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# INDIANA LAW JOURNAL

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## THE INDIANA DOCTRINE OF EXEMPLARY DAMAGES AND DOUBLE JEOPARDY

VICTOR E. ALDRIDGE JR.\*

The overwhelming majority of the courts hold that in considering the question of exemplary damages, it is immaterial that the wrong committed is also punishable as a crime.<sup>1</sup> Indiana is a member of the small minority that adheres to the view that if the tort is also a crime, there can be no recovery of punitive damages.<sup>2</sup> It is beyond the scope of this paper to embark into the formidable accumulation of material concerning the logic and policy mustered by the opposing camps.<sup>3</sup> Such a task would inevitably lead to text book proportions. Rather, I shall confine the discussion to a more or less detailed analysis of the problems that have actually arisen.

The Indiana doctrine was born in Judge Davison's opinion of *Hudson v. Taber* in 1854.<sup>4</sup> Only the gremlins are aware of the psychologic phenomena that tempted Judge Davison to turn a deaf ear to the common law and the mountain of majority authority to adopt for Indiana a view

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1. *Jackson v. Wells*, 13 Texas Civ. App. 275 (1896), 35 S.W. 528; *Roach v. Caldbeck*, 64 Vt. 593 (1892), 24 Atl. 989; *Bundy v. Maginess*, 76 Cal. 532 (1888), 18 Pac. 668; *Brown v. Evans*, 17 Fed. 912 (1883); *Smith v. Bagwell*, 19 Fla. 117 (1832), 45 Am. Rep. 12; *Boetcher v. Staples*, 27 Minn. 303 (1880), 7 N.W. 263.
2. *Murphy v. Hobbs*, 7 Colo. 541 (1886); *Cherry v. McCall*, 23 Ga. 193 (1857).
3. 15 Am. Jur., Crim. Law s 259 et seq.  
15 Am. Jur., Damages s 275 et seq.  
17 C.J. s 278  
8 R.C.L. 145 et seq.
4. 5 Ind. 322 (1854)

that had previously been almost solely confined to text-writer confabulation.<sup>5</sup> This case involved a suit for assault and battery and the plaintiff was seeking a favorable instruction on exemplary damages. Judge Davison said,

"There is a class of offences, the commission of which, in addition to the civil remedy allowed the injured party, subjects the offender to a state prosecution. To this class the case under consideration belongs; and if the principle of the instruction be correct, Taber may be twice punished for the same assault and battery. This would not accord with the spirit of our institutions. The constitution declares, that, 'no person shall be twice put in jeopardy for the same offence,' and though that provision may not relate to the remedies secured by civil proceedings, still it serves to illustrate a fundamental principle inculcated by every well-regulated system of government, viz., that each violation of the law should be certainly followed by one appropriate punishment and no more."

This statement is singular in two respects; first, Judge Davison did not say that allowing exemplary damages would be unconstitutional but only "not in accord with the spirit of our constitution," and secondly, he did not believe it was unconstitutional as witnessed by his words "and though that provision may not relate to the remedies secured by civil proceeding." What he intended as a source of authority for his decision yet remains a mystery.

There is another important aspect of this case that might be called an "instrument of toleration" for the announced rule of damages. Compensatory damages were not confined to the proof of actual physical injury, but the jury was authorized to take into consideration every circumstance of the act which injuriously affected the plaintiff; not only his property, but his person, his peace of mind, in short, his individual happiness. Throughout the history of Indiana decisions, the courts have repentently off-set their decision on exemplary damages by a similar consoling instruction.<sup>6</sup> This

5. Willis, "Measure of Damages When Property is Wrongfully Taken by a Private Individual" (1908) 22 Harv. L. Rev. 419; 1 Sutherland Dam. 740 et seq.; Sedgwick on the Measure of Damages 465; Hillard on Remedies for Torts; 12 Cent. L.J. 862; Wood, Nuisances 862.
6. Wolf v. Trinkle, 103 Ind. 355 (1885); State v. Stevens, 103 Ind. 55 (1885); Stewart v. Maddox, 63 Ind. 51 (1878) where the court held that the plaintiff was not restricted to mere pecuniary injury but might be allowed damages for loss of time, delay in business, expenses incurred; injury to business or profession, reputation, and social position; for physical suffering as bodily

author submits that the distinction between vindictive damages and "compensatory" damages of such a metaphysical nature, is largely a matter of spelling as the award may be as large in the latter case as if exemplary damages themselves had been allowed.

