with the excise laws which have hitherto been enacted, is to be found in the permission which is given to the injured person of joining as a defendant with the seller of the liquor the owner of the premises. This provision has been found to be a very effective one for the reason that heretofore the seller has frequently been found unable to respond in damages. The owner of the premises is, however, in a measure protected from the wanton acts of a seller who is rendered reckless from a knowledge of his own irresponsibility by the provision that "Any unlawful sale
or giving away of intoxicating liquors works a forfeiture of the tenant or lessee under the lease."

The actions, too, under the "Civil Damage Act" it is to be noticed, have been greatly encouraged, rendered comparatively inexpensive and easy to be prosecuted by the provision of a second section whereby any justice of the peace is given jurisdiction of an action brought under the act when the claim for damages does not exceed Two Hundred Dollars, and even in such a case, such justice by associating with himself two other justices of the county may extend his jurisdiction to cover a claim of Five Hundred Dollars.

Considering now somewhat more in detail the provisions of the act itself, we find our attention especially directed to the actions for injuries to the means of support of the person seeking to recover damages by reason thereof. The title of the statute, as we have already noticed, is "An Act to Suppress Intemperance, Pauperism, and Crime." It is consequently evident that one of the main purposes of the legislature in passing the act was to afford protection to the helpless and dependent. Inasmuch, too, as a very large proportion of
the poverty stricken families of our cities are indebted for their poverty to the habitual use of intoxicating liquors by the head of such family, it is little to be wondered that from the very enactment of the act a large majority of the actions which have been brought have been based on the claim of "injuries to the means of support". The construction of this clause has been the source of no little controversy even among the Supreme Court judges themselves. The claim was first made, a right of action would lie against the vendor of liquors for the injuries resulting from the intoxication only in those cases in which such an action might have been maintained in favor of the plaintiff against the intoxicated person himself, the claim in substance being that by reason of the statute it was intended that more persons should be made liable for the injury which had been committed but that it was not intended by the legislators to create a new right of action. In consequence of this course of reasoning we find the court in the case of Hayes v. Phelan (4 Hun 733), denying to the wife a recovery for loss of means of support by
reason of the death of her husband consequent upon his intoxication. This holding, however, was shortly after repudiated by the same court in which it was held, and as I think, justly, that all injuries should be included within the remedy of the act which were consequent upon the intoxication, the court reasoning that if "injury resulting from death were excluded the minor and immediate injuries would be provided for but the greatest of all excluded." Jackson v. Prookins 5 Hun 530.

The decision in Jackson v. Prookins was affirmed in Quain v. Russel (3 Hun 319) and the controversy seems to have been finally settled by the decision of the Court of Appeals in Mead v. Stratton (87 N.Y. 498) wherein it was held that the legislators in the passage of the act intended to give a right of action not known to the Common Law, that there could be a recovery for consequential as well as for direct injuries and that consequently there could be a recovery for loss of means of support resulting from death, the object of the act being not so much to render more persons liable for the injury but to "suppress the sale and use of intoxicating liquors."
It must, however, be borne in mind that, although, as we have seen, the act is construed liberally in favor of the persons who have been injured in their means of support by reason of the intoxication, actual injury to the means of support must be clearly proven and not left to inference. The Civil Damage Act does not create a right of action to recover compensation for more loss of services, as is the case in the right of action which is, in this state, given to the widow for the damages resulting to herself and the next of kin by reason of the death of the husband and father caused by the negligence of the defendant. The construction placed upon the statute in this regard clearly appears from the case of March v. Mabbit (3 Weekly Dig. 126) as well as from the language used by the Court of Appeals in the case of Volans v. Owen (74 N.Y. 526), wherein the learned judge states that "where injury to the means of support is the gravamen of the action, the plaintiff must show in order to maintain his action that by or in consequence of the intoxication or acts of the intoxicated person his accustomed means of support have been cut off or curtailed or that he has been reduced to a state of
dependence by being deprived of the support which he had before enjoyed. There must be proof that the services were necessary for the support and that he has been injured in his support. Diminution of income or loss of property don't constitute an injury to means of support if the plaintiff has notwithstanding adequate means of maintenance from accumulated capital or property or his remaining income is sufficient for his support. "The right of action for injury to the means of support exists, of course, in favor of all those who are reduced to want by reason of the intoxication of the one legally bound to support them and for whom he has neglected to provide and even although no death has resulted from such intoxication. The action therefore exists in favor of indigent parents for the loss of means of support by reason of the intoxication of the son as well as in favor of the child or wife for the loss of necessary support resulting from the intoxication of the parent or husband. Stevens v. Cheney (36 Hun 1). Of course the fact that the wife or other dependent person is injured in her means of support does not prevent her recovering any further and
additional damage to herself by reason of any personal injury suffered or injury to property independent of the injury to her means of support. Felyea v. Norris (5 Weekly Dig. 343).

