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that equities are involved and, therefore, the decisions will vary with the facts, will also contribute to an increase in the future cases. Finally, the failure of the courts thus far to clearly define the problem will result in an increase in the litigated cases. The courts should, in these cases, recognize at the outset that they are faced with an equitable problem. If such terms as frustration and impossibility are used, they should be clearly defined. Instead of continuing to avoid the use of generalities, the courts should lay down some general rules to assist them in deciding future cases and to guide prospective litigants in settling their differences out of court.

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RECOVERY OF EXEMPLARY DAMAGES IN THE ABSENCE OF A RECOVERY OF COMPENSATORY DAMAGES

IN LINE with the great weight of authority in this country, Texas courts allow the recovery of exemplary damages where the defendant's conduct is malicious, wanton, oppressive, or grossly negligent. Although the doctrine of exemplary damages is sometimes criticized as "disturbing the harmonious symphony of the law of damages of which the central theme is compensation,"[1] it has its defenders, and it seems certain that, due to the great weight of precedent, it will continue to be with us for some time.

In connection with the award of exemplary damages, one of the problems which has often arisen and about which there is some conflict is whether there must be a recovery of compensatory damages before exemplary damages may be awarded. Almost without dissent, the courts agree that the allowance of exemplary damages does not widen the field of actionable wrongs, and that there must

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[1] McCORMICK, DAMAGES (1935) 275.

first be established a cause of action independent of the claim for exemplary damages.[2] Beyond this point, there is a conflict on the question of whether a recovery of compensatory damages is also required. Probably the majority of courts in this country will allow a recovery of exemplary damages supported by a recovery of nominal damages only, but a substantial number require the recovery of compensatory damages.[3] It seems to be well settled that Texas courts follow the latter rule, denying exemplary damages if supported by an award of nominal damages only.[4]

The problem under discussion is sometimes confused by the employment of loose terminology. Generally speaking, compensatory damages are damages given as an equivalent for the injury done. They are synonymous with actual damages and are to be distinguished from nominal damages, which are a small and trivial sum awarded for a technical injury resulting from a violation of some legal right.[5] For the purpose of application of the rule that there must be an award of actual damages, some courts consider nominal damages as actual damages. Texas courts have refused to extend the meaning of actual damages and have held that nominal damages are not actual damages.[6] The term "nominal damages" is, however, often erroneously used to include small actual damages or damages incapable of measurement. An example of this sort of error is found in the case of *Postal Telegraph & Cable Co. v. Bacher*,[7] in which an award of 60 cents actual damages was classified as nominal actual damages and recovery of exemplary damages denied accordingly.

Another preliminary point to be considered is that some causes of action require actual damages as one of the essential elements

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[2] *Id.* at 293.

[3] Notes, 33 A. L. R. 384, 403 (1924), 81 A. L. R. 912, 917 (1932).

[4] Fort Worth Elevators Co. v. Russell, 123 Tex. 128, 70 S. W. 2d 397 (1934); Byrd v. Feilding, 238 S. W. 2d 614 (Tex. Civ. App. 1951); Anderson v. Alcus, 42 S. W. 2d 294 (Tex. Civ. App. 1931).

[5] 25 C. J. S., *Damages*, § 2, pp. 454, 458.

[6] Anderson v. Alcus, cited *supra* note 4.

[7] 90 S. W. 2d 620 (Tex. Civ. App. 1935).

of the cause of action. When this situation exists, it is apparent that exemplary damages should not be awarded in the absence of a showing of actual damages for the reason that no cause of action exists to which the damages may be appended. This result is consistent with the theory that the allowance of exemplary damages does not widen the field of actionable wrongs.

There remain, however, numerous instances in which a showing of actual damages is not essential to the maintenance of the suit. Examples of such actions are those for trespass to realty, actions for the recovery of realty or personalty, certain defamation actions, and actions in which equitable relief is sought. In these latter actions in which actual damages are either not essential to the existence of the cause of action or are so small as to be trivial in amount, should exemplary damages be awarded in the absence of a recovery of actual damages? The Texas courts have been practically unanimous in answering this question in the negative. The leading case in Texas and the one generally cited as authority is *Girard v. Moore*.[8] In that action, one for the wrongful suing of writs of attachment and garnishment, the court of civil appeals certified to the supreme court the question whether exemplary damages may be recovered when the only actual damages shown are simply nominal. The supreme court replied in the negative, laying down the rule that where no actual damages are shown, there may be no recovery of exemplary damages. No reasoning was given in support of the rule, but three earlier Texas cases were cited as authority.