From *Hudson v. Taber*, the Indiana courts have unbendingly taken the position that a court is unwarranted in allowing the recovery of exemplary damages where the wrong is also a crime,<sup>7</sup> and permitting them when the defendant is not susceptible to criminal punishment for his wrongful act.<sup>8</sup> The great confusion has arisen over the power of the legislature to provide for the allowance of exemplary damages or penalties in civil suits.<sup>9</sup> This problem will be reserved and a brief reference to some of the other important phases of the general doctrine will be considered first.

## I

One of the most curious results of the doctrine arises when a corporation is sued for an assault and battery committed by one of its agents.<sup>10</sup> A corporation in Indiana can

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pain, permanent disability, disfigurement; mental trouble as anguish of mind, sense of shame or humiliation, loss of honor; all of which were considered compensatory and not exemplary or punitive damages. *Nossaman v. Rickert*, 18 Ind. 350 (1862); *Missison v. Hoch*, 17 Ind. 164 (1861); *Taber v. Hudson*, 5 Ind. 322 (1854).

7. *Nay v. Byers*, 13 Ind. 412 (1859) (assault and battery); *Butler v. Mercer*, 14 Ind. 479 (1860) (malicious trespass); *Nossaman v. Rickert*, 18 Ind. 350 (1862) (assault and battery); *Humphries v. Johnson*, 20 Ind. 190 (1863) (malicious trespass); *More v. Cross*, 43 Ind. 34 (1873) (malicious trespass); *Kepler v. Hyer*, 48 Ind. 500 (1874) (assault and battery); *Stewart v. Maddox*, 63 Ind. 51 (1878) (false imprisonment, denied or rous); *Wolf v. Trinkle*, 103 Ind. 355 (1885) (assault and battery); *Wabash Printing & Pub. Co. v. Crumrine*, 123 Ind. 89 (1889) (malicious libel); *Tracy v. Hackett*, 19 Ind. App. 133 (1898) (malicious libel); *Borkenstein v. Schrack*, 31 Ind. App. 220 (1903) (assault and battery); *Anderson v. Evansville Brewing Ass'n*, 49 Ind. App. 403 (1912) (deceit but guilty of selling liquor to unlicensed retailer); *Skufakiss v. Duray*, 85 Ind. App. 426 (1926) (malicious trespass).
8. *Guard v. Risk*, 11 Ind. 156 (1858) (slander); *Millison v. Hoch*, 17 Ind. 227 (1861) (deceit); *Sangater v. Prather*, 34 Ind. 504 (1870) (deceit); *Ziegler v. Powell*, 54 Ind. 173 (1876) (malicious prosecution).
9. McClellan, "Exemplary Damages in Indiana" (1935) 10 Ind. L.J. 275.
10. *Indianapolis Bleaching Co. v. McMillan*, 64 Ind. App. 268 (1916); *Baltimore, etc. R. Co. v. Davis*, 44 Ind. App. 375 (1909); *Louisville N.A. & C. R. Co. v. Goben*, 15 Ind. App. 123 (1895); *Citizens*

not be prosecuted for a crime except when expressly so provided by statute.<sup>11</sup> This presents the anomalous situation of compelling the innocent corporation to respond vicariously with punitive damages because it is not subject to criminal prosecution for assault and battery, but if the agent who committed the tort is sued, he can shield himself from punitive damages because he is susceptible to criminal punishment. The practical result is that the innocent corporation is chastised and the culpable agent is protected. In one Indiana case,<sup>12</sup> there is language to the effect that a corporation is liable for exemplary damages only whenever the agent may be. In view of the above, it is submitted that such a statement is technically inaccurate.

