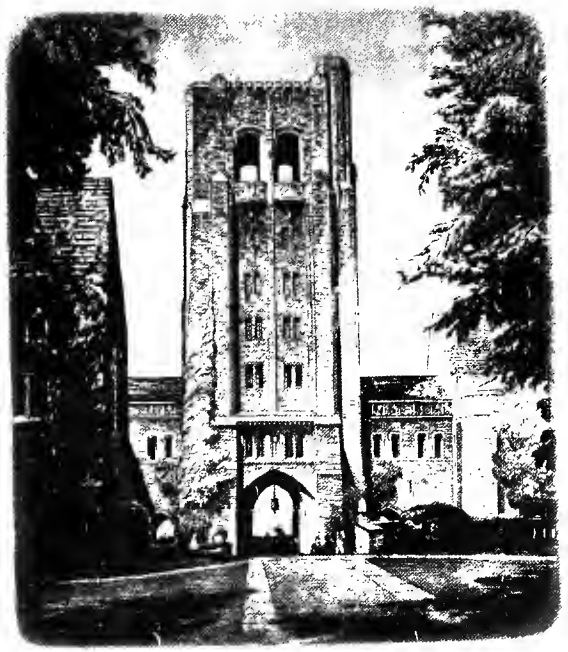

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PART II.

THE LAW OF DAMAGES

AS

APPLIED TO VARIOUS CONTRACTS AND WRONGS.

CHAPTER VIII.

AGENCY.

SECTION 1.

PRINCIPAL AGAINST AGENT.

General statement of the legal relation between, and the reciprocal obligations of principal and agent — The particular duties and the measure of an agent's liability to his principal — For neglect of the duty to procure insurance — For disregarding orders for the purchase and shipment of goods — Miscellaneous illustrations of an agent's liability for violations of duty — For defaults in regard to commercial paper — Same principles applied to factors — To brokers — Responsibility for acting without or beyond authority.

GENERAL STATEMENT OF THE RECIPROCAL OBLIGATIONS OF PRINCIPAL AND AGENT.— Agency is founded upon a contract, either express or implied, by which one party confides to the other the management of some business to be transacted in his name, or on his account, by which the other assumes to do the business and to render an account of it.[1]

The contract embraces reciprocal obligations between the parties, and either may have redress in damages for their violation. An agent who has no interest is bound to obey the instructions of his principal as a paramount duty, and to do the business placed in his hands with diligence and fidelity; he must, also, exercise a reasonable degree of skill and good judgment, according to the delicacy and importance of his undertaking.[2] Infractions of his contract are also instances of failure in duty; and the principal has an election to sue on the

[1] 2 Kent's Com. 612.

[2] Redfield v. Davis, 6 Conn. 438.

contract or for negligence as a tort.[1] But except where the dereliction is aggravated by fraud, the measure of damages is the same, whether the action is in one form or the other, and is equally governed by the contract.[2] The agent is an employé, and, therefore, entitled to compensation; he acts in the place of his principal and to effectuate his purposes, and has a right to indemnity; his functions are of a fiduciary nature, and he is subject to the rigid rules which apply to trustees. In respect of the matter of his agency, he can accept no inconsistent employment, nor act for his own benefit to the injury of his principal. Any advantage gained by the agent, whether it is the fruit of performance, or of violation of duty, belongs to his principal.[3]

Where, by departing from the instructions of his principal, he obtains a better result than could have been obtained by following them, the principal may claim the advantage thus obtained; he may do so though the agent contributed his own funds or responsibility in producing that result, and even if the principal incurred no risk or expense. The plaintiff's intestate, D, having a policy of insurance upon his life, had agreed with the company for its surrender and a return to him of the premium notes held by the company, which notes for that purpose had been sent to the company's agent to be delivered up. D entrusted the policy to the defendant as his agent, with instruction to surrender the same for cancellation. Defendant sur-

[1] Ashley v. Root, 4 Allen, 504.

[2] Bank of Orange v. Brown, 3 Wend. 158; Baker v. Drake, 53 N. Y. 211; Pinkerton v. Manchester R. R. 42 N. H. 424.

[3] Dodd v. Wakeman, 26 N. J. Eq. 484; Lafferty v. Jelley, 22 Ind. 471; Mouran v. Warner, 2 Lowell, 53; Bruce v. Davenport, 36 Barb. 349; Morrison v. The Ogdenburgh, etc. R. R. Co. 52 Barb. 173; Morrison v. Thompson, L. R. 9 Q. B. 480; Parker v. Nickerson, 112 Mass. 195; Hansacker v. Sturges, 29 Cal. 142; Parkist v. Alexander, 1 John. Ch. 394; Bain v. Brown, 56 N. Y. 285; Greentree v. Rosenstock, 61 N. Y. 583; Segar v. Edwards, 11 Leigh, 213. See Ætna Ins. Co. v. Church, 21 Ohio St. 492; Ingersol v. Starkweather, Walk. Ch. 346; McKinley v. Irvine, 13 Ala. 681; Banks v. Judah, 8 Conn. 145; Church v. Sterling, 16 Conn. 388; Sturdevant v. Pike, 1 Ind. 277; Copeland v. Mercantile Ins. Co. 6 Pick. 198; Moore v. Mandlebaum, 8 Mich. 433; Moore v. Moore, 5 N. Y. 256; Cumberland, etc. Co. v. Sherman, 30 Barb. 553; Shannon v. Marmaduke, 14 Tex. 217; Walker v. Palmer, 24 Ala. 358; Hitchcock v. Watson, 18 Ill. 289; Kimber v. Barber, L. R. 8 Ch. App. 56; Turnbull v. Gordeu, 38 L. J. Ch. 331.

rendered the policy, but, before the notes had been canceled or surrendered, applied to have the policy renewed for himself and one G. The agent thereupon returned the notes to the company, with a statement that D wished to renew and that defendant and G were to help him. A renewal policy was thereupon issued for the benefit of defendant and G. The premiums were thereafter paid by defendant and G, as were also D's premium notes, less the dividends credited thereon. G assigned his interest to defendant, and, upon the death of D, defendant collected and received the amount of the policy. In an action to compel the defendant to account, it was held that, by accepting the renewal policy, the defendant must be deemed to have adopted the instrumentalities by which it was obtained, and was bound by the representation made by the agent to the company; that aside from this, the defendant while acting as agent, having acquired, by departing from his instructions, a benefit, a part of the consideration for which proceeded from his principal, the plaintiff had a right to adopt his acts and to call him to account for the profits derived from the transaction.[1]

So long as property or money belonging to the principal can be traced and distinguished in the hands of the agent, his representatives or assignees, the principal is entitled to recover it, unless it has been transferred for value, without notice.[2] In respect to third persons, he is identified with his principal, and for the most part incurs no personal responsibility, when he acts, in the making and execution of contracts, in the name of his principal. The agent may, however, make himself a party, and assume liabilities as such, by failing to disclose his principal, or to act in his name when disclosed.

An agent derives possession from his principal or by virtue of his employment and cannot dispute his principal's title.[3] Thus money borrowed for a public object, and on the credit of the county, by an agent of the board of supervisors, under a resolution passed by them, without any legal authority, but not in violation of public policy, or of any positive statute, may be re-

[1] Dutton v. Willner, 52 N. Y. 312. See Ackenburgh v. McCool, 36 Ind. 473; Bain v. Brown, 7 Lans. 506; 56 N. Y. 285.

[2] Overseers of the Poor v. Bank of Va. 2 Gratt. 547; Denston v. Perkins, 2 Pick. 86.

[3] Placer Co. v. Astin, 8 Cal. 303; Clark v. Moody, 17 Mass. 145; Hammond v. Christie, 5 Robertson, 160.

covered from the hands of such agent by the board, and their want of authority to make the loan is no defense.[1] An agent must account to his principal until the true owner appears and establishes his title or right.[2] An auctioneer sued for the proceeds of goods entrusted to and sold by him, cannot set up title in himself, as a defense, or in mitigation of damages.[3] But an agent is not precluded from proving that the principal obtained the goods by fraud, where the rightful owner has given notice of his rights.[4]

It is an agent's duty to give the principal necessary information of what transpires in the agency, to enable him to protect his interests; to keep proper accounts and to render them on demand, and under certain circumstances without any demand.[5] The principal has a right to act on the assumption that the agent's reports made and accounts rendered are correct, and the agent will not be at liberty afterwards to dispute them.[6] Thus trover was brought for two insurance policies by the principal, a master of a vessel, against his agents, who were insurance brokers, and who had written the plaintiff that they had got two policies, one on account of the plaintiff's clothes and wages, and another on account of the owners, underwritten by N. A loss having happened, the defendants produced a policy underwritten by S, only insuring the ship in which the plaintiff had no interest. Lord Mansfield said: "I shall consider the defendants as the actual insurers." The defense attempted was that the letter was written by defendant's clerk through mistake, and that trover would not lie for that which never existed, but it was held that the defendants could not contradict their own representation.[7]

[1] Supervisors v. Bates, 17 N. Y. 242.

[2] Bain v. Clark, 39 Mo. 252; Aubery v. Fiske, 36 N. Y. 47; Floyd v. Bovard, 6 W. & S. 75; Beran v. Cullen, 7 Pa. St. 281; Ledoux v. Anderson, 2 La. Ann. 558; Ledoux v. Cooper, id. 586.

[3] Osgood v. Nichols, 5 Gray, 420.

[4] Hardman v. Willcock, 9 Bing. 382, note.

[5] 1 Pars. on Cont. 88; Elliott v. Walker, 1 Rawle, 126; Peterson v. Poignard, 8 B. Mon. 309; Brown v. Arrott, 6 W. & S. 402; Forrestier v. Bordman, 1 Story, 43; Ruffner v. Hewitt, 7 W. Va. 585; Eaton v. Welton, 32 N. H. 352; Lyle v. Murray, 4 Sandf. 590; Terwilliger v. Bealls, 6 Lans. 403.

[6] Vantries v. Richey, 8 W. & S. 87; Boston Carpet Company v. Journeay, 36 N. Y. 384.

[7] Harding v. Carter, 11 Petersdorff's Abr. 400. In Shaw v. Picton, 4 B. & C. 715, Bayley, J., said: "It

Where, on the proofs presented, a factor, as defendant, was liable for a loss occasioned by his negligence, the onus of proving what the actual loss was, was held to be on him, and not upon the principal; that in the absence of such proof, the full value of the goods, or at least of the money produced by their sale, might be adopted as the measure of damages.[1]

THE PARTICULAR DUTIES AND THE MEASURE OF LIABILITY OF AGENTS TO THEIR PRINCIPALS.— The particular duties of agents are various, depending on the nature of their agency; and breaches of duty will vary accordingly. The general rules of compensation, however, are the same as to all, but they must have a special application according to the duty in the particular instance and the peculiar facts which constitute a breach. And whether the duty is such as is implied by the situation and the usages and course of business, or such as may be imposed by instructions, the agent is liable for all losses which result from his failure to fulfil his obligations. He is liable for at least nominal damages for any breach of his agreement or duty; for the law presumes some damage from every violation of contract.[2]

Where the principal suffers actual injury he is entitled to full indemnity.[3] An examination of the cases will show that the general principle is peculiarly applicable, that the injured party

is quite clear that if an agent (employed to receive money, and bound by his duty to his principal from time to time to communicate to him whether the money is received or not) renders an account from time to time, which contains a statement that the money is received, he is bound by that account, unless he can show that that statement was made unintentionally and by mistake. If he cannot show that, he is not at liberty afterwards to say that the money had not been received and never will be received, and to claim reimbursement in respect of those sums for which he had previously given credit. I think that when an agent has deliberately and intentionally communicated to a principal that the money due to him has been received, he makes the communication at his peril, and is not at liberty afterwards to recover the money back again."

[1] Brown v. Arrott, supra; Beckman v. Shouse, 5 Rawle, 179; Beardslee v. Richardson, 11 Wend. 25; Clark v. Miller, 4 Wend. 628.

[2] Frothingham v. Everton, 12 N. H. 239; Blot v. Boiceau, 3 N. Y. 78; Marzetti v. Williams, 1 B. & Ad. 415.

[3] Brown v. Arrott, 6 Watts & S. 402; Frothingham v. Everton, 12 N. H. 239; Amory v. Hamilton, 17 Mass. 103; Harvey v. Turner, 4 Rawle, 223.

is entitled to receive such a sum in damages as will place him in as favorable condition as he would have been in had the contract and duty been fulfilled.[1] But such damages must be a proximate consequence of the agent's breach of duty; or they must be such as it may reasonably be supposed were within the contemplation of the parties. The injury need not proceed directly from the act or omission of the agent; but if it does not there must be an immediate practical dependence for exemption therefrom on some act which it was his duty to perform; or the exposure to the loss which occurs from an independent cause must proceed directly from some act of the agent which was a departure from the line of his duty, or from his omission of some act which it was his duty to perform to avoid such exposure or to provide indemnity against its possible consequences. This may be made clearer by some illustrations. A plaintiff put on the defendant's barge lime to be conveyed from the Medway to London. The master of the barge deviated unnecessarily from the usual course, and during the deviation a tempest wet the lime, and the barge taking fire thereby, the whole was lost. It was held that the law implies a duty on the owner of a vessel, whether a general ship, or one hired for the special purpose of the voyage, to proceed without unnecessary deviation in the usual course. On the point whether the damage was so proximate to the defendant's breach of that duty as to be the subject of an action, Tindal, C. J., said, "it was not rested, as indeed it could not be rested, on the particular circumstances which accompanied the destruction of the barge; for it is obvious that the legal consequences would be the same whether the loss was immediately by the sinking of the barge at once by a heavy sea, when she was out of her direct and usual course, or whether it happened at the same place, not in consequence of an immediate death's wound, but by a connected chain of causes producing the same ultimate event. It is only a variation in the precise mode by which the vessel was destroyed, which variation will necessarily occur in each individual case. But the objection taken is that there is no natural or necessary connection between the wrong of the master in taking the barge out of its proper course, and

[1] Magnin v. Dinsmore, 62 N. Y. 35.

the loss itself; for that the same loss might have been occasioned by the very same tempest if the barge had proceeded in her direct course. But if this argument were to prevail, the deviation of the master, which is undoubtedly a ground of action against the owner, would never, or under very peculiar circumstances, entitle the plaintiff to recover. For if a ship is captured in the course of deviation, no one can be certain that she might not have been captured if in her proper course. And yet in Parker v. James,[1] where a ship was captured whilst in the act of deviation, no such ground of defense was even suggested. Or, again, if the ship strike against a rock, or perishes by storm in the one course, no one can predicate that she might not equally have struck upon another rock, or met with the same or another storm, if pursuing her right and ordinary voyage. The same answer might be attempted to an action against a defendant who had by mistake forwarded a parcel by the wrong conveyance, and a loss had thereby ensued; and yet the defendant in that case would undoubtedly be liable. But we think the real answer to the objection is that no wrongdoer can be allowed to apportion or qualify his own wrong; and that as a loss has actually happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss, if his wrongful act had not been done. It might admit of a different construction if he could show not only that the same loss *might* have happened, but that it *must* have happened, if the act complained of had not been done."[2] So a factor is liable for a loss arising from his neglect to keep his principal informed of matters material to his interest; or from allowing moneys to remain in the hands of a sub-agent after he is informed of the receipt of them by such sub-agent.[3] Neither the ignorance of the principal nor the omission to call at once on the sub-agent for money in his hands, is the immediate cause of loss; but the want of timely notice prevents the principal exerting himself when ex-

[1] 4 Camp. 112.

[2] Davis v. Garrett, 6 Bing. 716. See Wallace v. Swift, 31 U. C. Q. B. 523.

[3] Brown v. Arrott, 6 W. & S. 402; Taylor v. Knox, 1 Dana, 395; Clark v. Bank of Wheeling, 17 Pa. St. 322.

ertion is necessary to prevent loss in his affairs, and the failure to take moneys from the hands of a sub-agent leaves them exposed to the consequences of his insolvency or want of fidelity. An agent who unreasonably neglects to inform his principal of the receipt of money is chargeable with interest, although he acts in good faith.[1]

A judgment creditor agreed, in lieu of her judgment, to accept the bond of another, conditioned to provide for and maintain her during life, or to pay her, if she preferred it, $150 per annum; the bond to be secured by mortgage on the land of the obligor. A person employed to prepare the instruments, and to have the mortgage entered of record, withheld it from record until the property became otherwise incumbered by claims to an amount beyond its value, and the debtor became insolvent. In an action on the case by the party injured, it was held she could recover from the agent all that she had lost by his default,—all that the mortgage, if duly recorded, would have been worth to her.[2] The liability of agents charged with the duty to procure insurance, and who fail in that duty, is another example of loss from exposure arising from their omission to perform an act to provide indemnity against its possible consequences.[3]

The acceptance of an agency is a general undertaking, among other things, to obey the directions of the principal, and this general undertaking becomes specific when the instructions are from time to time communicated. These instructions may be general, given for the accomplishment of the object for which the agency is created, or special with a view of some subordinate and subsidiary detail, in furtherance of that object. The pecuniary advantages which these general or special instructions manifestly embrace, in the light of other information which the agent possesses in common with his principal, are thus brought within their contemplation. These instructions

[1] Dodge v. Perkins, 9 Pick. 368; Clark v. Moody, 17 Mass. 145.

[2] Miller v. Wilson, 24 Pa. St. 114, Howell v. Young, 5 B. & C. 259; Shipherd v. Field, 70 Ill. 438; Short v. Skipworth, 1 Brock. 103; Park v. Hammond, 4 Camp. 344; 6 Taunt. 495; Charles v. Altin, 15 C. B. 46; Williams v. Littlefield, 12 Wend. 362; Caffrey v. Darby, 6 Ves. 488.

[3] See post, p. 9.

are, unless the contrary intention is expressed, supplemented by the usages of trade and business;[1] they fix boundaries of authority, as to subjects and methods, which may be exercised in the principal's name, at his risk and on his responsibility, independent of any subsequent election on his part. Hence, if the agent extends his operations to subjects not within his commission, or conducts them in a method excluded by his instructions, he acts at his peril; the principal is not bound; and if his property is thus lost, or his interests sacrificed or prejudiced, the agent must make good the loss,—and this loss is the amount shown to be necessary to place the principal in as good condition as a faithful performance of the agent's duty would have placed him in. The instructions may relate to measures deemed expedient by the principal to secure himself against a contingent or possible loss. If these instructions are disregarded, the agent will not be heard to say that he is not liable by reason of the uncertainty of the loss, if it happens; for it is a loss in contemplation of the parties; the instructions were intended to make exemption from such possible loss certain. After the disregard of such instructions, the loss when it occurs is morally the direct consequence of the agent's breach of duty, whatever may be the immediate physical cause.

For neglect of duty or agreement to procure insurance.—Any agent, who is in any case required to insure the property of his principal and fails to do so, or does it defectively; or in case of his inability, fails to give his principal timely notice, that he may thereby be warned to do it himself, will be held liable for the loss if one occurs which would be covered by the required insurance; and this loss is equal to the indemnity which it was the agent's duty to procure by the insurance.[2]

Upon an undertaking to effect an insurance according to

[1] See Walls v. Bailey, 49 N. Y. 464.

[2] Park v. Hammond, 4 Camp. 344; 6 Taunt. 495; Perkins v. Washington Ins. Co. 4 Cow. 645, 664; Morris v. Sammerl, 2 Wash. C. C. 203; De Tastett v. Cronsillat, id. 132; Thorne v. Deas, 4 John. 84; Wilkinson v. Coverdale, 1 Esp. 75; Webster v. De Tastett, 7 T. R. 157; Miner v. Tagert, 3 Binn. 204; Mallough v. Barber, 4 Camp. 150; Shoenfeld v. Fleisher, 73 Ill. 404; Beardsley v. Davis, 52 Barb. 159; Callander v. Oelrichs, 5 Bing. N. C. 58; Smith v. Lascelles, 2 T. R. 187; Gray v. Murray, 3 John. Ch. 167.

special instructions, a part of the duty implied is the giving of notice to the employer in case of failure; and an actual promise to that effect, though averred in the declaration, need not be proved.[1] A like duty to give notice was held to be imposed on a foreign merchant who had been accustomed to effect insurances for his correspondent abroad. It was held that he was answerable for his neglect because he thereby deprives the principal of any opportunity of applying elsewhere to procure the insurance.[2]

An insurance broker received instructions to effect a policy for 550*l.* on a ship and freight at and from Teneriffe to London, at ten guineas per cent. He effected it in the words of the order to him, without having subscribed a liberty, as was customary in such policies, "to touch and stay at all or any of the Canary Islands." It was held that the broker was liable for not having inserted the clause in question, and the principal recovered for the sum directed to be insured, deducting the premium.[3] If an agent neglect to obey instructions to procure insurance, he is not entitled to charge his principal the premium on account of his liability to answer for the loss, if one should occur, if no loss happens.[4] Where the agreement to insure is general, and there is no difficulty in procuring full insurance, and such is the general practice, in the particular matter embraced in the contract, the fair and reasonable construction of the agreement is that the party undertakes to procure a contract for full indemnity. In the absence of any evidence, aside from the general agreement to insure, the court, in fixing the amount of damages, would not, it seems, stop short of a full insurance. The contract of insurance is one of indemnity; and the party whose property is destroyed will not obtain indemnity unless he recovers the full value of his property. In an action against an agent for not procuring full insurance, the measure of damages is therefore the value of the property destroyed; to be reduced by any amount received under a partial insurance.[5]

[1] Callander v. Oelrichs, 5 Bing. N. C. 58.

[2] Smith v. Lascelles, 2 T. R. 187.

[3] Mallough v. Barber, 4 Camp. 150.

[4] Storer v. Eaton, 50 Me. 219.

[5] Beardsley v. Davis, 52 Barb. 159; Ex parte Bateman, 20 Jur. 365; Betteley v. Stainsley, 12 C. B. N. S. 499; Douglass v. Murphy, 16 U. C. Q. B. 113.

If the insurance directed, however, would be invalid, and could not be enforced at law, an action against the agent would not be maintainable for substantial damages; nor would it be any answer to that defense, that by usage and courtesy such insurances were usually paid.[1] As to costs incurred by the principal in an unsuccessful suit against the underwriters, where the broker had been in fault in respect of his principal's orders to procure insurance, the costs of that action were disallowed, Lord Eldon saying there was no necessity to bring that action to entitle the plaintiff to recover against the broker, and as it did not appear that the action on the policy was brought by the desire or with the concurrence of the broker, he was not liable for the costs.[2]

For disregarding orders for the purchase and shipment of goods.— If an agent abroad is directed to invest funds furnished him in goods of a certain description, and ship them to another place or country, and he disobeys the order, the principal is thus deprived of a gain or profit, if the goods would be worth more at the place to which they were required to be sent than at the place of shipment, after paying the cost of transportation, and would have reached the destination had the order been executed. The right of the principal to recover damages from the agent for this breach of duty, measured by that gain or profit, is obvious, if the difference of market value, and the safe arrival of the goods, can be established with the requisite certainty. It is a well-established rule that the damages to be recovered for a breach of contract must be shown with certainty, and not left to speculation or conjecture. The former fact, although sometimes mentioned as an insuperable objection,[3] has ceased to be a legal obstacle. Market values are susceptible of proof as a legal proposition; though in a particular instance it may be practically impossible. The time and place being fixed with reasonable certainty, the state of the market is but an ordinary inquiry by evidence — it is a practical, not a legal difficulty. A court or jury may take cognizance of the

[1] Webster v. De Tastet, 7 T. R. 157.

[2] Seller v. Work, cited in Marsh on Ins. 243.

[3] The Amiable Nancy, 3 Wheat. 546; L'Amistad de Rues, 5 id. 385.

fact when it is proved, and whether it is a foreign or domestic market can make no difference. That the property would have reached its destination if the agent had obeyed his instructions will, in many cases, be capable of the most satisfactory proofs; as where directions are given to send the goods by a particular vessel, and that vessel actually makes the voyage in safety.[1] Where the agent disobeys such an order, the burden should rest on him to show that if he had not disobeyed a loss would have occurred; or, in other words, that no injury has resulted from his breach of duty; and it is not enough that if he had obeyed instructions a loss *might* have occurred; he must show that it *must* have happened.[2]

A merchant in New York directed his correspondent in China to invest money, furnished him, in silks for the New York market; and he disregarded the order, and it appearing that the silks could have been sold at a profit, it was deemed profit which was within the contemplation of the parties, and being such as the proof showed with reasonable certainty would be realized, it was properly taken into consideration in the estimate of damages for such breach of duty.[3] In this case Rapello, J., said: "It is not necessary now to decide what is the proper rule of damages; but we are not prepared to sanction the idea that the rule adopted in cases of marine trespass, which is the prime cost or value of the property at the time of the loss, with interest,[4] is necessarily applicable to the case of the violation of a contract, entered into for the express purpose of procuring goods for sale at their place of destination, when their market value at that place can be shown. The fact that damages have been sustained must be proved with reasonable certainty; but even a loss of profits, if within the contemplation of the parties, at the time of entering into the contract, and a direct consequence of the breach, and not speculative or contingent, may be recoverable.[5] The certainty of the loss

[1] Bell v. Cunningham, 3 Pet. 69; S. C. 5 Mason, 161.

[2] Davis v. Garrett, 6 Bing. 716; Ryder v. Thayer, 3 La. Ann. 149; Farwell v. Price, 30 Mo. 587; Schmerlz v. Dwyer, 53 Pa. St. 335; Eby v. Schumacker, 29 Pa. St. 40; Wilkinson v. Laughton, 8 John. 213.

[3] Heinemann v. Heard, 50 N. Y. 27.

[4] 3 Wheat. 560.

[5] Griffin v. Colver, 16 N. Y. 494; Masterton v. The Mayor, 7 Hill, 61; 3 Pet. 85.

must depend upon the evidence; but to apply to such contracts the rules settled in cases of capture and collision would, in the generality of cases, exempt foreign agents from all responsibility for breaches of their contract with, or violation of their duty to, their principals, in respect to the purchase and shipment of goods, whether arising from negligence or fraud." [1]

MISCELLANEOUS ILLUSTRATIONS OF AGENT'S LIABILITY FOR NEGLECT OR BREACH.— The primary obligation of an agent whose authority is limited by instructions is to adhere faithfully to them; for if he unnecessarily exceeds his commission, he renders himself responsible for the consequences.[2]

Where a carrier of goods, or other agent, has charge of goods consigned C. O. D., and delivers them without collecting the moneys charged on them, he will be held liable for the amount which he was required to collect.[3] In such cases the agent disposes of the principal's property, though a special property, contrary to his instructions, and, therefore, is chargeable as upon an appropriation to his own use.[4] Any disposition of the principal's property, or choses in action, contrary to his duty, by which the principal is divested of the property and suffers injury, entitles him to recover of the agent as for a wrongful appropriation or conversion, to the extent of his interest and rights in the same.[5]

Where the insured employed a factor or agent to settle with

[1] See Gafford v. Rensley, 40 Vt. 506.

[2] Fuller v. Ellis, 39 Vt. 345; Rundle v. Moore, 3 John. Cas. 36; Hutchings v. Ladd, 16 Mich. 493; Goodrich v. Thompson, 4 Robt. 75; Schmerlz v. Dwyer, 53 Pa. St. 335; Johnson v. N. Y. Cent. R. R. Co. 31 Barb. 196; Scott v. Rogers, 31 N. Y. 676; Leverick v. Meigs, 1 Cow. 668; Peters v. Ballistier, 3 Pick. 495; Kingston v. Wilson, 4 Wash. C. C. 310; Whitney v. Merchants' Express Co. 104 Mass. 152.

[3] Walker v. Smith, 4 Dall. 389; Laverty v. Snethen, 68 N. Y. 522; Wheelock v. Wheelwright, 5 Mass. 103; Scott v. Rogers, 31 N. Y. 676; McMorris v. Simpson, 21 Wend. 610; Syeds v. Hay, 4 T. R. 260; Stearine, etc. Co. v. Heintzmann, 17 C. B. N. S. 56; Hutchings v. Ladd, 16 Mich. 493; Thompson v. Gwyn, 46 Miss. 522.

[4] Id.; LeGuena v. Gouverneur, 1 John. Cas. 436.

[5] Id.; Hancock v. Gomez, 50 N. Y. 668; Tuite v. Wakelee, 19 Cal. 692; Taussig v. Hart, 58 N. Y. 425; Jackson v. Baker, 1 Wash. C. C. 394; Parsons v. Martin, 11 Gray, 111; Gray v. Murray, 3 John. Ch. 167; Rundle v. Moore, 3 John. Cas. 36; Allen v. Brown, 51 Barb. 86.

the insurers as for a total loss, and an abandonment was duly made, and the agent afterwards, through mistake or misapprehension of a letter of the insured, or from negligence, adjusted the claim as an average loss at twenty per cent., and canceled the policy, it was held that the agent was responsible for the whole amount.[1]

An agent has no right to mix the funds of his principal with his own, and hold him liable for the depreciation of the moneys. If he would keep the money at the risk of his principal, for losses on bank failures, or other losses on the money itself, he must keep it separate and distinct from his own.[2]

Where grain was delivered to wharfingers to be shipped to a certain party in New Orleans; and before shipment they were notified not to ship to such party, but to another, which they neglected to do and shipped according to the first direction; the price of the grain being lost in consequence of the insolvency of the consignees, it was held that the wharfingers were liable to the shipper for the value.[3] A commission merchant took a bond for a simple contract debt due to him for goods sold on commission, and included in the same instrument a debt due to himself; it was held that by thus extinguishing the simple contract debt of his principal, and depriving him of the means of pursuing his claim against his debtor, the agent was at once answerable to him for the amount of the goods.[4] If a principal direct his agent to ship goods by a particular steamer or mode of conveyance, and the agent unnecessarily send by another and they are lost; the directed method having been departed from, the goods are disposed of contrary to the duty of the agent, and he must bear the loss.[5]

[1] Rundle v. Moore, supra; Kempker v. Roblyer, 29 Iowa, 274.

[2] Webster v. Pierce, 35 Ill. 158.

[3] Howell v. Morlan, 78 Ill. 162; Cutler v. Bell, 4 Camp. 184; Bessent v. Harris, 63 N. C. 542; Marr v. Barrett, 41 Me. 403.

[4] Jackson v. Baker, 1 Wash. C. C. 394. See Wilkinson v. Clay, 6 Taunt. 110.

[5] Johnson v. New Y. Cent. R. R. Co. 31 Barb. 196; Goodrich v. Thompson, 4 Robt. 75; Hand v. Bagnes, 4 Whart. 204; Ang. on Car. §§ 162, 176, 178, 213. In Johnson v. N. Y. Cent. R. R. Co., it was considered that a deviation from the course marked out by the principal which is rendered necessary by the circumstances of the case, not foreseen by the principal, is justifiable, if the agent exercises the care and

An agent, in matters left to his discretion, must exercise a reasonable judgment, and especially must act in good faith. An agent appointed to settle a claim against a third party received from the debtor promissory notes for the amount, payable at a future day, which were perfectly good, and were in fact paid when due. Before maturity the agent sold them for less than their face, without consulting with or informing his principals, and without making any inquiries of parties with whom money had been deposited for their payment. Upon being called upon to account, he denied that he had received anything on the notes for which he was liable to account; it was held that the sale of the notes was a clear violation of duty to his principals, and warranted a finding that it was made without authority; that the principals were entitled to recover, as for money had and received, to the full amount of the notes.[1]

He is bound to exercise his powers, or proceed in doing the business of his agency, according to usage, or in the ordinary course of the business he is employed in; that he will do so is to be assumed as the tacit direction of his principal from the absence of express directions. Hence, in such matters as are regulated by usage, they are at once his commission and a chart for his guidance.[2] Thus it was held that an agent of an insurance company, from the nature of the power to receive payment, having authority to receive payment of premiums, necessarily had power to accept whatever was generally used for the purpose of making payments in the locality where the debts were to be collected. The actual currency of that locality soon after the direction to collect premiums, being supplanted by confederate notes, and thenceforth that being the financial means used in buying and selling property and in creating and discharging debts, he was held authorized in his discretion to receive such notes; having received them in good faith, the payments were also valid as between the assured and the insurer.[3]

skill which his agency calls for; unless the instructions amount in substance to a prohibition of the act in any other than the prescribed method. Greenleaf v. Moody, 13 Allen, 363; Forrestier v. Bordman, 1 Story, 51.

[1] Allen v. Brown, 51 Barb. 86.

[2] Story on Agency, § 96; Phillips v. Moir, 69 Ill. 155; 13 Petersdorff's Abr. 751, 752, and notes.

[3] Robinson v. International Life Ins. Co. 52 Barb. 450; Baird v. Hall, 67 N. C. 230; Rodgers v. Bass, 46

But where debts in the hands of an agent are payable in a particular currency, he is not authorized to accept a different one, and he cannot do so except at his peril. During the years 1861–2, a party placed in the hands of his agent for collection, a number of notes and drafts, by their terms payable in United States currency, with no instructions as to the currency in which the collections should be made; the agent was left to exercise his discretion as to the procedure to be taken to enforce payment; he accepted confederate currency in payment and surrendered the notes and drafts; it was held that the action of the agent was wrongful as to his principal; without authority, actual or presumptive; and that he was liable to pay his principal the full amount of the notes and drafts in United States currency, although confederate money was at the time and place of payment the only currency in circulation.[1]

If a factor be directed to sell for gold he cannot discharge his liability to his principal in a depreciated currency.[2] So a bank which receives an uncertified check in payment of a draft held by the bank for collection, will be held liable for the amount of the draft, whether the check is paid or not, the draft having been surrendered; and a local custom to receive such checks is no defense.[3]

For defaults in regard to commercial paper.—The same general rule as to the measure of damages, which has been stated,[4] applies to agents having in charge for the owners, commercial paper, or other securities for the payment of money. If, through the negligence or unauthorized act of the agent, the paper or security becomes worthless, or its value impaired, the principal will have a right of action against the agent for damages equal to the loss. In respect to checks and bills of exchange, diligence is required not only to preserve the liability of the drawer and indorsers, but to have the advantage of such diligence as will be immediately productive. If an

Tex. 505. See Turner v. Beall, 22 La. Ann. 490; Richardson v. Futrell, 42 Miss. 525; Bernard v. Maury, 20 Gratt. 434.

[1] Mangum v. Ball, 43 Miss. 288.

[2] Poindexter v. King, 21 La. Ann. 697; Symington v. McLin, 1 Dev. & Bat. 291.

[3] Nunnemacher v. Lanier, 48 Barb. 234. But see Russell v. Hankey, 6 T. R. 12.

[4] Ante, p. 5.

agent, to procure acceptance of a bill, or for collection of a bill, check, or promissory note, by neglect seasonably to present the paper to the drawee or maker, discharges the other parties, he is liable for the damages which ensue. Where the debt is thus lost, the delinquent agent will be liable for the amount.[1]

Where a debtor transferred a note as collateral security for the payment of a sum of money owing by him, the amount of the note, when paid, to be applied towards the satisfaction of the creditor's demand, and if not paid to be returned to the debtor; the latter was held entitled to maintain an action in his own name for breach of duty against a bank with which the note was left by the creditor for collection, the bank having neglected to give notice of non-payment, whereby the debt was lost, and he was held entitled to recover the whole amount of the note and interest.[2]

The duty of the bank to exercise diligence in such a case need not be founded on any express contract with the person depositing the note for collection; it will be implied from the custom of banks, in favor of such person as may be beneficially interested in having the duty performed.[3]

The owner of a bill has an interest in having it presented for acceptance without delay, although such presentment is not necessary in the case of a bill payable on a day certain, to enable him to retain his claim against the drawer or indorser of such bill; and if the agent who has been entrusted with the bill for the purpose of getting it accepted and paid, or accepted only, neglects to comply with the direction of the owner to get the bill accepted without any unnecessary delay, he will be liable to the owner for the damage which the latter sustains by such negligence.[4] Nor does it require special instruction from the principal to impose this duty.[5]

[1] Bank of Washington v. Triplett, 1 Pet. 25; Tyson v. State Bank, 6 Blackf. 225; Allen v. Suydam, 20 Wend. 321; 17 Wend. 371; Montgomery Co. Bank v. Albany City Bank, 3 Seld. 459; Smedes v. Bank of Utica, 20 John. 372; 3 Cow. 662; Fabens v. Mercantile Bank, 23 Pick. 330; Bidwell v. Madison, 10 Minn. 13; Hamilton v. Cunningham, 2 Brock. 367; Bank of Orleans v. Smith, 3 Hill, 560.

[2] McKinster v. Bank of Utica, 9 Wend. 46; affirmed, 11 Wend. 473.

[3] Id.

[4] Allen v. Suydam, 20 Wend. 321; S. C. 17 Wend. 371; Chit. on Bills, 273.

[5] Id.

If protested for non-acceptance, the holder is not obliged to delay suit until the maturity of the bill; he may proceed at once against the drawer or indorser.[1] An immediate presentment not only determines the question whether the security of the drawees, or an acceptance *supra protest*, is to be added; but, on protest, it leads directly to inquiry and explanation, and enables the holder to take such prudential measures against all other parties as their character, circumstances, or the general state of the times may demand.[2] There may, therefore, be a case where there is not such negligence of the agent as would discharge a drawer or indorser, and yet be such as would entitle the principal to damages. These damages are not necessarily the amount of the bill, for the recovery will be limited to compensation for the actual injury. Prima facie, if the parties to the bill are discharged, the debt is lost; it cannot be presumed to exist in any other available form, and in that case the amount of the bill is the measure of damages. If the fact is otherwise, of course it may be shown. Where A, being indebted to B, sent him C's bill on D for the amount, and was not a party to it, and D, having no funds of C, refused acceptance, of which no notice was given, by the negligence of B's agent, in an action by B against his agent it was held that, inasmuch as A had not indorsed the bill, he was not entitled to notice, and must still remain liable to B for his debt, and that the drawer was not entitled to notice because he had no funds in the hands of the drawee; therefore B was entitled to such damages as he had suffered, but was not entitled to recover the whole amount of the bill; he was only entitled to such damages as he had sustained in consequence of having been delayed in the pursuit of his remedy against the drawer.[3] So, if there is negligent delay by an agent in presenting a bill for acceptance, and the antecedent parties, though not thereby discharged from their legal liability, in the mean-

[1] Walker v. Bank of State of N. Y. 9 N. Y. 582; Ballingalls v. Gloster, 3 East, 481; Allan v. Manson, 4 Camp. 115; Mason v. Franklin, 3 John. 202; Robinson v. Ames, 20 John. 146; Watson v. Loring, 8 Mass. 557; Bank of Rochester v. Gray, 2 Hill, 227.