The first of these cases, *Flanagan v. Womack*,[9] was one of assault and battery. The appellant assigned as error a charge to the effect that exemplary damages could not be recovered without proof of actual or compensatory damages. The court approved this charge, but in doing so indicated that for the purposes of the rule

[8] 86 Tex. 675, 26 S. W. 945 (1894). This case is erroneously styled "Giraud v. Moore," and citations to it frequently take this form.

[9] 54 Tex. 45 (1880).

nominal damages could be considered as actual damages. The court said:

> "It is a general rule, that for every unlawful trespass the injured party is entitled to at least nominal damages. Certainly this should be so if the trespass was of such character as to authorize exemplary damages. This nominal damage would be the measure of the actual damage if no other is shown, and must necessarily arise in every case in which exemplary damages could be given."[10]

The second case, *Jones v. Matthews*,[11] was a suit for injuries resulting from defendant's maintenance of a house of prostitution. The jury returned a verdict for exemplary damages, but no actual damages. The court reversed this judgment on the ground that there may be no recovery of exemplary damages without an award of actual damages. The third case, *Trawick v. Martin-Brown Co.*,[12] was a suit for wrongful attachment of real estate in which there was no proof of actual damages. The court held that recovery of exemplary damages was precluded. The question of nominal damages was not discussed.

It is apparent that none of these three cases is absolute authority for the rule enunciated by *Girard v. Moore*. The first case is direct authority against the rule, since it expressly declared that nominal damages should be considered as actual damages in meeting the requirement of actual damages. In the other two cases nominal damages were not even discussed. Nevertheless, the rule has been consistently applied in Texas to prevent the recovery of exemplary damages in any case in which no actual damages are recovered.

In the recent case of *Byrd v. Feilding*[13] plaintiff sued for the recovery of personalty wrongfully withheld by defendant and for exemplary damages. Trial resulted in a judgment for recovery of the personalty and for $150 exemplary damages. There was no

[10] *Id.* at 51.

[11] 75 Tex. 1, 12 S. W. 823 (1889).

[12] 79 Tex. 460, 14 S. W. 564 (1890).

[13] 238 S. W. 2d 614 (Tex. Civ. App. 1951).

finding of the value of the property withheld. On appeal, the case was reversed and remanded for a new trial, the court applying "the well recognized rule that there can be no recovery of exemplary damages in the absence of recovery of actual damages."[14] In doing so, the court attempted to distinguish the earlier case of *Steinberg v. Morgan*.[15] That case had declared that "the recovery of exemplary damages for an injury to or a trespass upon personal property . . . is allowed, and it is not material to the application of this rule whether the action is for the value of the property or for the recovery of the property itself."[16] The opinion in the *Byrd* case distinguished the *Steinberg* case by noting that the value of the property recovered in the latter case was stated in the judgment and provision made for return of the property in satisfaction of the judgment. Apparently, the conclusion to be drawn from the two cases is that when the value of the property recovered is stated in the judgment together with a provision for satisfaction of the judgment by return of the property, exemplary damages may be awarded. On the other hand, if the judgment is merely for the recovery of the property, no exemplary damages may be awarded. If a valid reason exists for making this illogical distinction, the court failed to set it out.[17]

Generally speaking, two reasons are given for the requirement that compensatory damages be awarded before there may be a recovery of exemplary damages: (1) a claim for exemplary damages is not a separate cause of action, and no action should be allowed for the recovery of exemplary damages only; and (2) since exemplary damages are in the nature of punishment, no action should be maintained for the sole purpose of punishing the

[14] *Id.* at 616.

[15] 300 S. W. 253 (Tex. Civ. App. 1927).

[16] *Id.* at 256.