The case of *Ziegler v. Powell*<sup>13</sup> involved a suit for malicious prosecution. The defendant had charged the plaintiff with stealing and the plaintiff had been acquitted upon a hearing before a justice of the peace. The plaintiff asked for an instruction for exemplary damages and the defendant objected contending he was liable to a criminal prosecution under a statute defining misdemeanors which provided "If any person shall maliciously, without probable cause, attempt to cause an indictment to be found, or other prosecution, for any crime or misdemeanor, to be commenced against any person, the person being innocent, such person so offending shall be fined not exceeding one thousand dollars, etc." The court allowed the instruction for exemplary damages holding that the defendant was not liable to prosecution under the statute as it applied to an attempt to cause an indictment to be found, or a prosecution to be commenced, not a consummated prosecution! This case seems to be the first of a series of warped constructions fostered by the court in an endeavor to escape the application of the rule. True, the rule escaped even a qualification, but the court arrived at an amazing result to allow punitive damages and still retain the sanctity of the Taber case. To say that the defendant was subject to a criminal prosecution at one stage of his action

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Steel R. Co. v. Willooby, 134 Ind. 563 (1893); Western Union Tel. Co. v. Bierhaus, 8 Ind. App. 563 (1893); Louisville N.A. & C. R. Co. v. Wolf, 128 Ind. 89 (1867).

11. State v. Sullivan Co. Ag. Soc., 14 Ind. App. 369 (1895); State v. President, 23 Ind. 362 (1864).
12. State v. Stevens, 103 Ind. 55 (1885).
13. 54 Ind. 173 (1876).

but successfully freed himself from it by continuing to pursue his prosecution to a decision seems not only contrary to legal principles but a bit absurd. The court was clearly dissatisfied if not indifferent to the prevailing law.

This suggests another quandary created by the Indiana rule. That is the necessity of construing criminal statutes in civil cases. Suppose that a court in a civil case decides that the defendant cannot be held for exemplary damages because he is subject to a criminal prosecution for the same act. If any force at all is to be attributed to this determination, it must be a legal conclusion of the defendant's guilt of a crime. Logically then, an introduction of this determination should be conclusive against the defendant in a subsequent criminal prosecution. Of course, even a correspondence school lawyer would feel like a commando when he heard this proposition and a whole massive wall of criminal theory would engulf it, but the problem would still remain unsolved. Suppose again, that after a civil determination of the defendant's innocence of crime, exemplary damages are assessed against him. Thereafter, a criminal prosecution results in his conviction. Could the defendant then appeal his civil case? If the determination of the civil case had been handed down by the Supreme Court and the time for petition for rehearing had lapsed, it would seem that the defendant would have no recourse for having been twice placed in jeopardy. Query, whether the defendant might succeed in recovering the amount of punitive damages paid in the civil suit by an action in the nature of quasi-contract. But this seems open to attack by the intricacies of *res adjudicata*. One can only speculate on an answer to this vicious circle. The courts have thus far enjoyed the tranquillity of not being faced squarely with this anomalous concoction.

The case of *Farman v. Lawman*<sup>14</sup> presents the delicacy of a strictly formalistic aspect of the Indiana rule. Here, the action was for assault and battery and false imprisonment. The court allowed punitive damages for the false imprisonment but refused to allow them for the paragraph charging assault and battery, saying that the defendant was liable for criminal prosecution for the latter. This case suggests the benefits that may reward a refined consideration of possible theories of the case. Apparently selecting a theory, the ele-

14. 73 Ind. 568 (1881).

ments of which, combined with the necessary state of mind for exemplary damages, would not constitute a crime, would be a successful device for evading the rule against exemplary damages.

## II

The most volatile field of litigation has been the controversy over the power of the legislature to provide for punishment of a wrongdoer in a civil action when the wrongdoer may also be subject to criminal prosecution. In order to promote clarity and continuity of thought as much as possible, an effort will be made to follow the decisions chronologically.