[2] Allen v. Suydam, 17 Wend. 371.

[3] Van Wart v. Woolley, 3 B. & C. 439. See Van Wart v. Smith, 1 Wend. 219.

time, become insolvent, the amount of the bill is prima facie the loss.[1]

[1] In Allen v. Suydam, supra, the action was brought against an agent for collection of a draft drawn July 21, 1833, payable sixty days after date, received by such agent August 16th. The agent retained it until September 2, when he transmitted it to the cashier of a bank in another state, where the drawee was doing business, and it was received by such cashier on the 6th of September and presented for acceptance on the following day. The drawees said they were not ready to accept — that they did not accept for the drawer without instructions, and they had none, but expected to hear from the drawer soon. The cashier called again on the 10th, and the drawees were then instructed not to accept, and refused; whereupon the draft was protested. On the 9th of October, the drawer died insolvent. When the draft was drawn he had funds in the hands of the drawees, but the amount was not shown; they testified, however, that the lateness of the day of presentment for acceptance made no difference in regard to acceptance, as it was an invariable rule with them not to accept without previous advice. It appeared that subsequent to the 16th of August the drawees accepted other drafts to the amount of $2,000; and it appeared also that the drawer conducted business as a merchant in the city of New York down to the time of his death; whilst on the other hand it was shown that on the 24th of July, 1833, his note to the plaintiffs for $606.77 was protested at Concord, and remained unprovided for until the draft in question was drawn for the amount. The trial court charged the jury in the action for negligence in not presenting the draft for acceptance, that the jury, having no other knowledge of the amount of the damage than from the proof of the amount of the draft, should find a verdict in favor of the plaintiffs for the amount of the draft and interest. The delay of the agent to present for acceptance was negligence. Cowen, J., said (17 Wend. 371): "I have examined Van Wart v. Woolley as reported in the different books referred to by Chitty. In 5 Dowl & Ryl. and 3 Barn. & Cress., Lord Tenterden, C. J., delivers the opinion of the court that mere delay of the agent to give notice to his principal, though the drawer were not therefore discharged, would subject him to damages. In Mood & Malk. N. P. reporters, the damages were assessed, before the same judge, at one shilling. The smallness of the sum was because, in the meantime, the plaintiff had recovered the full amount, with damages and costs, by an action in this state against Irving & Co., who transmitted the bill to England. Campbell, for the defense, strenuously contended that the mere delay of the remedy against an insolvent drawer who never had funds, and that, too, where the amount of the whole bill had been recovered from another, would not maintain an action. Lord Tenterden, however, was clearly of a contrary opinion.

"We may certainly assume upon such authority, that the object of notice is not confined to the saving of the ultimate legal remedy. Such a view, too, is justified by the nature of the business. And immedi-

ate presentment not only determines the question whether the security of the drawees, or an acceptance *supra protest* is to be added; but, on protest, it leads directly to inquiry and explanation, and enables the holder to take such prudential measures against all other parties as their character, circumstances, or general state of the times may demand. In the case at bar, there was not only a want of funds in the hands of the drawees, but a positive fraud by the drawer, who countermanded the acceptance; neither of which was known to the plaintiffs below, nor could be, until the demand made at Concord. A demand before maturity, almost certainly leading to discoveries very important to the principal, is not so unusual as to leave agents in ignorance that an acceptance should be sought for, through the earliest practicable means of communication. A knowledge of the truth, a few days or even a few hours earlier or later, is many times decisive. On the whole, we think the court below were right in holding, as a matter of law, that the delay of the defendants was unreasonable, and that they were therefore liable in this action."

The court of errors reversed the judgment below on the question of damages. At the maturity of the bill, the drawer was insolvent, but he had continued to do business as a merchant. There was no actual proof that had the bill been presented without delay, after the defendant received it and notice of non-acceptance given, payment could have been obtained, and the question was not submitted to the jury; the liability of the defendant for the amount of the bill was decided as a matter of law. The negligence complained of, though it did not discharge the drawer, prevented any attempt to obtain payment or security; prevented the very endeavor that diligence in presentment of such paper is intended to afford opportunity for. Should it not devolve on the party whose negligence is the obstacle to exertion in the direction of obtaining payment to show that it would have been unsuccessful? Senator Verplank, in his dissenting opinion (20 Wend. 334), said: "I can, therefore, find no sounder rule of damages, nor one better for protecting and reconciling all these claims of policy and justice, than that pointed out by the decisions in a large class of cases of agency, and by the analogy of the measure of damages in trover. In those cases, the presumption is, in the first instance, to the full nominal amount of the loss, as it appears on the face of the transaction against the agent wanting in diligence, or the party guilty of the tortious conversion. Thus, where an agent or factor neglects to insure for his principal, according to order, he is held responsible for the default, prima facie, to the total amount which he ought to have covered by insurance. But at the same time he is allowed to put himself in the place of the underwriter and to prove fraud, deviation, or any other defense which would have been good, had the insurance been made, or which would go to show that nothing at all, or how much, was actually lost by the neglect. Delany v. Stoddart, 1 T. R. 22; Wallace v. Tellfair, 2 T. R. 188; Webster v. De Tastett, 7 T. R. 157. In the courts of this state, Rundle v. Moore, 3 John. Cas. 36. And in the courts of the United States, Morris v. Summerl, 2 Wash. C. C. 203. See,

also, 1 Phil. on Ins. 521. So, too, in actions against sheriffs, where those official public agents become chargeable with the debt of another, by their own negligence or misconduct. When the default is established, the amount due the plaintiff in the original suit is the prima facie evidence of the measure of damages. This presumption may be controlled or rebutted, and the sheriff may give in evidence any fact showing either that the party has not been actually injured, or to how much less amount. He may show, for instance, the insolvency of the original debtor. But the burden of proof is upon him; if he leaves the presumption uncontradicted, that establishes the measure of damages. This has been frequently ruled at our circuits, nor can I find that it has ever been questioned in our supreme court, and is substantially recognized in Potter v. Lansing, 1 John. 215; Russell v. Turner, 7 id. 189. The Massachusetts decisions are particularly full on this point. See 10 Mass. 470; 11 id. 89; id. 183; 13 id. 187. Similar decisions may be found in the reports of other states. So again in trover. In Ingalls v. Lord, 1 Conn. 240, in trover for a note, it was held that the prima facie measure of damages was the face of the note; but that evidence might be given to reduce the amount, by proving payment in part, or the insolvency of the maker, or any other fact invalidating the note or lessening its value. It is true that Lord Tenterden, in Van Wart v. Woolley, . . held that damages must be shown, and that the face of the bill is not the conclusive measure; but this, I think, is not in contradiction to the view that I have taken. I therefore take the cases before mentioned to point out the sound doctrine here. The face of the bill is the prima facie measure of damages. These may be reduced by any positive evidence proving the real damage to be less; but the burden of that proof must be upon that negligent agent, and not on the party who suffers by his negligence. Circumstances like these of the present case may often render it difficult or impossible for either party to prove, or even to form a probable estimate of the precise damages incurred by the agent's neglect. In such cases, is it not just that those chances of loss which must fall upon one or the other should be thrown upon the party in default, and not upon the innocent sufferer? It was then for the defendants here to show that the debt would not have been paid had due diligence been used, or that there were any other circumstances to diminish the actual damages below the nominal amount."

In the majority opinion by the chancellor it was said: "In relation to the amount of damages, . . . I think the charge of the judge who tried the cause was clearly wrong; and that it has unquestionably produced great injustice in this case. . . . The relation between the drawer and indorser of the bill and the person to whom it is transferred for the mere purpose of negotiation or collection, is not the relation of indorser and indorsee, so as to throw the loss of the whole amount of the bill upon the latter, if he neglects to present the same for acceptance and payment in time, or to give notice of its dishonor to the indorser, as required by law. Nor will the payment of damages, by the agent, have the effect to subrogate him to all the rights and remedies of the person from whom he received the

bill, as against other parties who may be liable for the payment thereof; but it is a mere contract of agency which leaves the indorser to all his rights and remedies for the recovery of his debt as against other parties, and only renders the indorser liable as agent for the actual or probable damages which his principal has sustained in consequence of the negligence of such agent. This principle was distinctly recognized by the court of king's bench, in England, in the case of Van Wart v. Woolley, 5 Dowl. & Ryl. 374, where the plaintiff had not lost his remedy against the drawers of the bill, or the person from whom he received it, by reason of the neglect of the agents to present it for acceptance in due time; the drawers of the bill in that case having drawn without authority when they had no funds in the hands of the drawees, and Irving & Co., who sent the bill to the plaintiffs in payment, not standing in the situation of indorsers of the bill, as their names did not appear upon it. In that case, however, if there had been any evidence to warrant the belief that the bill would have been accepted if an immediate acceptance or rejection of the bill by the drawees had been insisted on, according to the decision in the case of the Bank of Scotland v. Hamilton (Glen on Bills, 109), the loss which had arisen from the neglect of the defendants in not pressing for an acceptance, or in not giving due notice of the dishonor of the bill immediately, if it could then probably have been collected from the drawees, should have fallen upon Woolley & Co. instead of Irving & Co., who had remitted the same to Van Wart; and the plaintiff would then have been permitted to recover whatever damages had been sustained by such negligence, for the benefit of Irving & Co. In that respect Irving and Co. stood in the same relative situation to Van Wart, as Dunlop did to the Bank of Scotland, in the case before referred to; and Woolley & Co. occupied the situation of Hamilton & Co., who were held liable in that case in exoneration of Dunlop's liability. The only difference in principle which I can see between the two cases is, that in the Scotch case it was evident that the bill would probably have been accepted and saved, if it had been presented for acceptance on *Saturday*, when it was received in Glasgow, instead of being kept back until *Tuesday* evening, when the news of the drawer's failure had reached that place; and, therefore, to exonerate Dunlop, who remitted the bill, the agents in Glasgow were very properly charged with the amount of the bill, the whole of which had been lost through their negligence, except the small amount of dividend which the bank would be entitled to out of the drawer's estate under the commission of bankruptcy against him; whereas, in the case of Van Wart v. Woolley, there was no reason to believe that the bill would have been accepted if the agent had insisted upon an answer immediately, and there was as little probability that anything would have been obtained from the drawers if Van Wart or Irving & Co. had received notice of the dishonor of the bill immediately after it was received by the agents in London. In the latter case, therefore, the damage which either Van Wart or those who had transmitted him the bill in payment had sustained, was merely nominal. Besides, the supreme court of this state having decided

that neither the drawer nor Irving & Co. were discharged from their liability to the plaintiff by this neglect of his agent, neither of them, in fact, having been injured by such neglect, the plaintiff, upon the second trial, was, of course, only held to be entitled to such damages as he had sustained, and which were nominal only. If the rule laid down by the judge who tried the present case was correct, that the principal was entitled to recover the whole amount of the bill and interest, because there was no other evidence to enable the jury to discover what the damage was, then the plaintiff in the case of Van Wart v. Woolley should have been permitted to retain his verdict upon the first trial; as it did not then appear whether he could actually succeed in collecting the money either from the drawers of the bill or from Irving & Co.; neither did it then appear whether, by the laws of this state, where they resided, they were not actually discharged from liability, so that no judgment could be recovered against them, in consequence of the negligence of the agent.

"The granting of the new trial in that case, therefore, proceeded upon the principle that the agent was not liable for the whole amount of the bill, unless damages to that extent had been sustained by his neglect; and that to recover damages to that extent it was incumbent on the party claiming, to give sufficient evidence to satisfy the court and jury that it was at least probable that he had sustained damages to that amount. Neither the Scotch nor the English case, therefore, is an authority to sustain the charge of the judge in relation to the amount of damages in the present case; on the contrary, the case of Van Wart v. Woolley is a direct authority to show that the agent ought not to be charged with the whole amount of the bill, unless there is sufficient evidence to render it at least probable that the whole amount of the debt would have been saved if the agent had discharged the duty which his situation imposed upon him. Where there is a reasonable probability that the bill would have been accepted and paid if the agent had done his duty; or where by the negligence of the agent the liability of a drawer or indorser who was apparently able to pay the bill has been discharged, so that the owner of the bill cannot legally recover against such drawer or indorser, I admit the agent by whose negligence the loss has occurred is prima facie liable for the whole amount thereof with interest as damages; unless he is able to satisfy the court and jury that the whole amount of the bill has not been actually lost to the owner in consequence of such negligence. . . Under the circumstances of this case, therefore, I think the jury should have been instructed that, upon the evidence, the plaintiffs were only entitled to nominal damages; or at least they should have been told to find only such damages as they should, from the evidence, believe it probable the plaintiff might have sustained by the delay in presenting the draft for acceptance immediately; for I do not see how it is possible for any one to believe, or even to suppose it probable from this evidence, that the whole amount of this draft was in fact lost to the plaintiff below, by the delay of the Allens in presenting it to the drawees, and giving notice of the dishonor thereof immediately to the drawer, who never intended that it should be accepted and paid."

It is manifest that Van Wart v.

Woolley was correctly decided; for Irving & Co. were properly assumed to be still liable for the debt which the bill was remitted to pay; and there was no evidence to rebut the presumption of their ability to discharge that debt. Hence the delay of measures against the drawer in consequence of the agent's negligence did not endanger its ultimate collection. The exemption of Van Wart from loss did not depend on the acceptance of the bill, nor on his recourse to the drawer. Allen v. Suydam presents no such features; the holder's only dependence in that case for payment was immediate recourse to the drawer. It is, therefore, not a parallel case. If he had received the timely notice he was entitled to from the agents, there was a reasonable probability that he could have obtained payment or security from the drawer. As the agent's negligence precluded any effort of this kind at a time that was vitally important for that purpose, were they entitled to have their wrong qualified by what is equivalent to a presumption that had the agent's duty been performed, the same loss would have been sustained? As between the holder of commercial paper and antecedent parties, the law presumes damage from the omission to present for payment. Heylyn v. Adamson, 2 Burr. 669; Cowley v. Dunlop, 7 T. R. 581. This is so though the party to whom such presentment must be made is bankrupt or insolvent. Russell v. Langstaffe, 2 Doug. 515; Warrington v. Furber, 8 East, 245; Nicholson v. Gouthit, 2 H. Bl. 609; Easdaile v. Sowerby, 11 East, 117; Bower v. Howe, 5 Taunt. 30; Ex parte Bignold, 1 Deac. 712; Holland v. Turner, 10 Conn. 308; Jackson v. Richards, 2 Cai. 343; Crossen v. Hutchinson, 9 Mass. 205; Garland v. Salem Bank, 9 Mass. 408; Sandford v. Dillaway, 10 Mass. 52; Farnum v. Foule, 12 Mass. 89; Groton v. Dallheim, 6 Greenlf. 476; Shaw v. Reed, 12 Pick. 132; Greeley v. Hunt, 21 Me. 455; Hunt v. Wadleigh, 26 Me. 271. Between such parties it is a conclusive presumption, to the extent of the face of the paper, and discharges from liability to pay it; between the agent and the holder, whenever the former is guilty of actionable negligence in respect to the same acts, it would seem just that there should be a rebuttable presumption of a like amount of injury. See Murray v. Judah, 6 Cow. 484; Syracuse Bank & N. Y. R. R. Co. v. Collins, 3 Lans. 29; Bradford v. Fox, 38 N. Y. 289; Hoard v. Garner, 3 Sandf. 179; Ingalls v. Lord, 1 Cow. 240; Caffrey v. Darby, 6 Ves. 496; Davis v. Garrett, 6 Bing. 716; Beardslee v. Richardson, 11 Wend. 25; Brown v. Arrott, 6 W. & S. 402; Beckman v. Shouse, 5 Rawle, 189.

In an action for the price of goods, it appeared that the same were sold at York on Saturday, the 10th day of December, 1825, and on the same day at 3 P. M. the vendee delivered to the vendor, as and for a payment of the price, certain promissory notes of the bank of D & Co., at Huddersfield, payable on demand to bearer. D & Co. stopped payment on the same day at 11 A. M., and never afterwards resumed; but neither of the parties knew of the stoppage or of the insolvency of D & Co. The vendor never circulated the notes, or presented them to the bankers for payment. But on Saturday, the 17th, he required the vendee to take back the notes, and to pay him the amount, which the latter refused. Held, under these circumstances, that the vendor of the goods was guilty of *laches*, and had thereby made the notes his own,

It is not only the duty of an agent employed to procure acceptance to apply promptly for it, and to give his principal notice of refusal, but also to obtain an absolute and valid acceptance, or to treat the bill as dishonored. If he takes an acceptance which does not bind the drawee, reposes upon it, and gives no notice that acceptance has been refused, he will be held to the same responsibility as though he had presented the bill for acceptance, and on refusal he had given no notice.[1]

If a bill is duly accepted when presented, the duties of an agent for its collection are similar to those of an agent for the collection of a promissory note. The holder in either case is entitled to have the paper presented at maturity to the party primarily liable for payment, and to prompt notice of non-payment, to enable him to take immediate measures against that party on his own judgment of the exigencies, and to notify the indorsers and drawer to preserve his right of recourse to them. Of course, where such presentment is not made for any of the reasons which in law constitute an excuse for non-presentment, the agent is not liable for neglect. But in such cases only is non-presentment excused; he is bound to the same diligence in notifying the principal of the facts to enable him to protect his rights as in other cases of dishonor.

The duties of a bank or other collecting agent, receiving a check for collection, are more exigent and complicated than in respect to other negotiable paper; and for negligence the same rule of damages applies,—that of making good any loss that

and consequently that they operated as a satisfaction of the debt. Camidge v. Allenby, 6 B. & C. 373. In this case Bayley, J., said: "The neglect . . . on the part of the plaintiff to give to the defendant notice of the insolvency of the bankers *may* have been prejudicial to the defendant. The law requires that the party on whom the loss is to be thrown should have notice of non-payment, in order to enable him to exercise his judgment whether he will take legal measures against other parties to the bill or note. Now here, if the notes had been returned on the Tuesday to the defendant, he might have taken steps against the bankers, and he had a right to exercise his judgment whether he would do so or not, although they had stopped; or he might have a remedy against the person who paid him the notes."

[1] Walker v. Bank of the State of N. Y. 5 Seld. 582. See Wingate v. Mechanics' Bank, 10 Pa. St. 104; McKinster v. Bank of Utica, 9 Wend. 46.

ensues to the principal in respect to moneys for which the check is drawn. The check is for money presently, and to obtain it at once is the obvious right of the holder, and the obvious intention of the drawer, if it is made in good faith. This, as the primary purpose, can only be adequately subserved by diligence stimulated by this view; and it will sometimes exceed that required for the preservation of the liability of the drawer and indorsers.[1] The duty of a collecting agent devolves

[1] Mr. Morse, in his excellent treatise on Banks and Banking, p. 327, says: "Every bank of deposit in the country is wont daily to receive from its customers, upon deposit for their credit, great numbers of checks drawn upon other banks; though it will be remembered that the present discussion is confined to those cases where the drawee-banks are in the same city or town as the receiving bank. In the case of every deposit of this nature the bank makes itself the agent of the depositor for the collection of the check. If circumstances should cause the obligation in any particular transaction to run to any person or party other than the one from whom the bank receives it, the nature of the obligation is not thereby substantially affected; especially it can never be increased. The duty of the bank is still precisely the same duty, though it may prove that a true owner, not at first known to the bank, is the party who is really entitled to claim performance of that duty, or damages for its breach. For the sake of brevity, we will hereafter designate the person, whoever he may be, to whom the obligation of the bank runs, as the depositor or customer. It is necessary in the outset thoroughly to disembarrass the relation of the bank to the customer, and consequently the whole matter of the duties and liabilities of the bank in the premises, from two wholly alien subjects, to wit: The relation of the payee, owner, or holder of the paper to the maker, drawer or acceptor thereof; and the relation of the party giving it in charge to the bank to any other person standing earlier in the progression of title. With the two last mentioned considerations the collecting bank has nothing whatsoever to do; it may ignore them utterly; in fact, oftentimes it may be incumbent upon it to ignore them utterly, for they may be rendered by circumstances in any particular case inconsistent with its own different, peculiar and wholly independent obligations in the business.

"The reiteration of this doctrine must be pardoned by reason of its importance. The common law, speaking through a great multitude of decisions, has laid down the rules which govern the presentment of checks as between the drawer, the indorsers, and the various subsequent holders; and there is complication enough in the topic. The common law has in like manner laid down the principles controlling the presentment of checks by a collecting bank as between the bank and the depositor; and in this topic also there is independent and ample complication. The entanglement of the two would result in a

on a party who receives, as collateral security for a debt, commercial paper or any securities for the payment of money from his debtor; he makes the paper his own, or subjects himself to equivalent damages by any act or negligence which deprives the debtor thereof, or involves a loss of the moneys represented by such collaterals.[1] In Roberts v. Thompson,[2] Scott, J., said: "The general rule is, that where a party receives a note as collateral security for an existing debt, without any special agreement, the party receiving such note must use ordinary care and diligence in collecting it; and if any loss should happen to the other party by reason of a want of such care and diligence, the law will compel him to make good the loss. Such cases are not governed by the strict rules of commercial law applicable to commercial paper, but fall under the general law of agency, which must determine the rights and liabilities of the parties." It was held that where a debtor assigned to his creditor as collateral security a negotiable promissory note of a third person, before maturity, and by the terms of the assignment waives demand and notice of non-payment, such creditor, acting in good faith, is not bound to demand or insist upon payment of the security before its maturity, though he may know, at the time, that payment would be made if insisted upon.

Where the defendant covenanted to take proper means to collect the amount secured by a mortgage of real estate, and was guilty of negligent delay, and still retained the security, Sandford, J., said, in answer to the defendant's position that the mortgage was either good or bad, if bad he could collect

senseless and inextricable confusion. If this one deposits a check in a bank there is a certain time within which the bank is bound to that depositor to present the check to the drawer for payment. It may be that a presentment before that time would be necessary to enable the payee to hold the drawer, or the holder to hold his indorser in case of non-payment, or it may be that presentment after that time would suffice for both these purposes. Neither of these facts modify or affect the time within which the bank is bound to its customers to present it."

[1] The Phœnix Ins. Co. v. Allen, 11 Mich. 501; Little v. Phœnix Bank, 2 Hill, 425; 7 Hill, 359; Dayton v. Trull, 23 Wend. 345; Copper v. Powell, Anthon, 49; Jennison v. Parker, 7 Mich. 355; Bradford v. Fox, 39 Barb. 203; S. C. 16 Abb. Pr. 51; 38 N. Y. 289; Heartt v. Rhodes, 66 Ill. 351; Story on Prom. Notes, § 498; Palmer v. Holland, 51 N. Y. 416.

[2] 14 Ohio St. 1.

nothing, and if good the plaintiff has lost nothing: "This we think is not sound. The mortgage, however good it may be, avails the plaintiff nothing so long as the defendant retains it, and neglects to collect it. He sustained his damage, if it were good, two or three years since, when he was entitled to receive his share of the security, and received nothing. His injury is the same as if he held the defendant's note, payable at that time, and it had remained unpaid. As to the amount, the amount of the bond and mortgage is its presumptive value. It belongs to the defendant to prove it to be a doubtful or a worthless security."[1]

Where a debt was really lost by the negligence of the attorney, through the insolvency of the debtor, in an action for the negligence of the attorney, the court loosely told the jury they might find what amount of damages they pleased. As the debtor was not totally insolvent, the jury found a verdict for a part of the plaintiff's demand.[2]

An express company having received from the drawer, for collection, with instructions to return it at once if not paid, a draft for a sum overdue from the drawee to the drawer, with interest, presented it for payment, when the drawee declined to pay $1.20 included in the draft. Thereupon the company, without collecting anything on the draft, agreed with him that they would hold it until he could inquire of the drawer as to the disputed part; and he wrote the same day, making such inquiry, and adding: "The parties will hold the draft until I hear from you." Upon receiving a reply in due course of mail, from the drawer, that the additional sum was for interest, the drawee was, and for two days continued to be, ready to pay the draft, which the express company continued to hold, but neglected again to present. The third day was Sunday, and on the fourth day he became insolvent. It was held that the express company were liable for the drawer's loss on the draft by the drawee's insolvency.[3] In New York, where the collecting bank is held liable for the default of a notary employed by it, the measure of damages which the holder of the paper can recover

[1] Hoard v. Garner, 3 Sandf. 179; Grant v. Ludlow, 8 Ohio St. 1.

[2] Russell v. Palmer, 2 Wils. 325.

[3] Whitney v. Merchants' Union Exp. Co. 104 Mass. 152.

from the bank, on the ground of such default of the notary, is the amount of the note and interest. If the holder has sued an indorser, and has failed to recover by reason of the default of the notary, it cannot increase the damages by adding the expenses of that suit; for the action against the bank is based upon the implied undertaking of the bank to give the notice, and not upon any false representation that the notice has been duly given.[1]

Reference has already been made to cases illustrating the responsibility of agents in respect to the currency they collect for their principals, and the losses afterwards by bank failures or depreciation.[2] He has no authority to receive anything but money, unless authorized to do so.[3] If the agent is authorized to receive depreciated currency, and does so, the loss by depreciation is that of the principal.[4] But if on making collections the bank or other agent receiving the money merely gives the principal credit for the amount, and uses the funds or blends them with others of his own, he assumes the risk of subsequent depreciation.[5] So if he deposit it with his banker, in his own name, and a loss occurs from the banker's insolvency.[6]

An agent to collect money is bound to make immediate payment to his principal.[7] He is not obliged to incur the risk, in the absence of instructions, of selecting the mode of remittance to a distant principal; but it is his duty in such case, when he has collected money on account of his principal, to give him immediate notice of the fact.[8] He will be chargeable with in-

[1] Downer v. Madison Co. Bank, 6 Hill, 648; Morse on Banks and Banking, 368.

[2] See ante, p. 17.

[3] Drain v. Doggett, 41 Iowa, 682; Aultman v. Lee, 43 id. 404; Webster v. Whitworth, 49 Ala. 201; Turner v. Turner, 36 Tex. 41; Mudgett v. Day, 12 Cal. 139.

[4] Marine Bank v. Fulton Bank, 2 Wall. 252.

[5] Id.; Webster v. Pierce, 35 Ill. 158. See Bartlett v. Hamilton, 46 Me. 425; Pinckney v. Dunn, 2 S. C. 314.

[6] Story on Agency, § 208; Cartwell v. Allard, 7 Bush, 482; Hammon v. Cattle, 6 S. & R. 290; MacDonnell v. Harding, 7 Sim. 178; Webster v. Pierce, 35 Ill. 158; Wren v. Kirton, 11 Ves. 377; Caffrey v. Darby, 6 Ves. 496; Massachusetts, etc. Ins. Co. v. Carpenter, 2 Sweeny, 734; Norris v. Hero, 22 La. Ann. 605; Sargeant v. Downey, 49 Wis. 524. See Wood v. Cooper, 2 Heisk. 441; Hale v. Wall, 22 Gratt. 424; Beilinger v. Gervais, 1 Desaus. 174.

[7] Merchants' Bank v. Rawls, 21 Ga. 289; Lyle v. Murray, 4 Sandf. 590.

[8] Id.

terest if he unreasonably neglect or delay giving such notice;[1] so if he convert the money to his own use.[2]

Same principles applied to factors.— In the absence of special directions as to price, a factor must sell for the fair value or market price; and if he disregards this duty and sells at a less price, he will be compelled to account for the goods at the prices which his duty required him to realize for them.[3] He has a reasonable time to make sale, and in case of neglect he is liable for the market value during that period; and this price the plaintiff has the burden of proving.[4] He thus makes himself responsible for the goods at the price for which it was his duty to sell them, when a reasonable time for making a sale has elapsed.[5] He is, however, only bound to ordinary diligence. When his instructions leave the management of the property to his discretion, he is bound only to good faith and reasonable conduct.[6] He is required to act with reasonable care and prudence; to exercise his judgment after proper inquiry and precaution.[7]

Like other agents, a factor must obey the orders of his principal, and is liable for losses which result from any deviation. If he is directed to hold for sale till a particular day and then sell, and he disobeys by selling before, he is liable for the difference between the price on that day and the price obtained.[8] And if directed not to sell below a certain price, and he does sell for a less price, he is liable for the actual damage sustained.[9]

[1] Dodge v. Perkins, 9 Pick. 368; Clark v. Moody, 17 Mass. 145.

[2] Hill v. Hunt, 9 Gray, 66.

[3] Bigelow v. Walker, 24 Vt. 149; Linsley v. Carpenter, 4 Robt. 200.

[4] Graham v. Maitland, 37 How. Pr. 307.

[5] Atkinson v. Burton, 4 Bush, 299; Whelan v. Lynch, 60 N. Y. 469.

[6] Evans v. Potter, 2 Gall. 13. See Guy v. Oakley, 13 John. 332.

[7] Leverick v. Meigs, 1 Cow. 645; Gheen v. Johnson, 90 Pa. St. 38.

[8] Brown v. McGran, 14 Pet. 479; Evans v. Root, 7 N. Y. 186; Courcier v. Ritter, 4 Wash. C. C. 549; Johnson v. Wade, 2 Bax. (Tenn.) 280; Hornsby v. Fielding, 10 Heisk. 367. See Kelly v. Smith, 1 Blatchf. 290.

[9] Hinde v. Smith, 6 Lans. 464; Taylor v. Ketchum, 5 Robt. 507; White v. Smith, 6 Lans. 5; Thompson v. Gwyn, 46 Miss. 522; Loraine v. Cartwright, 3 Wash. C. C. 151; Gray v. Bass, 42 Ga. 270. See Knowlton v. Fitch, 48 Barb. 593; S. C. 52 N. Y. 288.

It was once held in New York, that where an agent sells below the limit fixed in his instructions, the measure of damages is the difference between the price obtained on the sale and the minimum price limited by the instructions.[1] This decision was reversed, the appellate court holding that the principal was only entitled to compensation for the injury actually sustained; that it was competent for the factor to show in reduction of damages that the goods at the time of the sale, and down to the time of the trial, were worth no more than the price at which they were sold; that he takes the risk by such a sale of a rise in the value of the goods at any time before the action is brought, and perhaps down to the time of the trial. The invoice price, or that fixed by the principal in the instructions, is *prima facie* their value; and as to articles having no market value, the principal may insist on the price annexed to the instructions.[2] In a Massachusetts case, where a factor agreed he would not sell a consignment of tobacco for less than forty cents a pound, but did sell for less, the trial court refused to charge that the defendant would not be liable above the fair market value at the time it was sold, but was liable on the basis of its value when a return of it was demanded. This ruling was affirmed. The court said: "The sale of the tobacco below the limit of their authority was a breach of their agreement, and they cannot restrict the damages to the market value at that precise point of time. The injury may have consisted not in selling below the existing market price, but in choosing a time for sale when the market was depressed, and a favorable price could not be realized. The consignor had a right to insist that his goods should be held until his price could be obtained. We do not find it necessary to decide what rule of damages is absolutely correct. It has sometimes been said that the highest market price before action brought is the standard; at others, that the highest value before the trial may be awarded. It is safe to say that the factor is at least liable for the highest market value of the goods within a reasonable time after the sale in violation of instructions."[3]

[1] Blot v. Boicean, 1 Sandf. 111; Switzer v. Connett, 11 Mo. 88.

[2] 3 N. Y. 78; Hinde v. Smith, 6 Lans. 464.

[3] Maynard v. Pease, 99 Mass. 555; Anstell v. Crawford, 7 Ala. 335.

The limit by agreement or instructions may be fixed with reference to the selling price of other similar goods; when, in case of a sale for less, damages will be given on the basis of that limit; such selling price may be determined either by offers to sell made of the goods referred to in the ordinary course of business, or by actual sales.[1] In Brown v. McGran,[2] it is laid down as a general doctrine that: "Whenever a consignment is made to a factor for sale, the consignor has a right generally to control the sale thereof, according to his own pleasure, from time to time, if no advances have been made or liabilities incurred on account thereof; and the factor is bound to obey his orders. This arises from the ordinary relation of principal and agent. If, however, the factor makes advances, or incurs liabilities, on account of the consignment, by which he acquires a special property therein; then the factor has a right to sell so much of the consignment as may be necessary to reimburse such advances or meet such liabilities; unless there is some existing agreement between himself and consignor, which controls or varies this right. Thus, for example, if contemporaneous with the consignment and advances or liabilities, there are orders given by the consignor, which are assented to by the factor, that the goods shall not be sold until a fixed time, in such a case, the consignment is presumed to be received by the factor subject to such orders; and he is not at liberty to sell the goods to reimburse the advances or liabilities, until after that time has elapsed. The same rule will apply to orders not to sell below a fixed price; unless, indeed, the consignor shall, after due notice and request, refuse to provide any other means to reimburse the factor. And in no case will the factor be at liberty to sell the consignment contrary to the orders of the consignor, although he has made advances, or incurred liabilities thereon, if the consignor stands ready and offers to reimburse and discharge such advances and liabilities. On the other hand, where the consignment is made generally without any specific orders as to the time or mode of sale, and the factor makes advances or incurs liabilities on the footing of such consignment, then the legal presumption is that the factor is intended to be clothed with the ordinary rights of factors to sell in the exercise of a sound

[1] Harrison v. Glover, 72 N. Y. 451. [2] 14 Pet. 479.

discretion, at such time and in such mode as the usage of trade and his general duty require; and to reimburse himself for his advances and liabilities, out of the proceeds of the sale; and the consignor has no right by any subsequent orders, given after advances have been made, or liabilities incurred, by the factor, to suspend or control this right of sale, except so far as respects the surplus of the consignment, not necessary for the reimbursement of such advances or liabilities." This doctrine was approved in the subsequent case of Field v. Farrington.[1]

Where a factor is directed to sell at a particular time, it is his duty to sell when that time arrives or within a reasonable time thereafter, for the best price he can then obtain. If he omits to do so, the principal may treat the property as appropriated by the factor, and is entitled to recover the amount the goods could have been sold for if the order had been complied with.[2] In such a case the principal is obviously entitled to the price which would have been received if the agent had followed the instructions. So where the instructions are to hold until a certain price can be realized and the market advances to that price, but the agent has sold before, it is manifestly just to hold the agent for the difference between what he received and the limit fixed in his instructions. But where the instructions fix a limit of the price, which is at the time and continues to be in advance of the market value; where the agent sells after his power to sell has ceased, and when it was his duty to forward the goods to another market, or merely to hold them, and therefore by selling in violation of instructions he may be charged with a conversion, the question at what time the value shall be estimated in the assessment of damages is one of considerable difficulty, and on which there is considerable conflict of decision. Such cases will often differ from ordinary cases of trover, in the circumstance that the defendant knew the owner's intentions and was under obligation to obey instructions to effectuate them;

[1] 10 Wall. 141. See Weed v. Adams, 37 Conn. 378; Whitney v. Wyman, 24 Md. 134; Marfield v. Douglass, 1 Sandf. 360 (reversed, 3 N. Y. 70); Phillips v. Scott, 43 Mo. 86. But see Bell v. Palmer, 6 Cow. 128; Marfield v. Goodhue, 3 N. Y. 62.

[2] Whelan v. Lynch, 65 Barb. 326; 60 N. Y. 469.

hence the profits or ultimate advantage which the principal had in view, and which subsequent events showed would have been realized, were in a legal sense contemplated by the parties. But it is a question whether this should place an agent in a situation to answer by a severer standard than any wrongdoer who tortiously converts another's property, ignorant and reckless of the owner's intentions. The violation of an agent's conventional duty is no more culpable than is the violation of the owner's right of property by the other; it was the duty of the agent to obey instructions of his principal; and it is no less the solemn duty of others to abstain from the violation of the rights of ownership. Where a factor was instructed by his principal to sell wheat on consignment at a specified price on a given day, and if not sold on that day to ship the same to New York, he was held bound to obey the instructions or be liable as for a conversion. On the day mentioned for the sale, in the instructions, the factor, by giving a refusal until the morning of the following day, and then perfecting the sale for the required price, was held to have violated his instructions and to have incurred that liability.[1] Upon these facts Hogeboom, J., said: "The question is one of complete indemnity to the party injured. It is not stated in terms, and perhaps not in effect, that the sale by the defendant was fraudulent or in bad faith; and, therefore, no damages founded specially on that ground ought to be recovered. But it is stated that the sale was without authority and in violation of instructions, and, therefore, every damage consequent upon such a sale should be allowed. It is not stated that the instructions to ship to New York were with a view to the *immediate* sale of the wheat on its arrival at New York, and, therefore, the plaintiff should not be limited to the price of the wheat immediately after it would have arrived in New York, if forwarded according to the plaintiff's instructions. But it is stated, inferentially at least, that the order to ship to New York was with a view to an ultimate sale there. . . . Perhaps, if this would involve a more restricted rule of damages than would otherwise obtain, the plaintiff is not limited to it, inasmuch as there is in the complaint an allegation of an ille-

[1] Scott v. Rogers, 31 N. Y. 676.

gal conversion of the property entitling the plaintiff to such damages as belong to such a cause of action. . . . There is nothing in the case or in the evidence by which we can precisely ascertain what the plaintiff would have done with the property if he had retained it; and this presents one of the chief difficulties in ascertaining, in point of fact, the damages which the plaintiff has sustained. If he designed an immediate sale thereof, on its arrival in New York, the price at which he could have sold it at that time as compared with the price which the defendant got for it, and which from a stipulation in the case we are authorized to infer has been paid over to the plaintiff, would show the loss sustained by him. But, as before stated, neither the allegations in the complaint nor the evidence in the case discloses any clear proof of an intent to make an immediate sale; and I think, as well under well settled rules of law as the reason and spirit of the case, the plaintiff ought not to be limited to such damages. He may be supposed to be reasonably conversant with the market and with the prospects of a rise in the price, which subsequent events verified. . . . If at some subsequent time, within a reasonable period after the conversion, he had notified the defendants of his election to adopt the price at that period, I think that would have fixed a reasonable and lawful standard for the estimate of damages. It would have been saying, in substance, I elect to consider the property as mine up to this period; I now elect to make a sale of it, and I hold you responsible for the present value of the property. But no such course was taken. . . . No suit was commenced until years afterwards; and it is now claimed to be the legal rule, that the aggrieved party may make price at any time after the conversion and before the trial of the cause, or, at least, that he may do so, provided the suit is commenced within a reasonable time after the conversion. . . . It is obviously a rule of doubtful justice to give to the plaintiff the whole period until the statute of limitations would attach for the commencement of his action, and the whole period intervening between the conversion and the trial to select his standard of price, without ever having given notice of his intention to adopt the price of any particular period. A much more just and equitable rule, independent of adjudications upon this question, would seem to

be, to allow the plaintiff some reasonable period within the statute of limitations for fixing the price of the property, provided he notifies the adverse party *at the time* of such act on his part; but never to allow him unlimited liberty of selection as to the price of which he will avail himself at the trial of the cause. If he does not make and notify his election of time, then to fix the time by the day of the commencement of the action."

