

342, 97 Atl. 323 (1916); conversion, *Herrick v. Humphrey Hardware Co.*, 73 Neb. 809, 103 N.W. 685 (1905); Uniform Sales Act, *Postal v. Hagist*, 251 Ill. App. 454 (1928); *Crichfield-Loeffler Inc. v. Taverna*, 4 N.J. Misc. 310, 132 Atl. 494 (1926); *Corwin v. Grays Harbor Washingtonian*, 151 Wash. 585, 292 Pac. 412 (1930). *Contra: Millard v. Green*, 94 Conn. 597, 110 Atl. 177 (1920); *Goodhue v. State Street Trust Co.*, 267 Mass. 28, 165 N.E. 701 (1929); *Smith v. Lingelbach*, 177 Wis. 170, 187 N.W. 1007 (1922); 2 Williston, Sales (1924), § 619, n. 13. See 45 Harv. L. Rev. 1412 (1932). The court in the principal case did not deny recovery for the price on the ground that the Sales Act applied but held, rather, that situations similar and closely related to those governed by the Sales Act should be governed by the same rules in order to maintain uniformity. But see 17 Minn. L. Rev. 106 (1932); 34 Col. L. Rev. 1372 (1934). The Uniform Sales Act rules have been similarly applied to other situations not governed by the Act. *Thompson Spot Welder Co. v. Dickelman Mfg. Co.*, 15 Ohio App. 270 (1921); Influence of Sales Act on Non-Sales Law, 26 Col. L. Rev. 744 (1926). In other fields also, the tendency is apparent to apply statutory rules to closely related situations, thereby changing the former common law rule. Thus the Negotiable Instruments Law has in effect been applied to cases which it does not cover. *Weniger v. Success Mining Co.*, 227 Fed. 548 (1915); *Bank of Culloden v. Bank of Forsyth*, 120 Ga. 575, 48 S.E. 226 (1904); 12 Fletcher, Corporations (perm. ed. 1932), § 5477. Likewise statutes treating unincorporated associations as legal entities for some purposes have been held to have changed the common law rules as to unincorporated associations in other respects. *United Mine Workers of America v. Coronado Coal Co.*, 259 U.S. 344 (1922); Warren, Corporate Advantages without Incorporation (1929), 648, 662 ff.

Torts—Mental Suffering as a Cause of Action—[Nebraska].—When the plaintiff sued on a promissory note, the defendant cross-petitioned for damages for mental suffering caused by the plaintiff in its attempts to collect the debt. The attempts consisted of sending a series of threatening letters to the defendant and writing to the defendant's employer and neighbors. The plaintiff failed to prove in the execution of the note formalities necessary to its validity. On the cross-petition it was held, that the defendant recover, the mental pain intentionally inflicted to coerce payment of a debt known to be invalid constituting a cause of action. *La Salle Extension University v. Fogarty*, 126 Neb. 457, 253 N.W. 424 (1934).

Where there is a separate cause of action in tort or contract mental suffering will be considered an element of damages. *Lyons v. Smith*, 176 Ark. 728, 3 S.W. (2d) 982 (1928); *Fitzimmons v. Olinger Mortuary Association*, 91 Colo. 544, 17 P. (2d) 535 (1932); *Lonergan v. Small*, 81 Kan. 48, 105 Pac. 27 (1909). Emotional shock which involves physical consequences constitutes a cause of action whether the defendant acted intentionally or negligently. *Rogers v. Williard*, 144 Ark. 587, 223 S.W. 15 (1920); *Wilkinson v. Downton*, [1897] 2 Q.B. 57; *Hambrook v. Stokes Bros.*, [1925] 1 K.B. 141; *contra, Alexander v. Pacholek*, 222 Mich. 157, 192 N.W. 652 (1923); *Crutcher v. R. Co.*, 132 Mo. App. 311, 111 S.W. 891 (1908). But recovery is generally denied for mental suffering without physical consequences or a separate cause of action apart from the mental suffering. *Southern Express Co. v. Byers*, 240 U.S. 612 (1915); *Jones v. Western Union Telegraph Co.*, 233 Fed. 301 (1916); *Trigg v. St. Louis, K.C. and N.R. Co.*, 74 Mo. 147 (1881); *Brooker v. Silverthorne*, 111 S.C. 553, 99 S.E. 350 (1919). In the

cases allowing recovery defendant intentionally inflicted the mental suffering. *Wilson v. Wilkins*, 181 Ark. 137, 25 S.W. (2d) 428 (1930); *Barnett v. Collection Service Co.*, 214 Ia. 1303, 242 N.W. 25 (1932).