It must be borne in mind that the original Indiana decision of *Taber v. Hudson*<sup>15</sup> did not expressly hold that allowing vindictive damages in a civil suit when the wrongdoer was also susceptible of criminal punishment for the act, was unconstitutional. The court had offered only the inadequate expression that such was "not in accord with the spirit of our constitution." In 1858, the case of *Struble v. Nodwift*<sup>16</sup> involving a legislative civil action for exemplary damages against a criminally responsible defendant, reached the Supreme Court but the question of legislative power was neglected and this highly inflammable issue remained smoldering in the judicial pot until almost a score of years later. Then at about the same time, two cases, *Koerner v. Oberly*<sup>17</sup> and *Schafer v. Smith*<sup>18</sup> were filed with the Supreme Court. Both involved the question of exemplary damages under a liquor statute of 1873 which gave a civil action and authorized exemplary damages in favor of a wife against anyone selling liquor to her habitually inebriated spouse, and also made it a misdemeanor. An opinion for the *Schafer* case was first handed down by Judge Howk on March 6, 1877 upholding the constitutionality of the statute and allowing the plaintiff to recover exemplary damages. Judge Howk said, "We recognize the rule, which ordinarily prevails, that where a given act is or may be the subject of a criminal prosecution, and also of a civil action for damages in favor of the party thereby injured, exemplary damages will not be allowed in such

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15. 5 Ind. 322 (1854).

16. 11 Ind. 64 (1858).

17. 56 Ind. 284 (1877).

18. 63 Ind. 226 (1878).

action. This rule, however, like most of the *rules of civil practice*, is a proper subject of legislative action, and the General Assembly may well provide in such a case as the case at bar that the injured party may recover, not only actual damages, but also exemplary damages, and the courts of the State will be bound to carry out and enforce such provision. In considering this subject, appellant's counsel seem to confound the terms 'fine' and 'exemplary damages,' and to regard the one the synonym of the other; but there is a marked and well defined difference between the meaning of these terms. A fine is an amercement imposed upon a person for a past violation of law; but exemplary damages have reference rather to the future than the past conduct of the offender, and are not given as a compensation to the injured party, but as an admonition to the offender not to repeat the offense."

In arriving at this conclusion the court completely lost sight of the origin and basis of the Indiana rule which seemingly was one of constitutionality and double jeopardy and instead, relegating it to one of procedure or "a rule of civil practice" which of course, would make it a subject of legislative action. By resolving the basis of the Indiana rule to be one of procedure in order to save the statute, the court not only abandoned the basis upon which the rule against exemplary damages was originally predicated, but forced a rationalization of all previous cases where exemplary damages were denied, that was totally foreign to common law concepts. The common law had never known a rule of procedure which barred recovery of exemplary damages when the defendant was subject to criminal prosecution. How our courts could authoritatively support such a rule without legislative sanction is hard to conceive. The constitutional argument must be maintained or logically the whole formidable array of decisions since *Taber v. Hudson* which denied exemplary damages must fall. Judge Howk's distinction between a fine and exemplary damages is not worthy of quibble.

On April 13, 1877, petition for rehearing was filed and granted four days later.<sup>19</sup> Consequently, the opinion of Judge Howk was never published in the Indiana Reports. In the May term of 1877, the sister case of *Koerner v. Oberly* was decided exactly opposite to the opinion and holding in *Schafer v. Smith*. Judge Worden held the provision of the

19. Personal correspondence with Richman, C.J. June 22, 1943.



statute allowing exemplary damages violated the fundamental principle embodied in the Bill of Rights, that no person shall be put in jeopardy twice for the same offense and that it was inoperative and void. It was distinctly ruled that the legislature was prohibited by the constitution from authorizing the infliction of exemplary damages for a wrong which was also punishable as a crime. This was a direct ruling on legislative power and the decision returned the rule to the only solid basis it had ever had.

The opinion of the *Schafer* case becomes even more singular in view of the fact that only a matter of days after it was handed down without dissent, the same tribunal should come to the diametrically opposite conclusion without even the dissent of Judge Howk himself. Thereafter, on November 25, 1878, a second opinion was handed down by Judge Niblack for the *Schafer* case<sup>20</sup> which completely disposed of the case by saying, "The question of exemplary damages has been fully discussed and ruled upon by this court in the case of *Koerner v. Oberly*."

