$100,000 Awarded Plaintiff for False Imprisonment—in 1882

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On April 21, 1882, in a suit for false imprisonment between Hallet Kilbourn and John G. Thompson, the jury awarded the plaintiff damages in the sum of $100,000, in the Supreme Court of the District of Columbia. This is a very high verdict in 1962; but move the clock back eighty years, and it is an astonishing verdict. One is impelled to ask for samples of the eloquence to which the jury was treated by plaintiff's counsel.

We have them, but first let us examine the setting of this cause celebre known as *Hallet Kilbourn* v. *John G. Thompson.* Mr. Kilbourn was a real estate broker in the District of Columbia. In 1876 he was called as a witness before a committee of the House of Representatives of the United States. The committee was investigating a notorious real estate pool. Kilbourn refused to produce certain of his private books and papers pursuant to a subpoena. He was held in contempt of the House of Representatives and placed in jail. His attorneys were successful in their application for a writ of habeas corpus, and on April 28th the Supreme Court of the District of Columbia ordered that Mr. Kilbourn be set free.

Back in those times the Sergeant at Arms of the House of Representatives was one John G. Thompson. He was the one who took custody of Mr. Kilbourn and committed him to the jail.

Upon his release Hallet Kilbourn filed a civil damage suit for false imprisonment against John G. Thompson. The trial court on demurrer upheld Thompson's plea that he was acting under a valid contempt order of the House of Representatives and rendered judgment for the defendant. On writ of error, The Supreme Court of the United States, in a landmark case on the power of Congress over witnesses, reversed, holding the contempt order invalid, and remanded the case for trial. *Kilbourn* v. *Thompson,* 103 U. S. 168 (1880). The trial took place some several years later—justice being apparently rather slow in those times also.

Daniel W. Voorhees, a United States Senator from Indiana, was plaintiff's counsel. In his day he was a speaker, debater, and lawyer of unparalleled popularity. After his closing argument, the jury deliberated for five hours and returned a verdict of $100,000. The trial judge, Justice McArthur, granted a motion to set aside the verdict as excessive. He made this comment:

> "I think we can trace the influence upon the minds of the jury largely to the powerful appeal addressed to them by the counsel who closed the case on the part of the plaintiff. They were evidently moved by his eloquence and inspired by the magnanimity of his sentiments, so that they overlooked the more sober and impassive instructions of the law."

But this was not the end. At a second trial, Senator Voorhees did his trick again, and a verdict was reached in the sum of $60,000. This was also set aside, by Justice Cox, as excessive, and a third trial was ordered. Mr. Voorhees again represented the plaintiff, and a verdict of $37,500 was awarded. Justice Hagner ordered a remittitur of $17,500. The remittal was filed by the plaintiff, and the sum of $20,000 was eventually paid, with interest.

We now offer for your pleasure certain excerpts from the closing argument of Daniel W. Voorhees in the historic first trial.

He set the scene as follows:

> "Gentlemen, never in the whole course of my life have I heard such an attempt to belittle the great question of human liberty as has been made by the defense in this trial. Is it, indeed, a small thing for an innocent man to be in prison? A sadder sight can not be witnessed; a sadder thought never entered my mind. Think for a moment. Our sympathies sometimes go out even for the guilty in their deprivation of liberty, but what shall be said of man wholly innocent in slavery, chains, and prison! You are now considering the case of a man who was cast into prison without lawful charge or accusation, and who has been found by the Supreme Court of the United States, not only innocent of the semblance of wrong, but to have been upholding and defending the constitution of his country from first to last."

Then he moves to comment on the unjustifiable exercise of governmental authority:

> "It was high time that the constitution should be reasserted; that

its great principles should be revived, and further, that the limits of the power of congress should be determined. Those powers should not be allowed to overflow everything; to overflow your hearthstones, to overflow your private drawers, to overflow not merely your papers, but your mind and its secrets—powers which, in their full assertion, as six years ago, could penetrate the recesses of your soul, and drag hence your secret thoughts, or put you in prison without limit as to duration. It was high time for this power to be broken, and I am glad that I stood in this court, mostly relying upon the writings and teachings of that great apostle of human liberty and constitutional government, Thomas Jefferson, for the correction of this great evil. Authorities of courts also were at hand; but his writings on the question were a flood of light, demonstrating that this arbitrary power could not exist."

Mr. Voorhees saves his best tunes for the argument on damages, and here is the overture:

"Gentlemen of the jury, let us take another step in this case. The defense presented here on the question of assessment of damages I hardly know how to treat. I will speak respectfully, of course, of the counsel for the defense, for I feel that way; but it was such a trifling—such a belittling of the great fundamental rights of man; rights for the maintenance of which men have walked unfalteringly to the scaffold; for which nations have drawn the sword, that I was sorry to hear it. They told you that you ought not to give much damages to this man, whose fortune was broken, whose life was jeopardized; that you ought not to give him much damages because he was treated kindly and as a gentleman by Colonel Thompson. Is not Mr. Kilbourn a gentleman? If Hallet Kilbourn is not a gentleman I have yet to hear the fact mentioned, and I have known him a quarter of a century. We were young men together in Indiana. Why should he not be treated as a gentleman? In fact, Mr. Smith was dissatisfied on two points. First, he was dissatisfied with the decision of the supreme court of the United States; and secondly, he was dissatisfied because Kilbourn received kindly treatment from Colonel Thompson. Mr. Hallet Kilbourn was not a burglar. He was not a forger; he was not a thief; he was not a murderer; he had killed nobody. Why should not he be treated kindly? But it seems that such treatment was compensation in the minds of counsel for the defense."