In determining the precise amount of damage to the dependent person the court will consider all facts which have any connection whatever with the question of damages. Thus not only will evidence of the loss of labor, money, lands, or income contributing to the necessary support of the plaintiff be admissible and competent but also evidence of a loss of situation and inability to get another or insanity, sickness, and dissability, by reason of which the means of support of the plaintiff in the future will be cut off or diminished below what is reasonable for one in plaintiff's station of life. McCann v. Roach (81 Ill. 213). Thus, too, in Flynn v. Fogarty (106 Ill. 263) the court held that evidence that the deceased was of industrious habits was admissible as being relevant to the question as to the amount of damages suffered by the plaintiff, but at the same time the same court held that evidence of mental anguish,
arising from the loss of the society and companionship of the deceased was inadmissible as affording no information upon the question of damages but only tending to excite sympathy in favor of the plaintiff and against the defendant.

It is a noticeable fact that the rules regulating the admission of evidence in actions brought for injury to the means of support are in many respects the same as those which exist in the actions brought for a recovery of damages resulting from the negligence of the defendant whereby a husband or father has been killed, yet in some important respects they differ materially, thus while the contributory negligence of the deceased is a good defense in the latter case, we find nothing corresponding to it as a defense to an action brought under this statute. In fact, as we shall hereafter see, no matter how reckless or criminal the act of the intoxicated person which caused the injury the saloon keeper is not thereby relieved from liability. It is, however, true that if the wife, child, or dependent person who is plaintiff in the action connives at or voluntarily
encourages the person in his intoxication and thus is instrumental in bringing the loss upon herself she can recover, in Iowa at least, no damages. Kerney v. Fitzgerald (43 Iowa 580). I have been unable to discover any corresponding case in New York State, and inasmuch as we have already found that the act in New York State is for the purpose of "stopping the sale of intoxicating liquors rather than to afford a remedy for injuries sustained, I might, I think, with some reason question the soundness of the decision.

In another respect, too, the action differs materially from the action for damages resulting from negligence already referred to, inasmuch as in the latter case we find that the wife can recover in one action the damages resulting to herself and the next of kin, while in the action under this statute, although the court in Franklin v. Schermerhorn (supra) suggested that probably the legislature intended to give but a single right of action, yet the fact remains that the wife cannot recover in one action the damages suffered by herself and children and that it is improper for the several damaged
persons to unite as plaintiffs but that each can recover his or her proportionate share of the damage suffered in a separate action. This to be sure is, unfortunate because of the unnecessary litigation which is necessarily attendant upon a just recovery for the benefit of those rightfully dependent upon the deceased. In reality, however, the misfortune is not as real as at first appears for the reason that the inconvenience is in effect, obviated by the decision in Ludwig v. Glaes sel (34 Hun 312) whereby it is held permissable to have a guardian appointed for the infant children, who may then assign their right of action to the mother who can then recover for the benefit of all in one litigation.