The havoc wrought by the first opinion of the *Schafer* case was not confined to Indiana. That opinion fell into the eager hands of the Central Law Journal and was published in 4 Central Law Journal 271. In 1883, a case was before the Supreme Court of Kansas in volving the question of exemplary damages in a liquor statute almost identical with the one in Indiana.<sup>21</sup> The Kansas court quoting the first opinion of *Schafer v. Smith* from the Central Law Journal, said, "The law in Indiana was now that the legislature had power to give a civil action authorizing exemplary damages even when the defendant was subject to a criminal prosecution for the same act," and used this as the substantial basis of their decision upholding the constitutionality of the statute without taking the pains to look into the Indiana Reports where they would have found that opinion had been withdrawn and superceded five years previously. As in the words of the great Lord Coleridge, "this I believe, no one has ever followed."<sup>22</sup>

With the final decisions of the *Koerner* and *Schafer* cases safely bound in the Indiana Reports, apparently the

20. 63 Ind. 226 (1878).

21. *Jockers v. Borgman*, 29 Kan. 109 (1883).

22. *Bowen v. Hall*, L.R. 6 Q.B. 333 (1880-81).

battle had been fought and the issue decided. Such was not the case, and a few years later the court re-opened rusty doors and again brought out the issue of legislative power. This time, it was to work its greatest absurdities and crucifixion of legal concepts. The case of *State v. Stevens*<sup>23</sup> came before the Supreme Court in 1885. This was an action against a former clerk of circuit court to recover illegal fees collected. Section 6031, R.S. 1881 provided, "Any officer who shall charge, demand or take any unauthorized fee for the performance of any official act, shall, in addition to being deemed guilty of a misdemeanor, be liable to the party injured for five times the illegal fees charged, demanded, or taken." The culpable officer contended that the statute was unconstitutional and aptly quoted the *Koerner* and *Schafer* cases. The statute made the act a crime and also allowed a civil suit for five times the plaintiff's damage. Plainly, this was a civil punishment prescribed by the legislature. The only variation between the statute involved in the *Koerner* and *Schafer* cases and the present statute was that here, the legislature had prescribed the amount of exemplary damages instead of authorizing a jury to find them. The *Koerner* and *Schafer* cases would seem to have been decisive precedent. The opinion of Judge Mitchell indicated that his thought on the problem was unusually clear and learned. He said, "if the provision that 'no one shall be put in jeopardy twice for the same offense' is, as the court has recognized it to be, a sure protection against the power of the courts in that regard, it must be deemed equally potential against the power of the legislature. It cannot be maintained in reason that it shall be interpreted to mean that the courts can not adjudge a second punishment for the same offense except when expressly authorized by the legislature, for the reason that in so far as the legislature attempts to authorize such second punishment, the barrier of the constitution is as effectual against it as it is against the court."

This was a profound answer to the challenge of legislative power and if the statute had been thereafter adjudged unconstitutional, the issue of legislative power would have been dead and the law in Indiana would have undoubtedly been on solid footing thenceforth. The court, however, held the statute valid on the grounds that there was no element

23. 103 Ind. 55 (1885).

of exemplary damages but only a fixed amount for the civil liability of the officer as a measure of compensation for the injury. This was plainly inconsistent and was disappointing after the precise dicta of Judge Mitchell. Even the elasticity of definition could never permit of damages to the extent of five times the actual damage suffered being deemed compensatory. The legislature had plainly provided for punitive damages to be inflicted upon a violator of the statute and whether the exact amount was prescribed by the legislature or left to the discretion of a jury, there would be absolutely no difference in principle. In addition, Judge Mitchell, in his desire to uphold the constitutionality of the statute, gave vent to a statement which if accepted, would undermine the whole basis of the Indiana doctrine. He said, "Even regarding the whole statute as penal, it can not be said that the person offending has been put in jeopardy of the penalties prescribed until he has been tried for the misdemeanor and has also answered for the penalty fixed to the injured party as his compensation." In no Indiana case had the issue been whether the defendant could be civilly punished after he had been criminally convicted for the same act. The decisions had always been on a basis that the defendant *might* be criminally prosecuted and this was deemed sufficient to defeat exemplary damages. If one accepted the premise of Judge Mitchell's statement, no statute allowing punitive damages would be unconstitutional for that reason. The situation then would be that one could either be criminally prosecuted or sued civilly for exemplary damages, but once he had suffered one, he could plead it to defeat a subsequent criminal prosecution or exemplary damages in a civil suit. However, there would be no question of the legislature's power.

