

cation from such drinking, the injurious act shall have happened

The declaration says the defendant, by his servant, 1st. furnished and gave Wooley in the inn, &c., intoxicating liquors; 2dly, whereby he became and was intoxicated; 3rdly, and while so intoxicated he did assault, &c.

The furnishing and giving to Wooley intoxicating liquors in the inn is not the same as Wooley having drunk in the inn to excess of intoxicating liquors. The declaration shews that the liquor was therein furnished, and I think it shews, also, under the statement, that while so intoxicated Wooley did the act when he was in a state of intoxication from such drinking.

But in consequence of the omission above mentioned, I think, the plaintiff has not shewn a state of intoxication in Wooley, brought about by a violation of the act in question; for it is quite plain that the act requires not only that the liquor shall be furnished in the inn, but that that it shall be drunk in the inn, and drunk there to excess, to constitute responsibility in the innkeeper under the 40th section; it is the drinking to excess in the inn that is the culpable act of the innkeeper; an act which, it is presumed, he sees and knows of, and against which he may and ought to guard, while he cannot prevent the excessive drinking beyond his own precincts; and for anything that appears Wooley may have been furnished in the inn with the liquor on one day, and have drunk it to excess 50 miles off on another day, and there have become intoxicated, and then have assaulted McCurly, for which it could not be reasonable to hold the defendant liable; or, for anything to the contrary, the defendant may have sold to Wooley five gallons of liquor at one time, who may have taken it wholly away to his own house and there have become intoxicated, for which the defendant would not have been answerable under the statute.

The words, that the defendant did what it is said he did wrongfully and in violation of the Temperance Act, mean nothing without shewing how and in what manner it was wrongful and in violation of the act to do so.

The declaration, therefore, though not in the manner argued, we do not think contains a sufficient statement of facts from which it may appear that cause of action has accrued against the defendant.

But it was argued that no action of the kind could be maintained, however the declaration was framed. It was contended that no action would lie by the representatives, unless an action would, also, have lain at the suit of the party injured against the person who did the injury; and that no such action would have lain in this case, first, because the assault and its consequences constituted a felony, and therefore no civil action was maintainable until after the public offence had been first prosecuted; and secondly, because, in consequence of death ensuing, the person intoxicated never became liable to a civil suit at the instance of the deceased.

Under the 40th section it is quite plain the civil action is maintainable against the innkeeper; but his act is not one of felony in any respect, nor a misdemeanor.

Under the 41st section it is very probable the legislature did not contemplate death resulting in such a manner as to amount to a felony.

The act, however, provides for the representatives of the deceased suing; for provision has been made for this purpose. Now this is a new remedy against the innkeeper, and I do not think the legislature intended to postpone all redress against him until after a criminal prosecution had been had against the person intoxicated.

By ch. 78, before mentioned, and the corresponding act in England, the general rule and policy of the law in all cases within that statute have in this respect been altered.

So by the Carriers' Act (11 Geo. IV. and 1 Wm. IV. ch. 68) sec. 8, the plaintiff may reply that the carriers' servant feloniously broke the goods in respect of which the action is brought; which will, if shewn, entitle him to recover against the carrier, although the servant has not been prosecuted criminally.

The Temperance Act has not been so carefully framed as the Imperial Act alluded to, which expressly gives the civil remedy notwithstanding a felony has been committed which has not been prosecuted for; but I think the Temperance Act, at all events as against the innkeeper, may in like manner be acted on.

The remedy which has to be pursued in a case of the kind is said to be governed by the words, that the person who furnished the liquor "shall be jointly and severally liable to the same action by the party injured as the person intoxicated may be liable to." This probably means the same kind of action; and then, it is said, that only such an action as the person injured could have brought against the person intoxicated he may also bring against the innkeeper; and that although the representatives of the deceased may sue, yet they must bring one of the same kind of action the deceased could have brought if he had been living; and that they cannot sue for damages for the death of the deceased, because this is not the kind of action the deceased manifestly enough could have brought.

No doubt if the deceased had not been killed, or had not died, he must have sued the innkeeper in the like manner as he might have sued the person intoxicated, because the statute says they should be liable "to the same action," or, as we read it, to the same form or kind of action, jointly and severally; and in such an action the person injured could have recovered to the full extent of the injury he had sustained, if that injury had been short of the total loss of life itself. In such an action there would have been a perfect measure of damage for the loss and injury actually sustained.

If the argument of the defendant prevail, there can be no such measure of damage when death is occasional, and the action is brought by the representatives; because if the same, or the same kind of action is to be brought by the representatives, and the same kind of action only which the deceased could have brought, the loss and injury which have been really sustained cannot be compensated: the damage felt is for the life taken, but the deceased if suing for his own personal injury must have claimed in a different manner and at a lower standard, yet at a perfectly definite scale; but what is the representative to state as the limit of his or her cause of action, or the extent of the damage, if it be not for what is actually the cause and occasion of the action and the amount of the loss?