The rule adopted in this case was based on the assumed fact that the plaintiff did not intend to sell his wheat in New York at once after its arrival; and the legal right to the benefit he had impliedly reserved to himself, by his instructions, of any rise in that market which might take place in the near future; and this was construed to embrace the remainder of the season, from July 13th to November 29th, when navigation closed. The fact that he did not intend to sell immediately after the arrival of the wheat in New York was inferred apparently from the absence of proof that he intended an immediate sale. As the fact was important on the question of damages, it may admit of question whether the party asserting it, and claiming an increase of damages in consequence of it, should not have been required to prove it. The injury to the plaintiff by the sale made by the defendant was prima facie the difference between the amount obtained by that sale and the value of the wheat in New York when it should have arrived there, after deducting the cost of transportation.[1] Since the opinion was given from which the above extract was taken, there has been an important change declared in New York in the rule of damages for conversion, as well as for non-delivery of goods on a contract of sale where the price has been paid. In the absence of special circumstances, it is now the value of the property at the time and place of conversion, or breach of the contract, with interest.[2] And this is believed to be the general rule in this country,

[1] Bell v. Cunningham, 3 Pet. 69; Schmertz v. Dwyer, 53 Pa. St. 335; Eby v. Schumacher, 29 Pa. St. 40; Sturgess v. Bissell, 46 N. Y. 462; Magnin v. Dinsmore, 62 N. Y. 35; Sisson v. Cleveland, etc. R. R. Co. 14 Mich. 489.

[2] Baker v. Drake, 53 N. Y. 211; Ormsby v. Vermont Copper M. Co. 56 N. Y. 623; M. & T. Bank v. F. & M. Nat. Bank, 60 N. Y. 40; Wehle v. Haviland, 69 N. Y. 448; Mathews v. Coe, 49 N. Y. 57; Tyng v. Commercial Warehouse, 58 N. Y. 308; Whelan v. Lynch, 60 N. Y. 469; Wintermute v. Cooke, 73 N. Y. 107.

though it does not prevail uniformly in all of the states. The same rule ought to prevail between principal and agent; there are the same considerations to support it.[1]

The special circumstances which warrant an increase of damages beyond the value at the time and place of conversion are those which on general principles justify the allowance of consequential damages; and sometimes the courts proceed on principles analogous to those which a court of equity apply to unfaithful trustees. Where property is disposed of by an agent contrary to instructions, or without authority, it is often property purchased and directed to be held for a particular purpose. When that happens, and the object is thwarted by the act or omission complained of, the injury is properly estimated with reference to the special value of the property for the particular use intended.

The acceptance of a consignment is an implied acceptance of the accompanying terms stated by the consignor. Thus, where the consignor informed his factor that he had made a consignment to him, and should anticipate the avails by drawing certain bills of exchange on him; by accepting the consignment it was considered that he became bound to pay the bills; that, having failed to pay them, he was liable to the drawer for the damages and costs which he had been compelled to pay by reason of the bills having been protested.[2] A factor is authorized to sell on credit where it is justified by the usages of trade, and the credit is not beyond the usual period.[3] But where the principal consigns for sale without instructions, and the factor sells for cash on delivery, without giving any credit, it is his duty to obtain payment before he allows the property to go out of his control. If, through any negligence or carelessness on his part, or as matter of favor to the vendee, he is allowed to get possession, without making payment, the factor is liable to the

[1] See Wagner v. Peterson, 83 Pa. St. 238; Pinkerton v. Manchester R. R. 42 N. H. 424. See vol. I, pp. 173, 174.

[2] Urquhart v. McIver, 4 John. 103. See Walker v. Smith, 4 Dan. 389.

[3] Byrne v. Schwing, 6 B. Mon. 199; De Lasardi v. Hewitt, 7 B. Mon. 697; Greely v. Bartlett, 1 Greenl. 172; Clark v. Van Northwick, 1 Pick. 343; Forrestier v. Bordman, 1 Story, 43; Daylight Burner Co. v. Odlin, 51 N. H. 56; Story on Agency, §§ 60, 110.

consignor for the price.[1] So if, on the expiration of a credit, he extends it without the assent of his principal, he is responsible for any loss which results from such extension.[2] In selling on credit the factor must exercise skill and prudence; and if, without consulting his principal, he gives credit to a customer known to be, or whom due inquiry would have shown to be, of doubtful responsibility, he will be chargeable with any consequent loss.[3] Factors may conduct the business either wholly or in part without disclosing their principals, take notes, judgments and insurance policies, in their own names, without being chargeable with conversion, or those forms having the effect to exclude their principals.[4] They are entitled to a general lien on the goods, or their proceeds, in their hands, for their demands against the principal, not only for commissions, advances and disbursements, but for their liabilities in behalf of their principals not yet matured.[5]

Where a factor receives a del credere or guaranty commission there is some diversity as to his undertaking: whether it is absolute, as that of the primary debtor, to pay the principal the amount to which he is entitled for the goods sold, on the expiration of the buyer's credit, irrespective of his solvency or insolvency;[6] or whether it is a guaranty which binds the factor like a surety to pay on the purchaser's default.[7] On either view, when the event transpires which entitles the principal to apply to the factor for payment, recovery may be had against

[1] Deshler v. Beers, 32 Ill. 368. See Stallenwerck v. Thacher, 115 Mass. 224; Phillips v. Moir, 69 Ill. 155; Morrison v. Cole, 30 Mich. 102; Johnson v. Totten, 3 Cal. 343; Gilbert v. Chauviteau, id. 458.

[2] Hairston v. Midley, 1 Gratt. 98; Amory v. Hamilton, 17 Mass. 103.

[3] Ernest v. Stoller, 5 Dill. C. C. 438; Howe v. Sutherland, 39 Iowa, 484; Foster v. Waller, 75 Ill. 464; Burrill v. Phillips, 1 Gall. 360. See Gorman v. Wheeler, 10 Gray, 362.

[4] Story on Agency, § 111.

[5] Stevens v. Robins, 12 Mass. 180; Story on Agency, §§ 351, 377, 378.

[6] Sherwood v. Stone, 14 N. Y. 267; Wolfe v. Koppel, 2 Denio, 368; 5 Hill, 458; Cartwright v. Greene, 47 Barb. 9; Grove v. Dubois, 1 T. R. 112; Bize v. Dickason, 1 T. R. 285.

[7] Gall v. Comber, 7 Taunt. 558; Hornby v. Lacy, 6 M. & S. 566; Peele v. Northcote, 7 Taunt. 478; Morris v. Cleasby, 4 M. & S. 566; Story on Agency, § 215; Thompson v. Perkins, 3 Mason, 232. See Bradley v. Richardson, 23 Vt. 721; S. C. 2 Blatch. 343; Lewis v. Brehme, 33 Md. 412; Muller v. Bohlens, 2 Wash. C. C. 378; 1 Pars. on Cont. 92.

him for the goods sold, of the amount which would be recoverable in an action for money had and received if the purchaser had in fact paid.[1] If the money be paid to the factor, that generally fulfils the guaranty, which does not extend to assure its safe arrival to the hands of the principal, though such factor is bound to the care and prudence due from an agent in sending it.[2] But if the guaranty evinces an intention to cover a safe remittance, the responsibility may be thus enlarged.[3]

Keeping and rendering accounts, and giving the principal seasonable information, important to his interests, are especially duties of this class of agents,[4] and they are held very strictly

[1] Swan v. Nesmith, 7 Pick. 220; Wolfe v. Koppel, 5 Hill, 458; 2 Den. 368. See Dunnell v. Mason, 1 Story, 543.

[2] 1 Pars. on Cont. 92; Lucas v. Groning, 7 Taunt. 164; Muller v. Bohlens, 2 Wash. C. C. 378; Henbach v. Rather, 2 Duer, 227; Leverrick v. Meigs, 1 Cow. 645. But see Lewis v. Brehme, 33 Ind. 412.

[3] McKenzie v. Scott, 6 Bro. P. C. 280.

[4] Arrott v. Brown, 6 Whart. 9; Brown v. Arrott, 6 W. & S. 402; Elliott v. Walker, 1 Rawle, 126; Forrestier v. Bordman, 1 Story, 43; Clark v. Moody, 17 Mass. 145. In this case, Parsons, C. J., said: "The general rule laid down in the books is, that where goods are delivered to a factor to be sold and disposed of for his principal, the law implies a promise on the part of the factor that he will render an account of them whenever called upon by the principal, and if he refuses to account, he is liable in *assumpsit* for the breach of his implied promise. . . .

"Generally the consignor accompanies his consignment with directions how to apply the proceeds, either to pay them over to a third person; or to remit in bills, or in merchandise, or in specie; or to hold them to answer his future orders; and in these cases there can be no difficulty. For the factor cannot be liable until he has actually or impliedly broken his orders. I say impliedly, for if the factor should become bankrupt or insolvent, with the goods of the principal, or their proceeds, in his hands, so that he is disabled from remitting them, or otherwise appropriating them according to the instructions of the principal, there seems to be no reason why an action would not immediately lie against him; by analogy to the common law principle, that when a duty is to arise upon a demand, and the party liable has disabled himself from performing, the necessity of a demand ceases. . . .

"It is the duty of factors to account to their principals in a reasonable time, without any demand, in cases where a demand would be impracticable or highly inconvenient; so that a factor abroad, who should receive goods to sell, without special directions as to the mode of remittance, would be held, according to the course of business, to give his principal information of his progress in the transaction; and if he should neglect unreasonably to forward his account to his employer,

responsible for the truth of their accounts and reports. In Pennsylvania it has been held that where the information transmitted is such as may induce the principal, in the adaptation of his operations to his means, to rely on an outstanding debt as a fund on which he may confidently draw, the agent makes the debt his own. The representation has the effect of an estoppel.[1] In that case the agent credited the principal in his annual account current with a debt outstanding, and that debt afterwards proved bad, and because the agent neglected to give notice of that fact within a reasonable time, he was held responsible as an insurer of the debt. There would seem to be none of the qualities of an estoppel in the facts of such a case, and no ground for making the agent liable as an insurer. He incurred no liability for selling on credit, because he sold to a purchaser then in good credit, or apparently so; he credited the debt as one against such a purchaser, but not acting on a guaranty commission, he did not insure its collection. His omission to give notice of a subsequent failure was mere negligence, as the insolvency is not considered as impeaching the good faith or prudence of the sale. Such negligence, on general principles, rendered him liable for the actual injury resulting therefrom,[2]

this negligence would be a breach of his contract, and subject him to an action.

"So if he should render an untrue account, even without any intention of fraud, claiming a greater credit than he was entitled to, so that the balance shown was not true, we conceive the principal would have a right of action, without a demand. For he would be obliged to submit to such charges as the factor should choose to make, or to wait, perhaps at the risk of his debt, until his agent should voluntarily correct his account, and acknowledge a just balance.

"But if the factor should receive and sell the goods, without any special orders as to remittance, and upon an understanding, express or implied, that he is to hold the proceeds to the order of his principal; and he does nothing in violation of those orders, or to disable himself from complying with them when they shall be received, and transmits a true account of sales, in a reasonable time according to the course of business, and is ready to remit or answer drafts upon him, we think no action will lie against him for the balance in his hands. For his contract is to sell and render an account, and he ought not to be held to remit at his own risk; and he cannot remit at the risk of his principal, unless in compliance with instructions."

[1] Harvey v. Turner, 4 Rawle, 223; Arrott v. Brown, 6 Whart. 9. See ante, p. 4.

[2] Elliot v. Walker, 1 Rawle, 126.

by the principal not having early information to warn him against any operations proceeding upon that credit as a fund. The existence of the credit is a circumstance in the situation requiring greater diligence in communicating any fact affecting it; it is also a fact material on the question of damages, if in the absence of notice the principal was subjected to any sacrifice by acting upon such credit as real. The assumption that such negligence caused a loss equal to the amount of the debt, and that the agent should therefore be responsible for it as an insurer, independent of the consequences in the particular case, is treated as an exception, in that state, to the general rule, and has been criticised as such.[1] Whether a factor assumes an uncollected debt on report of which he gives the principal credit, assumes liabilities, or makes payments, is a question of intention. When the factor pays or gives his note or a credit to his principal for such a debt in a final account, it has been considered that the agent intended to make the debt his own.[2] But giving credit to the principal for unmatured debts in an account current, or giving notes made payable when funds from such debts are expected, is not a conclusive assumption of such debts by the factor; such credit is but a liquidation of the account, and does not alter the factor's responsibility.[3] He is entitled to charge back to the principal such of the credited debts as prove bad,[4] or to defend against the principal's action on a note given for such credits, in the same event, on the ground of a failure of consideration.[5]

A factor or consignee, after apprising his principal of the sale of goods consigned to him, may wait to receive directions as to the mode of remitting the net proceeds; he is not liable to an action until he is in some default in remitting or paying the proceeds according to the orders of his principal.[6] He is not

[1] 1 Am. L. Cases, note to Goodenow v. Tyler.

[2] Oakley v. Crenshaw, 4 Cow. 250. See Hapgood v. Batcheller, 4 Met. 573; Robertson v. Livingston, 5 Cow. 473; Harvey v. Turner, 4 Rawle, 223.

[3] Robertson v. Livingston, 5 Cow. 473; Reily v. Lamar, 2 Cranch, 343; Hapgood v. Batcheller, 4 Met. 573.

[4] Reily v. Lamar, supra.

[5] Hapgood v. Batcheller, supra.

[6] Ferris v. Paris, 10 John. 285; Holden v. Crafts, 4 E. D. Smith, 490; Cooley v. Betts, 24 Wend. 203; Brink v. Dolsen, 8 Barb. 337; Greentree v. Rosenstock, 61 N. Y. 583.

liable to interest until he is in some default.[1] He must make remittance in the manner directed by the principal. If directed to remit by draft, and he remits in a different manner, and the money is lost, he must bear the loss.[2] In February, 1837, S, a resident of New York, received a sum of money as agent of H, who resided in Liverpool, and was directed to remit by purchasing and forwarding a bill of exchange. S thereupon purchased a bill on his own credit at a premium of eleven and one-half per cent., which he forwarded to H at ten per cent., that being the rate at which similar bills were then selling for cash. H kept the bill until November, 1839, having in the meantime made various unsuccessful efforts to collect it, and was then first informed that it had not been purchased with his money. He immediately wrote to S that the bill would not be regarded as payment, and shortly afterwards brought an action for money had and received, and it was held that the action was maintainable.[3]

To BROKERS.— Brokers constitute a distinct class of agents, and are employed in a great variety of commercial transactions. Breaches of their duty are compensated on the same general principles as apply between principal and agent generally. Though, strictly, a broker is a mere negotiator of bargains between other parties, without any trust or bailment of the subject of his agency; still the name is sometimes applied to agents who have actual or symbolical possession of the thing which is the subject of their negotiations.[4]

He must make full satisfaction to his principal for any loss sustained by his fault; the principal has recourse upon him for damages which will be equivalent in amount to the advantages he was entitled to expect from a due performance of his duty. Thus, a loan broker who undertook to obtain ample security for his principal's money by mortgage of real estate, and took a mortgage which proved insufficient security in consequence of

[1] Ellery v. Cunningham, 1 Met. 112; Pope v. Barrett, 1 Mason, 117. See Fulkerson v. White, 22 Tex. 674.

[2] Foster v. Preston, 8 Cow. 198; Kerr v. Cotton, 23 Tex. 411.

[3] Hays v. Stone, 7 Hill, 128.

[4] See Story on Agency, § 32.

prior incumbrances, was held liable for the loss.[1] So, we have seen an insurance broker who neglects his duty to effect insurance, or performs the duty defectively, is made liable in respect to the loss in place of the insurance, as the insurer would have been had the policy been duly effected.[2] A house agent who charges a commission to a landlord for letting his house is bound to due and reasonable care in ascertaining the solvency of the tenant; and if in default in this respect, to make compensation for the rent lost by the tenant's insolvency.[3]

Stock brokers are employed in respect to stocks, bonds and things of that nature to make sales and purchases very nearly as factors are in respect to merchandise, and their liabilities are governed by the same principles. They are as agents bound to obey the instructions of their customers, and must not only answer for any loss or damage which results from any deviation, but may be made liable as for conversion whenever they make any disposition of the subjects of their agency contrary to their duty. Where a certificate of shares in a corporation was entrusted to a broker with directions to sell under circumstances specified, it was held that he had no right to transfer the shares for any other purpose to the name of another person or to his own name; and that evidence of a custom or usage among brokers so to do was not admissible; that the owner might treat such a transfer as a sale, and recover of the broker the market price of the shares on the day of the transfer, although the broker afterwards tendered to him another certificate of an equal number of such shares.[4] And he is subject to the same rule of damages if he convert stock or bonds deposited with him as a pledge or security.[5] Where a broker undertakes to sell stock short for a customer and to carry it on the payment of margin and commission, he is bound to make both a sale and a purchase. Every short sale is made by the seller with the contemplation of covering it by a purchase when the market shall have declined; and for the purpose of making a

[1] Shipherd v. Field, 70 Ill. 438.

[2] Ante, p. 9.

[3] Heys v. Tindall, 1 B. & S. 296.

[4] Parsons v. Martin, 11 Gray, 111; Taylor v. Ketchum, 35 How. Pr. 289; S. C. 5 Robt. 507; Taussig v. Hart, 49 N. Y. 301.

[5] Wagner v. Peterson, 83 Pa. St. 238; Neiler v. Kelly, 69 id. 403.

profit by the decline. When the broker has made the short sale, he having delivered the stock to the purchaser and received the price, he is said to carry the stock for his principal until he is bound by his contract to purchase stock to cover it, and the margin is the broker's security against any loss by advance in the market during that time. If this time is not fixed by the contract, the law implies from his agreement to make a short sale for his customer for a commission, that it is part of the bargain that the broker shall carry the stock for a reasonable time, for in no other way can the object of the parties be effectuated. A short sale to be covered immediately would be a very idle transaction. The broker can, however, close the transaction at any time if the margin upon his demand and notice is not kept good. After he has carried the stock for a reasonable time, thus affording his customer an opportunity to realize his expectations, he may, upon notice, close the transaction with his customer. He is his agent, and must obey his orders both in making the sale and covering it. If he acts without orders, or against the orders of his principal, he commits a breach of duty, and becomes liable, like any other agent, for the loss he may occasion his principal. Where a broker, after a short sale of stock made for his principal, without notice to him, or any default on his part, or any authority from him, bought in the stock and covered the short sale, and afterwards, on receiving the principal's direction to cover the short sale, did not as he could not comply, having previously disabled himself from doing so by his own purchase, he was held liable to his principal, for this breach of duty, for the difference between the price at which the stock was sold short and the market price on the day when the order was received to purchase, with interest, deducting commissions and revenue stamps.[1]

A broker purchased stock for a customer, not as an investment, but upon speculation; the latter furnishing a small amount as a margin, and the former supplying the residue; it was held that if, upon being advised of an unauthorized sale of the stock the principal desires further to prosecute the advent-

[1] White v. Smith, 54 N. Y. 522; Knowlton v. Fitch, 48 Barb. 593; 52 N. Y. 288.

ure, he has a right to disaffirm the sale, and to require the broker to replace the stock, and upon failure or refusal to do this, the remedy of the principal is to replace it himself; and the advance in the market price from the time of the sale up to a reasonable time to replace it, after notice of the unauthorized sale, affords a complete indemnity and is the proper measure of damages.[1]

Damages for acting as agent without, or in excess of authority.— A party may suffer injury from the assumption by another to act as his agent, without any authority, as well as by acts of an agent contrary to private instructions, but in the exercise of such apparent authority that the principal cannot repudiate them. In such cases the pretended or disobedient agent is liable to the principal for the loss he suffers from such misconduct. Where a person falsely pretending to be the agent of the owner of land to sell the same, executed a contract for its sale, which was recorded, and upon which the purchaser brought suit for specific performance, thereby putting the owner to trouble and expense, such pretended agent was held liable to the owner in an action on the case for the damages sustained by him in defending the suit.[2] So, where an agent so misconducted that his principal was obliged to go into chancery to be relieved from his act, it was held that the agent should pay the costs.[3] But where the principal is not bound, and has the option to repudiate the act done in his behalf without authority, he will ratify it as to the agent by ratifying the act as to the other party, and will thus exonerate the agent from liability for acting without or in excess of his authority.[4] An agent who has employed a sub-agent under such circumstances that the latter is responsible directly to him, instead of the principal, is as to such sub-agent a principal; he may sue in his own name for any breach of duty by such sub-agent; he will be entitled

[1] Baker v. Drake, 53 N. Y. 211; Markham v. Jaudon, 41 id. 235.

[2] Philpot v. Taylor, 75 Ill. 309.

[3] Respass v. Morton, Hard. (Ky.) 226.

[4] Winpenny v. French, 18 Ohio St. 469; Woodward v. Suydam, 11 Ohio, 360; Ætna Ins. Co. v. Sabine, 6 McLean, 393; Bray v. Gunn, 53 Ga. 144; Towle v. Stevenson, 1 John. Cas. 110; Beall v. January, 62 Mo. 434; Nesbitt v. Helser, 49 Mo. 383; Bean v. Drew, 15 La. Ann. 461; Watson v. Bigelow, 47 Mo. 413.

to recover for the benefit of his principal such damages as he has suffered or will suffer therefrom; or to an amount which will indemnify himself if the principal has recovered from him the damages resulting from such sub-agent's fault,[1] and including costs, where it was reasonable to defend, and the defense is conducted in a reasonable manner.[2]

Section 2.

AGENT AGAINST PRINCIPAL.

An agent is entitled to reimbursement of moneys paid for his principal — His right, as a factor, to make sales for this purpose — When he is entitled to charge for exchange — How the right to reimbursement affected by agent's mode of doing the business — An agent's right to indemnity — Not entitled against the consequences of known and intentional wrong.

An agent is not only entitled to compensation for his services in performing the business of his agency, but also to be reimbursed the moneys paid by him therein, and to be indemnified in respect to any liabilities he has incurred within his authority to third persons in behalf of his principal, or by obeying his lawful orders. The subject of compensation for services has been sufficiently discussed in the chapter on that subject.[3]

An agent is entitled to reimbursement of moneys paid for his principal.— The agent's right to be repaid moneys he has expended for his principal pursuant to his authority rests upon a clear legal ground; they are moneys paid at the principal's request, and the law implies a duty and promise to refund.[4]

[1] Van Wart v. Woolley, 5 Dowl. & R. 374; Story on Agency, § 201; Mainwaring v. Brandon, 8 Taunt. 202. See Allen v. Snydam, 20 Wend. 321, 328.

[2] Mers le Blanch v. Wilson, L. R. 8 C. P. 227. See vol. I, p. 135; Baxendale v. London, etc. R'y Co. L. R. 10 Ex. 35. See Richardson v. Dunn, 8 C. B. N. S. 655.

[3] Vol. II, p. 440.

[4] Ramsay v. Gardner, 11 John. 437; Packard v. Lienow, 12 Mass. 11; Ruffner v. Hewitt, 7 W. Va. 585; Powell v. Trustees of Newbergh, 19 John. 284; Elliott v. Walker, 1 Rawle, 125; D'Arcy v. Lyle, 5 Bin. 441; Brown v. Clayton, 12 Ga. 564; Warren v. Hewett, 45 id. 501; Wade v. Roberts, 6 Humph. 124; Shearman v. Akins, 4 Pick. 283; Yeatman v. Corder, 38 Mo. 339; Bastable v. Denegre, 22 La. Ann. 124; Greeley v. Bartlett, 1 Greenl. 172; Vandyke v. Brown, 8 N. J. Eq. 657; Sentance v. Hawley, 13 C. B. N. S.

Thus where a principal ordered his agent to purchase a commodity for him, and to draw on him for the amount; when the agent has complied with such direction the principal is bound to accept and pay his bills; if he fails to do so, the agent is entitled to recover from him not only the amount of the bills, but damages and costs of protest. If the agent has paid these he may recover upon a count for money paid, and the bills may be given in evidence on that count.[1] This right of action will not be affected if the agent sell the commodity without orders, after the protest of the bills, although he has rendered no account of the sales.[2]

THE RIGHT OF FACTOR TO MAKE SALES TO REIMBURSE HIMSELF.—But where the goods or assets of the principal in the hands of the factor or agent are a primary fund for the payment of moneys due him, it is necessary for him to show that the primary fund is exhausted, and the remedy against the principal personally is limited to the deficiency.[3] But in Massachusetts it has been held[4] that advances made by a factor on receipt of goods consigned to him for sale are presently due, and suit may be brought therefor without waiting for the avails of the consignment. The principal consigned to a factor parcels of cotton for sale, and immediately drew drafts on him which were accepted and paid. The cotton was sold by him to persons in good credit, for their notes payable to him on time. Before their maturity some of the makers became insolvent, and the factor brought suit for the moneys advanced on the drafts. The court said, by Shaw, Ch. J., that "the payment of the drafts by the plaintiffs, and the time of their payment, were not at all dependent upon the sale of the cotton. The

458; Capp v. Topham, 6 East, 392; Blackmar v. Thomas, 28 N. Y. 67; Hidden v. Waldo, 55 N. Y. 294; Gihon v. Stanton, 9 N. Y. 476; Story on Agency, § 335. In Moore v. Remington, 34 Barb. 427, it was held that where an agent is entitled to charge for expenses, he may recover for the fair worth of his board, even though he actually paid nothing for it.

[1] Riggs v. Lindsay, 7 Cranch, 500.

[2] Id.

[3] Corlies v. Cumming, 6 Cow. 181; Montgomerie v. Ivers, 17 John. 38; Gihon v. Stanton, 9 N. Y. 476; Hidden v. Waldo, 55 N. Y. 294. See Peisch v. Dickson, 1 Mason, 9; Barrill v. Phillips, 1 Gall. 360.

[4] Beckwith v. Sibley, 11 Pick. 482.

consignment of the cotton for sale, upon which the plaintiff would have a *lien*, not only for the repayment of the amount of the particular drafts, but for their general balance, no doubt emboldened the consignors to draw more freely upon their correspondents than they otherwise would, and operated as an inducement to the latter to accept and pay their drafts. But that circumstance has very little tendency to prove that the plaintiffs relied exclusively upon that fund, or had agreed to await reimbursement until such particular fund was realized or had failed. . . . The legal relation of the parties then was this: The defendants were indebted to the plaintiffs for money due presently; they had a lien on the cotton before the sale, and on the notes taken for it, after the sale, as security for the debt due them. And although they took the notes in their own name, it was in trust for the consignors; the property in the notes remained beneficially in the defendants, and the plaintiffs had only a lien.[1] But where a creditor has a collateral security for his debt, he is not confined to rest exclusively upon such security for repayment; but notwithstanding the pledge or collateral security, may look to the general credit of the debtor; and have his action, unless there is some agreement or contract, express or implied, to give time, or to look to a particular fund. In the present case, the burden is upon the defendants, and no such agreement is proved, and no usage, course of dealing or other circumstances from which such a contract can be implied." In a later case,[2] the defendant applied to the plaintiffs to make and they made sundry advances in cash and in their acceptances to enable him to purchase sheepskins, upon an agreement that he would pull the wool and consign the same to the plaintiffs as security for such advances, and for sale upon a guaranty commission. Hubbard, J., said: "The facts, as they are stated, do not furnish evidence that the plaintiffs agreed to give the defendant credit until the property consigned to them was sold. The plaintiffs stand like other commission merchants. They have no right, in the absence of directions, immediately to sell the goods consigned to them, if

[1] Denston v. Perkins, 2 Pick. 86; Chesterfield Manuf. Co. v. Dehon, 5 Pick. 7.

[2] Upham v. Lefavour, 11 Metcalf, 174.

the interest of the consignors will be sacrificed by such a sale. The receiving of the goods under an agreement like the present carries with it, also, the obligation to give a reasonable credit; and to force the goods into market as soon as received, without regard to the interest of the owner, and merely to turn them into money as early as practicable, would be such a breach of duty as to expose them to a claim of damages, if the goods were sacrificed by the sale. On the other hand, they are only required to give a reasonable time, and then, if the goods are not sold, they may call for payment, or further security, and may sue for the amount due them."

WHEN HE IS ENTITLED TO CHARGE FOR EXCHANGE.— Under an agreement to collect debts and apply proceeds to the payment of a principal's indebtedness to the agent, he is entitled to deduct from the proceeds the rate of exchange between the place of collection and the place where the debt from the principal is payable, and his reasonable commissions.[1]

HOW THE RIGHT TO REIMBURSEMENT AFFECTED BY MODE OF DOING THE BUSINESS.— Where an agent who was employed to subscribe stock in a railroad company, for his principal and in his name, subscribed and paid calls in his own name, it was held that the principal was not bound; and on tender of a transfer of the certificate the agent was not entitled to recover for the money paid; he should have pursued the instructions and subscribed in his principal's name.[2] But where the order was general to buy stock for the principal, and the brokers bought, paid for it, and took the certificate in their own names, after an offer to transfer the certificate, a demand of payment and neglect by the principal to pay, they were held entitled to recover the price paid, and not merely the difference between that price and the market value of the stock on the day of their demand.[3]

Where the principal is liable for moneys paid by the agent, he is liable also for interest, if a stipulation therefor exists or may be presumed from the nature of the business or the usage

[1] Howe v. Wade, 4 McLean, 319.

[2] Shrack v. McKnight, 84 Pa. St. 26.

[3] Giddings v. Sears, 103 Mass. 311. See Dodge v. Tilston, 12 Pick. 328.

of trade; or if the principal is in default in the performance of his obligation to reimburse the agent.[1] To give rise to this obligation to reimburse, on the part of the principal, the disbursement must be within the agent's authority, and the money must have been reasonably and in good faith paid.[2] He should pursue his principal's instructions, and cannot recover for extra expenses caused by departing therefrom.[3]

An agent's right to indemnity — An agent is entitled to indemnity for losses or damages sustained in transacting the business of his agency, and against liabilities incurred therein. Where an agent, acting bona fide and without fault in the proper service of the principal, is subjected to expense, or sued on any contract made by him, or for any act done pursuant to his authority, the law implies that the principal will indemnify and reimburse him.[4] This is the general principle, arising from the relation of the parties, and applies not only to entitle him to recover full compensation where the loss has already happened, but also, *quia timet*, in giving him the right to retain funds or securities as indemnity for outstanding liabilities which have not matured, or been actually enforced.[5]

[1] Story on Agency, § 338; vol. I, pp. 588, 596.

[2] Ruffner v. Hewitt, 7 W. Va. 585. In Fuller v. Ellis, 39 Vt. 345, the plaintiff had hired the defendant, who was skilled in the management of horses, to take two horses to Richmond, Va., for exhibition at the state fair, and to sell them, if possible, for the most he could get for them. While at Richmond he sold one, and after ineffectual efforts to dispose of the other, without consulting his principal, he took it to Charleston, S. C., and finally succeeded in selling it; but his expenses amounted to $445.23. On account of the unsettled state of the country, it was impossible for the defendant to bring back the horse after he reached Wilmington, N. C. It was held that the defendant exceeded his instructions, and he was not entitled to pay for his expenses after he left the place to which his instructions directed him to go. And regarding him as a general agent, he did not exercise a sound discretion and act with common prudence, and on that ground was not entitled to recover. Brown v. Clayton, 12 Ga. 564; Story on Agency, § 336.

[3] Range v. Harwood, 39 Tex. 139; Keys v. Westford, 17 Pick. 273.

[4] Powell v. Trustees of Newburgh, 19 John. 284; D'Arcy v. Lyle, 5 Bin. 441; Stocking v. Sage, 1 Conn. 519.

[5] Id.; Story on Agency, § 339; Bartable v. Denegre, 22 La. Ann. 124; Drummond v. Humphreys, 39 Me. 347; Poole v. Adkisson, 1 Dana, 115; Yeatman v. Corder, 38 Mo. 337; Howe v. Buffalo, etc. R. R. Co. 37 N. Y. 297.

To afford ground for compensation, the loss must occur without the agent's fault,[1] naturally and directly from the execution of the agency; this must be the cause and not merely the occasion of the damage.[2] Thus, if he is compelled to pay damages to a third person for a false representation of the quality of the principal's goods, made innocently in pursuance of directions from the principal, and in consequence of a deception practiced by him;[3] or for converting the property of a third person, by the direction of the principal, claiming to be the owner, the agent having no notice of any adverse title,[4] the injury proceeds from the execution of the agency, and the agent is entitled to indemnity from the principal.

NOT ALLOWED AGAINST CONSEQUENCES OF KNOWN AND INTENTIONAL WRONG.— If one request or direct another to do an act which he knows at the time will be a trespass, and promise to indemnify him, the promise is void; but if the person who does the act at the instance or by the command of another does not know at the time that he is committing a trespass, the promise of indemnity is valid.[5]

If a third person has recovered judgment against the agent which he has satisfied, the amount which he has been so compelled to pay is the measure of damages in his action for recovery over against the principal.[6] In such case, if the third person so recovering judgment against the agent accepts the note of the agent in discharge of the judgment, it is equivalent to payment for the purpose of recovery against the principal.[7]

[1] Elliott v. Walker, 1 Rawle, 126.

[2] Duncan v. Hill, L. R. 8 Ex. 242.

[3] Paley on Agency, 152, 301.

[4] Adamson v. Jarvis, 4 Bing. 66; Coventry v. Barton, 17 John. 142; Avery v. Halsey, 14 Pick. 174; Allaire v. Ouland, 2 John. Cas. 54.

[5] Coventry v. Barton, 17 John. 142; Betts v. Gibbins, 2 A. & L. 57; Adamson v. Jarvis, 4 Bing. 66, 72; Ives v. Jones, 3 Ired. L. 538; Hays v. Stone, 7 Hill, 128; Howe v. Buffalo, etc. R. R. Co. 37 N. Y. 297.

[6] Howe v. Buffalo, etc. R. R. Co. supra; Kip v. Brigham, 6 John. 158; Blasdale v. Babcock, 1 id. 17. See vol. I, p. 139.

[7] Howe v. Buffalo, etc. R. R. Co. supra.

Section 3.

THIRD PERSONS AGAINST AGENT.

Under what circumstances an agent may render himself liable to third persons — Measure of damages in their favor where he acts without or beyond his authority — His liability on his implied warranty of authority — When money may be recovered back from an agent.

UNDER WHAT CIRCUMSTANCES AN AGENT MAY RENDER HIMSELF LIABLE TO THIRD PERSONS.— In matters of contract a third person may in many cases recover against one who is, in fact, an agent acting within the scope of his authority, as well as against one exceeding his authority, or acting as agent without being such at all. Where one who is in truth an agent, but does not disclose his principal, makes a contract in his own name; or discloses his principal, and yet contracts in his own name because credit is given to him personally, or his personal responsibility is relied upon, he becomes the principal, and his agency in no way affects his liability. There is another class of cases where written contracts are made by persons assuming to be agents, but who have not the requisite authority, and the contract is so framed that when the name of the principal and the words indicating agency are rejected because not used or inserted by authority, a complete contract remains in the name of the agent. In such cases the pretended agent has been held liable as the principal. The cases, however, are in conflict on the question whether the agent can be made liable as principal on such an instrument.[1] But where he is treated as the principal, and liable accordingly, the element of agency is wanting, as in the preceding class.

MEASURE OF DAMAGES WHERE HE ACTS WITHOUT OR BEYOND HIS AUTHORITY.— A person assuming to act as an agent for another having no authority, or exceeding his authority, is liable in some form of action to the person with whom he deals in that assumed character.[2] And he is responsible not only where he so

[1] Story on Agency, § 204*a* and notes.

[2] Paley on Agency, by Dunlop, p. 387; Story on Agency, § 264.

assumes to act, and fraudulently asserts that he has authority, but also where he misleads by knowingly acting without authority, although intending no fraud.[1] So, also, where he undertakes to act as an agent in good faith, believing that he has due authority, when he has not, and acts under an innocent mistake.[2] Mr. Baron Alderson, in Smout v. Ilbery, said: "There is no doubt that, in the case of a fraudulent misrepresentation of his authority, with an intention to deceive, the agent would be personally responsible. But, independently of this, which is perfectly free from doubt, there seems to be still two other classes of cases, in which an agent who, without actual authority, makes a contract in the name of his principal, is personally liable, even where no proof of such fraudulent intention can be given. First, where he has no authority, and knows it, but nevertheless makes the contract, as having such authority. In that case, on the plainest principles of justice, he is liable. For he induces the other party to enter into the contract, on what amounts to a misrepresentation of a fact peculiarly within his knowledge; and it is but just that he who does so should be considered as holding himself out as having competent authority to contract, and as guarantying the consequences arising from the want of such authority. But there is a third class, in which the courts have held that, where a party, making the contract as agent, bona fide believes that such authority is vested in him, but he has, in fact, no such authority, he is still personally liable. In these cases, it is true, the agent is not actuated by any fraudulent motives; nor has he made any statement which he knows to be untrue. But still his liability depends on the same principles as before. It is wrong, differing only in degree, but not in its essence, from the former case, to state as true what the individual making such statement does not know to be true, even though he does not know it to be false, but believes, without sufficient grounds, that the statement will ultimately turn out to be correct. And, if that wrong produces injury to a third person, who is wholly ignorant

[1] Id.; Downman v. Jones, 9 Jurist, 454–458.