And now he classically describes imprisonment:

"Gentlemen, did you ever reflect on what imprisonment is? You think a carpeted floor would make a jail anything but a jail if you were there? Opposing counsel ask you to put yourselves in Thomp-

son's place. I have no complaint to make of John G. Thompson. I know him well, and I know that no truer, better man lives than he is. They ask you to put yourselves in his place. Put yourselves in Hallet Kilbourn's place likewise, and then answer me whether a carpet will make the jail floor any softer to your feet. Put yourselves in his place, and then answer me whether a picture on the walls would make those walls any less the walls of a prison. Put yourselves in his place, and then answer me whether, although you can solace yourselves with a glass of wine with your friends, whether it is not the jail still; and whether, however good the fare may be, it is not still prison fare. It has been said that captives' tears have watered their bread through all the ages, and that is true. The prison is a prison—it matters not how you adorn it. In prison, gentlemen, liberty assumes its dearest form. It is not for you to measure here in your jury-box how Hallet Kilbourn felt for those forty-five days. Liberty is said to be the brightest in dungeons, for then its habitation is the human heart. When it has no other habitation than the heart then it grows brighter. That means simply to convey the thought that man dwells on it then; he knows what it means then; he knows its value; he properly estimates the priceless heritage of liberty when he is deprived of it. The slave knew the value of liberty better than you do. The man who is deprived of a blessing feels that blessings brighter grow as they fly away. So the enjoyment of freedom, the right of constitutional protection, when you are deprived of them, assume then their greatest value. Oh, how little (my friends will pardon me for saying so), how beneath the lowest point to which my contempt can descend is a defense based upon the fact that a man was allowed to board himself in jail and that he had the right to purchase some delicacies beyond the prison fare that was allowed him. I can not appreciate such a defense. I was born with a mind incapable of comprehending such an argument."

We redeem this interruption to point up a paradox. Recently the Courts have dealt, in opinion after opinion, with the right of plaitniff's counsel in damage suits to argue pain, suffering and humiliation on a per diem basis, i.e., a suggested amount of money per day. Some Courts hold that this is proper; others hold it to be an improper excitation of the jury. (See 60 ALR 2d 1331. Per diem or similar mathematical basis for fixing damages for pain and suffering.) In the *Kilbourn* case, Daniel W. Voorhees objected to the use by the *defense* of the per diem argument. Times change. Mr. Voorhees speaks:

"I have no hesitation in saying it, widely and as far as my voice

may reach, that the attitude of this government toward Mr. Kilbourn, or any other citizen it has wronged, whose rights it has trampled upon, should be one of broad, generous reparation, not one of technical, miserable calculation of *per diem* for suffering. There are times in the lifetimes of men when you can not measure an outrage by the day. There comes sometimes a flash of wrong and of outrage that degrades and humiliates a man for which it is impossible to give too great a compensation."

And now we close with the words which were in the ears of that jury on April 21, 1882, just as they began their deliberations which led to the $100,000 verdict:

"Now, in its closing stage, we come before you and ask that twelve men of the District of Columbia may announce to the world that they appreciate its dignity and value. Whether we ever collect a dollar or not is not your affair—not mine—but whether you return a verdict that shows you cheapen liberty, cheapen your own rights. trifle with those fundamental principles which have made battlefields red with blood, or whether you arise to the dignity of the occasion, and assert in a manly, broad, strong way the approval which you have in your hearts at this moment of this brave man for doing what he has done, is another question, and one of vast importance. I will leave this case with you, gentlemen, with the parting injunction that as you measure these rights that are your own so they will be measured unto you; as you measure the great rights involved in Kilbourn's case at some time you or your children will have them measured back to you. No man errs on the side of a high appreciation of the constitutional rights of the citizen. When spoken to about the argument of this case, and the question was submitted to me whether I would go into it now, with my connection with the congress of the United States, I resolved the doubt in my mind by saying: 'No man can make a mistake on the side of constitutional liberty. The supreme court of the United States has decided that Hallet Kilbourn was right from the beginning to the end in asserting his freedom from the jail.' And as I stood with him in the beginning I have no hesitation in standing with him in the end. I can not err in upholding what has been declared by the highest judicial tribunal of my country as the citizen's rights. Nor can you err unless you cheapen those rights. You can not err by letting it go forth that here in this great capital the spirit of constitutional government has not died out in your hearts, and that you do not hold the life or the liberty of one of your fellow-citizens cheaply. It might have been the loss of his life as well as his liberty. If they had a right to take his liberty they had a right to take his life. Life is not dearer than liberty. Liberty is the dearest in my estimation. As to the loss of one or the other, as a choice, I would

say, take my life, for without my liberty life is of no value, none whatever; not the slightest. The iron hand of power laid on Hallet Kilbourn was not more merciful than the hand of the executioner would have been on his throat. It might have been his life, for it was imperiled. It might have been lost. With these views in your minds, gentlemen of the jury, you can not go astray. I submit this case to you in confidence that it will not grow less by reason of your treatment of it."