In this connection it may be well to allude to the fact that although the seller of the liquor may be joined as a defendant in the same action, with the owner of the premises upon which the intoxicating beverages were sold, the courts, as appears from the decisions in Jackson v. Brookins (supra) and in Morenus v. Crawford (15 Hun 45), will not permit the joinder as defendants of two or more different individuals who, at
different times and in different places sold liquor which contributed to the intoxication of the person by whom the injury was caused. This doubtlessly, in various respects, is productive of good results for the reason that the recovering of exemplary damages would frequently be found to be justifiable in an action against one certain individual liquor seller only, while if numerous vendors were made defendants and rendered jointly liable, exemplary damages being justifiable as against but one of the defendants it would be inequitable to permit the recovery of any such damages and consequently there could be no distinction available between a reckless dealer and one who always exercised discretion in the sale of liquor. Inasmuch, too, as the plaintiff will almost invariably bring the action against the one who by reason of his individual negligence has practically been the cause of the intoxication, both because thereby he may recover the extra compensation allowed by way of exemplary damages and because he can in such an action more easily make out a strong case and one which will appeal to a jury. It follows that the penalty is made to rest upon the liquor seller
whd is in reality the cause of the intoxication by reason of his having sold liquor to one whom he must have known to be already under the influence of liquor. In one respect, however it must be conceded that the rule is unfortunate for the reason that, inasmuch as in nearly all the states, although different parties may be sued, yet there can be but one recovery, (Kearney v. Fitzgerald (supra) it necessarily is true that the plaintiff may, because perhaps of his greater responsibility, bring the action against the dealer who, although by selling some liquor, has contributed to the intoxication yet is really not the one who is the most blameworthy, and in consequence the latter escapes all punishment. But, as we have already seen, the innocence and good faith of the liquor dealer constitutes no defense to the action, and it has even been held both in New York state and in Massachusetts that where the bar keep has sold liquor to a certain individual without the knowledge or consent of the liquor dealer (George v. Gobey 128 Mass 289) and even contrary to his express instructions (Smith v. Reynolds 8 Hun 128()) the latter is nevertheless liable for all damages resulting therefrom.
The only distinction then which exists in favor of the vendor whom I have indicated without any reference herein to the morality of the trade, as the innocent liquor dealer, is to be found in his exemption from liability from what I have termed exemplary damages. Exemplary damages, or as it has variously been termed, vindictive or punitive damages, are based on the willfulness of the act and upon the moral turpitude and atrocity of such acts rather than upon the actual damages which have been suffered and are consequently to be regarded in the light of a punishment rather than measured by way of compensation. In consequence we find that whenever a liquor dealer sells intoxicants to a person after he has received a notice to refrain from doing so or when he made such sales knowing the purchaser to be intoxicated or in the habit of getting intoxicated, proper grounds exist for the award of exemplary damages. Grady v. Prigge (21 Weekly Dig. 81) Weitz v. Ewen '50 Iowa 34). Accordingly in the case of McEvoy v. Humphrey (77 Ill. 338), wherein it appears that a husband became intoxicated by reason of liquors sold by the defendant after notice by the wife to re-
train from making such sales to her husband and in consequence the latter lost or squandered $29.00 belonging to his wife, the plaintiff in the action, and although no other damage was suffered by the wife than such loss, we nevertheless find the verdict of the jury for $200 in favor of the plaintiff to have been considered, on appeal, not to have been excessive or ground for reversal. Likewise we find that the sale of liquors without a license, or to one who was known to habitually squandered in dissipation the wages with which he ought to have supported his family furnished good grounds for the award of exemplary damages inasmuch as such sales must have been made from motives of cruelty, wantonness, or recklessness. Davis v. Standish (26 Hun 115; 95 N.Y. 632).