[2] Story on Agency, § 264; Smout v. Ilbery, 10 M. & W. 1, 9, 10; 2 Sm. Lead. Cas. 222–227, in note to Thompson v. Davenport, 9 B. & C. 78.

of the grounds on which such belief of the supposed agent is founded, and who has relied on the correctness of his assertion, it is equally just that he who makes such assertion should be personally liable for its consequences. On examination of the authorities, we are satisfied that all the cases in which an agent has been held personally responsible, will be found to arrange themselves under one or the other of these classes. In all of them it will be found that he has either been guilty of some fraud, has made some statement which he knew to be false, or has stated to be true what he did not know to be true; omitting, at the same time, to give such information to the other contracting party as would enable him, equally with himself, to judge as to the authority under which he proposed to act."[1]

An agent liable on implied warranty of authority.— He is liable as upon a warranty of his authority;[2] and for the reason that, where he exceeds his authority or acts without any, and so has not bound his principal, he has misled the party with whom he has dealt. Therefore, the rule does not apply where it appears that he fully communicated his authority, before the dealings in question were concluded. In that case the other party acts upon his own judgment of the agent's power.[3] And so where an agency had existed but had been determined by the death of the principal abroad unknown to either party.[4]

The liability rests upon fraud or warranty, and extends to the whole loss or injury which the party dealt with sustains in consequence of the contract as made not being binding upon the supposed principal. Thus where an agent employed to purchase property at auction at a limited price exceeded his authority, he was considered as purchasing on his own account.[5] So where an agent of a bank, by means of false representa-

[1] Collen v. Wright, 8 El. & Bl. 647; Weeks v. Brofert, L. R. 8 C. P. 427.

[2] White v. Madison, 26 N. Y. 117; 26 How. Pr. 481; Collen v. Wright, 8 El. & Bl. 647; Baltzen v. Nicolay, 53 N. Y. 467.

[3] Barry v. Pike, 21 La. Ann. 221; Aspinwall v. Torrance, 1 Lans. 381; Clark v. Foster, 8 Vt. 98; Ogden v. Raymond, 22 Conn. 379; Sinclair v. Jackson, 8 Cow. 585; Hall v. Lauderdale, 46 N. Y. 70; Jefts v. York, 10 Cush. 392; Story on Agency, § 265. See Lander v. Castro, 43 Cal. 497.

[4] Smout v. Ilbery, 10 M. & W. 1.

[5] Hampton v. Specknagle, 9 S. & R. 212.

tions as to his authority to employ attorneys for his principal, secured professional services for the bank in sundry attachment proceedings, and on suit against the bank by the attorney for the value of his services, it turned out that the agent had no such authority as represented, and so the bank could not be made responsible; it was held that the attorney had his action against the agent personally for the value of his services as attorney, together with the actual amount of his costs incurred in the suit against the bank.[1] The same doctrine has been applied in other cases. The damages properly include the value of the property sold, or of the services rendered by the procurement of the agent unqualified to bind the supposed principal; and if an abortive suit has been prosecuted on the contract, on the faith of its being a binding contract, against such principal, the costs of that action are recoverable as part of the damages.[2]

[1] Wright v. Baldwin, 51 Mo. 269.

[2] Eckstein v. Whitehead, 10 U. C. C. P. 65; Randell v. Trimen, 18 C. B. 786; 37 Eng. L. & Eq. 275; Spedding v. Nevell, L. R. 4 C. P. 212; Goodwin v. Francis, L. R. 5 C. P. 295; Collen v. Wright, 7 El. & Bl. 301. In this case, W signed a written agreement describing himself in the signature as agent of G, whereby he agreed with C that a lease should be granted to C of a farm belonging to G. C and W both believed that W had authority from G to make the agreement; but in fact W had no such authority. G refusing to grant the lease, C filed a bill against him for specific performance, and, after G had put in his answer, denying W's authority, C gave W notice of the suit, and ground of defense, and that C would proceed with the suit at W's expense, unless W gave him notice not further to proceed; and that C would bring an action against W for damages in the event, either of the bill being dismissed on the ground of the defense set up, or of W requiring C not to further proceed. W answered repudiating his liability to C. The bill was dismissed on the ground of the defense set up. It was held that C was entitled to maintain an action against W as for breach of a promise that W had the authority; and that C might recover in such action damages for the expense of the chancery proceedings, it not appearing that he had instituted them incautiously, and they being therefore damages naturally resulting from the misrepresentation made by W. Lord Campbell, C. J., said: "We are to consider whether the plaintiff is entitled to recover in respect of the expenses of the chancery suit. I think he is. He acted as a reasonable man would who gave faith to the representation that a contract had been made by the alleged principal; he required that that contract should be specifically performed. The case cannot differ from that of a sale of goods by a party alleging himself to be a

THE MEASURE OF DAMAGES.— The same sum which the agent, without authority, had agreed for in behalf of his solvent principal, would be the sum recoverable against him.[1] In other words, where upon an executed consideration a certain sum would be due from the supposed principal if he had been bound by the contract and solvent, that sum is recoverable from the unqualified agent.[2]

Where the agent has exceeded his authority, the party with whom the contract is made is not bound to look to the principal for so much of the contract as the agent was authorized to make, but may hold the agent responsible to the amount of the contract.[3] It seems, however, that the holder of such a contract may resort to the principal for so much as the agent had authority to promise in his behalf, where it is severable.[4] If one pretending to be an agent has contracted as such without authority from the principal, the party contracted with, on learning the facts, has the right to repudiate the contract, and hold the person who assumed to be agent immediately responsible for damages on his warranty of authority, without waiting for the time when an action might be maintained on the contract itself. Damages in such a case, it is said, are measured, not by the contract, but by the injury resulting from the agent's want of power.[5] But such damages must ordinarily be such as could be

broker. The purchaser says that the alleged broker's contract is broken, because he had no authority to sell. If, before the action was brought, the alleged broker had explained the mistake, the purchaser could not have recovered damages incurred by subsequently prosecuting the action. But if the assertion was made and never retracted, I could not blame him for bringing the action. If the purchaser could not know that the alleged broker had no authority to make the contract, the loss arising from the action seems to me naturally to result from the allegation. I cannot distinguish the case of such an action from the case of a bill for specific performance filed in the belief that the contract was authorized on the part of the alleged principal."

[1] Sumner v. Williams, 8 Mass. 162; Meech v. Smith, 7 Wend. 315; Dusenbury v. Ellis, 3 John. Cas. 70; Palmer v. Stephens, 1 Denio, 471; Pitman v. Kintner, 5 Blackf. 250; Bowen v. Morris, 2 Taunt. 385; Polhill v. Walter, 3 B. & Ad. 114; Wooder v. Dennett, 9 N. H. 55; Grafton Bank v. Flanders, 4 N. H. 239; Feeter v. Heath, 11 Wend. 477.

[2] Id.

[3] Feeter v. Heath, 11 Wend. 477.

[4] Johnson v. Blasdale, 1 Sm. & M. 17. See Gordon v. Buchanan, 5 Yerg. 71; 1 Par. on Cont. 69.

[5] White v. Madison, 26 How. Pr. 481; S. C. 26 N. Y. 117.

recovered against the party for a total breach, or a breach co-extensive with the principal's repudiation of the supposed agent's act. The auctioneer who sells real property without sufficient authority, so that the purchaser can get no title, will be liable to pay the purchaser's expenses of investigating the title, with interest on the deposit, and also interest on the purchase money, if kept in readiness and unproductive.[1] If a special agent employed to sell, with orders not to warrant, nevertheless does so, the principal would not be bound, and the agent will be answerable; for otherwise the buyer would be without remedy.[2] By the contract, so far as the agent is concerned, the other contracting party is entitled to the same compensation as upon a total breach of a valid contract. If the principal is not bound by and does not adopt the contract, the consequential loss to the other party is the same that he would suffer if the principal had bound himself according to the tenor of the contract, and then refused to fulfil. In the latter case the injured party may obtain his damages by action directly upon the contract; this may not always or generally be done in an action against the agent; but in an action on his express or implied warranty of authority, or for the deceit, the same rule of compensation which would be applicable to the defaulting party would be the only adequate measure of redress against the agent who had caused the same injury through a want of the assumed power to bind the party who refuses to ratify and perform. This is well illustrated by the judgment in an English case.[3] The action was against the agent for breach of implied warranty, that in purchasing a ship from the plaintiff he had authority to make the contract for the supposed principal. It appeared at the trial that the principal having refused to adopt the defendant's contract, the plaintiff resold the ship at a less price than the contract price. The resale was taken to be reasonably made for the best price that could be obtained, and it was taken that the principal was perfectly solvent, and it was held that a verdict was properly taken for damages measured by the difference between the contract price and that obtained on the resale. Lord Campbell, C. J., said: "What was the contract in this

[1] 2 Sedgw. on Dam. 89, note.

[2] Paley on Agency, by Dunlop, 386; Fenn v. Harrison, 3 T. R. 757.

[3] Simons v. Patchett, 7 El. & Bl. 568.

case? That the defendant had authority from . . (his principals), . . so that the bargain he had made in their name was binding on them. What, then, has the plaintiff suffered from this bargain not being binding on . . (them) . . ? It is not disputed that, if the bargain had been binding, and had not been fulfilled, the plaintiff would have recovered against . . (the principals) . . damages for not fulfilling the contract; and if they had fulfilled the contract, the plaintiff would have had from them the full price. The loss of the damages, therefore, which he would have recovered from . . (the principals) . . is the direct consequence of the breach of the defendant's contract. Viewing the matter in another light, the result is much the same. It is not to be disputed that, if direct evidence had been given of a fall in the market price of ships between the time of the making of the supposed bargain and the time at which the plaintiff might reasonably resell the ship, that fall in the price would be recoverable. Might not the jury reasonably infer such a fall in price from the difference in price actually obtained in this case? If so, the case would be brought within the general rule as to the measure of damages for not accepting goods." This case proceeded upon the assumption of the solvency of the principal. On that assumption the same rule was applied which would have applied to the principal if he had been bound by the contract and refused to accept and pay for the property. The damages to be recovered against the false agent, however, are what was lost by the plaintiff by not having the valid contract which the agent warranted he had. Though if there had been such a binding contract, the purchaser would have been liable to the plaintiff in damages; yet if the purchaser was not solvent, the jury would say that the loss in consequence of not having a binding contract was not the sum for which he would in that case have had judgment against the purchaser.[1]

When money may be recovered back from agent.—An agent will be responsible on his contracts, though made as agent, where there is no responsible principal to resort to; that is, where he represents a principal not suable other than the gov-

[1] Simons v. Patchett, supra, per Crompton, J.

ernment.[1] So where money has been paid to an agent for the use of his principal, under such circumstances that the party paying it might recover it back from the latter. In such cases, as long as the money has not been paid over by the agent, nor his situation altered, as by giving his principal fresh credit upon the faith of it, it may be recovered from the agent.[2]

An action may be brought against an agent who has received money to which his principal has no right, if the agent has had notice not to pay the money over; and in some cases without such notice, if the money has not been actually paid over.[3] Where an agent has settled with his principal by retaining his own fees and costs, and paying over the balance, he has so closed his account as not to be liable to repay the money paid to him by mistake.[4] But it is not sufficient that the agent has passed the sum received to the principal's account, giving him credit for it in discharge of a debt to himself.[5] Where the payment to the agent has been compulsory, and not expressly for the use of the principal, or has been obtained by the agent fraudulently or illegally, no notice not to pay it over to the principal is necessary; and the action may be maintained against the agent, notwithstanding he may have paid the money over to his principal.[6]

An agent is liable for his torts.— An agent is also liable for torts committed by himself, although done in the business of another;[7] that is, for acts of affirmative misfeasance, whether

[1] Paley on Agency, 374; Story on Agency, § 280; Hills v. Bannester, 8 Cow. 31.

[2] Paley on Agency, 388; Buller v. Harrison, 2 Cowp. 565; Cox v. Prentice, 3 M. & S. 344; Hearsay v. Pruyn, 7 John. 179; Langley v. Warner, 1 Sandf. 209; Mowatt v. McClelan, 1 Wend. 173; Story on Agency, § 300. See Bank of the U. S. v. Bank of Washington, 6 Pet. 8, 18.

[3] Hearsay v. Pruyn, supra.

[4] Mowatt v. McClelan, 1 Wend. 173.

[5] Buller v. Harrison, 2 Cowp. 565; Paley on Agency, by Dunlop, 389. See Frye v. Lockwood, 4 Cow. 454; La Farge v. Kneeland, 7 id. 456; Carew v. Otis, 1 John. 418.

[6] Snowdon v. Davis, 1 Taunt. 359; Ripley v. Gelston, 9 John. 201; Edwards v. Hodding, 1 Marsh. 377; 5 Taunt. 815; Hardacre v. Stewart, 5 Esp. 103; Miller v. Aris, 1 Selw. N. P. 103. See Elliott v. Swartwout, 10 Pet. 137.

[7] Horner v. Lawrence, 37 N. J. L. 46.

done intentionally or ignorantly, in pursuance of the agency, he is directly liable to the person injured; and the latter is not limited to an action against the principal.[1] But for negligence of duty imposed by his employment an agent or servant is not liable to a third person, but only to the employer. There is no privity of consideration between the servant and the person who employs his master; and nonfeasance alone will not support an action without consideration.[2]

[1] Crane v. Onderdonk, 67 Barb. 47; Erwin v. Davenport, 9 Heisk. 44; Elmore v. Brooks, 5 id. 45.

[2] Paley on Agency, by Dunlop, 396, 399.

CHAPTER IX.

INSURANCE.

Growth and importance of insurance contracts.

The law of insurance has now arrived at such a condition of importance that it occupies a very large share of the attention of the courts and the legal profession. A hundred years ago it had scarcely an existence, and its growth has been entirely out of proportion to that of other branches of the commercial law, great as these have been. A glance at the modern law reports reveals the fact that the adjudged cases involving the consideration of the law of insurance probably exceed those of any other class.

And when we reflect that not a ship hoists her anchor for a voyage on the ocean, nor a river steamer casts her lines loose from her wharf, without this protection from the results of disaster; that not a village on the continents of Europe and America has failed to take its "bonds of fate" against the ravages of flood and fire, equally with the great commercial cities of the world; and that solicitous affection has in thousands of instances demanded provision against the edicts of death itself, by a ransom in favor of the living; we need not be surprised at the almost overshadowing proportions to which this topic of the law has grown in so short a period. Against the perils of storm and wreck, treachery and public enemies on sea and river; against accidents by fire, whether kindled by God in the lightning's flash, or by the imprudence or viciousness of men on land or ocean; against the inevitable decree of death itself, to whose hand all must yield, the law of insurance has provided indemnity if not consolation.

The business itself demands and absorbs an amount of capital and capacity commensurate with the vastness of the field it occupies, and the discussions to which it has given rise are second in magnitude to none that claim the attention of the forum.

The comparatively restricted portion of this vast field, appro-

priate for consideration in a treatise like the present, would seem to lighten the writer's labors; but a very little reflection will satisfy the reader that the extent and application of the remedies for wrongs can never be thoroughly explained or understood until the elements of the broken contract have been carefully studied and analyzed; and while the remedy is but an insignificant part of the whole subject, its useful presentation presupposes a careful examination of all that precedes it.

While, therefore, the present chapter will be devoted to the question of the damages arising upon contracts of insurance, the preparation for that discussion is necessarily drawn from a somewhat careful survey of the wider field embracing the entire subject.

DIFFERENT KINDS OF INSURANCE.—Insurance is generally divided into three classes, viz.: Marine, fire, and life insurance.

The first is defined to be a contract by which one party, called the underwriter, or insurer, for a stipulated sum, called a premium, undertakes to indemnify the other, who is called the insured, against all perils of the sea, or certain enumerated perils, to which the ship, cargo or freight, which is called the subject of insurance, may be exposed during a certain voyage, or for a period of time.

The second is defined to be contracts of insurance against accidents or loss by fire, and is applicable to all species of property subject to injury or destruction by fire.

The third class is contracts upon the life of some particular person, which are to the effect that upon the death of the person whose life is insured, during the time for which it is so insured, or if generally upon his life, that upon the occurrence of his death, the insurer will pay the amount of the policy to the person holding the same.

The instrument, when executed, as it usually is, in writing, by the parties, contains the terms of the contract, and is denominated a policy of insurance.[1]

[1] Unless required by statute, the contract of insurance need not be in writing. Commercial Ins. Co. v. Union Ins. Co. 19 How. (U. S.) 318; Trust. of Baptist Church v. Brooklyn Fire Ins. Co. 19 N. Y. 305; Angell v. Hartford Ins. Co. 59 N. Y. 171; Sanborn v. Firemen's Ins. Co. 16 Gray, 448; Baxter v. Massasoit Ins. Co. 13 Allen, 320; Putnam v. Home Ins.

Section 1.

MARINE INSURANCE.

The cause of damage must be proximate — Extent of injury; manner of ascertainment — Interpretation of contract — Valued policies — Methods provided by the contract for ascertaining damages; when invalid — When proofs of loss a condition precedent — Manner and time of making proofs — Preliminary proofs intended for information only — Pleadings — Rule of damages on open policies — In cases of partial loss — Losses are adjusted on the principle of indemnity — General average.

Cause of damage must be proximate.— Preliminary to entering upon the general question of the measure of damages in marine insurance, there is one branch of the subject, affecting the right of recovery, that deserves specific notice. It is a maxim in marine insurance, "that the direct, and not the remote cause of the damage," is to be considered.[1] The existence of this rule is not controverted, but there has been great dispute in its application.

The United States supreme court applied the maxim as follows:

1. When two causes of loss concur, one at the risk of the assured, and the other insured against, or one cause insured against by A, and the other by B, if the damage caused by each peril can be discriminated from the other, it must be borne proportionately.

2. But if the damage caused by the two perils cannot be distinguished from each other, then the party responsible for the predominating efficient cause, or which set in operation the other, is liable for the loss.

It was therefore held in the particular case, that when an insurance upon a steamboat against fire excepted "any fire happening by means of any invasion, insurrection, riot or civil commotion, or of any military or usurped power," it is an insurance against fire caused by a collision, and that the underwriters against fire were responsible for a loss occasioned by the

Co. 123 Mass. 324; Relief Ins. Co. v. Shaw, 94 U. S. 574; Hening v. U. S. Ins. Co. 2 Dill. 26; Davenport v. Peoria Ins. Co. 17 Iowa, 276.

[1] Davis v. Garrett, 6 Bing. 716; Ionides v. Universal Ins. Co. 14 C. B. (N. S.) 260; 108 E. C. L. 259; Ins. Co. v. Transportation Co. 12 Wall. 194, 201.

sinking of a vessel caused by fire, though the fire was occasioned by a collision not insured against, if the effect of the collision, without the fire, would have been only to cause the vessel to settle to her upper deck, and that was such a condition as that she could have been saved.

Erle, C. J.,[1] said: "The conclusion I have come to, after an attentive consideration, is that the plaintiff is entitled to recover in respect of a loss of a part of the insurance. The policy was for £3,000 upon six thousand five hundred bags of coffee, valued at £25,000, and it contained an exception in the following words: 'Warranted free from capture, seizure and detention, and all consequences thereof or any attempt thereat, and free from all consequences of hostilities, riots or commotions.' The insured ship, with the coffee on board, on her voyage from Belize to New York, had to pass Cape Hatteras. The captain intending to shape his course north northeast until he had rounded the cape, and then to steer due north, being out of his reckoning, and conceiving that he had passed the cape, when he was, in fact, about thirty miles south and ten miles west of it, ran the ship on shore at Hatteras Inlet, where she was eventually lost. If these had been the only facts, it would have been a clear case of loss by perils of the sea. But it appears that at Cape Hatteras, until the secession of the Southern States of America, there had always been a light maintained, and that the light had been extinguished for hostile purposes by the confederate or southern party, who were at the time in possession of North Carolina. It may be taken as a fact, for the purpose of the present judgment, that if the light had still been there, the captain would have seen it, and might have put about in time and saved the ship.

"The great contention on the first part of the case was whether the loss so brought about was a loss 'by the consequence of hostilities,' within the meaning of the policy. The extinguishment of the light was undoubtedly an act of hostility upon the part of the confederates towards the federals; but was the loss the consequence of hostilities? I agree with the learned counsel, that the question is entirely one of construction, and

[1] In Ionides v. Universal Ins. Co. 14 C. B. (N. S.) 260.

that the intention of the parties is to be gathered from the contract itself, taking it with the surrounding circumstances. . . . I agree with the learned counsel who suggested that the words of the exception in this policy are to be construed as they would be if the assured had reassured his cargo against the perils which are excepted by the warranty now in question, so that to make the policy attach, the court must in that case have held that the consequence of hostilities was so connected with the loss of the ship as to make the underwriters liable. The maxim '*causa proxima non remota spectatur*' is peculiarly applicable to insurance law. The loss must be immediately connected with the supposed cause of it. Now, the relation of cause and effect is matter which cannot always be actually ascertained; but if, in the ordinary course of events, a certain result usually follows from a given cause, the immediate relation of the one to the other may be considered to be established. Was the putting out of the light at Cape Hatteras so immediately connected with the loss of the ship as to make the one the consequence of the other?

"Can it be said that the absence of the light would have been followed by the loss of the ship, if the captain had not been out of his reckoning? It seems to me that these two events are too distantly connected with each other to stand in the relation of cause and effect. I will put an instance of what I conceive to be a 'consequence of hostilities' within the meaning of this policy. Suppose there was a hostile attempt to seize the ship, and the master in seeking to escape capture ran ashore and the ship was lost: there the loss would be a loss by the consequences of hostilities within the terms of this exception. Or, suppose the ship chased by a cruiser, and, to avoid seizure, she gets into a bay where there is neither harbor nor anchorage, and in consequence of her inability to get out she is driven on shore by the wind and lost: that loss would be a loss resulting from an attempt at capture, and would be within the exception. But I will suppose a third case,—the ship chased into a bay where she is unable to anchor or to make any harbor, and getting out again on a change of wind, but in pursuing her voyage encounters a storm which, but for the delay, she would have escaped, and being overwhelmed was lost: there, although it may be said

that the loss never would have occurred but for the hostile attempt at seizure, and that the consequence of the attempt at seizure was the cause without which the loss would not have happened, yet the *proximate* cause of loss would be the perils of the sea, and not the attempt at seizure. Take another instance. The warranty extends to loss from all the consequences of hostilities. Assume that a vessel is about to enter a port having two channels, in one of which torpedoes are sunk in order to protect the port from hostile aggression, and the master of the vessel, in ignorance of the fact, enters this channel and his ship is blown up: in that case the proximate cause of the loss would clearly be the consequences of hostilities, and so within the exception. But, suppose the master, being aware of the danger presented in the one channel, and, in order to avoid it, attempts to make the port by the other, and by unskilful navigation runs aground and is lost,— in my opinion that would not be a loss within the exception, not being a loss proximately connected with the consequences of hostilities, but a loss by a peril of the sea, and covered by the policy.

"Applying these principles to the facts of the present case, I am of opinion that, the captain having missed his reckoning, and either not keeping a sufficient lookout, or not lying to when his position was doubtful, and so running on shore, it cannot be said that the absence of the light was proximately the cause of the loss; but that the loss was not within the exception contained in the warranty, but was within the general terms of the policy; and that, as the wreck of the ship brought about the loss of the cargo, the insurers are liable."

Perhaps the most useful and satisfactory decisions of recent date on the question are found in the cases of Insurance Co. v. Boon,[1] and Insurance Co. v. Express Co.,[2] to which the practitioner is referred.

EXTENT OF INJURY; MANNER OF ASCERTAINMENT.— Assuming that a contract has been made between the underwriter and the insured, and that a breach of the underwriter's undertaking has occurred, the first question of interest to the parties is as to the extent of the injury, and how it shall be made good. And the

[1] 95 U. S. 117. [2] Id. 227.

first observation is, that whenever the policy by its terms provides a particular manner of ascertaining the damages, that must be followed. Insurance contracts are to be interpreted and construed in the same way, and by the same general rules, which apply to other business contracts. The state of the existing law, the effect of usage and custom, the usual course of business, the intention of the parties, the technical and popular meaning of words, the effect of warranties, special representations, of conditions, exceptions and limitations in the contract,— none of these call for special observation, save that they are to be expounded as in all other contracts, finally, to effectuate the purposes had in view when made.[1]

Interpretation of contract.— It is, perhaps, fair to say that in marine insurance particularly the policy or written contract is a less perfect guide to the real engagement of the parties to it than almost any other species of contract; for the subject matter is such that in the nature of it the stipulations must often be general, in order to cover a variety of details, and thus leave much to interpretation finally by the judicial tribunals. In alluding to this class of instruments, Chief Justice Marshall observed[2] that "policies of insurance are generally the most informal instruments which are brought into courts of justice; and there are no instruments which are more liberally construed in order to effect the real intention of the parties, if that intention can be clearly ascertained." While perhaps the growing importance of insurance has led to greater precision than when Judge Marshall uttered this criticism of insurance contracts, there is no doubt still much justice and truth in his remarks.[3]

Valued policies.— One very common means of fixing the amount of the underwriter's liability in cases of loss is by what

[1] No clearer general statement of the law for construing contracts can probably be found than that contained in chapter 30 of Mr. Bishop's little work on contracts, published in 1878. The rules for interpretation are concisely and forcibly stated, and the citation of cases is copious and discriminating.

[2] Yeaton v. Fry, 5 Cranch, 342.

[3] Parkhurst v. Gloucester Mutual Fishing Ins. Co. 100 Mass. 301; Oliver v. Mutual Com. Ins. Co. 2 Curt. C. C. 290–1; Rankin v. Potter, 5 Moak's Eng. Rep. 40; id. L. R. 6 H. L. 83.

is known as a "valued policy." This is where the amount to which the underwriter is bound is for a sum fixed upon by agreement, by the parties to the contract, at the time it is made, and is usually not open to evidence to vary it; when such a contract is made, it can only be impeached for fraud.[1] But if upon a valued policy there is only a partial loss of the subject of insurance, the insured can only recover the proportion which the loss bears to the whole amount fixed in the policy, and if the contract furnishes the rule of determination, other evidence will not be admissible, as for instance: the parties by the policy agreed upon an estimate of $9,600 as the value of three hundred and eighty kegs of a particular kind of tobacco. One hundred and fifty-seven kegs were lost, and the court held that the insurer was bound by his contract to pay for the partial loss at the same rate he would have paid for the whole, if the whole had perished, and evidence of the value was excluded.[2] In the case of Forbes v. Aspinwall,[3] the principle of the above case was in part denied; but as the facts were not parallel, the case can scarcely be construed as denying the rule or as materially qualifying it. The case of Shawe v. Felton[4] applies the rule in a very extreme case. The syllabus of that case is to the effect: "That on an insurance on ship and goods, valued at so much, on a voyage to Africa and the West Indies, the assured is entitled to recover the whole sum on a total loss which happened in the latest period of the voyage, although a considerable part of the estimated value consisted originally in stores and provisions for the purchase and sustenance of slaves during the voyage, and the slaves were brought to a profitable market at the final place of the ship's destination, where she arrived in port a mere wreck, and soon after foundered. Where a ship insured arrived in port a mere wreck, and was obliged to be lashed to a hulk to avoid sinking, and in attempting to remove her to the shore a few days afterward, she sunk, held, that the assured might recover as for a total loss, though her cargo was

[1] Harris v. Eagle Ins. Co. 5 Johns. 368; Lewis v. Rucker, 2 Burr. 1167; Cushman v. N. W. Ins. Co. 34 Me. 487; Lycoming Ins. Co. v. Mitchell, 48 Pa. St. 367; Forbes v. Aspinwall, 13 East, 323.

[2] Harris v. Eagle Ins. Co. 5 Johns. 374.

[3] 13 East, 323.

[4] 2 East, 109.

saved and brought to a profitable market." It was said in that case that to open the policy and order an inquiry would take away all the certainty which valued policies were intended to have, and to nullify the deliberate agreement of the parties, which had been made to avoid the necessity of an investigation into the damages actually occurring. The rule that the value fixed in the policy shall be conclusive has been adopted by statute in some of the states, and it has been held that under such a statute a stipulation inserted in the policy requiring proofs of loss, estimates, etc., by the insured, and if differences arise, there should be an arbitration before any suit could be maintained, was void.[1]

METHODS PROVIDED BY THE CONTRACT FOR ASCERTAINING DAMAGES; WHEN INVALID.— It is a common provision in fire insurance cases to stipulate for a settlement of losses insured against, by arbitrators or umpires, to be selected in a manner pointed out in the contract. It is also very generally required that the insured shall furnish certain proofs of the loss, within an arbitrary fixed period after the occurrence, or "immediately," as "soon as possible," or "within a reasonable time."

It may be remarked that no stipulation, the effect of which would be to affect the jurisdiction of the courts to determine upon the liability or non-liability of the insurer, is regarded as valid. And as we have already seen,[2] a stipulation for ascertaining the cash value of the loss by proofs and umpire, before any suit can be instituted against the insurer, when the statute provided that the sum fixed in the policy should be the measure of damages, is invalid.[3] Any stipulation in the contract that deprives the courts of the power to determine the right to recover, is void, no matter what substitute may be provided to determine that question.[4] Parties, after the damages have ac-

[1] Reilly et al. v. Franklin Ins. Co. 43 Wis. 449, quoting White v. Conn. Mut. Life Ins. Co. 5 Cent. L. Jour. 486; Farmers' Ins. Co. v. Curry, 10 Chi. L. N. 43. In opposition: Emery v. Piscataqua F. & M. Ins. Co. 52 Me. 322; Chamberlain v. N. H. Ins. Co. 55 N. H. 249.

[2] Ante, p. 68.

[3] Thompson v. St. Louis Ins. Co. 43 Wis. 459; Hughes v. Vinland F. Ins. Co. 43 Wis. 323; Kill v. Hollister, 1 Wils. 129; Ins. Co. v. Morse, 20 Wall. 445.

[4] Scott v. Avery, 5 H. L. Cas. 811; Thompson v. Charnock, 8 T. R. 139; Stephenson v. Piscataqua F. & M. Ins. Co. 54 Me. 70.

crued, may agree to any lawful method of settlement, but they cannot stipulate in advance how the damages shall be determined, so as to prevent a resort to the courts for their lawful remedy, any more than they can provide a remedy prohibited by law.[1] Subject to these restrictions, which are imposed as a matter of public policy, on the power of parties to make a binding contract not to resort to the judicial tribunals, any lawful means of ascertaining the loss and arriving at an adjustment of the amount is valid and binding.

When certain proofs of loss are required by the contract to be made by the insured, before the loss is payable, those proofs are a condition precedent to a right of action against the insurer.[2] And no action can be maintained on the policy, unless it is averred that these conditions have been complied with, and the proof shall sustain the allegations at the trial.[3]

When proofs of loss a condition precedent.— When these proofs of loss are to be furnished within a given time after the occurrence of the casualty, the insured must comply with the requirement.[4] It occurs to the writer that such a rule, based simply on an arbitrary fixed time, ought to be construed only as directory, and that when a reasonable compliance with the requirement in substance is shown, it should be sufficient. When by the contract the proofs of the loss are to be made in a reasonable time, what is such time, is a question of fact to be determined upon evidence, if disputed, and is therefore a question for the jury.[5]

Manner and time of making proofs.— These proofs must be furnished in the *form* specified in the contract, but if none is specified, then it is sufficient that the proofs furnish satisfactory evidence of the loss.[6] In the New York case cited, the court observed that the provision in policies of insurance, re-

[1] Stephenson v. Piscataqua F. & M. Ins. Co. 54 Me. 70.

[2] Colombian Ins. Co. v. Lawrence, 10 Pet. 507; Wright v. Hartford Ins. Co. 36 Wis. 522; Edgerly v. Farmers' Ins. Co. 43 Iowa, 587.

[3] Ibid.

[4] Smith v. Haverhill Mut. Fire Ins. Co. 1 Allen, 297.

[5] Wightman v. Western Ins. Co. 8 Rob. 482; Edwards v. Baltimore Ins. Co. 3 Gill (Md.), 176.

[6] Phœnix Ins. Co. v. Taylor, 5 Minn. 492; Germania F. Ins. Co. v. Curran, 8 Kan. 9; Walsh v. Washingtou Marine Ins. Co. 32 N. Y. 427; Taylor v. Ætna Ins. Co. 13 Gray, 434.

quiring notice and proof of loss, is to be expounded liberally in favor of the assured; and its requirements are satisfied by furnishing such reasonable evidence as the party can command at the time, to give assurance to the underwriters of his right to receive the money, and of their liability for the loss. This opinion was pronounced in a case where the insurance had been effected by one for the benefit of himself and other owners, and all the parties had not united in the preliminary notice and proofs, and the changes in some of the interest were not noted therein.

The manner of making proofs is discussed in a large number of cases, of which those cited below may be found instructive.[1] And the requirements of the policy as to preliminary proofs may be waived either expressly, or by conduct from which a waiver may be implied.[2] There is probably no difference in the construction to be placed upon marine contracts of insurance and those against fire on land, in the matter of making the proofs and estimates of loss, and the cases of both classes are referred to as equally in point.

While mere silence on the part of the insurer is not a waiver of proofs of loss in accordance with the contract, still any act which has the effect to mislead the insured into the belief that the proofs will not be required, is proper evidence to the jury of a waiver, and is admissible to be considered; and the question as to whether there has been a waiver, is a question for the jury.[3]

[1] Keeler v. Niagara Fire Ins. Co. 16 Wis. 523; Kernochan v. N. Y. Bowery Ins. Co. 17 N. Y. 428; Works v. Farmers' Ins. Co. 57 Me. 281; Frost v. Ins. Co. 5 Den. (N. Y.) 154; Pratt v. N. Y. Central Ins. Co. 55 N. Y. 505; Ayres v. Hartford Ins. Co. 17 Iowa, 176.

[2] In addition to the cases cited in the preceding note, the following will be found in point on the subject of waiver of the sufficiency of preliminary proofs of loss: Charlestown Ins. Co. v. Neve, 2 McNeil (S. C.), 237; Post v. Ætna Ins. Co. 43 Barb. 351; Ætna Ins. Co. v. Tyler, 16 Wend. 385; O'Neil v. Buffalo F. Ins. Co. 3 Comst. 122; Hentle v. Franklin Ins. Co. 1 Cush. 257; Tayloe v. Merchants' Ins. Co. 9 How. (U. S.) 390. And it is said, that when strict compliance has become impossible with the terms of the contract, it will be excused if the party furnishes the best attainable proof and shows good faith. Hynds v. Schenectady Ins. Co. 11 N. Y. 554; Norton v. Rensselaer Ins. Co. 7 Cow. 645; Lycoming Ins. Co. v. Scholenberger, 44 Pa. St. 259; Patrick v. Farmers' Ins. Co. 43 N. H. 621; Clark v. N. E. Ins. Co. 6 Cush. 342; Cornell v. Le Roy, 9 Wend. 163.

[3] Johnston v. Cal. Ins. Co. 7 John.

PRELIMINARY PROOFS FOR INFORMATION ONLY.— All these proceedings relating to notice, proof of loss and so forth, are for the protection and information of the insurer, and do not fix the amount of the damages or confine the right of the insurer to recover.

They clearly cannot be made to bind the insurer, however formally they may be made, and upon the same principle the other party is not bound. Although these proofs seem to be treated in some sort as admissions by the insured, and may be properly regarded as evidence, it seems hardly consistent to give a greater effect to them as against one party than the other. They are really intended for the protection and benefit of both; they in fact ought to bind neither. Like a coroner's inquest in a case of homicide, they are purely for information, and any attempt to give them a quasi-judicial consequence is as unfair to one party as to the other.[1]

When the books and accounts of the insured have been lost or destroyed, the preliminary proofs which they might furnish are not required.[2]

The following cases on the question of proofs of loss, what are in time and what are not, what is a waiver by the insurer and what is not, may be profitably consulted by the practitioner.[3] When the pleadings contained an allegation that the

315; Great West. Ins. Co. v. Staaden, 26 Ill. 365; O'Brien v. Com. Ins. Co. 63 N. Y. 111.

[1] Ætna Ins. Co. v. Stevens, 48 Ill. 31; McMartin v. Ins. Co. of N. A. 55 N. Y. 222.

[2] Mechanics' Fire Ins. Co. v. Nichols, 16 N. J. L. 410; Wightman v. West M. & F. Ins. Co. 8 Rob. (La.) 442.

[3] Peoria Marine and F. Ins. Co. v. Lewis, 18 Ill. 553; Edwards v. Balt. Ins. Co. 3 Gill, 176; Kimball v. Howard Ins. Co. 8 Gray, 33; Knickerbocker Ins. Co. v. Gould, 80 Ill. 388; Duncan v. Topham, 8 Man. Gr. & Scott, 229; Waterman v. Dutton, 6 Wis. 265; Hall v. Delaplaine, 5 Wis. 206; Killips v. Putnam Fire Ins. Co. 28 Wis. 472; O'Conner v. Hartford F. Ins. Co. 31 Wis. 161; Blossom v. Lycoming F. Ins. Co. 64 N. Y. 166; Palmer v. St. Paul F. & M. Ins. Co. 44 Wis. 201; O'Brien v. Phœnix F. Ins. Co. 76 N. Y. 459; Rakes v. Amazon Ins. Co. 51 Md. 512; Hicks v. Empire F. Ins. Co. 6 Mo. App. 254; Underwood v. Farmers' Joint Stock Ins. Co. 57 N. Y. 500; Bunstead v. Div. Mut. Ins. Co. 12 N. Y. 81; Worsley v. Wood, 6 T. R. 710; Craig v. Parkis, 40 N. Y. 181; Inman v. West. Ins. Co. 12 Wend. 452; Diehl v. Adams Co. Mut. Ins. Co. 58 Pa. St. 452; Trask v. Ins. Co. 29 Pa. St. 198; Patrick v. Farmers' Ins. Co. 43 N. H. 621; Brink v. Hanover F. Ins. Co. 70 N. Y. 593; Smith v. Com. Ins.

condition in the policy, that preliminary proofs should be made, had been complied with, it was held supported by evidence that the insurer waived the proofs.[1]

PLEADINGS.— When the preliminary proofs of the loss have been made by the insured according to the contract, or have been waived by the insurer, expressly, or by such conduct as will relieve the insured from the duty of making them, and there is a refusal to pay the indemnity provided, resort must then be had to the judicial tribunals. In stating his case for recovery, the party must present all the facts upon which his right to recover depends. The contract should be either set out at length or in legal effect, with full allegations of the breach or breaches, the loss, the compliance of plaintiff with its requirements, if any, subsequent to the loss, or a waiver of them by defendant, or the impossibility of compliance, when that would operate to excuse, an allegation of the injury and its extent, demand, when the same is necessary, and refusal to pay. Upon the joinder of issue and the settlement of incidental questions affecting the right of recovery, comes the more important discussion of the amount of damages.