The reason given for the general denial of recovery for mental suffering alone is the great risk of fraud in the proof of the mental pain. *Wadsworth v. Western Union Telegraph Co.*, 86 Tenn. 695, 8 S.W. 574 (1888); 1 Street, Foundations of Legal Liability (1906), 475; Pound, Interests of Personality, 28 Harv. L. Rev. 343, 359 (1915). But the risk is greatly lessened if, as in the principal case, proof is required that the acts were intended to inflict mental pain. *Wilson v. Wilkins*, 181 Ark. 137, 25 S.W. (2d) 428 (1930); *Barnett v. Collection Service Co.*, 214 Ia. 1303, 242 N.W. 25 (1932). With this safeguard the courts might well recognize mental injury as a distinct cause of action (see *Maze v. Employer's Loan Society*, 217 Ala. 44, 114 So. 574 (1927)) rather than attempting to bring it within the conventional categories of tort liability. Goodrich, Emotional Disturbances as Legal Damage, 20 Mich. L. Rev. 497 (1921); 18 Iowa L. Rev. 397 (1932).

Trial Practice—Power of Federal Court To Deny New Trial upon Defendant's Consent to Increased Damages—[Federal].—Plaintiff, having obtained a verdict in an action based upon the defendant's negligence, moved for a new trial on the ground of inadequate damages. The trial court ordered that judgment be entered for \$1,000 more than the verdict if the defendant consented, otherwise, a new trial would be granted. On appeal by the plaintiff, *held*, that the court had no power to make such an order, since, under the seventh amendment to the Constitution of the United States, no fact determined by a jury can be re-examined otherwise than according to the rules of the common law; and at common law a new trial was the only way to re-examine the question of damages when the verdict was for an inadequate amount. Morton, C. J., dissenting. *Schiedt v. Dimick*, 70 F. (2d) 558 (C.C.A. 1st 1934).

The order made by the court in the present case is the converse of the well established remittitur practice. In using the remittitur, the court may, in certain cases where the defendant moves for a new trial on the ground of excessive damages, order a new trial unless the plaintiff consents to a judgment for the amount which the court thinks a reasonable jury would assess, remitting the excess. *Western Union Telegraph Co. v. North*, 177 Ala. 319, 58 So. 299 (1912); *North Chicago Street R. Co. v. Wrixon*, 150 Ill. 532, 37 N.E. 395 (1894); *Yard v. Gibbons*, 95 Kan. 802, 149 Pac. 422 (1894). See notes in 53 A.L.R. 783 (1928); 39 L.R.A. (N.S.) 1064 (1912); 14 Minn. L. Rev. 675 (1930). The remittitur has been long held not to violate the seventh amendment. *Arkansas Valley Land and Cattle Co. v. Mann*, 130 U.S. 69 (1889); *Clark v. Sidway*, 142 U.S. 682 (1891); *Jacoby v. Johnson*, 120 Fed. 487 (C.C.A. 3d 1903).

There seems to be no distinction between the remittitur and the order made in the present case. In the opinion reference is made to the argument that a jury awarding excessive damages has found plaintiff's damage to be at least equal to the sum fixed by the court because it had been assessed at that figure and more, while in the case of inadequate damages, there can be no implied finding by the jury if the greater amount. In each case, however, the court discards the jury's finding and denies the motion for a new trial if the other party consents to accept an amount which the court believes a reasonable jury would find. Moreover, the argument that defendant should not be allowed to complain in case a remittitur results in a judgment more favorable to him