In the case of Reed v. Terwilliger (42 Hun 310) for the reason which we have so frequently cited that the legislature in the passage of the act intended to go far beyond anything known to the Common Law and for the further reason that the landlord and seller are by the act made jointly liable for any injuries suffered,
the court argued that a landlord would be jointly liable with the seller for exemplary damages whenever it appeared that the circumstances connected with the sale were especially aggravating although the owner of the premises might have been completely ignorant of such circumstances. Upon appeal, however, (116 N.Y. 530) the Court of Appeals, while acknowledging the fact that the legislature created a cause of action not known to the Common Law, denied that they thereby made any change in the rules for ascertaining the and determining the damages and in effect held that no man could be rendered liable by way of exemplary damages for the lawless acts of another. Whenever, however, motives of recklessness characterize the acts of the landlord, he is compelled to respond in punitive damages no less than the vendor is compelled so to respond under similar aggravating circumstances. Thus damages which can be regarded in no other light than vindictive damages have been rendered against a landlord who has leased his business for the sale of liquors knowing at the time of such lease that the lessee was accustomed
to keep a disorderly place, or had been in the habit of selling without a license, or to minors or to habitual drunkards. Kreiter v. Nichols (23 Mich. 496); Garmsley v. Perkin (30 Mich. 495).

Inasmuch, however, as we have already discovered, in considering the constitutionality of the act the statute cannot violate any provision of the constitution and still be valid, the courts very naturally have decided that although several actions might exist for the same offense by reason of the different persons injured thereby, still exemplary damages could be but once allowed for the reason that under our constitution a person can be but once put in jeopardy for the same offense. Secor v. Taylor (4 Hun 123). This fact to my mind, affords another argument in favor of so amending the act as to afford one action by the wife in her own behalf and for the benefit of the next of kin for the reason that "equality is equity" and under this statute as it now exists the first person having a right of action for the same offense and who may recover a judgment is unjustly preferred to those who may have
a stronger equitable right to a judgment and yet are for one reason or another delayed in procuring their judgment.

Having now considered, at some length the nature of the act itself and the remedies afforded for a violation thereof it but remains for us to consider, as briefly as we reasonably may, the nature of the evidence which must necessarily be produced to justify a recovery. From the language of the statute it is evident that to justify a recovery against a defendant the evidence produced must clearly establish the facts that the act causing the injury was committed by an intoxicated person or in consequence of his intoxication and that such intoxication was caused wholly or in part by the liquors sold or furnished by the defendant. A mere sale of intoxicating liquors, therefore, cannot justify a judgment unless the vendee was intoxicated at the time of committing the act by which the complainant was injured. McEntee v. Spiehler (12 Daly 435). So, too, it appears at least in the decisions of a majority of the states that the intoxication must be the cause of the injury. Thus in Schmidt v. Mitchell (84 Ill. 195),
where an action was brought for the plaintiff's injuries which resulted from the death of the intoxicated person caused by the fault of a surgeon in failing to properly treat a wound which was received by the intoxicated person in an affray, it was held that no damage could be recovered which resulted solely from the death of such person. A similar holding was likewise sustained in a case reported in 53 Indiana 517, wherein it appears that the deceased met his death by reason of a falling barrel which was suspended over the sidewalk, which accident could not have been foreseen or prevented had the deceased been free from the influence of liquor at the time of its occurrence but which was caused by outside influences over which he had no control. These two cases, last cited, are not, to be sure, rendered under the Civil Damage Act in New York State but so similar are the corresponding acts in Illinois and Indiana that I do not doubt that they will be regarded as possessing some authority in this state. The decisions in this state are not entirely in harmony to be sure, with those rendered in many of the other states, yet I have found
none, which I consider actually conflicting with the two last cited which commend themselves to my mind as being founded in reason. It might, however, be considered somewhat difficult to entirely reconcile the Illinois case with some of the decisions of our Supreme Court. The latter court has repeatedly declared that in order to justify the recovery it is not necessary to show that the injury produced by the intoxicated person was the "natural, reasonable, or probable" result of the intoxication or of the sale of liquors causing such intoxication, but that it was sufficient should it appear that the deceased was, to any extent, deprived of the natural use of his faculties or rendered incapable of carrying for himself. Beers v. Walhizer (43 Hun 255); Blatz v. Rohrbach (42 Hun 403). In accordance with this principle the court has held that the wife might recover for injury to her means of support arising by reason of the imprisonment of her husband for a homicide committed while he was intoxicated, although it was the imprisonment and not the intoxication and the consequent deprivation of the faculties of her husband during the period of his intoxication which was
the proximate cause of the injury. Beers v. Walhizer (supra): nor could it be claimed that the homicide could have been foreseen by the defendant as a "reasonable or probable" result of his sale of liquor. It seems, therefore, and the language of the court in Davis v. Standish (supra) is especially clear upon this point that to justify a recovery for injury to person, property, or means of support, it is only necessary that the jury shall be able to infer from the facts presented for their consideration that "the intoxication was to such an extent as to deprive the man of the normal use of faculties, either physical or mental, so that he is rendered incapable of caring for himself", under which circumstances it may be inferred that the intoxication is the real although not the immediate cause of such injury.