RULE OF DAMAGES ON OPEN POLICIES.— We have already seen that in cases of a valued policy the amount of recovery is fixed, and evidence of the loss is not admissible beyond or

Co. 49 Wis. 322; Ætna Ins. Co. v. Stanton (Geo.), 9 Ins. L. Jour. 6; Chandler v. Com. F. Ins. Co. 88 Pa. St. 224; Hibernia Ins. Co. v. O'Connor, 29 Mich. 241; Aurora F. & M. Ins. Co. v. Kranick, 36 Mich. 289; Harriman et al. v. Queen Ins. Co. 49 Wis. 71; Franklin Fire Ins. Co. v. Chicago Ice Co. 36 Md. 102; Home Ins. Co. v. Balt. W. Co. 93 U. S. 527; Levy v. Peabody Ins. Co. 10 W. Va. 560; Young v. Hartford F. Ins. Co. 45 Iowa, 377; Home Ins. Co. v. Lindsey, 26 Ohio St. 348; Farmers' Ins. Co. v. Frick, 29 Ohio St. 466; Jones v. Mich. Ins. Co. 36 N. J. L. 29; Basch v. Humboldt Ins. Co. 35 N. J. L. 429; Taylor v. Roger Williams Ins. Co. 51 N. H. 50; Hibernia Mut. F. Ins. Co. v. Meyer, 39 N. J. L. 482; Heath v. Franklin Ins. Co. 1 Cush. 257; Clark v. N. E. Ins. Co. 6 id. 342; Francis v. Somerville Ins. Co. 25 N. J. L. 78; State Ins. Co. of Mo. v. Todd, 83 Pa. St. 272; Mason v. Citizens' F. & M. Ins. Co. 10 W. Va. 572; Post v. Ætna Ins. Co. 43 Barb. 357; Peoria Ins. Co. v. Whitehill, 25 Ill. 466.

[1] Pine v. Reid, 6 Man. & Gr. 1; Atlantic Ins. Co. v. Manning, 3 Col. 224.

aliunde the contract.[1] But assuming that the policy is an open one, i. e., the value in case of loss has not been fixed by provision in the contract, then the rule as to the measure of damages is *the actual loss sustained by the insured at the time of the accident or loss, to be determined by evidence*, as in other cases of damage, controlled or varied only by the terms of the contract.[2] The original cost, or the cost of reproduction, is no necessary element of the value.[3] And when the insurance is upon a limited interest, for example, a mortgage on property, and not upon the property itself, the actual loss will control the amount of the recovery;[4] and the value of any remaining interest is not admissible to depreciate the amount of the limited interest for which recovery is sought.[5] The application of this rule has resulted in establishing other rules for the ascertainment of damages on this principle; and to some of the more prominent we will now refer. The insured offered to prove the actual cash value before the injury from which the damage caused by collision might be inferred, and thus the cash value of the property, when attacked by the fire, ascertained; and it was held that the evidence was rightly excluded, and that the only way to establish the damage was by ascertaining the cost of restoring the vessel to the condition she was in before the fire.[6] It is proper to observe of this case that the insured had two policies of insurance on the vessel; one covering accidents by collision, and one a fire policy, and the cause was tried on the refusal of the insurers to pay the latter loss. The evidence as to the value of the vessel, which was excluded, went to show its condition, not at the time of the accident by fire, but before.

[1] Ante, p. 68.

[2] Commonwealth Ins. Co. v. Sinnott, 37 Pa. St. 205; Portsmouth Ins. Co. v. Brazee, 16 Ohio, 82; Ins. Co. v. Transportation Co. 12 Wall. 194–203; Snell v. Del. Ins. Co. 4 Dall. 430; Carson v. Marine Ins. Co. 2 Wash. C. C. 468; American Ins. Co. v. Griswold, 14 Wend. 399; Savage v. Corn Ex. Ins. Co. 36 N. Y. 655.

[3] Ætna Ins. Co. v. Johnson, 11 Bush, 587; Com. Ins. Co. v. Sinnott, 37 Pa. St. 205; Carson v. Marine Ins. Co. 2 Wash. C. C. 468.

[4] Hadley v. N. H. F. Ins. Co. 55 N. H. 110.

[5] Carpenter v. Prov. etc. Ins. Co. 16 Pet. 496; Clark v. Wilson, 103 Mass. 219.

[6] Ins. Co. v. Transportation Co. 12 Wall. 201, citing 10 Gray, 143.

The decision is a very clear recognition of the principle of the general measure of damages, and the strict application of it to the contract; and it was observed by the court that there was no other way of ascertaining such damages except to find "the cost of restoring the vessel to the condition she was in before the fire, and not her condition before the collision, which preceded and caused the fire." The court also observed that if, in restoring the vessel, the repairs covered the injuries by the collision, as well as by the fire, the former should be excluded in fixing the amount of the loss by fire.[1] If goods are jettisoned, their value must be ascertained by the prime cost.[2] But while this is proper evidence, it is held that it is not conclusive, but the insured may prove and recover the actual value of his loss.[3] In this case the vessel had been purchased by the insured at a condemnation sale for a low figure, and the insurers insisted that this price should govern the amount of the damage; but the court was clearly of opinion that the insured "was entitled to prove and to recover the actual value of the vessel;" and Mr. Justice Washington observed, in the case of Carson v. Marine Ins. Co.[4] (a case involving insurance on cargo), that he could see no reason for establishing this rule which would not equally apply to the case of goods insured.

The cases cited apply this rule under various circumstances. In one policy it was stipulated that "the said loss or damage be estimated according to the true actual cash value of the said property at the time the loss shall happen." The court below instructed the jury "that the value as estimated in the manufacture of each machine, and before it was tried in the field, would be the standard of valuation." This instruction the supreme court held to be error, and said that the true rule was, "what were the machines worth at the time the fire happened, and this must be ascertained by testimony."[5] In ascertaining the value of the property insured the premium on the

[1] See Dows v. Faneuil Hall Ins. Co. 127 Mass. 346.

[2] Le Roy v. United Ins. Co. 7 John. 344.

[3] Snell v. Delaware Ins. Co. 4 Dall. 430.

[4] 2 Wash. C. C. 472.

[5] Com. Ins. Co. v. Sinnott, 37 Pa. St. 205.

policy is to be added[1] as part of the value. So also it is held that the value insured is estimated upon the proof of value with charges upon the goods added.[2] But in a case where the insured abandons the property to the insurer, who refuses to accept the abandonment, the insured cannot recover for any but necessary expenses. And if in such case, instead of selling the ship, as he may do, or laying her up and discharging the crew, the insured continue the crew in service under wages, he cannot make that expense a charge on the underwriter. The latter is answerable for the loss of the subject insured, with the necessary expenses incurred in laboring for the recovery and safety of it, but his contract reaches no other charge.[3] The actual value of the property lost will furnish the measure of damages in all cases where there is an open policy and the amount named in the policy is equal to the loss.[4] In an action brought on an agreement to insure certain property, on a failure to do so, the court held the measure of damages to be the value of the property upon proof of its loss.[5] And where the liability of the insurer, by the terms of the policy, could not exceed one-half the value of the property destroyed, it was held that the value of the goods at the time of the loss, furnished the basis upon which the damages were to be calculated. The cases on the subject are too numerous to cite, but they support the general proposition stated with practical uniformity.[6] In cases where the loss exceeds the amount of the insurance, the insured has the right to recover the whole amount of the policy;[7] and although the policy contains a stipulation "that, in all cases of other insurance, the insured shall not be entitled to demand or

[1] Louisville, etc. Ins. Co. v. Bland, 9 Dan. 143.

[2] Ante, p. 68; 7 Johns. 344.

[3] Frothingham v. Prince, 3 Mass. 563; Lawrence v. Van Horne et al. 1 Caines, 276; Henshaw v. Marine Ins. Co. 2 Caines, 274; McBride v. Marine Ins. Co. 7 Johns. 430; Barker v. Phenix Ins. Co. 8 Johns. 307.

[4] Wolfe v. Howard Ins. Co. 7 N. Y. 583; Savage v. Corn Ex. F. & Inland Ins. Co. 36 N. Y. 655.

[5] Ela v. French, 11 N. H. 356.

[6] Fried v. Royal Ins. Co. etc. 47 Barb. 127 — a case of life insurance; Wills v. Wells, 8 Taunt. 264; Atwood v. Union Mut. F. Ins. Co. 28 N. H. 234; Fried v. Royal Ins. Co. 50 N. Y. 243.

[7] Etna Ins. Co. v. Tyler, 16 Wend. 385; Strong v. Manuf. Ins. Co. 10 Pick. 40; Commonwealth v. Hide & L. Ins. Co. 112 Mass. 136.

recover on this policy any greater portion of the loss or damage than the amount truly insured bears to the whole amount insured on said property," if the property exceeds in value the amount of the insurance, the insurer is liable for the sum contained in the policy.[1] The loss is usually estimated in cases of marine insurance by the value at the time and place where the cargo was to be sold.[2] The value of the property in such case may be ascertained by the original value at the port where the voyage commenced, deducting the wear and tear; and the value of goods is usually that which they had at the place of lading;[3] the exception to this being, that where the goods are placed on board for a particular market, the value at that point is taken to be the real value — the general rule being, that gains and profits must be insured as such, and are not included, unless in the particular case specified, in the general loss.

In cases of partial loss. — While the rules already stated and examples given in illustration are sufficient to furnish a guide to the measure of damages in cases of entire loss of the subject insured, they do not fully apply in a class of instances which are complicated by the fact of only a partial injury. It becomes important, therefore, to inquire when there is a total loss, and when it may be so treated, though the loss is only in fact of a part. The American rule is, when in marine insurance the cost of repairs exceeds half the value of the property insured, the loss is regarded as total, and the insured by an abandonment becomes entitled to damages in the full amount of the insurance.[4] In the case last cited, the vessel having been condemned by the French government, a formal abandonment was not regarded as necessary to perfect the right of

[1] Etna Ins. Co. v. Tyler, 16 Wend. 385; Haley v. Dorchester Ins. Co. 1 Allen, 536; Richmondville Union Seminary v. Hamilton Mut. Ins. Co. 14 Gray, 459.

[2] Clark v. United F. & M. Insurance Co. 7 Mass. 345; Lee v. Grinnell, 5 Duer, 400.

[3] Coffin v. Newburyport M. Insurance Co. 9 Mass. 436; Minturn v. Cal. Insurance Company, 10 Johns. 75.

[4] Smith v. Manuf. Ins. Co. 7 Met. 448; Gracie v. New York Ins. Co. 8 Johns. 237.

the insured to recover for a total loss. If a total loss *actually* occurs, the assured may recover for such loss without an abandonment; if the loss is, however, only constructively total, a formal abandonment is necessary to complete the right of the assured to recover. But the insured is never required to abandon and claim for a total loss unless the subject is totally destroyed. He has his election to claim for a partial loss and retain that which is preserved from the peril.[1] Assuming that a case exists which entitles the insured to claim as for a partial loss, and, when it not being total, he elects to receive his insurance on that part which has been lost, what is the rule? In cases where the value is fixed by the policy, the rule, as already stated,[2] is that the insured is entitled to recover the proportion which the loss bears to the whole amount fixed in the policy, and no evidence in such cases is admissible as to the value — the policy being conclusive as to that, while the evidence is admitted to fix the proportion of the loss to the whole amount insured. But it must be understood that a mere specification of value will not convert an open into a valued policy, when either through repugnant conditions, such as a limitation to the amount necessary to replace, the actual value is made the basis of indemnity, or when, in case of partial loss, there is no apparent means of determining the amount of indemnity apart from the actual damages. When the part lost is of a specified number of valued articles of equal worth, the damage is that proportion of the valued sum.[3] A very common device for their own protection, by insurers, is to insert in the contract a provision giving the right to elect to replace the loss — in fire insurances, to rebuild — or pay the insurance; but all such arrangements are unknown to the general law of insurance, except as they are made a part of the contract by express stipulation of the parties. In such cases it is held that the contract is not simply one of insurance, but is, to use the language

[1] See 8 John. 237, supra; Snow v. Union Ins. Co. 119 Mass. 592, and cases cited in the opinion.

[2] Ante, p. 68; Harris v. Eagle Fire Co. 5 John. 374.

[3] Brown v. Quincy Mut. F. Ins. Co. 105 Mass. 396; Cushman v. N. W. Ins. Co. 34 Me. 487.

of the court in a New York case, a "building contract," and is to be interpreted like any other of that kind.[1] In the case referred to, the insured, after a loss by fire, commenced to rebuild, and the insurance company concluded to avail itself of its option to "replace," and offered to do so. The insured declined to recognize the right of the company to refuse to pay the insurance, completed his building, and then brought suit on the policy for the value of the property destroyed. The court held that the plaintiff's insurance policy had become a contract to "rebuild," and nonsuited the plaintiff because the defendant was not permitted to do so. While such clauses in contracts are common, and are a good means by which the insurer retrieves his misfortune, they are but inventions to escape liability or restrict it, and are hardly within the pale of legitimate insurance. When the partial loss complained of is upon an open policy, the damages follow the rule — the actual cash value of the goods where laden, with interest and charges added. Profits are excluded because they are themselves the subject of separate insurance; the exception being, that when a ship is loaded and insured for a particular market,[2] the value at the port of destination is taken as the true value for which the insurer is liable in cases of contribution by way of average.

Losses are adjusted on the principle of indemnity.— In adjusting these partial losses, the guiding principle is that the contract of insurance is based on the idea of indemnity to the insured in case of loss; hence all means which the law supplies, independent of the contract, for ascertaining the amount of the injury, have their origin in the idea of indemnity. So, while it is true that where there has been a total loss of the subject of insurance, and the price has been fixed by the contract, that value must be taken; if the value has not been fixed, and the subject has been lost, its actual cash value, to be ascertained by competent evidence, must be accepted by the insured; on the same principle, where an insurance is effected on an entire cargo, or on all goods to which it attaches, if part of the cargo or goods is safely delivered on shore, and the balance lost,

[1] Beals v. Home Insurance Co. 36 N. Y. 522.

[2] Ante, p. 77.

a proportionate reduction must be made from the amount of the insurance; and it makes no difference whether the policy be a valued or open one, because by the delivery of part, so much has been withdrawn from the liability insured against;[1] and where there is an insurance on the charter of a ship, or the freight of a full cargo, if less than a full freight would have been insured, had there been no loss, the insured must submit to a proportionate deduction in the event of loss.[2] Where there is an open policy on the freight, the manner of arriving at the indemnity is to ascertain the loss by computing the entire amount of freight payable, deducting what is saved, and the balance will constitute the amount to be paid. No deduction is made for expenses in this calculation.[3] Whilst this rule seems to be a departure from the strict doctrine of indemnity, it is supported upon the ground that it is the universal usage, and is analogous to the rule of fixed damages in valued policies.[4] Where the injury occurs to the ship, and the question is as to the extent of the damage, the reasonable rule is to ascertain what has been the actual cost of repairs, where they have been made, or the estimated cost, if they have not been made, and these will constitute the loss to be paid.[5] If the ship has been sold without repairs, under circumstances which do not entitle the owner to claim for an entire loss, the insured is entitled to recover the difference between the price the ship brought and her value at the inception of the risk. In order to limit the effect of this general rule, it is held that, in making repairs, instead of charging the insurer with the entire cost, while the owner who retains the renewed ship is put in a better position by the substitution of new material for old, a usage has grown up, and is now sanctioned by the courts, by which one-third of the cost of the new is subtracted in favor of the insurer.[6] And this rule is again limited, so that where the owner has derived no benefit, as where the vessel was new and in her first voyage, or where the ship has been broken up or sold, the reduction is

[1] Tobin v. Harford, 13 C. B. (N. S.) 791; affirmed, 17 id. 528; Brooke v. Louisiana Ins. Co. 4 Mart. (La.) N. S. 640, 681.

[2] Forbes v. Aspinall, 13 East, 323.

[3] Palmer v. Blackburn, 1 Bing. 61.

[4] Moss v. Smith, 9 C. B. 104.

[5] 4 M. & G. 669.

[6] Poingdestre v. Royal Exchange, R. & Mood. 378.

not made.[1] In argument in the court of exchequer in this last case, Sir F. Pollock said, in reply to the attempt to procure a reduction on account of repairs to a ship on her first voyage, that "a policy of insurance is a contract of indemnity, which is not to be put aside by any rule not as plain as that which makes a bill payable after three days' grace," and Lord Abinger, C. B., agreed with him. Whether charges incurred in the preservation of vessel and cargo are recoverable as average loss, or under the provision for "suing, laboring and traveling," seems as yet uncertain. Such charges have been recovered where they were incurred before a loss, because, as the vessel became afterwards a total loss and the underwriters had to take her and pay the insurance, they took her *cum onere* — taking the place of the owner, who would have been liable.[2] While the insurer is not liable for provisions or traveling expenses of a ship, and they are not recoverable from him *as insurer*, where he succeeds the owner, by reason of his contract, which permits the latter to abandon to him, he becomes liable in his new character of owner.[3]

General average.— Intimately connected with the question of damages in marine insurance cases is the law of "general average." When, owing to stress of weather, or other great peril, to which the ship and cargo are subject, extraordinary sacrifices are made of some portion, or some extraordinary expenses are necessarily incurred, for the benefit of the ship and cargo, this loss is held as a lien on the balance remaining of the cargo and the ship, to be made good to whoever has been the particular sufferer.[4] The term "general average" is a contribution made by all parties concerned or interested in either ship or cargo, towards reimbursing the individuals or persons whose particular loss was incurred for the common benefit. Whatever is done deliberately and voluntarily under circumstances of great peril and distress for the preservation of the ship and remaining cargo, may be brought into general average, and must

[1] Fenwick v. Robinson, 3 C. & P. 323; Pirie v. Steele, 8 C. & P. 200.

[2] Lirie v. Janane, 12 East, 648; Le Cheminant v. Pearson, 4 Taunt. 367.

[3] Thompson v. Bancroft, 4 East, 34.

[4] Marsh. Ins. 544; Abbott on Shipping, 296; Strong v. New York F. Ins. Co. 11 John. 334.

be made good by the insurers against the peril insured against in proper proportion.[1] And the adjustment of the general average, though made in a foreign country, and upon a basis which would not be recognized where the insurance contract was made, is held to be conclusive on the insurer.[2] The English rule is less strict on the insurer, and requires "clear proof" that the foreign adjustment could have been enforced where it was made.[3] To entitle the loss to be brought into general average the sacrifice must not be chargeable to the fault of the owner, and it must be voluntary and intended for the common benefit.[4] Jettison of deck cargo cannot be claimed for general average, nor a loss wholly due to a sea peril.[5] When the duty to contribute by way of general average is settled, the next question is as to the sources of the contribution; and here it should be observed that goods which are sacrificed, contribute equally with such as are saved; for if this were not required, the loser would be in a better condition than the other contributors, as he would have the entire value returned to him, while his co-sufferers would lose a proportion.[6] Nor does anything contribute which has not been exposed to risk; for instance, where part of a cargo has been landed or has been sold for ship necessities.[7] Generally it is said that the ship and freight always contribute, and all goods carried for traffic whether they pay freight or not, and whether they belong to merchants, passengers, owners or masters, and they pay according to their value.[8] Bullion and jewels contribute, unless worn on the person. Baggage and wearing apparel of passengers are exempt. Deck goods contribute — though generally, as we have seen, they could not demand contribution if lost; and where a ship is ransomed from pirates the

[1] Russ v. Ship Active, 2 Wash. C. C. 226; Strong v. Ins. Co. 11 John. 333; Louisville, etc. Ins. Co. v. Bland, 9 Dana, 147.

[2] 11 John. supra; Depau v. Ocean Ins. Co. 5 Cow. 63.

[3] Harris v. Scaramanger, L. R. 7 C. P. 481; Stewart v. West India, etc. Co. L. R. 8 Q. B. 88, 362; Power v. Whitmore, 4 M. & S. 141; Mayne on Dam. sec. 466.

[4] Butler v. Wildman, 3 B. & Ald. 402; Scudder v. Bradford, 14 Pick. 13; Wolcott v. Eagle Ins. Co. 4 Pick. 429; Smith v. Wright, 1 Caines, 43.

[5] Lenox v. United Ins. Co. 3 John. Cas. 224; Crane v. Aiken, 13 Me. 229; Covington v. Roberts, 2 B. & P. N. R. 378; Power v. Whitmore, 4 M & S. 141.

[6] Arnold on Ins. 918; Abbott on Ship. 505, 552, 11th ed.

[7] Ibid.

[8] Brown v. Stapyleton, 4 Bing. 119.

seamen contribute out of their wages; and where freight is due at the time, it is subject to the contribution. If the freight has been paid in advance, it is exempt.[1] Neither are provisions for the ship, or anything that belongs to the "wear and tear," liable to be brought in.

The contribution is dependent on two things which are parts of one design: 1st, the method of ascertaining the loss; and 2d, the method of ascertaining the value of the property saved. Both depend upon where the adjustment is effected. If it is done at the port whence the ship sailed, the loss will be the invoice price, and charges added, unless the goods can be replaced, in which case the loss will be the invoice price and shipping charges, but no insurance.[2] Prepaid freight must also be added if the goods would have been carried on.[3] The value of the property saved is determined by the same rule. When the adjustment takes place at an intermediate port, or at the ship's port of destination, the property is estimated at the value it would sell for, deducting freight, duty, and landing expenses. And where the property saved has been damaged by the same accident that caused the loss, or by a subsequent disaster, their value is estimated as if all the lost and saved had arrived at port in the same condition. If the goods sacrificed are recovered before the adjustment, the loss is estimated by adding to the damages sustained by them, the expenses attending their recovery. The principle running all through these various rules is that equality is equity, and the intention is to do simply what is just. Rules are adopted with modifications and exceptions to effectuate their purpose, and are not allowed to override the real purpose of accomplishing what is just.[4] When damages occurring to the ship are of such a character as to amount to a partial loss, the manner of computing the general average is to ascertain the cost

[1] Frazer v. Worms, 19 C. B. (N. S.) 159.

[2] Tudor v. Macomber, 14 Pick. 34.

[3] Frazer v. Worms, supra.

[4] On the subject of the manner of making adjustments the following cases may be consulted: Miller v. Letherington, 6 H. & N. 278; affirmed, 7 H. & N. 954; Gould v. Oliver, 4 Bing. N. C. 134; Milward v. Hibbert, 3 Q. B. 120; Crane v. Aiken, 13 Me. 229; Lenox v. United Ins. Co. 3 John. Cas. 224; Smith v. Wright, 1 Caines, 43; Dodge v. Barton, 5 Greenl. 286. Also the treatises of Arnold and Benecke on this branch of the subject of insurance.

of repairs, deducting the one-third new from old.[1] Where there is a total loss of the ship, the measure of damages, or rather the amount of the loss, is held to be the value the ship would have been to the owner if he could have had her in security at the time of the loss, with the gross freight she would have earned by the voyage.[2] This is not the accepted law in England or in continental countries, according to Benecke, but it may be regarded as the law of this country, notwithstanding the opinion of Chancellor Kent in the case of Bradhurst v. The Columbian Ins. Co.[3] The rule laid down by the supreme court of the United States is supported by very able American authority, which is cited, and has never been modified by that court. When the ship has been sold, the price she brought fixes her value in making the adjustment.[4] If she has not been sold, or has been totally lost, the value is ascertained by first ascertaining her value when the voyage was commenced; from this is subtracted the provisions and stores used up to the time of the loss, and any partial loss she may have sustained anterior to the final loss; and it is said that to this should be added any amount paid the ship as contribution on account of general average loss to herself.[5] The balance will be the basis of the contribution. The cases involving the method of the adjustment are almost without number; and the professional reader will find it to his advantage in complicated cases to consult a standard work like Arnold, or Phillips, where the rules and exceptions are particularly discussed in detail.

[1] Abbott on Ship. (11th ed.) 551.
[2] Columbian Ins. Co. v. Ashby, 13 Pet. 331.
[3] 9 John. 13.
[4] Bell v. Smith, 2 John. 98.
[5] Arn. on Ins. 986 (4th ed.).

Section 2.

FIRE INSURANCE.

Rule of indemnity the same as in marine insurance; rules of construction the same; contract may be by parol; examples — General rule of damages; insurer bound for the whole loss within the amount of the policy — What the jury may consider; illustrations — Damage to be proved by legal evidence as in other cases — General average in fire insurance; example — Insurer's liability on contracts to pay all losses, not exceeding a fixed proportion of stock insured; instances; exceptions — Damages in special cases — Insurance on commission goods — Rule in case of loss where mortgagee insured; where he insures for his own benefit; contradictory decisions; Massachusetts rule commended — Contracts to replace or rebuild — No defense that a subsequent law or ordinance forbids the erection; insurer may put the insured in as good condition by repairs and renewals; particular instances — Adjustments and replacements where there are several policies; damages for failure of insurer to fulfil building contracts.

Fire insurance.— Thus far the subject of damages recoverable in marine insurance has been observed upon, and while the general remarks as to the character and quality of the contract are equally applicable to fire insurance, and many of the cases are cited from either class of insurance with propriety, there are some differences that demand notice.

All that has been said as to the contract being one for the indemnity of the insured for marine losses, is equally applicable to contracts of insurance against fire.

Whenever it is established that the parties have concluded a contract, by which the risk insured against, the amount of the indemnity, the duration of the obligation, the amount of the premium, and the manner of its payment, are definitely fixed, there is an agreement which is as sacred in the eye of the law as any that can be made.[1] And this contract, which must be such as to bind both parties to it,[2] is to be interpreted and construed, except when controlled or limited by statute, by the same rules and principles of interpretation which govern other contracts.[3] Contracts *for* insurance may be not only made

[1] First Baptist Church v. Brooklyn Ins. Co. 28 N. Y. 153; Strohn v. Hartford Ins. Co. 37 Wis. 625.

[2] Wood v. Poughkeepsie Ins. Co. 32 N. Y. 619.

[3] Portsmouth Ins. Co. v. Brinckly, 2 Ins. Law Jour. 842; Ill. Ins. Co. v. Marseilles Manuf. Co. 6 Ill. 236, supra.

by parol, but it has been held that they may be so made, though the charter of the insurance company requires all contracts *of* insurance to be in writing;[1] and if the risk has been accepted, and notice of the fact forwarded to the insured, though it may not have reached the latter until after the destruction, the insurer's obligation is complete.[2] It has been held that the contract is complete though the insurer, an incorporated company, had left the matter in the hands of an agent to determine, if he had agreed to it, though the company had not received any notice of his acceptance of it.[3] And the contract is complete when the policy has been forwarded to the agent for delivery to the insured, though in fact it has not been delivered.[4]

General rule of damages.— Assuming, therefore, the existence of a contract between the insurer and the insured against loss of or injury to the subject by fire, and assuming that a loss has occurred, the first question is as to the amount which the insured can recover.

Remembering the rule, that insurance is a contract of indemnity, and that the insurer agrees for the *immediate*, not the *remote* consequences of the loss,[5] he is bound to pay the whole loss, if within the amount of the policy, without regard to the proportion between the amount insured and the value of the property at risk; and he is liable for the damage to the building or goods, excluding all gains or profits which might have come to the insured if the fire had not occurred.[6] The qualification just stated does not extend to the exclusion of evidence of the rental of buildings insured, where the value of the buildings is in issue, and the evidence is offered to prove such value.[7]

[1] Security Ins. Co. v. Kentucky Ins. Co. 7 Bush, 81. See contra, Head v. Providence Ins. Co. 2 Cranch, 127.

[2] Tayloe v. Merchants' Ins. Co. 9 How. (U. S.) 390; Hallock v. Commercial Insurance Co. 26 N. J. L. 268.

[3] Ellis v. Albany City Ins. Co. 50 N. Y. 402.

[4] Hallock v. Ins. Co. supra.

[5] Insurance Co. v. Boon, 95 U. S. 117; Insurance Co. v. Express Co. id. 227.

[6] Liscom v. Boston Mut. Fire Ins. Co. 9 Met. 205; Underhill v. Agawam Mut. Ins. Co. 6 Cush. 440; Phœnix Ins. Co. v. Cochran, 51 Pa. St. 143; Welles v. Boston Ins. Co. 6 Pick. 182; Wright and Pole, Matter of, 1 A. & E. 621; Niblo v. North Am. Ins. Co. 1 Sandf. 551.

[7] Cumberland Valley Mut. Prot. Co. v. Schell, 29 Pa. St. 31.

Where an insured building is totally destroyed, in estimating the amount of the loss, there is no rule based on the estimated cost of a new building, with the difference between the new and the old structure, as in adjusting marine losses on ships;[1] nor does the cost of rebuilding furnish the rule of damages. The fair value of the property destroyed, as fixed by the judgment of a jury, is accepted as decisive of the question.[2]

What jury may consider.—It is said when the subject of the insurance has not a "ready" market value, the jury have the right to form their own judgment of the value, provided it be not unfair. The cost of replacing the thing, deterioration, its worth to a stranger, are elements proper to be considered, but are not conclusive.[3] And in the case of articles having a ready market, the market value at the time and place of the destruction is regarded as the cash value; but a temporary rise or depression of that value, above or below the ordinary value, should not be allowed to control. Neither cost, profits, or unpaid duties, are necessary elements, unless the latter reduce the insurable interest; and in the case of damaged goods, a fair sale at auction with the knowledge of the insurer furnishes a proper basis for fixing the damages.[4] In cases where the insurer restricts his liability by the policy to two-thirds, or some proportion of the actual value of the building and goods "at the time of loss," the limit applies equally to both classes of property; and when the insurer provides that partial losses shall be paid in full, not exceeding the amount insured, provided the insured had on hand the lowest amount stated in the application, as if the insurance is on merchandise to the amount of three thousand dollars, it is not regarded as a case of partial loss, though a small amount, for example, twenty or thirty dollars' worth, were saved, because that was not the real intention of the parties.[5]

[1] Miss. Mut. Ins. Co. v. Ingram, 34 Miss. 215.

[2] Brinley v. National Ins. Co. 11 Met. 195.

[3] Brinley v. Nat. Ins. Co. supra; Niblo v. North Am. Ins. Co. 1 Sandf. 551; Commonwealth Ins. Co. v. Sinnott, 37 Pa. St. 205.

[4] Wolfe v. Howard Ins. Co. 1 Sandf. 124; Hoffman v. Ætna Ins. Co. 1 Rob. (N. Y.) 501; Hoffman v. Western Insurance Co. 1 La. An. 216.

[5] Singleton v. Boone County Ins. Co. 45 Mo. 250.

There is no right of abandonment in fire as in marine insurance,[1] and goods destroyed are to be paid for at their value at the time of their loss; and if they are only damaged, the difference between their value in their present and their prior condition. When the goods are so injured as not to be salable in the ordinary way, the insured may, on notice to the insurer, or with his knowledge, make a fair sale at auction, and, crediting him with the proceeds, recover the balance. If the sale is made without notice to, or knowledge of, the insurer, the insured takes upon himself the burden of proving that the goods brought all they were worth, the returns of the sale, of themselves, being insufficient evidence of the value.[2] When the parties have agreed in the policy upon the manner of ascertaining the value of the property, the law will sustain the agreement, as already stated in the opening of this chapter.[3]

Damages proved by any legal testimony.— If no such agreement exists, then the law permits the insured to prove by any legal testimony what the value actually was, so as to fix the damages;[4] and as to what testimony is admissible to establish the ultimate point in the inquiry, is more a question in the law of evidence, than in that of insurance. There are many varying and inharmonious decisions on what is proper testimony, but for the reason assigned they will not be further referred to.

General average in fire insurance.— While it is said the election of the insured to abandon the property does not exist in fire, as in marine insurance, and this constitutes one of the distinctions between them, they have in some cases a feature in common which we would least expect to find, viz.: general average. During the progress of a fire the insured, with the approval of the insurer, procured and hung out of the windows of the building wet blankets, which proved to be of essential service in stopping the progress of the flames, and in preserving the goods in the building. On this state of facts, it was held[5] that the insurer and the insured should contribute towards the

[1] Henderson v. Western M. & F. Ins. Co. 10 Rob. (La.) 164.

[2] Ibid.

[3] Ante, p. 66.

[4] Lycoming Fire Ins. Co. v. Jackson, 83 Ill. 302.

[5] Welles v. Boston Ins. Co. 6 Pick. 182.

loss of the blankets so used, in proportion to the amount which they respectively had at risk in the store and contents. It was a practical case of dry land jettison, and general average contribution, deduced from the "laws of the sea." Common sense and common justice proved superior to the general rule, that, in a loss under a policy of insurance against fire, the amount is to be paid without contribution; and shows that the insurer may become liable beyond the amount named in the policy.

Recoveries in special cases.— If a contract of insurance is to the effect that the insurer will pay all losses and damages, not exceeding a specified sum, which may happen to the insured property during the term of the insurance, and that the loss and damage shall be estimated according to the true and actual value of the property at the time the fire shall occur, and be paid at the rate of two-thirds of the actual loss,— the insurer's liability is not limited to two-thirds of the actual loss. The liability under such a contract is to pay all losses sustained by the insured within the sum named in the policy, and not exceeding two-thirds the value of the stock insured. If the goods insured were worth only the amount specified in the policy, the insurer would only be liable for two-thirds of that amount; but if the stock were worth twice the amount of the sum stated in the policy, the insurer would be liable for the whole sum stated therein, because the loss exceeded the two-thirds of value which the insurer agreed to pay.[1] And whenever the contract is that the insurer will pay the value, or a certain proportion of the value of the property at the time of the loss, that value is determined by its *then* value, without reference to its worth at the time of the inception of the risk.[2] In cases where divers lots of goods in different places or buildings, and separately valued, are insured together for a gross sum named in the policy, though only on a proportion of the value, and a loss exceeding the proportion happens to a part of the lots, the liability of the insurer is not confined to the proportion of the value of the lots which

[1] Ashland Mut. Ins. Co. v. Housinger, 10 Ohio St. 10; Huckins v. People's Ins. Co. 31 N. H. 238.

[2] Huckins v. People's Mut. F. Ins. Co. 31 N. H. 238; Post v. Hampshire Mut. F. Ins. Co. 12 Met. 555; Atwood v. Union Mut. F. Ins. Co. 28 N. H. 234.

are destroyed, but is to the extent of the injury, not exceeding the amount named in the policy. In a case in the supreme court of New Hampshire, where an insurance was effected for a gross sum on the plaintiff's house and sheds, valued at $1,200, furniture therein $250, barns $250, barn and shed in the meadow $250, hay and grain therein $400, it was held in a suit involving losses to the amount of $900, the loss being of the barn and sheds in the meadow and the hay and grain therein, that the insurer was liable for the entire loss of all the hay in both barns, and not simply a proportion of each parcel or lot actually destroyed.[1] On the same doctrine, it was held in Louisiana, that where an insurance was taken on cotton to the amount of $20,000, the cotton being stored in seven different warehouses, and cotton to the value of $17,000 was destroyed in one of the warehouses, the insured was entitled to recover the full sum lost, and was not limited to a proportion to be ascertained by a comparison of the sum in the policy to the value of the whole property insured. The court construed the policy to mean that the insurer engaged by his contract to indemnify the insured against all loss or damage, on all and every part and parcel of the cotton insured, to the extent of $20,000; and as the loss was within that sum, although six of the seven lots insured were uninjured, the insured was entitled to recover for the entire loss.[2] And it may be stated as a rule, that where the amount of insurance is not distinctly apportioned between the subjects of it by the policy, the latter, to its full amount, will bear any loss that happens to either.[3] But if the policy is specifically limited to certain designated subjects, it will not be extended beyond the things specified.[4] In the New Hampshire case just cited, it was held that on a policy for $1,500, where the by-laws of the insurer provided that in no case would the company become bound to pay more than two-thirds of the actual value of the property insured at the time of loss, and the insured proved that he had on hand at the time property of the value of $2,250, that the insurer

[1] Rix v. Mut. Ins. Co. 20 N. H. 198.
[2] Nicolet v. Ins. Co. 3 La. 371.
[3] Blake v. Exchange Mut. Ins. Co. 12 Gray, 265, and cases cited supra.
[4] Supra; Huckins v. People's Ins. Co. 31 N. H. 238; Storer v. Elliott Ins. Co. 45 Mc. 175; Liddle v. Menket F. Ins. Co. 4 Bosw. 179; Bengass v. Alliance Ins. Co. 10 Allen, 221.

might recover the full amount of $1,500, it appearing that so much had been destroyed.