Judge Elliott felt compelled to dissent from Judge Mitchell's conception of compensatory damages but concurred in the decision. Judge Elliott wheeled out the old legislative power argument used in the withdrawn opinion of Judge Howk in the *Schafer* case, maintaining that the legislature had the power to provide for punitive damages in cases where an injury is caused by an illegal act, although the illegal act may subject the defendant to a criminal prosecution and the legislature has authority either to limit the amount to be recovered or to leave it to be ascertained by a jury. Judge Elliott saw that whether the legislature or the jury fixed

the punitive damages was a distinction without a difference as far as the constitutionality of the statute was concerned. It is unfortunate that he adhered to the legislative power theory. Thus, the case of *State v. Stevens* not only limited and confused the clear doctrine of the *Oberley* and *Schafer* cases, but brought out again the "die-hard" legislative power theory in Judge Elliott's dissenting opinion.

In 1893, the case of *State v. Schoonover*<sup>24</sup> reached the Supreme Court. This case involved a suit under a statute which gave a party bribed to vote in a certain manner, a civil action for \$300 against the bribing party, which bribing party was also subject to a criminal prosecution. The statute could have been upheld under the double jeopardy theory without an injustice to the rule as the amount of damages prescribed could have passed for a legislative estimate of the actual damage suffered by the plaintiff for the peculiar type of injury. However, Judge Dailey saw fit to indorse as the basis of his decision, the dissenting opinion of Judge Elliott in *State v. Stevens*. This case is rather disheartening. Previously, the illogical legislative power theory had been utilized only as a last resort to uphold legislation. Here, the theory had been adopted when such was unnecessary. Thus, the Supreme Court had finally decided squarely in favor of the power of the legislature to prescribe both criminal and civil punishment for the same act.

One other case worthy of mention was decided in the Supreme Court in 1900. This case, *State v. Latshaw*,<sup>25</sup> involved the validity of the fraudulent marriages act. This act provided that if a man, subject to criminal prosecution for seduction or bastardy, entered into a marriage fraudulently to escape punishment and then subsequently abandoned his wife, the wife might sue for a penalty (it was called a penalty in the act) of not less than \$200. The defense contended that such might result in double jeopardy. This contention was, however, disapproved by the court, it holding that the provision for damages were compensatory and not punitive. The court did not hold, as in the *Schoonover* case, that the legislature had power to provide a civil action authorizing punitive damages for an act which was also subject to a criminal prosecution. Judge Jordan merely said,

24. 135 Ind. 532 (1893).

25. 156 Ind. 194 (1900).

"The legislature may provide for the recovery of damages in a civil action where the injury is caused by an illegal act, although the same act may subject the defendant to a criminal prosecution." There is no argument with this decision as it is conceded that the legislature can provide for damages in a civil action when the malfactor is subject to criminal prosecution as long as it does not attempt to provide for *punitive* damages. In view of the fact that Judge Jordan chose also to call the provision for damages compensatory and not penal, it seems that he was attempting to place his decision within the confines of the double jeopardy theory which had been abandoned in the *Schoonover* case. Indeed, the provision for damages might justifiably be considered as merely compensatory with a minimum limitation as to the amount the court or jury could find. The case can be squarely reconciled with the decisions in the *Koerner* and *Schafer* cases and the dicta by Judge Mitchell in the *Steven's* case, as an authority in favor of the double jeopardy theory although at first blush the opinion seems to support the legislative power theory.