As to the second point of evidence regarding the necessity of proof that the intoxication was caused wholly or in part by the liquors sold or furnished by the defendant we find that the courts are more stringent in their demands in regard to the evidence necessary to justify a recovery. The evidence of the sale
must be clear and not amount to mere conjecture or suspicion. Thus it has been held that the fact that the person inflicting the injury had been seen to come out of a store in an intoxicated condition and was known to have left his hat there was not sufficient proof of such sale. Loveland v. Primos (32 Hun 477). The particularity of the Supreme Court in this regard is well illustrated by the case of Campbell v. Schlesinger (48 Hun 23) wherein it was held that no action would lie against the proprietor of a saloon for injury caused by his barkeeper while intoxicated in said saloon, although the proprietor was aware of the fact that such barkeeper was intoxicated about one half of the time during which he was tending bar. From the opinion of the court in this case it appears that the judge based his verdict on the fact that, there being no direct proof of the drinking of the liquor, the possibility existed that the barkeeper procured, and the proprietor of the saloon supposed that he procured, the liquor which caused him to become intoxicated elsewhere than at the bar at which he was employed.
Thus we find that although in their construction of the act the courts have recognized its true nature as one designed to inflict a burden on the sale of intoxicants and not merely to afford a remedy for a wrong suffered, they have at the same time not gone beyond the limits of their strict legal authority. They have refused to sustain a judgment against a liquor dealer when strict legal proof has been lacking although the combination of circumstances against him have been very suspicious, and they have likewise declined to render a verdict for exemplary damages when such a verdict would not be in strict accord with the principles of the Common Law and of our own constitution. While recognizing the liability of the owner of the premises for the acts of his lessee they have refused to hold him responsible without clear proof that such acts were performed with his knowledge either actual or constructive, and have refused to impose such a liability upon him because of his mere inactivity in finding out the actual facts. Loan v. Etzel (62 Iowa 429). While recognizing the especial regard paid in the act
to the rights of the poor and incompetent they have declined assistance except by virtue of the strict legal proof of pauperism and incompetency, and have expressly refused assistance to those who by their own connivance and wrong doing have waived their rights to demand such aid. In short, while, perhaps in not a few respects, which I may have already hinted at, the act might well be remedied by legislative action, the fact remains that inasmuch as each particular case as it arises must be construed and decided in accordance with and in conformity to legal methods and forms of procedure which are the adaptation of centuries of litigation, but little chance exists for the rendition of any greater injustice than such as may be inevitable from the provisions of the act itself. It can never be forgotten that our courts and our legislatures are but parts of that system of checks and balances which so characterizes our entire scheme of government. Each in its own peculiar way serves to prevent the excesses of the other. The police power of the state is one of the most important and necessary of the powers possessed by our legislature, and certainly in no way more efficacious to any community
can it be exercised than in the regulation and control of the sale of intoxicants. As explained, controlled, and regulated by the courts, it can but be true that the really meritorious provisions in legislative acts which have been passed in the exercise thereof will appear while the inherent faults will be discovered and remedied and future excesses of the same nature prevented.