Insurance on commission goods.— There is some difficulty in applying the measure of damages, where the policy is taken upon goods which are held for sale on commission. It is clear that unless the policy specifies that the goods are held upon commission, and are insured for the true and actual or some specified value, and insured as such, the loser cannot recover beyond the loss of his commissions. A party who sells goods on commission has such an interest as entitles him to insure them, but he must not insure such goods as his own; for as his contract is one of indemnity, and his interest, in fact, limited, he will be restricted to his actual loss. But where the property so held is insured, as well the interest of the factor as of the consignor whom he represents, and who need not be specified or named, the policy will attach upon the thing, as in other cases. And where a policy embraces "goods as well the property of the assured as those held by him on commission," and agrees to make good to the insured all loss and damage, to be estimated according to the true actual value at the time the loss shall happen, the insured may recover the whole value of such property, and not merely the amount of his lien or commissions.[1] In a Massachusetts case the insurers were commission merchants, and took out a policy for $10,000 on merchandise in their store, and by them held in trust. At the time of taking the policy they represented to the insurance company that they were in the habit of receiving goods for sale; that they made advances on some of them, and on some they made none; that the goods on hand were constantly changing by sales and new consignments; and that they desired to be insured on such goods to secure themselves against loss by fire, as the consignors might not be able to repay the advances. On the case stated, it was decided that the insurer was liable only to the extent of *the interest* of the insured in the property lost; in other words, to such goods, and only to the extent that advances had been made or commissions attached.[2]

[1] De Forest v. Fulton F. Ins. Co. 1 Hall, 84; Brichta v. New York Ins. Co. 2 Hall, 372.

[2] Parks v. General Interest Assurance Co. 5 Pick. 34.

Insurance by mortgagee.— Where a mortgagee of property insures on his own account, it is but an insurance to the extent of his debt, and the insurer is liable only to the amount of the debt; but if the mortgagor takes out a policy and assigns it to the mortgagee as part of the security, the mortgagee is entitled to recover the whole amount, though if there be an overplus beyond what is due on the mortgage debt, he will be liable to account to the mortgagor for it.[1] In a case arising in Massachusetts, it was held that when a mortgagee at his own expense insures his interest in the property against loss by fire, without particularly describing the nature of his interest, he is entitled on the happening of the loss, to recover the amount of his loss as mortgagee to his own use, without first assigning his mortgage to the insurer; nor is he compelled to account to the mortgagor for the amount so recovered in whole or in part; he retains a right to recover his whole debt from the mortgagor. And, on the other hand, when the debt is paid by the mortgagee, the money is not in law or equity the money of the insurer, who has paid the loss, nor is it money paid for his use.[2] It must be confessed that at first view the doctrine of the case of King v. State Mutual F. Insurance Co. seems at variance with other well established principles, but a closer examination of it will show it to be sound law. If a mortgagor insures and assigns the policy to the mortgagee as a further security for his debt, or if the mortgagee agrees to insure as part of his contract with the mortgagor, it is reasonable to say that he shall, as between him and the mortgagor, have only his debt, and that the policy is but a part of the security for that debt; but when the mortgagee, for his own security and at his own expense, and for his own exclusive benefit, procures an insurance, there is no such relation between the mortgagor and mortgagee as would authorize the former, or any one subrogated to his rights, to call upon the insured for any part of the money paid on such policy.

The insurance company having received its premium, and the

[1] Tyler v. Etna Ins. Co. 16 Wend. 385; Carpenter v. Providence Ins. Co. 16 Pet. 495; Foster v. Equit. Mut. F. Ins. Co. 2 Gray, 216; McEwan v. Western Ins. Co. 1 Mich. N. P. 118.

[2] King v. State Mut. F. Ins. Co. 7 Cush. 1. The English case of Dobson v. Land, 8 Hare, 216, proceeds upon similar principles.

event having occurred upon which its liability became fixed, could no more defend the action than in any other case of a contract liability; nor would the mortgagor have any right to call on the insured, because the money was procured on an independent contract and consideration, moving from the party who received it. This case is supported by some subsequent adjudications, and seems on principle to be unassailable.[1] It is further announced in the case last cited from New Jersey, that where a mortgagee holds other securities for the same debt and effects insurance on the mortgaged property, and subsequently parts with any of his securities, or part of his mortgage is paid, the insurer will only be liable on his policy to the amount remaining unpaid. But if the mortgagee parts with his other securities, or receives payment of part of his debt after a suit has been commenced, he is entitled to recover the full amount of his insurance. Nothing else being put in issue by the pleadings, the right of the parties must be determined as they existed at the time the suit was instituted. If the mortgagee has been paid the debt, to protect or secure which the insurance was effected, or if he has impaired the rights of the insurer in any securities, to the benefit of which the insurer was entitled, the latter must resort for relief to a court of equity, his equitable claim not being a proper subject for a jury.

It is respectfully submitted that the whole difficulty here suggested is based on the erroneous notion that a contract made by one person for his own benefit, on a consideration proceeding from him, with which the other has nothing to do, may be treated as giving that other a right. Of course under the code system of pleading, where legal and equitable defenses may be mingled in the same action, the difficulty last suggested would have no existence. In New York[2] it was held that, when the insurer did not have *notice* that the insurance was on a mortgage interest, it was no defense to the action on the policy by the mortgagee, that the mortgage was ample security for what

[1] Concord Mut. Ins. Co. v. Woodbury, 45 Me. 452; Howard v. Lamar Ins. Co. 51 Ill. 409. It is questioned in New Jersey, and the opposite rule is there recognized. Sussex Ins. Co. v. Woodruff, 26 N. J. L. 541.

[2] Kernochan v. New York Bowery Ins. Co. 17 N. Y. 428.

remained unpaid on the mortgage debt, notwithstanding the loss by fire, and that therefore the plaintiff was not injured, though a loss had actually occurred. The court said that "if in any case the insurer of a mortgagee is entitled on payment of a loss to an interest in the debt and security, it is a mere equity, not arising out of the contract of insurance, but from all the circumstances of the case." The court further said that the insurance was not of the "debt of the mortgagor," but was of the property, and upon its destruction the insured mortgagee had the right to recover. This case, to the extent the decision went, was decided upon correct principles, though the court did not seem inclined to fully adopt the Massachusetts doctrine.

Contracts to replace or rebuild.— As has been already said, there is now a class of insurance contracts in which the insurer reserves the right to replace the articles lost or rebuild the structures destroyed. This right depends wholly on the contract, and does not exist independent of it. Under such a contract, if the insurer rebuilds, or replaces the goods, no action for the loss in money can be maintained. But if he fail to rebuild, the measure of damages is not what it would cost to replace or repair the property, but such a sum as will be a fair indemnity for the loss.[1] And where the insurer elects to rebuild, and is not permitted by the public authorities by reason of the building being dangerous, or not being in conformity with some ordinance of the city, he must pay the damages for not performing his contract.[2] The fact that such a structure is prohibited by governmental authority, and that a new building must be of better material — brick, for instance, instead of wood — does not excuse the insurer; he must either build in conformity to such regulations or pay the insured the actual amount of the loss.[3] Under

[1] Commonwealth Ins. Co. v. Sinnott, 37 Pa. St. 205; Walbum v. Ins. Co. 4 La. 289.

[2] Brady v. Northwestern Ins. Co. 11 Mich. 425; Brown v. Royal Ins. Co. 1 Ellis & Ellis, 853.

[3] 1 Ellis & Ellis, supra. In the noted case of Hall v. Wright (E. B. & E. 746), in the English exchequer chamber, the subject of relief from a contract where fulfilment has become impossible is fully discussed. In the American publication of that case (96 E. C. L. Rep. 795), the editor adds a lengthy and valuable note showing that the American cases

a provision in a policy authorizing the insurer to elect to rebuild the property destroyed, he may place the insured in as good condition as he was before the fire occurred, by repairs or renewals, which make it equal to its former condition. And in an action on the policy, evidence of the repair and renewal is a good defense.[1] The insurer may show further in defense of an action, that after his liability occurred and before the time for their election to repair had expired, they had made an arrangement with the insured by which the time for making the repairs had been extended beyond the time fixed in the policy, and this will be a good defense to the action for the loss.[2] It is also held that when the insurer reserves the option to make good the loss by "rebuilding, replacing or repairs, *the insured to contribute one-fourth* of the expense," etc., and there is a partial loss, and the insurer makes substantial repairs, though not so perfect as the contract requires, the insured is entitled to recover the difference between the value of the buildings as repaired in part, and what the value would have been had the repairs been complete. The insurer in such a contract must pay one-fourth of the value of such repairs to the estate — not simply one-fourth of the cost.[3]

ADJUSTMENTS AMONG INSURERS WHERE THERE ARE SEVERAL.— In cases of insurance in more companies than one, when each reserves the election to rebuild, and upon a loss each elects to rebuild and fails in the performance, the insured will be entitled to recover the damages he has sustained by a breach of the contract to rebuild, by proceedings against either company, or against all; and in the former case, the insurer who has done nothing towards the performance is liable thereafter to the other

support the general doctrine of the case. "Where the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity; because he might have provided against it by his contract." Paradine v. Jane, Aleyn, 26; Barker v. Hodgson, 3 M. & S. 267; Clendaniel v. Tuckerman, 17 Barb. 184; Phillips v. Storm, 16 Mass. 238.

[1] Franklin F. Ins. Co. v. Hamill, 5 Md. 170; Ellmaker v. Franklin Ins. Co. 5 Pa. St. 183.

[2] Ellmaker v. Franklin Ins. Co. supra.

[3] Parker v. Eagle Ins. Co. 9 Gray, 152.

for contribution;[1] and if the building contract, in such case, is only partially performed, the liability under the rule stated above, in cases of part performance, is for the difference between the value of the work done and the value of the property if it had been done according to contract.[2]

This brief view of the rule of damages in fire insurance cases must suffice. It might be extended almost indefinitely by a review of the voluminous cases which are reported in the courts of the American states, and in the courts of the United States. Such a labor more naturally belongs to a work devoted to the topic of insurance exclusively, and as a number of such treatises are already in existence, the profession would hardly justify a further excursion into that field.[3]

Section 3.

Life and Accident Insurance.

Definition of life insurance — Character of the contract of life insurance — Not a contract of indemnity — When such insurance is held as security — When it is not a collateral security — Accident policies; when available only for indemnity; how damages estimated; recovery may be had for the actual loss, not exceeding amount of the contract; consequential damages not considered — Difference between English and American rule as to scope of recovery — Rule of damages stated.

Definition of life insurance.— As already stated,[4] a life insurance contract is an agreement upon the part of the insurer with the person who takes the policy, that upon the death of the person whose life is insured during the time for which it is so insured, or, if generally upon his life, upon the occurrence of his death, the insurer will pay the amount of the policy to the person holding the same.

Character of the contract.— The discussions as to whether a life insurance is, or is not, a contract of indemnity make it necessary to do what has been omitted in the notice of marine

[1] Morrell v. Irving Fire Ins. Co. 33 N. Y. 429.

[2] Morrill v. Irving Fire Ins. Co. supra.

[3] The recent digest of insurance decisions by Messrs. Hine and Nichols, of New York, will furnish the practitioner with a ready means of consulting the cases, and presents the law and reported cases in a very concise and admirable manner.

[4] Ante, p. 62.

and fire insurance contracts, viz.: discuss briefly the nature of the contract itself, as this influences in a degree the measure of the recovery in particular cases.

There seems to be a fundamental difference between the leading authorities on the point whether a life insurance contract is one of indemnity or not; the well-settled English rule being that it is not, and the preponderant authorities in America inclining to the contrary. Except in a particular class of cases, however, arising under these contracts, the question is an abstract one, but in that class it becomes vital, and hence important to be considered. Whenever the amount of the recovery may be determined or limited by the idea of its being given by way of indemnity, it is important to fix the nature of the contract, and it must be admitted as stated above, that there is a want of harmony in the decisions. It was at first held in England, in Gadsell v. Boldero,[1] that a life insurance policy was a contract for indemnity, and such seems to be the current opinion in this country.[2] To the contrary, it is now settled in England that such a policy is a simple contract to pay such a sum at the death of the person named therein, whose life is insured, and neither more nor less than that sum, with interest from the death, can be recovered.[3]

It seems that the original case in England [4] was acquiesced in by the parties, no steps having been taken to reverse it, but was generally disregarded in practice; and, after many years, has been overruled in that country.[5] It was overruled by the unanimous decisions of six judges sitting in the exchequer chamber. Baron Parke said, in the course of his opinion, that "the contract commonly called life insurance, when properly considered, is a mere contract to pay a certain sum of money on the death of a person, in consideration of the due payment of a certain annuity for his life, the amount of annuity being calculated in the first

[1] 9 East, 72.

[2] American Life and Health Ins. Co. v. Robertshaw, 26 Pa. St. 189; Bevin v. Conn. Mut. Ins. Co. 23 Conn. 244; Rivers v. Gregg, 5 Rich. Eq. (S. C.) 274.

[3] Dalby v. India and London Life Assurance Co. 15 C. B. 365; Law v. London, etc. Assurance Co. 1 K. & J. 223; Rawls v. American Ins. Co. 27 N. Y. 282.

[4] Gadsell v. Boldero, supra.

[5] Dalby v. India & London Ass. Co. supra.

instance according to the probable duration of the life; and when once fixed it is constant and invariable. The stipulated amount of annuity is to be uniformly paid on one side, and the sum to be paid in the event of death is always (except where bonuses have been given by prosperous offices) the same on the other. This species of insurance in no way resembles a contract of indemnity." The overruled case proceeded upon the statute of 14 G. III, c. 48, but upon an erroneous construction of it. That statute to prevent wagering policies required that the person effecting for himself the insurance should have an interest in the continuance of the life insured, and limited the recovery to that interest. The overruling case held that wagering policies were not void at common law; and that the statute only required an interest to support the insurance when it was effected, and limited the recovery to the interest then existing. In this country, wagering contracts, by statute and by the common law, have generally been held void, as immoral and contrary to public policy; and hence the right of one person to obtain, for his own benefit, insurance on the life of another, is more restricted. Such insurance is permitted if it is not, in fact, intended in whole or in part, as a wagering venture. A person who has an interest in the continuance of the life which is the subject of the insurance, may effect an insurance upon it. The amount of it is chiefly important as an evidentiary fact in the determination of its validity — in determining whether it is speculative. If such an interest exists at the time the insurance is effected, the contract has a valid inception. Whether it will continue valid if that interest afterwards ceases, is perhaps an open question in this country;[1] though it is said in a late case by the supreme court of the United States, that a policy taken out in good faith, and valid at its inception, is not avoided by the cessation of the insurable interest, unless such be the necessary effect of the provisions of the policy itself.[2] The interest, probably, should be pecuniary, but when insusceptible of definite measurement in money, the amount fixed in the policy will not affect the validity of the contract

[1] 2 Smith Lead. Cas. 352, 353; Ferber v. American Mut. L. Ins. Co. 15 Gray, 249.

[2] Connecticut Mut. L. Ins. Co. v. Schaefer, 94 U. S. 461.

without other proof tending to show an intention to speculate on the chances of the life; nor will it be subject to modification by extrinsic proof.[1] Policies which are subject to no objection at their inception or afterwards, for being unsupported by the requisite interest in the beneficiary, are enforced not only in England but in this country; and they are not enforced on the principle of indemnity, but as valued policies, imposing on the insurer the obligation, upon the happening of the death, to pay the precise sum the life was insured for.[2] When a legal policy upon a life is made, all that remains is to follow the terms of the contract. If, in consideration of certain premiums paid or to be paid, annually or otherwise, a person enters into a contract with another, to the effect that at a given time or on the occurrence of an event, he will pay that other so much money, the failure to pay after the occurrence is a breach of the contract, affording to that other a perfect right of action for the precise sum agreed to be paid. The party agreeing to pay has received the consideration in the premium money, and whether we call the resulting express obligation an indemnity, a debt, or a penalty, it becomes due as a liquidated sum, under the contract; and any attempt to question the right of the policy holder is only to raise a question as to whether the obligor in any contract may not repudiate it, and still keep the benefits of full performance of the provisions in his favor. When one person has such an interest in the life of another as to be entitled to effect an insurance on his life, and does so, paying his own money for the policy, it is a contract between the insurer and the holder of the policy; and any inquiry as to whether the interest of the insured has continued, and is in existence at

[1] Connecticut Mutual Life Insurance Co. v. Schaefer, 94 U S. 461; Bevin v. Connecticut Mutual Life Ins. Co. 23 Conn. 244; Loomis v. Eagle Ins. Co. 6 Gray, 396; Meltz v. Eagle Ins. Co. 2 E. D. Smith, 268; Equitable Life Ins. Co. v. Patterson, 41 Ga. 338; Chisholm v. Capital Life Ins. Co. 52 Mo. 213; Lewis v. Phœnix Mut. L. Ins. Co. 39 Conn. 104; Valton v. National L. Ass. Co. 22 Barb. 9; 20 N. Y. 32; Hoyt v. N. Y. Ins. Co. 3 Bosw. 440; Morrell v. Trenton F. & L. Ins. Co. 10 Cush. 282; Lord v. Dall, 12 Mass. 115; Mitchell v. Union L. Ins. Co. 45 Me. 104.

[2] Trenton Mutual L. & F. Ins. Co. v. Johnson, 24 N. J. L. 576; Bevin v. Connecticut Mut. L. Ins. Co. 23 Conn. 244; Lord v. Dall, 12 Mass. 115; Goodwin v. Mass Mut. L. Ins. Co. 73 N. Y. 480, 497.

the time the death occurs, either by the insurer or the representatives of the deceased, is on principle immaterial and irrelevant. The motive of A to insure the life of B is probably self-interest, but it is of no consequence to C, who issues a policy to A, what the real motive is, if it be lawful and furnishes to C the agreed consideration for the engagement. If A buys and pays for a particular thing, which C delivers, no other party has any interest in the transaction, legal or equitable. The insurer gets his premium, and the person advancing it is entitled to the benefit of the contract as much as if he had sold a lot of merchandise, and the purchaser had agreed to pay a stated price at a certain time.[1]

[1] Professor De Morgan, in his Essay on Probabilities, p. 244, has so thoroughly annihilated the theory of the case of Gadsell v. Boldero, and the cases following and adopting it, that I cannot forbear quoting. He says:

"The word *insurance* or *assurance* has given rise to some wrong notions, and it will be worth while to examine the nature of the contract. A & Co. engage with B that, in consideration of 1*l.* a year, paid by him during his life, they will pay 20*l.* to his representatives as soon as he shall be dead. Both parties run a risk: A & Co. that of having to pay B more than they receive; B that of paying more than will at his death produce 20*l.* But the risk of the office is of immediate loss; and that of B of deferred loss; that of the former is also continually lessening, and that of the latter increasing; until, should B live long enough, both risks become certainties. If the insurance be only for a term of years, B runs the risk of losing his premiums altogether.

"The office does not inquire what reason B may have for assuring his own life or that of another person, nor do any possible contingencies, except those of life, affect the office calculations. We cannot, therefore, be too much surprised at the ignorance shown by that judge who declared that life insurance was of, its own nature a contract of indemnity; that is, if, by any lucky chance, B can be proved to have accomplished the object for which he insured by other means, he has no claim upon the office. The circumstances are as follows: and the absurd conclusion is law, and would be practice, if the insurance offices had not refused to acknowledge the decision, or protect themselves by the precedent. A & Co. covenanted with B to pay 500*l.* if C should die within the term of seven years next ensuing, in consideration of the usual premium. C did die within the term; A & Co., in answer to a claim of 500*l.*, replied that the intention of B in insuring the life of C was to obtain security for the payment of a debt of 500*l.* due by C to B, which debt had already been paid by C's executors; consequently they owed nothing to B. An action was brought by B, and defended by A & Co., on the above plea; and a special case being made, the case was decided by the court of queen's bench against the

WHEN LIFE INSURANCE COLLATERAL SECURITY.— When a person takes an insurance on his life, paying the premiums, and assigns the policy as collateral security to his creditor for a debt, there is no question that the assignee is a trustee for the proceeds be-

plaintiffs, thereby establishing the principle that life insurance is a thing similar to fire or ship insurance; namely, a contract of indemnity, to be fulfilled with allowance of salvage.

"The defendant's case rested upon the asserted nature of the contract, and the statute of 14 G. III, c. 48, which enacts that 'no greater sum shall be recovered from the insurers than the amount or value of the interest of the insured in such life.' The act does not state at what time the interest is to be reckoned, but the plaintiffs contend that *the time of death* was the meaning of the statute; the defendants averred, and the court decided, that *the time of bringing the action* was to be understood. The plaintiffs contended that the debt was not the object of insurance, but the life of the insured; the court decided that 'this action is, in point of law, founded upon a supposed damnification of the plaintiffs, occasioned by the death, existing and continuing to exist at the time of the action brought; and, being so found, it follows, of course, that if, before the action was brought, the damage which was at first supposed likely to result to the creditor was wholly obviated and prevented by the payment of his debt, the foundation of the action on his part, or the ground of such insurance, fails.' This sentence contains nothing but very good sense, and no doubt very good law; but the application of it was accompanied by a mistake as to the nature of the damnification which the plaintiffs had sustained. The counsel on both sides, the court, the insurance office, and the plaintiffs themselves, showed a very partial knowledge of the nature of the contract; and I make no doubt, that almost every person who heard it agreed with the court, however much they might impugn the decision on other grounds, that the damage to the creditor was 'wholly obviated and prevented by the payment of the debt.'

"In order to show that such was not the case, we must suppose that an exactly similar transaction had taken place before any insurance office existed. How this could have been may not be apparent, if we take the notion which the law formerly entertained of such an office; namely, that it is a species of gambling house; but if we prefer to consider it as a savings bank, with an equalization system, which is unquestionably the correct notion, we may return to the circumstances which the case would have presented had there been no insurance. C, a person whose credit has become doubtful, is indebted to B to an amount which B could not afford to lose; consequently B, knowing that the chance of payment is precarious, resolves to diminish his expenses, hoping by economy to restore to his family the sum which he may have lost by his engagements with C. He collects, accordingly, a small fund, which he places with his banker, avowing the purpose of its collection. In the meantime C dies, and some friends pay off his debts, and that due to B among the rest. The

yond the amount of the debt. In such case the policy is merely pledged as collateral, and follows the general rule applicable to all collateral securities; the proceeds are applied in payment of the debt secured, and the surplus goes to the debtor or his rep-

latter having now no further occasion for such economy, draws upon his banker for the amount, and is answered that, since the purpose of the saving was fulfilled by the payment of C's debt, he, B, has no further claim upon his own money. An action is brought, and the courts decide that the banker is right, and that B, having really attained his object in one way, has no right of property in the proceeds of another attempt to serve the same purpose.

"The only distinction between the case just put and that which actually occurred is, that the banker was a person who gained his profits by receiving such savings during a contingent term, and guarantying a fixed sum; standing the loss, if there were any, and paying himself for it out of the gain which would accrue in another instance; the premium having been calculated so as to insure a moral certainty of profit upon the average of similar cases. It is not pretended, on either side, that the chance of indemnification at the hands of C's executors was made to lessen the consideration paid by B for the guaranty; and the legal iniquity of the decision may, I think, be made clear, as follows:

"It will hardly be disputed, firstly, that the legislature is the judge of what shall constitute valuable consideration; and secondly, that a consideration which is expressly allowed to be good in a statute, should be admitted as such in the decisions of the courts. Now, the contract of insurance, be it gambling, or be it not, rests entirely upon the permission given by the law to consider a high chance of a small sum as good consideration for a low chance of a large sum. If I now pay 2*l.* of premium for 100*l.* in case I should die in a year, and if my executors can maintain an action for 100*l.*, it must be because the law sanctions the notion that 2*l.*, nearly certain, may, with consent of parties, be considered as an actual equivalent for a distant chance of 100*l.*; as much so as one weight of silver for another of bread, or food, clothing and wages for personal services. It is true that the same law, fearing certain reputed immoral practices, to which the power of making a particular bargain offers temptations, may limit the circumstances under which it will permit such bargains to be made; but this is equally true in regard to the other sort of contracts mentioned; indeed, there is no sort of bargain which is not under regulation. The law, then, allows risks, and permits unequal chances to be compensated by giving odds; the courts declare that, after the cost shall have been made, and one of the parties shall have stood his risk, which turns out in his favor, the other party shall receive an *ex post facto* release from the conditions of his bargain, because circumstances afterwards arise, which, had they existed at the time of making the bargain, would have made it illegal. The several principles on which the decision was founded, well carried out, as they say in parliament, would require that the previous contracts of a man

resentatives; and on this principle the case of American Life & H. Ins. Co. v. Robertshaw[1] was rightly decided.

But as has already been said of the case of a mortgagee who insures the mortgaged property on his own account against loss by fire, this furnishes no reason for either the insurer or the debtor to demand an inquisition into the contract.[2] The contract is to pay to the holder of the policy the sum specifically mentioned on the death of the person named; and the duty of the insurer is plain, so long as contracts are regarded as things to be enforced or kept, as they are made. In a recent case in the supreme court of the United States,[3] the duty of a creditor to account to the estate of his debtor for the overplus received by him in a policy of insurance beyond the amount of his debt is distinctly recognized and enforced; but it is nowhere intimated that if the creditor had procured a policy on the life of his debtor, paying the premiums himself, that any such duty to account would have arisen. The case was this: P insured his life for $3,000 in the American Life Insurance Company in November, 1866. In 1871 P was owing B, and being embarrassed and unable to pay the accruing premiums on the policy, made an assignment of the policy to B, who annually paid the premiums until 1873, when an absolute assignment and transfer of the policy was made to B. It was conceded that the entire assignment, and the final one, had their origin in the loan of B to P in 1871, and the court construed the last assignment, though absolute in form, as simply intended by the parties as an appointment of B to receive from the company, upon the death of P, such sum as would then become due on the policy, and, after reimbursing himself to the extent of his loans to P, to pay the balance to the persons entitled, viz.: his, P's, legal representatives.

who became insane should be null and void; that the meat which a man buys for his dinner should be returnable to the butcher under the cost, if a friend should invite him in the meantime; and, in the case before us, supposing that C should have outlived the term, and his debt were paid, as before, then B might have brought his action against the office for the return of the premiums; alleging that, as it turned out, the office would have been indemnified, and, therefore, should be considered as having run no risk."

[1] 26 Pa. St. 189.

[2] King v. State Mut. Ins. Co. 7 Cush. 1; ante, p. 99.

[3] Page v. Burnstine, 102 U. S. 664.

It was accordingly decreed that B was the trustee of the estate for the balance remaining in his hands, after repaying the loan and the advances for premiums. No effort was made by the company to compel the holder of the policy to accept the simple amount of his loan as an indemnity, and the case is in entire harmony with the doctrine herein maintained.

Accident policies.— Where the injury to the person does not produce death, these policies are entirely different, and are clearly contracts for indemnity.[1] In this class of cases, the damages are not estimated by any proportion between the amount of injury sustained, and the amount payable had death occurred, but the damage is the amount of injury the insured has actually sustained, not exceeding the sum mentioned in the policy. The expenses incident to the injury, and compensation for the suffering resulting therefrom to the insured, are the basis of the estimate. Remote consequences of the injury are not to be considered; for instance, the special loss which the accident may impose upon an individual, growing out of his profession, occupation, or the state of his business, the damages are such as naturally follow the effects of the injury; like the loss of a limb, or an eye, and the attendant loss of time, suffering, expense, etc.[2]

Difference between English and American decisions as to the scope of recovery.— The English case last cited limits the right to recover, in case of an accident insurance, to the suffering and expenses of the injured party, and the ruling is followed in some of the American states.[3] This, however, seems not be the accepted doctrine of the American courts; and upon principle is not sustainable. The action in such case is upon the broken contract, and if loss of time follows the breach, it seems reasonable that it should be the subject of compensation. If a person, as the direct consequence of an injury, loses his time and money in treating his injury, to say that the latter shall be paid back, and the former be without compensation, is both unjust

[1] Theobald v. Railway Pass. Ass. Co. 10 Ex. 45.

[2] Hadley v. Baxendale, 9 Ex. 354; Theobald v. R. P. Ass. Co. supra.

[3] Francis v. St. Louis Transfer Co. 5 Mo. App. 9.

and illogical. Indemnity requires it, and the general and accepted rule in analogous cases fully supports it.[1] Some of the cases cited were actions for breach of contract, and are therefore precisely in point; in others they were cases based on the defendant's negligence, and were for personal injuries resulting therefrom, and upon principle apposite to the point under review.

RESTATEMENT OF THE MEASURE AND ELEMENTS OF DAMAGE.— As a conclusion, the rule of damages measuring the right of recovery in life insurance is:

1. Upon the death of the party insured, the insurer becomes liable to pay the amount of the policy, and interest upon that sum, if there be delay.

2. When there is an injury, not fatal, the accident insurer is liable to pay the insured damages, such as a jury may find included in the following elements:

(1) Expense incurred. (2) Suffering resulting from the hurt received. (3) Loss of time during the disability caused by the injury.

[1] Ransom v. N. Y. & Erie R. R. Co. 15 N. Y. 421; Williams v. Vanderbilt, 28 N. Y. 224 (per Balcom, J.); Howe Machine Co. v. Bryson, 44 Iowa, 159; Drinkwater v. Dinsmore, 16 Hun (N. Y.), 250; Indianapolis v. Gaston, 58 Ind. 224; Morris v. C. B. & Q. R. Co. 45 Iowa, 29.

CHAPTER X.

LANDLORD AND TENANT.

SECTION 1.

LANDLORD AGAINST TENANT.

Action for use and occupation — Action for rent — No apportionment or abatement of rent on account of the bad condition or partial destruction of the demised property — Entire destruction of demised premises ends liability for rent — Same, when entire premises taken for public use — Covenants for repairs — Liability of assignee for repairs — Damages for repairs or non-repair in special cases — Covenants not to sub-let or assign — Covenants to insure.

The principal claim of a landlord against his tenant is that for rent, or for compensation in some form for the use of the demised premises. Leases generally contain, however, other covenants or stipulations for breach of which damages are recoverable; among these are covenants to repair, not to sub-let or assign, and to insure. All these topics will be discussed in their order.

ACTION FOR USE AND OCCUPATION.— This is an action of general assumpsit for reasonable compensation for the use of real estate with the permission of the owner, or one who is as to the occupant entitled to the rights of a landlord. In England, this action is supposed to be given by the statute of Geo. II, and it is probable that the action did so originate; but the weight of American authority is that it is maintainable on the principles of the common law.[1] It must be founded upon contract, express

[1] Crouch v. Briles, 7 J. J. Marsh. 255; Roberts v. Tennell, 3 T. B. Mon. 247; Burnham v. Best, 10 B. Mon. 227; Gould v. Thompson, 4 Met. 227; Dwight v. Cutler, 3 Mich. 566; Eppes' Ex'rs v. Cole, 4 Hen. & Munf. 161. In Hogsett v. Ellis, 17 Mich. 351, 371, Christiancy, J., said: "Since the old notion that such a claim savors of the realty, and could, therefore, be recovered only by an action of a higher nature, has been quite generally exploded, and especially since the true theory of implied promises in assumpsit has come to be better understood and settled, and such promises no longer rest merely upon the inference that a promise *in fact* has been made, but upon the *duty* of the defendant *to*

or implied, creating the relation of landlord and tenant, and imposing upon the defendant the obligation to pay for the use of the premises.[1] The form of the action, however, does not purport that it is based upon an express contract, nor does it presuppose any demise;[2] still if there be an actual lease, not under seal, this action will lie, and such lease is admissible to establish the relation of landlord and tenant and to fix the amount of rent.[3] A contract may be evidence to settle the amount of rent, though not valid as a lease under the statute of frauds.[4] On a verbal lease for more than a year, no action will lie where the statute requires it to be in writing; but if the statute has not declared it to be void, any use may be made of it by either party, except that of bringing an action upon it. The lessee, if he enters under such a lease, may use it for the purpose of showing that he is not a trespasser, and after he has enjoyed the leased premises for the term, he will be liable for the rent, not upon the express contract, but upon the contract implied by law, from his use and occupation of the premises, and either party, it is believed, may use the contract to fix the amount to be recovered.[5]

pay, a duty which he will not be heard to deny that he has promised to perform, courts in this country have very properly held that assumpsit for use and occupation may be maintained at common law. And we are certainly unable to see why the implied promise to pay a reasonable compensation for the use of the owner's premises, does not, within the limitations above laid down, come clearly within the principle of an implied promise at common law, as the like promise to pay for the use of a horse or the reasonable value of goods purchased."

[1] Taylor's L. & Ten. § 636; Hood v. Mather, 21 Mo. 308; Edmondson v. Kite, 43 Mo. 176; Kittridge v. Peaslee, 3 Allen, 235; Davidson v. Ernest, 7 Ala. 817; Bradley v. Davenport, 6 Conn. 1; Henwood v. Cheeseman, 3 S. & R. 500; Pierce v. Pierce, 25 Barb. 243; Dalton v. Laudahn, 30 Mich. 349; Logan v. Lewis, 7 J. J. Marsh. 3.

[2] Chambers v. Ross, 25 N. J. L. 293.

[3] Burnham v. Best, 10 B. Mon. 227; Sargent v. Ashe, 23 Me. 201; Osgood v. Dewey, 13 John. 240; Stevens v. Coffeen, 39 Ill. 148; Perrine v. Hankinson, 11 N. J. L. 181; Williams v. Sherman, 7 Wend. 109; Crawford v. Jones, 54 Ala. 459; Syllivan v. Stradling, 2 Wils. 214; Birch v. Wright, 1 T. R. 387; Wilkins v. Wingate, 6 T. R. 62; Brewer v. Palmer, 3 Esp. 213; Baker v. Holtpzaffell, 4 Taunt. 45; Egler v. Marsden, 5 Taunt. 25; Smith v. Stewart, 6 John. 46; Bancroft v. Wardwell, 13 John. 489.

[4] De Medina v. Polson, Holt, N. P. 47.

[5] Roberts v. Tennell, 3 T. B. Mon. 247; Parker v. Hollis, 50 Ala. 411.

Circumstances in the conduct of the parties may suffice to show that the occupation was with the owner's permission, notwithstanding a notice to quit, and a tacit agreement in respect to the amount of rent to be paid. Thus, a tenant had been occupying at a stipulated rent of $250 a month, and the landlord served him with a notice to quit, having the effect to terminate the tenancy at the expiration of the current rent period; but it appeared that before that date the tenant had proposed to the landlord, through a third person, to continue his tenancy at $300 per month; that the landlord expressed himself satisfied with it, though there was no evidence that he notified the tenant of his acceptance. The tenant remained in possession, and the court, in an action for the rent, said, "the inference is that he did so with the consent of the plaintiff, and that the proposal was accepted. We must infer this, or infer that he kept possession against the plaintiff's will and as a trespasser; and of the two inferences we adopt the former." [1] Where a tenant holds over after his lease has expired, the inference that the parties consent to a continuance of the same terms is so strong that it is adopted as a rule of law.[2] But the rule does not apply, and such an agreement is not implied where the lease contains many collateral stipulations which could not be performed in a subsequent term;[3] nor where the intention to continue the same terms is otherwise rebutted by the terms of the lease,[4] or the conduct of the parties; where notice is given that

[1] Hoff v. Baum, 21 Cal. 120; Brinkley v. Walcott, 10 Heisk. 22; Griffin v. Knisely, 75 Ill. 411. In Chambers v. Ross, 25 N. J. L. 293, it was held that a landlord does not deprive himself of the right to recover rent of a tenant by erroneously disclaiming his relation of landlord, unless such disclaimer has been acted on by the tenant, or prejudiced him.

[2] Baker v. Root, 4 McLean, 572; Ames v. Schuesler, 14 Ala. 600; Schilling v. Holmes, 23 Cal. 227; Whittemore v. Moore, 9 Dana, 315; Carter v. Collar, 1 Phila. 339; Phillips v. Monger, 4 Whart. 226; Hemphill v. Flynn, 2 Pa. St. 144; Osgood v. Dewey, 13 John. 240; Evertson v. Sawyer, 2 Wend. 507; McCarty v. Ely, 4 E. D. Smith, 375; Clapp v. Noble, 84 Ill. 62; Parker v. Hollis, 50 Ala. 411; Meaher v. Pomeroy, 49 Ala. 146; Quinette v. Carpenter, 35 Mo. 502; Laugerenne v. Dougherty, 35 Pa. St. 45; Prickett v. Ritter, 16 Ill. 96; Weston v. Weston, 102 Mass. 514.

[3] Diller v. Roberts, 13 S. & R. 60.

[4] Abbot v. Shepherd, 4 Phila. 90; 15 Am. Dec. 581, note.

a higher rent will be claimed,[1] or the tenant gives notice of a different intention.[2] Where the lease was not for an annual rent, it has been held not to govern after the term expired, but other evidence was admissible to show what was a reasonable annual rent.[3] So it has been held that circumstances affecting the condition of the premises may be shown to diminish or increase the rent.[4] The old lease is only evidence of a continuing agreement, at a like rate, in connection with the silence or other conduct of the parties evincing consent to abide by its terms for an extended time. Hence any facts are admissible which contradict the inference of such consent.[5] Thus, after a sufficient notice to quit, to terminate a pending lease, a landlord served the tenant with a notice that if he continued in possession after the date when the tenancy ceased under the notice, he would be charged with an increased rent, and it was held that such increased rent was recoverable.[6] So where a tenant was let into possession during the currency of a term, the rent then being 47*l.*, with an agreement that at the end of the term he was to pay 80*l.*; and he paid the 47*l.*, but the agreement was abandoned in consequence of disputes arising in regard to it, though he continued to occupy, it was held that the jury should consider what was a fair rent for the continued holding, and that no necessary inference could be drawn from the former holding at 47*l.*[7]

If a tenant enters with the consent of two owners, but afterwards promises one to pay him his half, this has been held sufficient to entitle him to recover separately for his share.[8]

A special action may be maintained on an agreement which is absolute to pay rent for the use of real estate, though the tenant has not taken possession, where there is a demise, parol or otherwise, and the lessor is not at fault in preventing actual enjoyment.[9] But general assumpsit for use and occupation

[1] Hoff v. Baum, 21 Cal. 120; Griffin v. Knisely, 75 Ill. 411; Mack v. Burt, 5 Han. 28.

[2] Delano v. Montague, 4 Cush. 42.

[3] Evertson v. Sawyer, 2 Wend. 507.

[4] Whittemore v. Moore, 9 Dana, 315; Clapp v. Noble, 84 Ill. 62. See McCarty v. Ely, 4 E. D. Smith, 375.

[5] Thomas v. Zumbalen, 43 Mo. 471.

[6] Higgins v. Halligan, 46 Ill. 173.

[7] Thetford v. Tyler, 8 Q. B. 95.

[8] Sargent v. Ashe, 23 Me. 201.