Finally, it might be doubted that there was even a question of double punishment involved in the case. The defendant had married the plaintiff to escape criminal prosecution and at present had abandoned her but was still legally married. In *State v. Otis*<sup>26</sup> it was held that where the female seduced, subsequently marries her seducer, that during the continuance of such marriage, he cannot be successfully prosecuted upon the charge of criminal seduction. If this be true, the defendant was not subject to a criminal prosecution because although he had abandoned the plaintiff, giving rise to the civil cause of action, yet he legally remained her husband and could not be criminally prosecuted. Under these circumstances there would be no question of the legislature's power even as to making the civil action punitive in character.

### III

As stated at the beginning, it has not been the purpose here to evaluate the Indiana rule of exemplary damages. Sufficient to say, it is contrary to the common law and the overwhelming majority of authority. Yet, in the multitude of

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26. 135 Ind. 267 (1893).

Indiana cases there is no suggestion of abandonment of the doctrine. Thus, conceding the principle to be permanent, the legal basis should be closely examined and placed on a solid, logical foundation. That foundation must be the double jeopardy clause in the constitution of Indiana.

It is recalled that the original Indiana case of *Taber v. Hudson*<sup>27</sup> declared that allowing exemplary damages would "not accord with the spirit of our institutions," but did not expressly declare that such would be double jeopardy and unconstitutional. As the common law would have allowed the damages and the legislature was silent, the only authority for such a conclusion must have really been unconstitutionality. Then the withdrawn opinion of Judge Howk in *Schafer v. Smith* attempted to allow the legislature to provide for exemplary damages by contending that the question was merely one of legislative power and not double jeopardy. This opinion was withdrawn and soon after, the case of *Koerner v. Oberly*<sup>28</sup> held that it was as much double jeopardy and unconstitutional for the legislature to allow exemplary damages against a person susceptible of criminal punishment as it was for the courts to do so. The final opinion of the *Schafer* case followed the *Koerner* case.<sup>29</sup> *State v. Stevens*<sup>30</sup> adhered to the constitutional theory of the *Koerner* and *Schafer* cases but allowed the statute to stand by calling the prescribed damages compensatory instead of punitive as they undoubtedly were. It was in the *Stevens* case that Judge Elliott also gave his dissenting opinion, returning to the theory used in Judge Howk's withdrawn opinion and contending that the question was one of legislative power and not constitutionality. The case of *State v. Schoonover*<sup>31</sup> needlessly utilized the legislative power theory by indorsing Judge Elliott's dissenting opinion in the *Stevens* case. The statute involved could have probably been upheld under the constitutional theory. Finally, the case of *State v. Latshaw*<sup>32</sup> upon close analysis, seemed to adhere to the constitutional theory and although the statute involved was upheld, it seems

27. 5 Ind. 322 (1854).

28. 56 Ind. 284 (1877).

29. 63 Ind. 226 (1878).

30. 103 Ind. 55 (1885).

31. 135 Ind. 532 (1893).

32. 156 Ind. 194 (1900).

that Judge Jordon was attempting to reconcile it with the constitutional theory by calling the damages merely compensatory, and as previously stated, this was probably justified.

The courts have unbrokenly denied exemplary damages when the defendant is subject to a criminal prosecution for the same act.

As the common law allowed such damages to be assessed, the basis of these cases necessarily must be one of constitutionality and double jeopardy.

This constitutional limitation must apply to the legislature as well as the courts.<sup>33</sup>

Only one decision<sup>34</sup> squarely decides in favor of the legislative power theory. All the remaining cases have on close analysis, either expressly or impliedly adhered to the constitutional theory that the legislature has no power to authorize punitive damages when the defendant is also susceptible to criminal prosecution for the same act.

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33. McClellan in his article "Exemplary Damages in Indiana" 10 Ind. L.J. 275 (1935), believes the legislature has this power but he offers no supporting argument.

34. State v. Schoonover, 135 Ind. 532 (1893).