[17] In a Comment in 3 Baylor L. Rev. 591, 593 (1951), the distinction is rationalized on the basis of the difference between the common law actions of detinue and replevin. The author properly condemns such a distinction as having no place in the decision of this question today.

defendant.[18] Neither of these reasons will support the rule under consideration. The first argument is met by showing that many suits do not require actual damages as an essential element of the cause of action. The second reason is refuted by the argument that the suit is not for punishment alone but is for the vindication of a legal right.[19] The weakness of the rule is recognized by McCormick:

> "Consequently, it seems desirable to recognize the principle that, if a cause of action is found to exist by the jury, in a case where 'actual' damage is not an essential element of the cause of action, then, if the necessary culpability on defendant's part be established, a verdict for exemplary damages is proper, though the award of other damages is nominal or absent entirely."[20]

It is apparent that the arguments made in favor of the rule applied in Texas are fallacious. But if a different rule is to be advocated, some positive reason for such a rule should be advanced. One such argument is that there seems to be no reason to differentiate between suits in which actual damages are recovered and those in which actual damages are not essential to the maintenance of the action. The purpose in each instance is the vindication of a legal right. The fact that in one instance the damages are actual and in the other only technical seems to be no reason to say that in one exemplary damages may be awarded while in the other they may not. In addition, it should be noted that "the fundamental purpose underlying an award of exemplary . . . damages . . . is to punish the wrong-doer in order that such punishment may serve as a warning and example to prevent him and others from the commission of like offenses and wrongs in the future."[21] If the plaintiff has no more incentive to bring the suit than the recovery of nominal damages, the offender will not be punished,

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[18] See Comment, 18 Tex. L. Rev. 488, 489 (1940).

[19] *Id.* at 489.

[20] McCormick, Damages (1935) 294.

[21] Burlington-Rock Island R. Co. v. Newsom, 239 S. W. 2d 734 (Tex. Civ. App. 1951).

and the desired deterrent to further offenses will not be present. Finally, the compensatory effect of exemplary damages probably tends to remedy a weakness in the law of compensatory damages, which often fails fully to make recompense for the injury usually resulting to a plaintiff from the defendant's wilful, wanton, malicious, or oppressive conduct.

Closely related to the subject under discussion is the requirement that exemplary damages bear a reasonable relation to the actual damages awarded.[22] The Texas courts are among the minority in requiring such a relationship.[23] The requirement is defended by McCormick as a rough means of assuring that the award will not be the result of passion and prejudice on the part of the jury.[24] Another writer has urged this rule as being the proper basis for upholding the decision in *Byrd v. Feilding*.[25] It is submitted that the arguments made against the requirement of a recovery of actual damages apply with equal force to the requirement of a reasonable relationship to actual damages. The measure of exemplary damages should be the degree of malice, oppression, or gross negligence which forms the basis for the award and the amount of money required to punish the defendant, considering his financial condition.[26] These factors bear no necessary relationship to the actual damages awarded. Consequently, where their presence justifies a greater degree of punishment, such punishment should not be reduced or withheld because the actual damages are small or non-existent. Perhaps there may arise situations in which recourse to the rule as a rough limitation on jury passion or prejudice is justified, but it should be recognized that the rule is a guide only—not an inflexible rule preventing proper punishment where appropriate.[27]

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[22] International & G. N. R. Co. v. Telephone & Tel. Co., 69 Tex. 277, 5 S. W. 517 (1887); Flannery v. Wood, 73 S. W. 1072 (Tex. Civ. App. 1903) *er. ref.*

[23] 25 C. J. S., *Damages*, § 126, p. 740.

[24] McCormick, Damages (1935) 298.

[25] See Comment, 3 Baylor L. Rev. 591 (1951).

[26] Note, 33 A. L. R. 384, 399 (1924).

[27] This point is illustrated in Cotton v. Cooper, 209 S. W. 135, 138 (Tex. Comm. App. 1919). An award of $3,500 exemplary damages based upon only $400 actual damages

For the reasons indicated, it is submitted that the rule allowing the recovery of exemplary damages in those suits in which actual damages are not essential to the maintenance of the suit is preferable to that applied in Texas. In suits in which actual damages are an essential element of the cause of action, the rule that there should be no recovery of exemplary damages in the absence of a recovery of actual damages is appropriate. Perhaps without realizing it, and certainly without justifying it, the Texas courts have applied the same rule to suits in which actual damages are not essential to the maintenance of the action. Perhaps the Texas rule is so well settled and of such long standing that future courts will refuse to disturb it even though impressed by the arguments against it. Should they be so inclined, however, it seems the rule could be overruled on the basis of the weight of authority elsewhere and on the basis of the demonstrated erroneous manner in which it was developed.

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was upheld because "the welfare of society demands the imposition of such punishment" of the "nefarious" activities of defendant loan company.