[9] Tully v. Dunn, 42 Ala. 262.

will not lie if the tenant has never gone into possession; but if he has taken a lease for a specified term, agreeing to pay rent, and once gone into possession so as to vest the term, this action will lie for the rent of the whole term, although the tenant may have abandoned the possession before the stipulated period expired.[1] A mere tenant at will has no term vested in him, and is only liable for actual occupation.[2]

Where the agreement was not signed by the lessee, and the lessor failed to fulfil the agreement on the principal point which was the inducement to it, the court held that the lessee could hardly be said to have enjoyed under the agreement, and the jury were instructed to allow compensation only according to the benefit he actually enjoyed.[3] The court said "that an eviction of part of the premises being shown, the jury was to ascertain, independently of any agreement, what the defendant ought to pay." The lessee not having executed the lease, he was not thereby bound to pay the rent reserved; and not having enjoyed what the lease purported to grant, the rent so reserved could not be regarded as the measure of recovery. In a later English case, where the lessors had not executed the indenture which purported to grant certain tolls for a year, it was held that the grantee, although he enjoyed the tolls for the full term, was not bound by the covenant on his part to pay the sum reserved as the consideration. It was considered that the sum so reserved was fixed as the price of a conveyance of an estate or right in the tolls for a year, and that though the grantee had had the tolls, the right or estate had not been granted; that in fact he had occupied under a mere license, and therefore there could be no recovery except on a *quantum meruit*.[4]

Where the amount of rent or compensation for the use has not been fixed by agreement, it is a *quantum meruit* claim; the

[1] Pinero v. Judson, 6 Bing. 206; Jones v. Reynolds, 7 C. & P. 335; Woolley v. Watheng, 7 C. & P. 610; Edge v. Strafford, 1 Cromp. & J. 391; Sullivan v. Jones, 3 C. & P. 579; Crommelin v. Thiess, 31 Ala. 412; Adrean v. Hawkins, 4 Har. & J. 319; McGannagle v. Thornton, 10 S. & R. 251; Cort v. Planer, 7 Robt. 413; Ward v. Wilcox, 1 Denio, 37; Hoffman v. Delihanty, 13 Abb. 388; Hall v. Western Transp. Co. 34 N. Y. 284; Little v. Martin, 8 Wend. 219; Westlake v. DeGraw, 25 Wend. 669.

[2] Crommelin v. Thiess, 31 Ala. 412.

[3] Tomlinson v. Day, 2 Brod. & Bing. 680.

[4] Swatman v. Ambler, 8 Ex. 72.

landlord is only entitled to what it was reasonably worth, and this must be ascertained by the jury upon evidence. If the property was untenantable, that fact will affect the amount of recovery.[1]

It is an equitable action, and the plaintiff can recover no more than is equitably due. Where the defendant was turned out of possession of a demised farm, after making preparations for crops which he could not reap, so that he received no benefit from the occupation, it was held that the plaintiff could recover nothing.[2] A certain share of the profits of a tavern and farm was stipulated to be paid for the use of the same, and it was held to be a money rent; that though the amount was uncertain, that was no impediment to recovery on a count for use and occupation. The uncertainty would be removed by such proof as the plaintiff might be able to produce. If unable to prove the actual profits, he might resort to proof of the value. And the defendant whose appropriate duty it was to keep and render an account of the profits, as well as to pay over to the plaintiff his share, might exhibit proof of the actual profit in order thereby to limit the demand against him.[3]

To establish the rental value evidence may be received showing what the property had rented for in years immediately preceding the period in question; and also what other similar tenements rented for in the same neighborhood at and about the same time.[4] On this point Whitman, C. J., said: "Nothing is more common, in ascertaining the value of one thing, than to compare it with others of known value, and of a similar description. Money itself is but a thing of known and fixed value; and we are continually comparing all other things with it by way of fixing their value. If two dwelling houses are nearly contiguous, and one of them has a known and fixed value, and the other has not, but its value has to be ascertained, resort may be had to a comparison of the one with the other for the purpose. Our constant course of reasoning is from things known to things unknown; and our deductions depend upon it. Our

[1] Brolaskey v. Loth, 5 Phila. 81; Potter v. Truitt, 3 Harr. (Del.) 331.

[2] Wheeler v. Shed, 1 D. Chip. 208; Gilhooley v. Washington, 4 N. Y. 217.

[3] Perrine v. Hankinson, 11 N. J. L. 181.

[4] Fogg v. Hill, 21 Me. 529.

conclusions from circumstantial evidence are of this nature; and the evidence here relied upon to prove the value of a tenancy is of this class. The leases of the store in question in former years, to which one of the defendants was a party, were properly admissible. These show what he had admitted the value of the tenancy to be in years immediately previous. If rents had fallen, it would have been competent for the defendants to have shown it by way of lessening the effect in a greater or less degree arising from such admission."[1] But what one had paid for the use of the property is not admissible as a ground and measure of his recovery against another.[2] The opinions of witnesses, having knowledge of the particular subject, are generally held admissible on questions of value.[3]

Actions for rent.— Actions for rent are generally actions for a fixed sum, either reserved by a written instrument or made certain by oral agreement. In either case, when the contract is proved the jury have but to ascertain the amount in arrear and interest; unless on some ground of defense there is a right to an abatement, or the right of action or the liability is divided by conveyance of the reversion or assignment of the term. The only difference in substance between an action directly on the terms of the lease, and an action for use and occupation, is, that in the one the declaration is special and in the other general; the purpose of both actions is the same, and both are alike actions arising upon contract.[4]

In certain cases the amount of rent depends on some subsequent facts — as where it is a certain proportion of the profits to be realized from a use of the demised premises;[5] where it is to be calculated at some rate upon the production of a mine or a quarry,[6] or must be fixed by arbitration.[7] If after agreeing to fix the rent by arbitration, one of the parties refuses to act in selecting an arbitrator, a court may execute this feature of the agreement by a reference.[8] Under a covenant in a lease, that if

[1] Fogg v. Hill, 21 Me. 529.
[2] Moore v. Harvey, 50 Vt. 297.
[3] See Vol. I, p. 795; Vol. II, p. 375.
[4] Dalton v. Laudahn, 30 Mich. 349.
[5] Perrine v. Hankinson, 11 N. J. L. 181.
[6] Brainerd v. Arnold, 27 Conn. 617; Cross v. Tome, 14 Md. 247.
[7] Viany v. Ferron, 5 Abb. N. S. 110.
[8] Id.

the landlord re-entered for the non-payment of rent, he might relet the premises as the tenant's agent, and that the tenant should be liable for any deficiency, the landlord, if he re-enters and relets, and brings an action for a deficiency, before the rent under the new lease becomes due, can only recover the difference between the rent reserved by the original lease, and the rent agreed to be paid by the new tenant. By commencing the action without waiting to see if the new tenant pays the rent he agrees to pay, he assumes the hazard of his default. In such an action the landlord cannot recover for the expenditures made by him upon the premises after the re-entry, although by reason thereof he was enabled to relet at an enhanced rent.[1] In a case where the rent reserved was a certain fixed proportion of the price of stone which the lessor might get out of the demised premises and sell, to be paid to the lessor in a reasonable time after the stone should be sold and paid for, it was held that the lessees were under an obligation to work the quarries in a reasonable manner during the term. The case was deemed analogous to a letting of land upon shares, as it is termed, where it is said it would hardly be claimed it would be optional with the lessee whether he would cultivate the land or not. The very nature of the contract in these cases implies that the property is to be cultivated for the mutual benefit of the lessor and lessee.[2] This obligation is more precisely defined in a Pennsylvania case. Upon a lease of coal land at a fixed price per bushel for all that should be mined, there being no stipulation as to the quantity to be mined, it was held that the lessors were entitled to recover, in an action of covenant, the stipulated rate for all that could reasonably have been mined, but deducting on the part not mined its value unmined.[3] Where a demise was made for a term of years of all the lessor's right in the coals in a certain estate, reserving 8*d.* per ton of coal worked, raised or got in each year, not exceeding thirteen thousand tons in any year, or that amount in money, viz., 433*l.* 6*s.* 8*d.*, each year as fixed rent, whether the coal should be worked or not; and the lessee covenanted accordingly, it was held that the whole rent stipulated

[1] Hackett v. Richards, 13 N. Y. 138.
[2] Brainerd v. Arnold, supra.
[3] Lyon v. Miller, 24 Pa. St. 392; Cross v. Tome, 14 Md. 247. See Filey v. Meyers, 43 Pa. St. 404.

for was payable, although the mine was so exhausted that the lessee could not raise thirteen thousand tons in a year. The court held that a fixed rent was stipulated, coupled with a covenant that the mine should be worked to that extent; and the covenant did not carry with it, by any implication, a condition that there should be coal to that amount capable of being worked.[1] If a tenant of a coal mine is to pay the lessor in coal at specified prices, in the absence of any special agreement as to the condition in which the coal is to be delivered, it is the duty of the tenant to deliver it in a marketable condition; and if not so delivered, the expense necessarily incurred by the landlord in preparing it for market may be charged by him to the tenant.[2]

If rent is payable in specific articles, the measure of damages for failure to deliver them is the same as upon other contracts for the delivery of specific articles — the value of the articles when they should have been delivered.[3] Where the rent is a fixed amount payable in specific articles, the lessee is entitled to pay in that mode at the time when the rent is due; but if he does not avail himself of that privilege, he is bound to pay that amount in money, with interest after it becomes due. In other words, it is like any other debt payable in specific articles.[4]

If the landlord accepts a surrender;[5] puts an end to the lease for any cause, before the expiration of the term,[6] or evicts the tenant from any part of the demised premises, his right to rent will

[1] Marquis of Bute v. Thompson, 13 M. & W. 487; Jervis v. Tomkinson, 1 H. & N. 195. Compare Clifford v. Watts, L. R. 5 C. P. 577. In Prestons v. McCall, 7 Gratt. 121, the tenant of a salt works was bound to pay as rent two-thirds of the salt manufactured, and to manufacture at least sixty thousand bushels per annum. He failed to manufacture that quantity. It was held that the rent to be distrained for, or recovered, was governed by the actual amount manufactured; that for failure to manufacture the required amount in any one year, the proper action would be for damages occasioned thereby, and not for specific rent of sixty thousand bushels of salt.

[2] Andenried v. Woodward, 28 N. J. L. 265.

[3] Brooks v. Cunningham, 49 Miss. 108; Brown v. Adams, 35 Tex. 447. See Safely v. Gilmore, 21 Iowa 588.

[4] See Vol. II, p. 387.

[5] Mackellar v. Sigler, 47 How. Pr. 20; Hall v. Burgess, 5 B. & C. 332; Home Life Ins. v. Sherman, 46 N. Y. 370; Whitney v. Meyers, 1 Duer, 266; Elliott v. Aiken, 45 N. H. 30.

[6] Day v. Watson, 8 Mich. 535; Crane v. Hardman, 4 E. D. Smith, 339; Zale v. Zale, 24 Wend. 76.

thereupon cease, or be suspended;[1] and if this be done between the days specified in the lease for the payment of rent, the rent for the current period will be lost, for there can be no apportionment for a part of a rent period, unless there is an agreement therefor.[2] Where there is an agreement for an apportionment, it will be made accordingly. Thus, where a lease for three years required and recited the payment of all the rent in advance, and provided that in case the premises should be destroyed by fire during the term, the rent reserved, or a proportionate part thereof, should be suspended or abated, until the premises should be put in proper condition for use and habitation by the lessor, or the lease should be thereby determined and ended, at the election of the lessor; and during the term the building was destroyed by fire, and the lessor elected not to rebuild; it was held, that the lessee was entitled to recover back a proportionate part of the rent paid in advance; because the provision for suspension or abatement of rent could apply to nothing but the rent which had been mentioned as having been paid in ad-

[1] Royce v. Guggenheim, 106 Mass. 201; Morse v. Goddard, 13 Met. 177; Thamway v. Collins, 6 Gray, 227; Leishman v. White, 1 Allen, 489; Smith v. Bidany, 4 Houst. 113; Hunt v. Cope, 1 Cowp. 242; Watts v. Coffin, 11 John. 495; Christopher v. Austin, 11 N. Y. 216; Wright v. Lattin, 38 Ill. 293; Randall v. Alburtis, 1 Hilt. 285; Getes v. Comstock, 4 N. Y. 270; Peck v. Hiler, 14 How. Pr. 155; 24 Barb. 178; Marsh v. Butterworth, 4 Mich. 575; Halligan v. Wade, 21 Ill. 470; Wade v. Halligan, 16 Ill. 507; Bentley v. Sill, 35 Ill. 414; Tone v. Brace, 8 Paige, 597; Leadbeater v. Roth, 25 Ill. 587; Holbrock v. Young, 108 Mass. 83; Lewis v. Payn, 4 Wend. 423; New York Academy of Music v. Hackett, 2 Hilt. 217; Dyett v. Pendleton, 8 Cow. 727; Hayner v. Smith, 63 Ill. 430; Upton v. Townend, 17 C. B. 30; Vaughan v. Blanchard, 1 Yeates, 175; Blair v. Claxton, 18 N. Y. 529; Tunis v. Grandy, 22 Gratt. 109; Poston v. Jones, 2 Ired. Eq. 350; Hart v. Windsor, 13 M. & W. 85; Smith v. Wise, 58 Ill. 141; Wolf v. Weiner, 7 Phila. 274; Holmes v. Guier, 44 Mo. 164; McClurg v. Price, 59 Pa. St. 420; Mirick v. Hoppin, 118 Mass. 587; Dewey v. Gray, 2 Cal. 374; Colborn v. Morrill, 117 Mass. 262; Bennet v. Bittle, 4 Rawle, 339; Briggs v. Hall, 4 Leigh, 484; Wells v. Mason, 5 Ill. 84; Maverick v. Lewis, 3 McCord, 130; Sneed v. Jenkins, 8 Ired. 27; Chatterton v. Fox, 5 Duer, 64; Smith v. Shepard, 15 Pick. 147; Hegeman v. McArthur, 1 E. D. Smith. 147; Lynch v. Baldwin, 69 Ill. 210; Leopold v. Judson, 75 Ill. 536; Walker v. Tucker, 70 Ill. 527.

[2] Zale v. Zale, 24 Wend. 76; Skaggs v. Emerson, 50 Cal. 3; Briggs v. Hall, 4 Leigh, 484; Chatterton v. Fox, 5 Duer, 64; Campbell v. Shields, 11 How. Pr. 565; Kessler v. McConachy, 1 Rawle, 435.

vance, and the only way of abating it was by allowing a proportionate part to be recovered back.[1]

Eviction by a stranger having a paramount title also bars rent subsequently payable.[2] It is a bar because it deprives the tenant of the consideration.[3] Eviction by the lessor, even from a part of the leased premises, suspends the rent for the whole. Quiet enjoyment of the premises, without any molestation on the part of the landlord, is the implied condition on which the tenant is bound to pay rent.[4] And when his possession is interfered with in such manner as to amount to an eviction by the landlord as to a part of the premises, it is a wrong done to one whom he was bound to protect, and the law will not permit him to apportion it so as to compel the lessee to pay anything for the enjoyment of the residue. While an eviction from part by the landlord continues, he cannot recover from his tenant for his occupation of any other part, either upon the lease or in an action for use and occupation.[5] And the fact that the tenant has recovered damages for the eviction does not restore the landlord's right to rent while the eviction continues.[6] But where the eviction from part of the demised premises is by a stranger asserting a superior title, it is only a bar *pro tanto*.[7] If one of two tenants in common makes a lease, and his cotenant afterwards takes possession of part of the common property, the same rule applies to exonerate the lessee *pro tanto*.[8] Such an eviction is a discharge of so much of the rent as is in proportion to the land evicted.[9] So, if the lessor accepts a sur-

[1] Rich v. Smith, 121 Mass. 328; May v. Rice, 108 Mass. 150.

[2] Morse v. Goddard, 13 Met. 177; Hegeman v. McArthur, 1 E. D. Smith, 147.

[3] Royce v. Guggenheim, 106 Mass. 201; Dyett v. Pendleton, 8 Cow. 727; Taylor's L. & T. § 378; Evans v. Murphy, 1 Stew. & Port. 226.

[4] Id.

[5] Id.; Shumway v. Collins, 6 Gray, 227; Leishman v. White, 1 Allen, 489; Skaggs v. Emerson, 50 Cal. 3; Lewis v. Payn, 4 Wend. 423; Christopher v. Austin, 11 N. Y. 216; Lawrence v. French, 25 Wend. 443; Colburn v. Morrill, 117 Mass. 262; Fitchburg, etc. Corp. v. Melven, 15 Mass. 268; Briggs v. Hall, 4 Leigh, 484; Tunis v. Grandy, 22 Gratt. 109; McClurg v. Price, 59 Pa. St. 420.

[6] Peck v. Hiler, 24 Barb. 178.

[7] Peters v. Grubb, 21 Pa. St. 455; Christopher v. Austin, 11 N. Y. 216; Moffat v. Strong, 9 Bosw. 57; Fillebrown v. Hoar, 124 Mass. 580; Johnson v. Oppenheim, 12 Abb. N. S. 448; Giles v. Dugro, 1 Duer, 331.

[8] Hoopes v. Meyer, 1 Nev. 433.

[9] Stevenson v. Lombard, 2 East,

render of part, or rightfully enters upon part for a forfeiture, or by special condition for entry, the rent may be apportioned.[1]

Physical expulsion is not necessary. Any act of a permanent character, done by the landlord, or by his procurement, with the intention and effect of depriving the tenant of the enjoyment of the premises demised, or of a part thereof, to which he yields and abandons the possession, may be treated as an eviction.[2] To constitute an eviction, the tenant must be disturbed in his possession, and in pleading an eviction an ouster must be alleged.[3] But there are a variety of circumstances which are deemed such a disturbance of possession as to coustitute an eviction short of physical force or legal process. It has been held that any interference, on the part of the landlord, which impairs the beneficial enjoyment of the premises, such as the creation of a nuisance in another part of the same building, or the like, is sufficient.[4] The tenant must, however, quit the possession in consequence of such interference.[5] There is no implied warranty in a general lease that the demised building is safe, well built, or fit for any particular use;[6] and this absence of an implied covenant not only refers to the beginning, but to the whole term. Even the landlord's default in not repairing, when he is bound by custom or covenant to do so, and in consequence the buildings become unfit for occupancy, does not authorize the tenant to quit, or to refuse to pay rent.[7] A breach by the

575; Carter v. Burr, 39 Barb. 59; Hunt v. Cope, 1 Cowp. 242; Lansing v. Van Alstyne, 2 Wend. 661; Lawrence v. French, 25 Wend. 443.

[1] Coke Litt. 148*a*.

[2] Royce v. Guggenheim, supra; Smith v. Raleigh, 3 Camp. 513; Upton v. Townend, 17 C. B. 30; Morris v. Tillson, 81 Ill. 607; Hayner v. Smith, 63 Ill. 430.

[3] Vernam v. Smith, 15 N. Y. 327; Kerr v. Shaw, 13 John. 236; Waldron v. McCarty, 3 John. 471.

[4] Dyett v. Pendleton, 8 Cow. 727; Rogers v. Ostram, 35 Barb. 523; Halligan v. Wade, 21 Ill. 470; Cohon v. Dupont, 1 Sandf. 260; Moffat v. Strong, 9 Bosw. 57; Wright v. Lattin, 38 Ill. 293; Morse v. Goddard, 13 Met. 177; Leadbeater v. Roth, 25 Ill. 587.

[5] Home Life Ins. Co. v. Sherman, 46 N. Y. 370; Cram v. Dresser, 2 Sandf. 120; Gilhooly v. Washington, 4 N. Y. 217; Fuller v. Roby, 10 Gray, 285.

[6] Dutton v. Gerrish, 9 Cush. 89; Foster v. Peyser, 9 Cush. 242; McGlashen v. Tallmadge, 37 Barb. 313; Cleves v. Willoughby, 7 Hilt. 83; Hart v. Windsor, 12 M. & W. 68; Weller v. Castles, 3 Gray, 323; Libbey v. Tolford, 48 Me. 316.

[7] Royce v. Guggenheim, 106 Mass. 201.

lessor of his covenants in the lease for repairs or improvements is no defense, except by way of recoupment, to his demand for rent covenanted to be paid, unless by the terms of the lease his performance of his covenants is made a condition.[1] Nor can the tenant, in summary proceedings at the instance of the landlord to obtain possession, set up his breaches of covenants in the lease as a counterclaim.[2]

Where the landlord, by the terms of the lease of a store being erected by him, undertook to finish it for immediate occupancy as a store by a given time, it was held that the lessee, by entering at that time, notwithstanding that the store was not finished, so that the term was vested, the lessee waived the condition precedent, though not the right to have the work done. Thereafter the lessor's default in not completing the store was no defense to an action for rent, except as a counterclaim. If the lessee had not taken possession, he could only have been made liable for rent upon his covenant, as for a breach of an executory contract; and to entitle the lessor to recover, he would be obliged to show that he had performed his part.[3] Tortious conduct of the landlord on the demised premises, which does not disturb the tenant's possession, though it may diminish his beneficial enjoyment, will not amount to an eviction, nor have the effect to suspend the rent.[4]

Eviction is no answer as to rent which has already accrued, and has become due before the eviction took place.[5] And this

[1] La Farge v. Mansfield, 31 Barb. 345; Kelsey v. Ward, 16 Abb. 98; 38 N. Y. 83; Etheridge v. Osborn, 12 Wend. 529.

[2] People v. Kelsey, 14 Abb. 372; McHoy v. Ryan, 27 Mich. 110; D'Armond v. Pullen, 13 La. Ann. 137; Eldred v. Leahy, 31 Wis. 546; Lunn v. Gage, 37 Ill. 19.

[3] La Farge v. Mansfield, 31 Barb. 345; Lunn v. Gage, 37 Ill. 19.

[4] Fuller v. Ruby, 10 Gray, 285; Drake v. Cockroft, 4 E. D. Smith, 34; Johnson v. Oppenheim, 12 Abb. N. S. 449; Edgerton v. Page, 20 N. Y. 281; Lounsberry v. Snyder, 31 N. Y. 514; Cram v. Dresser, 2 Sandf. 120; Mortimer v. Brunner, 6 Bosw. 653; Vatel v. Herner, 1 Hilt. 149; McFadin v. Rippey, 8 Mo. 738; Luckey v. Frantzkee, 1 E. D. Smith, 47. See Leostzky v. Canning, 33 Cal. 299.

[5] Vernam v. Smith, 15 N. Y. 327; McKeon v. Whitney, 3 Denio, 452; New York Academy of Music v. Hackett, 2 Hilt. 317; Pepper v. Rowley, 73 Ill. 262; Kessler v. McConachy, 1 Rawle, 435; Salmon v. Smith, 1 Saund. 202; May v. Diaz, 42 Ala. 383; Getes v. Comstock, 4 N. Y. 270; Johnson v. Oppenheim, 55 N. Y. 280; Crane v. Hardman, 4 E. D. Smith, 448; Hinsdale v. White, 6 Hill, 507; Cortsingham v. Phillip, 1 E. D.

is so, though the rent be payable in advance, and the eviction takes place during the rent period for which it was payable.[1] Nor will eviction bar rent which accrues after it has ceased, if the tenant continues in possession.[2] And giving a note for the rent during eviction from part of the premises is a waiver of the objection, and the moral obligation from partial enjoyment is a sufficient consideration.[3]

Smith, 416; Dawson v. Donati, 2 E. D. Smith, 121; Whitney v. Meyers, 1 Duer, 266.

[1] Whitney v. Meyers, 1 Duer, 266; Healy v. McManus, 23 How. Pr. 238; Getes v. Comstock, 4 N. Y. 270.

[2] Ogden v. Sanderson, 3 E. D. Smith, 166.

[3] Anderson v. Chicago, etc. Ins. Co. 21 Ill. 601. In Merritt v. Closson, 36 Vt. 172, the plaintiffs, tenants, had paid a part of the rent of leased premises, when they were ousted by the defendant, who took all the crops. *Held*, that in estimating the damages the defendant is entitle to have the unpaid rent deducted from the value of the crops, though he could not maintain an independent action to recover it.

Poland, Ch. J., said: "The court told the jury that the defendant, by thus ousting the plaintiffs, forfeited all right to that portion of the rent unpaid, and that therefore the crops taken by him were to be estimated at their full value, without deducting anything for the unpaid rent. It is undoubtedly true the defendant could not, if he ousted his tenant during the term, maintain any action to recover the rent to be paid for the term. But the question here was, what damage or loss had the plaintiffs suffered by the wrongful act, or breach of contract, on the part of the defendant. What would they have gained, or been entitled to, if the defendant had allowed them to remain on the premises till the end of the year? They would have had the use of the premises and the personal property to the end of the year, subject to the payment of the balance of the rent, and the expense of keeping the stock. By being ousted from the premises, the plaintiffs lost the use of the premises for the residue of the year, the crops on the farm, and the use of the personal property; but they also were relieved from the burden of paying the balance of the rent, and from keeping the stock through the winter. The true rule of damages was the difference in value between the two conditions. The county court recognized this in part, and decided that nothing should be allowed to the plaintiffs for the loss of the use of the premises for the residue of the year, as the evidence showed that the unpaid rent was more than the value of such use, and if they remained they would have the rent to pay. So the jury were directed, if they found that the keeping of the stock through the winter would cost the plaintiffs more than the worth of the use of the stock, the difference should be deducted from the value of the crops. If there was still, after the allowance of these deductions, any sum of unpaid rent which the plaintiffs would have had to pay if they had not been ousted, in order to entitle them to have the crops as their own by the terms of the lease, that should have also been deducted.

It is a general principle that there can be no apportionment of rent in respect to time. By this is meant that the sum accruing between one time of payment and another is a single, entire debt; it is due from the tenant only on the condition of enjoying the premises for the whole rent period, and only to the owner of the reserved rent when it becomes payable. These rent payments may be successively recovered by different persons; but in the absence of an agreement therefor, there can be no recovery for occupation for a part only of the time between rent days. If, therefore, the enjoyment be interrupted, the rent for the current rent period is lost. And if a person having a life estate, with no power to make a lease to continue longer than during his life, should make a lease for a year, reserving rent half yearly, and should die before the end of a half year, there could be no legal demand for the rent of that half year. The executor or representative of the lessor would not be entitled to it, although there was no eviction, because the lessor's title ceased at his death; and by the nature of the contract, the tenant was not bound to pay, and the lessor was not entitled to receive rent, except in the sums and at the times specified in the lease. His successor in the reversionary estate could not claim it, for the additional reason that the reversion was not his until the lease itself was terminated by the death of the life tenant who gave it. If the lessee continues to hold afterwards, such holding is necessarily under some new contract with the party on whom the estate has devolved.[1] If the lease continues, although intermediate the days of payment the reversion passes wholly into new hands, the obligation of the lessee to pay rent will continue also. Thus, in the middle of a quarter, the lessor may convey the whole estate which is under the lease, or it may be sold under execution or mortgage, or he may die leaving it to descend to his heirs, or he may dispose of it by will. The lease itself is unaffected by these events, and the rent is there-

"In actions for breach of contract where the damages are open and unliquidated, the true rule of damages is to requite the party for what he has actually lost by the violation of the contract by the other."

[1] Marshall v. Moseley, 21 N. Y. 280; Perry v. Aldrich, 13 N. H. 343. Compare Foot, Appellant, 22 Pick. 299, and Price v. Pickett, 21 Ala. 741.

fore payable as though they did not occur; but it is payable only in the sums and at the times specified in the demise. The reversion may be transmitted to a new owner during the period between the days of payment, but such an event does not divide the obligation of the tenant. The accruing rent follows the reversion wheresoever that goes, and neither the former owner nor his representative can recover any portion of it. Being recoverable only in a single sum, and not until the prescribed day of payment, the common law gives it to him who is the reversioner at that time.[1] The covenant to pay rent creates no debt until the day of payment arrives.[2]

Where the entire reversion is transferred, subject to the lease, by sale or descent, by act of the lessor or by operation of law, the rent which becomes payable afterwards follows the reversion, unless reserved or otherwise specially disposed of, and belongs to and may be recovered by the party so succeeding to the reversion.[3] Nor is it necessary, in such cases, to perfect his right to the entire rent afterwards falling due, or to discharge the tenant's liability to the lessor therefor, that such tenant should attorn or be evicted.[4]

A covenant for rent runs with the land, and, at common law, rent may be apportioned either on severance of the land from which it issues, or of the reversion to which it is incident.[5] The rent must be divided and apportioned whenever several persons succeed to the right of the lessor to receive the rent; also when the demised premises, by assignment of the lessee's estate, goes in parcels or otherwise to other persons. When the severance of the reversion is by the act of the lessor, the consent of the

[1] Price v. Pickett, 21 Ala. 741. See Mixon v. Coffulo, 2 Ind. 30; Sutliff v. Atwood, 15 Ohio St. 186.

[2] Wood v. Partridge, 11 Mass. 488; 3 Kent's Com. 470.

[3] Wise v. Falkner, 51 Ala. 359; Dailey v. Grimes, 27 Md. 440; Fay v. Holloran, 35 Barb. 295; Getzandoffer v. Caylor, 38 Md. 280.

[4] Id.; English v. Key, 39 Ala. 113.

[5] Van Rensselaer v. Bradley, 3 Denio, 135; Stevenson v. Lombard, 2 East, 575; Astor v. Miller, 2 Paige, 68; Cruger v. McLaury, 41 N. Y. 219; Van Horn v. Crane, 1 Paige, 455; Merceron v. Dowson, 5 B. & C. 479; Wollasten v. Hakewill, 3 M. & G. 297; Ingersoll v. Sergeant, 1 Whart. 337; Van Rensselaer v. Chadwick, 22 N. Y. 32; 2 Platt on Leases, 131, 132; Marshall v. Moseley, 21 N. Y. 282; Crosby v. Loop, 13 Ill. 625; Cole v. Patterson, 25 Wend. 456; Linton v. Hart, 25 Pa. St. 193; Reed v. Ward, 22 Pa. St. 144; Biddle v. Hussman, 23 Mo. 597.

tenant is necessary to the apportionment, unless the persons who become the owners liquidate and settle the proportions to be paid them respectively [1] If not so adjusted, it may be apportioned by the jury, upon evidence, according to the relative value of the several parts held by each of the owners.[2] But if the severance of the reversion is by the act of the law, or where it occurs by descent to several heirs, or a judicial sale of part, an apportionment may be made without the consent of the tenant; he will have two or more landlords instead of one, and be bound to pay rent to each, according to his interest.[3] When a tenant has assigned a part of his estate under the lease, by which he has covenanted to pay rent, he is not thereby relieved from his obligation. If the lessor thinks proper to rely on his covenant, he is at liberty to do so without resorting to the assignee. When the lessee has covenanted to pay rent, he cannot exonerate himself, either wholly or in part, by any assignment. Nor can he apportion the rent between himself and his assignee without the concurrence of the landlord, so as to liquidate the liability of the assignee.[4]

The action for rent against the lessee's assignee is based on privity of estate; hence he is only liable so long as he remains in the legal relation to the premises of assignee. If he assigns to another and the latter accepts the assignment, the liability of the former is at an end.[5] The assignee of a lease is liable for rent only by reason of the privity of estate between him and the lessor, and this privity of estate is the assignee's right of possession under the assignment, and not his actual possession;

[1] Bliss v. Collins, 5 B. & Ald. 876; Roberts v. Snell, 1 Man. & Gr. 577; Ryerson v. Quackenbush, 26 N. J. L. 236; Taylor's L. & T. § 383.

[2] Cuthbert v. Kuhn, 3 Whart. 357; Farley v. Craig, 11 N. J. L. 262; McElderrey v. Flannagan, 1 Har. & G. 308; 3 Kent's Com. 370.

[3] Cole v. Patterson, 25 Wend. 456; Wotton v. Shirt, Cro. Eliz. 742.

[4] See Ghegan v. Young, 23 Pa. St. 18; Frank v. Maguire, 42 Pa. St. 77; Wall v. Hinds, 4 Gray, 256; Taylor's L. & T. § 384; Pitcher v. Tovey, 1 Salk. 81; Buckland v. Hall, 8 Ves. 92. See Bailiff of Ipswick v. Martin, 1 Roll. Abr. 235.

[5] Siefke v. Koch, 31 How. Pr. 383; Sutliff v. Atwood, 15 Ohio St. 186; Hintze v. Thomas, 7 Md. 346; Journeay v. Brackley, 1 Hilt. 447; Armstrong v. Wheeler, 9 Cow. 88; Lekeng v. Nash, 2 Str. 1221; Taylor v. Shum, 1 B. & P. 21; Paul v. Narse, 8 B. & C. 486; Graves v. Porter, 11 Barb. 592; Hannen v. Ewalt, 18 Pa. St. 9. See McKeon v. Whitney, 3 Denio, 452.

and in an action by the lessor against the assignee for rent, the measure of the latter's liability is the extent of his possessory right, though it be to an undivided part, and not the extent of his actual possession.[1] The assignee of the whole premises is

[1] St. Louis Public Schools v. Boatmen's Ins. Co. 5 Mo. App. 91. In this case a lease was made to two persons, one of whom, by deed, assigned his undivided half interest therein to a third person, who entered into exclusive possession and occupied the whole of the leased premises; the lessor sued the assignee for the amount of the rent reserved in the lease. Held, that the assignee was liable only for the undivided half. Bakewell, J., said: "In the consideration of this case, we have no aid from any direct authority on the very point involved. The precise question seems never to have come up for judicial determination, except in a single instance. In that case, the reported opinion is deprived of the weight it would otherwise have, from the unfortunate circumstance that the premises of the learned judge who delivered it being wholly untenable, one is compelled to distrust the conclusion arrived at; which, of course, can only be correct by accident, and must be erroneous if arrived at by any process of right reasoning.

"There can be no question that the assignee of a lease is liable only by the privity of estate between himself and his landlord. Arch. L. & Ten. 70; Smith L. & T. 292; Hannen v. Ewalt, 18 Pa. St. 9. But it is assumed by the learned judge delivering the opinion in the case referred to (Damainville v. Mann, 32 N. Y. 197), that perhaps the assignee is not liable by virtue of the privity of estate; and he puts the liability on the ground of actual possession. It has not, we believe, ever been held that an actual entry under the assignment is necessary to make the assignee liable in respect of assignments by deed, which are regarded as effecting a transfer, not only of title, but also of the legal possession. The acceptance of the assignment creates the liability, and the legal possession which ownership implies is all that is required. Woodf. L. & T. 166, 289; Taylor L. & T. 450–452; Smith v. Brinker, 17 Mo. 148. In Walker v. Reeves, 2 Doug. 461, note, quoted in the New York case, the question was discussed whether the assignment imposed the obligation to pay rent. Lord Mansfield says that it does; that the actual possession is immaterial; and that the possession in law, by the assignment of the title which passed the possessory right, is sufficient. The case was that of a mortgagee who had not taken possession, and it was distinguished from that of an absolute assignee, who was assumed to be liable without entry. Although the cases in which the assignee in bankruptcy is held not liable to pay rent are put expressly upon the ground that an assent to the assignment is necessary to bind him, and the question of actual possession is considered in such cases only as it bears upon this assent (Turner v. Richardson, 7 East, 335), the learned judge in the New York case asserts that the true grounds of the decision in these cases is the question of possession, which seems to be not the fact.

"After quoting a remark by Shep-

pard, the well-known author of the Touchstone, in an argument referred to the report of Webb v. Russell, 3 T. R. 394, which he interprets by the light of his peculiar view of the law, the learned judge boldly concludes that there is no privity of estate between the lessor and the assignee of the lease where there is only constructive possession; and, having found an imaginary resting place for his feet, he proceeds to construct thereon a fabric which can have no greater value than any other poetic fiction, because, like the Stags of Tityrus, it rests on air. He proceeds to argue that the owner of the other undivided half of the lease in the case before him, who took by a separate assignment, is under no obligation to pay rent, not being in possession. This, clearly, is not the law. Coote's L. & T. and text-books and cases *passim*. Yet, on the truth of this proposition, he proceeds, mainly, to rest the decision of the whole question. It follows, he says, that defendant in possession is taking the property of the landlord without any responsibility to him (as if the lessor, before the determination of the term, had any right to say who should occupy the premises); and this, he thinks, is manifestly unjust, because the assignee in possession, having all that is useful in the premises, should pay the rent as the condition of his enjoyment. But why, it may be asked, should he pay a rent which he has never agreed to pay, and which may at the time of his possession be ten times the actual rental value? For, having what is useful in the premises, it would seem that he should only pay what may be shown to be the reasonable value of their use. But that is not the theory of this action, and is not what the lessor is seeking to recover from the assignee. However, whilst holding that defendant is liable, the learned judge says that he adopts this conclusion not without considerable hesitation. We cannot adopt this conclusion at all; and we think that this case, properly considered, even tells against the respondent in the case at bar. It seems to be admitted in the opinion, that, but for an assumption which we cannot but consider as wholly unwarranted, the decision should be the other way. The lessor looks for his rent, not to the person in possession, but to the lessee; and if he rents to two, and by agreement between themselves, or otherwise, one of them has exclusive possession, or if they choose to keep the premises vacant, this in no way concerns the lessor. The relation of landlord and tenant does not exist between the landlord and the mere occupier; nor can one merely occupying land be sued for rent in an action of debt or covenant. On the other hand, it is nowhere intimated in the books that the assignee is liable on a *quantum meruit*, as for use and occupation. He is liable at the rate fixed by the lease of which he is the assignee. If the rent is not paid, the assignee in possession may be put out; but we can see no reason whatever why the assignee of an undivided interest in a lease, though in the actual possession of the whole premises, should be made to pay the whole rent reserved. Any such rule might work very great hardship in cases that may be easily supposed; while there seems to be no hardship in holding the assignee in possession liable only according to his interest as shown by the assignment itself. His interest by virtue of the assignment created his liability; and we

liable for the rent of the whole, though only in possession of a part.[1] And if the assignee continues in the actual possession and beneficial enjoyment of the premises, his liability as assignee will continue, though he may have assigned to another person.[2] The assignee of a separate part is liable only for the rent of that part.[3]

If several tenants in common, of land chargeable with rent, make partition, each assuming the payment of his equitable share of the rent, each will still be liable to the lessor for the rent, but as between themselves each will be liable to the others for any amount either may be compelled to pay beyond his proportionate share.[4] A release by the lessor to one of the tenants in common, given subsequent to the partition, discharging him from the payment of rent on his divided part, will not extinguish the liability of the others. Such a release makes the lessor a party to the partition and apportionment; thereafter he cannot claim from the others more than the portion of the rent

do not see why the assignee of an undivided, and perhaps infinitesimally small, interest should, any more than a stranger, be liable for rent for the whole premises at the rate reserved in the lease, and which, obviously, may be no measure of their actual rental value, merely because his possession is, as it may well be, larger than his interest. If the landlord does not get his rent, he may forfeit the lease and put out any one in possession, whether assignee or sub-tenant. The reason of the case seems clear. Where a lease is made to two, there is privity of estate and privity of contract between lessor and lessee; by the terms of the contract, and by virtue of the contract and not of the privity of estate, each lessee is liable for the whole rent, though each has only an undivided half of the estate. Where one of those two men assigned his interest, there is now no privity of contract between the assignee and the landlord; but there is privity of estate; and that privity of estate, and that alone, creates the liability for rent. The liability for rent, in such a case, does not arise from privity of contract, for that is at an end; nor from possession, for it is held in Missouri (17 Mo. 148) and elsewhere, that possession can never be material in establishing the liability of an assignee of a lease, except so far as it may serve to determine the question of acceptance of the assignment,— that is, the question whether the defendant is in fact the assignee. The ground of liability is privity of estate alone. The only question that remains, then, is as to the extent of that privity; and this, we think, is determined by the extent of the estate."

[1] Negley v. Morgan, 46 Pa. St. 281.

[2] Id.

[3] Astor v. Miller, 2 Paige, 68.

[4] Van Rensselaer v. Chadwick, 24 Barb. 333; Graves v. Porter, 11 Barb. 592; Van Rensselaer v. Gifford, 24 Barb. 349.

fixed between the lessees by their contract of partition.[1] In making such apportionments the ratio of values and not of quantities governs.[2] If there is no proof of relative values the whole premises will be presumed to be of equal value; then an apportionment made according to relative quantities will be deemed prima facie right.[3] But in a case against the assignee of part of the demised premises, where upon the trial the court had apportioned the rent, as matter of law, according to the number of acres, there being no evidence of value, it was held to be error. Beardsley, C. J., said: "The amount due would necessarily depend on the proportionate value of the part of which the defendant was assignee, there being no evidence that the amount to be paid on his part had been adjusted by agreement between the parties in interest. I see no data in the case before us upon which the defendant's share could be determined as a matter of law, and very little to aid the jury in ascertaining it as a matter of fact. Possibly there was enough to have upheld a verdict if the amount had been determined by the jury; but the judge refused to submit the question to their decision, in which, I think, he clearly erred."[4]

No apportionment or abatement of rent on account of bad condition or partial destruction of the demised property.— A tenant who has made an unconditional contract to pay rent for a term cannot claim an apportionment or abatement of rent for being deprived of any beneficial enjoyment of the premises by their being out of repair, or untenantable, or unfit for the use for which they were leased.[5] Nor if the buildings or premises are destroyed or rendered useless by fire, tempest, flood, war or other inevitable casualty[6] Moreover, there is no implied war-

[1] Van Rensselaer v. Gifford, 24 Barb. 349.

[2] Van Rensselaer v. Gallup, 5 Denio, 454; Same v. Jones, 2 Barb. 643; Same v. Bradley, 3 Denio, 135; Cathbert v. Kuhn, 3 Whart. 357; Farley v. Craig, 11 N. J. L. 262; McElderrey v. Flannagan, 1 Har. & G. 308.

[3] Van Rensselaer v. Jones, supra.

[4] Van Rensselaer v. Bradley, 3 Denio, 153.

[5] Westlake v. De Graw, 25 Wend. 669; Cleves v. Willoughby, 7 Hill, 83; Welles v. Castles, 3 Gray, 323; Dalton v. Gerrish, 9 Cush. 89; Hart v. Windsor, 12 M. & W. 68; Sutton v. Temple, 12 M. & W. 52.

[6] Paradine v. Jane, Aleyn, 26; Wagner v. White, 4 Har. & J. 564;

ranty by the landlord of the fitness of the premises for the use the tenant has in view, or against accidental destruction; nor is there any implied undertaking to repair or rebuild.[1]

ENTIRE DESTRUCTION OF DEMISED PREMISES ENDS LIABILITY FOR RENT.— But where the estate out of which the rent issues is gone, and the demised tenement has ceased to exist, the rent terminates, and the obligation to pay it is at an end. Thus, by the lease of apartments in a building in a town for the purpose of trade, the lessee takes only such interest in the subjacent land as is dependent upon the enjoyment of the apartments rented and necessary thereto; and if they are totally destroyed by fire this interest ceases; the relation of landlord and tenant, upon such a lease, is dissolved by the destruction of the apartments by fire, and thenceforth the lessee has no interest in or right to the land.[2]

The lease is not terminated, nor the right to rent extinguished, where, by the operation of the lease, the tenant has, after destruction of the building, an interest in the soil, and is

Richard Le Taverner's Case, 1 Dyer, 56a; Hallett v. Wylie, 3 John. 44; Belfeur v. Weston, 1 T. R. 310; Monk v. Cooper, 2 Ld. Ray. 1477; 2 Str. 763; Fowler v. Bott, 6 Mass. 63; Izon v. Gorton, 5 Bing. N. C. 501; Arden v. Pullen, 10 M. & W. 321; Helbarn v. Mofford, 7 Barb. 169; Robinson v. L'Engle, 13 Fla. 482; Smith v. Ankrim, 13 S. & R. 39; Gibson v. Perry, 29 Mo. 245; White v. Molyneux, 2 Ga. 124; Gates v. Green, 4 Paige, 355; Patterson v. Ackerson, 1 Edw. 96; Peterson v. Edmonson, 5 Harr. (Del.) 378. A lease of mill property provided for an abatement of rent in case any part of the property should be damaged by fire during the term; and a boarding house on the premises, used by the mill operatives, was destroyed by fire; and it was held that the abatement to be made was not limited to the rental value of the building destroyed, but included any depreciation in the rental value of the remainder of the premises, if caused by the destruction of the boarding house. Cary v. Whiting, 118 Mass. 363.

[1] Tay. L. & T. § 372; Sheets v. Selden, 7 Wall. 416; Johnson v. Oppenheim, 43 How. Pr. 433; Westlake v. De Graw, 25 Wend. 669; McGlashan v. Talmadge, 37 Barb. 313; Sutton v. Temple, 12 M. & W. 52; Hart v. Windsor, 12 M. & W. 68. See Doupe v. Gennen, 37 How. Pr. 5; S. C. 45 N. Y. 119.

[2] McMillan v. Solomon, 42 Ala. 356; Graves v. Berdan, 26 N. Y. 498; Austin v. Field, 7 Abb. N. S. 29; Ainsworth v. Ritt, 38 Cal. 89; Kerr v. Merchants' Exch. Co. 3 Edw. 315; Winton v. Cornish, 5 Ohio, 417; Womack v. McQuarry, 28 Ind. 103. See Izon v. Gorton, 5 Bing. N. C. 501.

authorized to rebuild, so that thereby or otherwise he may still have some beneficial enjoyment of the premises.[1]

SAME, WHEN ENTIRE PREMISES TAKEN FOR PUBLIC USE.— Whenever the estate which a lessor had at the time of making the lease is defeated or in any manner determined, the lease is extinguished with it.[2] An instance is where a tenant for life is the lessor having no power to make a lease to continue after his death, and makes a lease for a term, and dies before that term ends.[3] So, where the entire premises demised are taken for any public use, the lease is thereby terminated; the lease becomes void when the proceedings have divested the lessor's title on payment therefor to the lessor.[4] But where only a portion of the demised premises is taken it has no effect upon the rights or relations of lessor and lessee; each is entitled to compensation for his property taken for public use; and the lessee is entitled to no abatement of the rent he has covenanted to pay, unless by force of some provision of the lease or statutory regulation.[5]

[1] Graves v. Berdan, 26 N. Y. 498. In South Carolina it has been held that where a tenant has been dispossessed by an enemy he ought to be thereafter relieved from paying rent; that his liability is suspended when his enjoyment is interrupted by the casualties of war. Bayly v. Lawrence, 1 Bay, 499. So where a hurricane rendered the rented house untenantable. Ripley v. Wightman, 4 McCord, 477. In the later case of Coagan v. Parker, 2 Rich. 255, it appeared that the tenant, although his beneficial enjoyment was impaired by the casualties of war, had not surrendered or offered to surrender the lease, or otherwise to rescind the contract, and it was held that his defense should not be allowed. The authorities in that state and elsewhere are reviewed, and the true doctrine held to be, that where there is a substantial destruction of the subject matter out of which the rent is reserved, in a lease for years, by an act of God or the public enemy, the tenant may elect to rescind, and on surrendering all benefit from the lease shall be discharged from the payment of rent. It was also decided that if the tenant be deprived of the beneficial enjoyment of the leased premises according to the intent of the lease, that is a destruction of its subject, of its subject matter, within the meaning of these terms, whether there be a physical destruction of the premises or not.

[2] Taylor's L. & T. § 519.

[3] Marshall v. Moseley, 21 N. Y. 280.

[4] Barclay v. Pickles, 38 Mo. 143; Foote v. Cincinnati, 11 Ohio, 408; Noyes v. Anderson, 1 Duer, 342.

[5] Workman v. Mifflin, 30 Pa. St. 362; Parks v. Boston, 15 Pick. 198.

Upon such condemnation, the amount of compensation or damages is the same whether one person owns the property entirely, or several have distinct estates or interests therein.[1] Where the division of interest is between a lessor holding the reversion and the lessee of an unexpired term, the subsequent liability of the latter for rent without abatement, notwithstanding the curtailment of the demised premises, enhances his share of the damages which are assessed on the taking for public use.[2] But where, as in Missouri and New York — in the latter state by statute,— the rent is apportioned, when a part of the leased property is taken for public use,[3] the lessor's share of the damages is enhanced by the subsequent loss of rent on the part so taken. He then gets in hand from the public an equivalent for his rent, and the tenant's future liability is apportioned so as to confine it ratably to the residue.[4]

Interest on rent in arrear is, in this country, allowed upon the same principles as upon other debts.[5] Although it was held in

[1] Edmunds v. Boston, 108 Mass. 535; Burt v. Merchants' Ins. Co. 115 Mass. 1; Burt v. Wigglesworth, 117 Mass. 302; Ross v. Elizabethtown R. R. 20 N. J. L. 230; Kohl v. United States, 91 U. S. 367.

[2] Id.

[3] Biddle v. Hossman, 23 Mo. 597; Kingsland v. Clark, 24 Mo. 24; Gillespie v. Thomas, 15 Wend. 464; William and Anthony Sts. 19 Wend. 678.

[4] In the Matter of New York C. R. R. Co. 49 N. Y. 414, a railroad company leased its road and all its land upon or across which the road or any part thereof, or its machine shops, etc., were constructed. It was held that the lease included all lands acquired for use in operating the road, and without which the use of the road or any part of it would be less convenient and valuable; and it was also held that where the railroad company had prior to the execution of such a lease acquired title to a piece of land for the purpose of use as a street in connection with its road, which use would be highly beneficial to and convenient for its business, the land was included in the lease, although such use had not been actually obtained at the time of the execution of the lease; and that upon the subsequent condemnation of this land by another railroad, the lessee was entitled to the use of the money awarded as damages for such taking during the continuance of the lease.

[5] Elkin v. Moore, 6 B. Mon. 462; Honore v. Murray, 3 Dana, 31; Clark v. Barlow, 4 John. 183; Stockton v. Guthrie, 5 Harr. (Del.) 204; Walker v. Hadduck, 14 Ill. 399; Naglee v. Ingersoll, 7 Pa. St. 185; Glover v. Wilson, 6 Pa. St. 290; McQuesney v. Hiester, 33 Pa. St. 435; Dorrill v. Stephens, 4 McCord, 59; Dennison v. Lee, 6 Gill & J. 383; Downing v. Palmateer, 1 T. B. Mon. 64; Vance v. Evans, 11 W. Va. 342; Stevenson v. Maxwell, 2 Sandf. Ch. 273; Crane v. Hardman, 4 E. D.

some old cases that interest should not be allowed upon rents, because it would be making a profit on profit, the more modern and reasonable doctrine seems to be that a certain sum due for rent is similar to any other debt;[1] but it is said, in the Kentucky case from which the foregoing is quoted, that when due by verbal contract, interest shall be allowed or not according to circumstances. In Mississippi it is said interest on rent is in the discretion of the court.[2] In New York it seems to be settled, that interest is not only allowed on rent payable in money, but also when payable otherwise, as in wheat, fowls and services, if not paid when due.[3] In a case in which the point was very fully considered, Bronson, J., referring to the earlier cases, said: "The principle to be extracted from these decisions may be stated as follows: 'Whenever a debtor is in default for not paying money, delivering property, or rendering services, in pursuance of his contract, justice requires that he should indemnify the creditor for the wrong which has been done him; and a just indemnity, though it may sometimes be more, can never be less, than the specified amount of money, or the value of the property or services at the time they should have been paid or rendered, with interest from the time of the default until the obligation is discharged. And if the creditor is obliged to resort to the courts for redress, he ought, in all cases, to recover interest, in addition to the debt, by way of damages.' It is true that on an agreement like the one under consideration, the amount of the debt can only be ascertained by an inquiry concerning the value of the property and services. But the value can be ascertained; and when that has been done, the creditor, as a question of principle, is just as plainly entitled to interest, after the default, as he would be if the like sum had been payable in money."[4] It is accordingly allowed also in an action for use and occupation.[5]

Smith, 448; Binsse v. Wood, 47 Barb. 624; Van Rensselaer v. Jones, 2 Barb. 643; Van Rensselaer v. Jewett, 2 N. Y. 135.

[1] Burnham v. Best, 10 B. Mon. 227.

[2] Howcott v. Collins, 23 Miss. 398.

[3] Lush v. Druse, 4 Wend. 313; Van Rensselaer v. Jones, 2 Barb. 643.

[4] Van Rensselaer v. Jewett, 2 N. Y. 135. See Livingston v. Miller, 11 N. Y. 80.

[5] Ten Eyck v. Houghtaling, 12 How. Pr. 523.

In Virginia, however, it is not recoverable of course. In an early case,[1] Tucker, J., said: "This question depends partly upon the nature of the thing demanded which is *rent*, and partly upon the nature of the action which is brought for the recovery of it. Some consideration is also due to the nature of interest and damages according to the principles of the common law." Because a summary remedy by distress was afforded to the landlord for rent, it was deemed to be giving him advantage from his own *laches* to allow him interest, unless the tenant had in some way obstructed that remedy. "Rent service, when it consisted either in personal or manual operations, or in unproductive things, as capons, spars, bows, shafts, roses and other articles enumerated by Sir Edward Coke, was not of a nature to yield any profit growing out of the thing itself, in the nature of interest. And if they happened to be uncertain, the lord could neither distrain nor recover damages for withholding them. By the common law, interest, under the odious name of usury, was altogether prohibited; consequently it could not be recovered in the common law courts for the mere detention or delay of payment of a debt, however just, or how unreasonably soever the payment might have been delayed. And upon this principle it seems to be that in actions of debt the damages are in general merely nominal; and even in replevin, at common law, it would seem that the rent is to be regarded as the certain measure of damages." It seems to be considered in that state that interest is allowable in the discretion of the chancellor or jury, in view of particular facts, showing a delay in the landlord's remedies for rent, without any neglect on his part.[2] It is not allowed where it appears that there were always effects on the premises liable to distress, sufficient to have satisfied the rents, even though such rents were demanded by the landlord.[3]

Covenants for repairs.—It has been the established rule of the common law for ages, that an express covenant to repair binds the covenantor to make good any injury to the demised

[1] Newton v. Wilson, 3 Hen. & Munf. 470.

[2] Id.; Cooke v. Wise, 3 Hen. & Munf. 463; Wickie v. Lawrence, 5 Rand. 571.

[3] Dow v. Adams, 5 Munf. 21. See Payne v. Graves, 5 Leigh, 561; Roper v. Wren, 6 Leigh, 38; Buckmaster v. Grundy, 8 Ill. 626; Malliday v. Mackie, 4 Gratt. 1.

premises which human power can remedy, even if caused by storm, flood, fire, inevitable accident, or the act of a stranger.[1] It embraces not only the buildings on the demised premises at the date of the demise and covenant, but any new buildings erected during the term, unless the covenant expresses a different intention; as where it is a covenant to keep in repair the demised buildings.[2]

Such a covenant, however, does not bind the tenant to insure against natural wear and decay;[3] nor to give the landlord at the end of the term new buildings in the place of old ones.[4] Where a very old building is demised, it is not meant that it should be restored in an improved state, nor that the consequences of the elements should be averted; it is to be repaired as an old house; but the tenant has the duty of keeping it as nearly as may be in the state in which it was at the time of the demise, by the timely expenditure of money and care.[5] The term "good repair" is to be construed with reference to the subject matter, the age and class of the tenement, and must differ, as that may be a palace or a cottage; but to keep in good repair presupposes a putting into good repair, and means that during the whole term the premises shall be in good repair.[6]

[1] Leavitt v. Fletcher, 10 Allen, 119; Polack v. Pioche, 35 Cal. 416; Nave v. Berry, 22 Ala. 382; Phillips v. Stevens, 16 Mass. 238; Paradine v. Jane, Aleyn, 26 Dyer, 33a; Earl of Chesterfield v. Duke of Bolton, Comeyn, 627; Walton v. Waterhouse, 3 Saund. 422a; Bullock v. Dommitt, 6 T. R. 650; Compton v. Allen, Style, 162; Green v. Eales, 2 Q. B. 225; Bigelow v. Collamore, 5 Cush. 226; Allen v. Cullver, 3 Denio, 294; Bohannom v. Lewis, 3 T. B. Mon. 376; 2 Platt on Leases, 186; Parrott v. Barney, 1 Sawyer, 423.

[2] Doe d. Worcester School Trustees v. Rowlands, 9 C. & P. 734; Cornish v. Cleife, 3 Hurl. & Colt. 446.

[3] Harris v. Goslin, 3 Harr. (Del.) 338; Ball v. Wyette, 8 Allen, 275; Gutheridge v. Munyard, 7 C. & P. 129; Harris v. Jones, 1 Mood. & Rob. 173.

[4] Belcher v. M'Intosh, 8 C. & P. 720; Hart v. Windsor, 12 M. & W. 68; Mantz v. Goring, 4 Bing. N. C. 451.

[5] Gutheridge v. Manyard, 7 C. & P. 129; Payne v. Haine, 16 M. & W. 541.

[6] Payne v. Haine, 16 M. & W. 541; 3 Par. on Cont. 233; Burdett v. Withers, 7 A. & E. 136; Walker v. Hatton, 10 M. & W. 249; Hart v. Windsor, 12 M. & W. 68. But see West v. Hart, 7 J. J. Marsh. 258, in which, referring to Brashear v. Chandler, 6 T. B. Mon. 150, Nicholas, J., said: "It is said in that case that a covenant simply to repair may be construed to embrace only the making good what may be dam-

And it is proper to show what was the age, class and general state of repair of the premises when the tenant took them, in order to measure the extent of the repairs to be done.[1]

The covenant to repair or to keep in good repair does not mean merely that the premises are to be kept in as good a state of repair as when the tenant took them; for that may not be good repair.[2] Such covenants are to be construed according to their particular words.[3] A covenant to put the premises into habitable repair does not require the tenant to make a new house; but the word "put" implies that it is to be improved; regard being had to the state in which it was at the time of the agreement, and also to the situation and class of persons who are likely to inhabit it, the tenant is to put it into a condition fit for a tenant to inhabit.[4]

Where the general covenant to repair excepts damages by the elements or acts of providence, no damages are within the exception to which human agency has in any way contributed.[5] A tenant holding over is impliedly bound by all the stipulations in the lease which are applicable to his new situation, including that for repairs, where there is nothing in the lease, or any extrinsic fact, to destroy this implication.[6]

In a covenant to keep the outside premises in repair, the ex-

aged, *ad interim*, but that the stipulation to deliver in good repair, in every respect, left no room for limiting it into a covenant merely to repair according to the original condition of the farm. The word keep seems to us to have direct reference to the condition of the premises at the time of the leasing, and that the then state of repair must be taken to be what the parties meant by good repair. There is so broad and palpable a distinction between a promise to put into repair and one to keep in repair, that it is almost impossible to believe that the parties meant the former when they used the latter expression. A covenant to keep in repair is certainly no broader than a covenant to repair, and if the latter obliges only to make good the damages, *ad interim*, no greater stress can be laid on the promise to keep in repair." See Sluttz v. Locke, 47 Md. 562.

[1] Payne v. Haine, supra; Burdett v. Withers, supra; Stanley v. Towgood, 3 Bing. N. C. 4; Mantz v. Goring, 4 Bing. N. C. 451.

[2] 3 Par. on Cont. 233.

[3] Cornish v. Cleife, 3 Hurl. & Colt. 446.

[4] Belcher v. McIntosh, 8 C. & P. 720.

[5] Polack v. Pioche, 35 Cal. 416.

[6] Digby v. Atkinson, 4 Camp. 275; Doe d. Riggs v. Bell, 5 T. R. 471; Beavan v. Delahay, 1 H. Bl. 8; Beal v. Sanders, 3 Bing. N. C. 850.

ternal parts are construed to be those which form the inclosure of them, and beyond which no part of them extends; and it has been held to be immaterial whether those parts are exposed to the atmosphere, or rest upon and adjoin some other building which forms no part of the premises let, as a wall dividing the demised house from an adjoining one.[1] Where a party to a lease of a carriage house, consisting of a frame covered with matched boards, a shingle roof, and having a plank floor, covenanted to do the necessary repairs on the outside, and the other those on the inside, it was held that the outside included the whole outer shell of the building, or external inclosure of roof and sides; that the necessary repairs on the outside were those which would make the building outwardly complete. The building having been crushed without the fault of either party by a heavy fall of snow upon the roof, it was held that the party who undertook to make the outside repairs must first rebuild so as to make the building externally complete, before the other party was bound to make the repairs inside. The fact that rebuilding the outside would so far replace the whole building as to leave very little to be done on the inside, and then make the performance of the other party's covenant very easy, did not in any degree excuse the former from first performing his contract.[2]

For a continuing breach of a covenant to repair, damages may be recovered *toties quoties*.[3] But a covenant by a lessee to repair fences, on or before a certain day, is not a continuing covenant, and, in an action for a breach, damages must be recovered once for all.[4] An action may be brought for breach of a covenant to keep demised premises in repair, whenever such breach occurs, even while the lessee is in possession and during the term;[5] and the recovery will be limited to compensation for the injury to the plaintiff. Where the action is brought by

[1] Green v. Eales, 2 Q. B. 225.

[2] Leavitt v. Fletcher, 10 Allen, 119.

[3] Hill v. Barclay, 16 Ves. 402; Kingdon v. Nottle, 1 M. & Sel. 365; Tremeere v. Morrison, 1 Bing. N. C. 89; Beach v. Crain, 2 N. Y. 86; Shaffer v. Lee, 8 Barb. 420; Phelps v. New Haven, etc. Co. 43 Conn. 420. See Cooke v. England, 27 Md. 14.

[4] Cole v. Buckle, 18 Upp. Can. C. P. 286.

[5] Buck v. Pike, 27 Vt. 529; Luxmore v. Robson, 1 B. & Ald. 584; Schiefelin v. Carpenter, 15 Wend. 400. See Atkins v. Chilson, 9 Met. 52.

the owner of the reversion, and the term has not expired, the measure of damages is the diminution in value of the reversion in consequence of the want of repairs.[1] This is manifestly a just rule rather than that of the amount it would cost to put the premises in repair, as was held in some early cases.[2] The landlord is not bound to expend the moneys recovered in damages in repairs, and whatever he recovers beyond his reversionary interest is in excess of due compensation. Alderson, B., said:[3] "The damages for non-repair may surely be very different if the reversion would come to the landlord in six months or nine hundred years, and that Lord Holt's doctrine in Vivian v. Campion would startle a man to whom the proposition was stated."

Where the reversion is limited to one for life, with remainder to another in tail, with remainder to a third in fee, and there is a breach of covenant which gives the tenant for life a right to sue, he can only recover damages according to the injury done to his life estate, and not the damages which may be sustained by the reversioner.[4] The injury to the reversion, however, is not universally the basis and measure of recovery; the injury which the plaintiff suffers, and for which the tenant is liable, may not arise from depreciation of the reversion. Thus, a defendant, an underlessee, who had covenanted with the plaintiff, his lessor, as the latter had to his lessor, to keep, and, at the expiration or sooner determination of the term, to leave and deliver up the premises in repair, allowed them to become out of repair. While they remained in this condition, the plaintiff having committed a forfeiture by non-payment of rent, the superior landlord ejected both the plaintiff and defendant; and it was held that the plaintiff was entitled to recover substantial damages for the non-repair of the premises. The lease to the plaintiff was for a term of seventy-two years, only sixteen of which had elapsed. Though the term had been for-

[1] Doe d. Worcester School Trustees v. Rowland, 9 C. & P. 734; Smith v. Peat, 9 Exch. 161; Mills v. East London Union, L. R. 8 C. P. 79; Williams v. Williams, L. R. 9 C. P. 659; Atkinson v. Beall, 11 U. C. C. P. 245.

[2] Vivian v. Campion, 2 Ld. Raym. 1125; 1 Salk. 141; Nixon v. Denham, 1 Irish L. 100.

[3] Turner v. Lamb, 14 M. & W. 412.

[4] Evelyn v. Raddish, Holt, N. P. 543.

feited by the plaintiff's act, and not that of the defendant, it was ended, and by the terms of the covenant the lessor was entitled to have a surrender of the premises in repair; hence the damage to the reversion from the non-repair was necessarily what it would cost to put the premises in repair. It was contended for the defendant, that as the plaintiff had no reversion, and had lost it by his own default, he was entitled only to nominal damages; that it was as if the premises had been built on a cliff which fell into the sea. But Pollock, C. B., said: "This case is distinguishable from the supposed case of the demised premises being destroyed by a convulsion of nature, or by falling into the sea, or being swallowed up and lost, because there the original lessor could not maintain an action of covenant against his tenant, and therefore such lessee would have no right of action against his underlessee. That does not apply here, because the superior landlord has a right of action on the covenant to leave and deliver up in repair. . . . And as the intermediate landlord is liable to make good the defects in the premises, he may indemnify himself by this action beforehand." In respect to the diminution in value of the reversion being the measure of damages, Bramwell, B., said it "was a very good test, but not the only test of the damages to be recovered. Then a case was suggested, of a man being under a covenant to repair a house, but not to rebuild it if it should be burnt down. If in such a case the house should be burnt down when out of repair, I should say that no action could be maintained by the lessor on the covenant to repair, because he would have sustained no damage. Here, however, the premises when delivered up to the ground landlord were worth 40*l.* less than they would have been if in proper repair." [1]

Where the tenant, under a lease containing a covenant to repair, underlet the premises to one who entered into a similar covenant, and the original lessor brought an action on this covenant in the first lease, and recovered 10*l.* damages, and 57*l.* costs, and the lessee therein incurred 48*l.* costs in his defense; it was held that the damages and costs recovered in that action, and also the costs of defending it, might be recovered as special damages in an action against the undertenant for breach of

[1] Davies v. Underwood, 2 Hurl. & N. 570.

his covenant to repair. The court say: "If he could not recover these damages and costs against this defendant, he would be without redress for an injury sustained through the neglect of the defendant, and not in consequence of his own default; for during the term he could not enter and repair the premises without rendering himself liable to be treated as a trespasser." [1] This case as to the allowance of the costs of the former action has been overruled.[2] In a case in which the plaintiff, after having suffered judgment at the suit of his lessor for non-repair of demised premises, sought to recover from his own lessee for breach of the covenants for repairs contained in the sublease of the same premises, including the costs to which he had been subjected, the Queen's Bench held the covenants in the two leases were materially different, and suggested that this consideration had been overlooked in the decision of the preceding case.[3] Parke, B., said the action was not on a contract of indemnity; that the only true measure of damages was what it would cost to put the premises in repair, and if the plaintiff had expended more, that was his own fault, for which the defendant was not liable.[4] In a similar case which came before the same court the following year,[5] these facts appeared: The original lessors having brought an action against the plaintiff for breaches of the covenant to repair, he applied to the defendant to perform the repairs, and for instructions as to the course he should pursue with respect to the defense of the action. The defendant denied that any notice to repair had been given; insisted that the premises did not require it, and even refused permission to the plaintiff to enter and execute the repairs himself; the plaintiff thereupon offered to suffer judgment by default, which the defendant refused to assent to. The plaintiff then gave the defendant notice, that, as he had

[1] Neale v. Wyllie, 3 B. & C. 533.

[2] Walker v. Hatton, 10 M. & W. 249; Penley v. Watts, 7 M. & W. 601.

[3] Neale v. Wyllie, supra.

[4] Penley v. Watts, 7 M. & W 610. On the argument, the cases of Lewis v. Peake, 7 Taunt. 153, and Pennell v. Woodburn, 7 C. & P. 117, were referred to, and Parke, B., said: "Those cases would be applicable if the [former] action had been defended in the belief that the premises were in repair. The case of a warranty applies to an existing state of things, not to a thing to be done in the future."

[5] Walker v. Hatton, 10 M. & W. 249.

denied that any notice had been served, and insisted that the premises were not out of repair, he should traverse the breaches of covenant assigned, and try the question, holding the defendant responsible for the costs. This he accordingly did, and the result was that the original lessor recovered 68*l.* damages and 58*l.* 12*s.* costs, and he himself incurred costs to 53*l.* 14*s.* 4*d.* in defending the action. Lord Abinger, C. B., said: "I do not think the covenant entered into by the defendant extended to the payment of the whole of these damages, but only to that portion of them which was necessarily incurred by the plaintiff. Now the real damage he sustained was the sum of 68*l.*, being the amount recovered by the plaintiff in the former action. The costs were certainly incurred by the present plaintiff in his own wrong, for he could have put an end to the present controversy between him and his lessor by the payment of that sum in the first instance, or he might have subsequently paid it into court. If we held that any more damages were recoverable, there would be no limit; the only safe rule is, to confine the verdict to those which were the necessary result of the act complained of, viz., the want of repairs; and I cannot see how it can be contended that the costs of both the plaintiff and the defendant in the former action were the natural or necessary consequences of that act. I think the case of Neale v Wyllie is not law, and that it was decided on a mistaken principle." While it was said in this case by Parke, B., that the covenants in the two leases were not, in substance, identical, since one was given two years after the other, and a general covenant to repair must be construed to have reference to the condition of the premises at the time when the covenant begins to operate; still the amount of the damages recovered against the plaintiff in the action on the covenants in the first lease was adopted as the "real damage" for breach of the second, on the motion of the defendant. On the whole, it is probable that the costs were disallowed because unnecessarily incurred; on the ground of an improvident defense of the former action.[1]

[1] See Smith v. Compton, 3 B. & Ad. 407; Short v. Kalloway, 11 A. & El. 28; Tindall v. Bell, 11 M. & W. 228; Wrightup v. Chamberlain, 7 Scott, 598; Smith v. Howell, 6 Exch. 730; Blyth v Smith, 5 Man. & Gr. 405.

A landlord cannot recover as part of his damages for the failure of his lessee to repair, losses to which he himself has contributed by his own acts. Thus, the plaintiff held the demised premises subject to the performance of several covenants, one of which was to repair; he sublet to the defendant on a covenant by the latter to repair, which the defendant failed to perform. The superior landlord ejected the plaintiff for breach of all the covenants, including that broken by the defendant. It was held that the plaintiff could not recover from the defendant for the loss of the term, because there were breaches of other than the defendant's covenant, and it did not appear that the ejectment resulted alone from the breach of the defendant's covenant; and it was left undecided whether, if the loss of the term had been solely caused by the defendant's failure to perform his covenant, it could have been taken into consideration in the assessment of damages.[1] Where the plaintiff, to save his lease from forfeiture, has entered during his tenant's term, after default of the latter on his covenant to make repairs, and has executed repairs which both covenants required, the reasonable cost of the same is the measure of damages against his tenant; and it is not necessary for the plaintiff to prove that his lessee assented to his entry and to the repairs being made by him, because, if there was no assent, the plaintiff would be merely liable as a trespasser, and it would have no effect on the measure of the tenant's liability for non-repair.[2]

As has been already incidentally mentioned, if a tenant bound to repair, or under a covenant to leave and deliver up in repair, leave the premises at the end of his tenancy in a state of dilapidation, he is liable in damages for what it will reasonably cost to put them in the state in which he was bound to leave them,[3] and, also, to make compensation for loss of the use while the premises are undergoing repairs.[4]

[1] Clow v. Brogden, 2 M. & G. 39.

[2] Colley v. Streeton, 2 B. & C. 273. See Williams v. Williams, L. R. 9 C. P. 659.

[3] Penley v. Watts, 7 M. & W 601; Rawlings v. Morgan, 18 C. B. N S. 776; Keyes v. Western Vt. State Co. 34 Vt. 81; State v. Ingram, 5 Ired. 441; Hays v. Moynihan, 60 Ill. 409; Rutland v. Dayton, 60 Ill. 58. See Myers v. Burns, 35 N. Y. 269; Cook v. Soule, 56 N. Y. 420; Penn. R. R. Co. v. Patterson, 73 Pa. St. 491; Phelps v. New Haven, etc. Co. 43 Conn. 453.

[4] Woods v. Pope, 6 C. & P 782, Hexter v. Knox, 63 N. Y 561. See Green v. Eales, 2 Q. B. 225.

If buildings fall to the ground by reason of the neglect of the covenantor to repair them, or if they are blown down by the wind, or burned by an accidental fire, the proper measure of damages is the amount it will take to rebuild, deducting the difference in value between old and new, as the landlord is not entitled to be put in a better position on account of the destruction, and cannot have the value of a new house when the one he lost was an old house.[1] If there be both a covenant to repair, and a covenant to insure against loss by fire for a specific sum, the liability of the covenantor, on his covenant to repair, in respect of the cost of rebuilding in case the premises are burned down, is not limited to the amount of the sum covenanted to be insured.[2] Nor has the tenant any equity to compel his landlord to expend money, received upon insurance, in rebuilding the demised premises, on their being burnt down, or to restrain the landlord from suing for rent, until after the premises have been rebuilt.[3]

Liability of assignee of lease for repairs.— An assignment of a lease subject to the performance of the covenants, does not import a covenant on the part of the assignee; but a covenant to repair runs with the land, and he is liable whilst he continues to hold the premises.[4] This covenant is divisible in respect to the privity of estate, and may be apportioned when the reversion or the land is severed.[5] In an action by an intermediate lessor against his lessee, after the lease had passed through several hands, and the premises had been surrendered, out of repair, to the superior landlord, it appeared that the premises were out of repair while held by the defendant, and while in the possession of the subsequent assignees, and it was held that, in the absence of proof to the contrary, the dilapidations took place in the defendant's time. Pollock, C. B., observed: "It does not appear that the defendant made any complaint about the state of the premises at the time he took

[1] Yates v. Dunster, 11 Exch. 15; 1 Add. on Cont. § 767.

[2] Digby v. Atkinson, 4 Camp. 275.

[3] Leeds v Cheetham, 1 Sim. 146.

[4] Wolveridge v Steward, 1 Cr. & M. 644, Hintze v. Thomas, 7 Md. 346; Gordon v. George, 12 Ind. 403.

[5] Badeley v. Vigurs, 4 El. & Bl. 71, Lee v. Payne, 4 Mich. 106; Cox v Fenwick, 4 Bibb, 538; Congham v. King, Cro. Car. 222 McMurphy v. Minot, 4 N. H. 251.

them, and if so, the presumption is, either that the premises were in a good state of repair, or that the person from whom he took them paid him a sum of money to put them in repair."[1]

DAMAGES FOR REPAIRS AND NON-REPAIRS IN SPECIAL CASES.— A person desired to erect a building adjoining the brick house of another, and obtained permission to sink his foundation wall below and partly under the latter, agreeing to pay all damages such house might thereby suffer; in putting in that foundation damage was done to the brick house; the owner repaired it, and, in a suit for the expense so incurred, called expert witnesses who gave detailed estimates of the cost of repairs. Among the items was one for "risk" in doing the work, and there was conflicting testimony in respect to its being a usual charge in such cases. Sheldon, J., delivering the opinion of the court, thus referred to it: "It can hardly be said that there was no evidence tending to show that this charge of risk was not a proper item of the expenses of the repairs of the building; and so long as there was any such evidence, although it might be weak, it was for the jury to consider and weigh it; and we cannot say that the court erred in refusing to entirely exclude it from the consideration of the jury. The court could not have been required to do more than say to the jury, that they should not make any allowance on account of that item, unless they believed, from the evidence, that it was a usual and customary charge in the making of such repairs. The item should not have been allowed, as an item of damage, under the evidence. But there were four witnesses . . . each one of whose estimate of the damages, exclusive of that item, exceeded the amount of the verdict, so that we cannot say that that charge must have entered into the verdict and formed a part of it."[2]

By an act of the legislature, in 1857, for the sale of public works, consisting of a railroad and canal, it was required that the purchaser should, immediately after taking possession, "thereafter keep up, in good repair and operating condition, the line of said railroad and canal," the same to be and remain forever a public highway, and kept open and in repair by the purchaser for all parties desiring to use and enjoy the same.

[1] Smith v. Peat, 9 Exch. 161. [2] Hayes v. Moynihan, 60 Ill. 409.

By a subsequent act, it was declared that by the act of 1857 the commonwealth required the purchasers of the main line to keep the canal "in a condition of repair and fitness for use, which shall, at all times during seasons of navigation, be equal and not inferior to the condition of repair and fitness for use in which they were at the time the commonwealth delivered the same into the purchaser's possession." It was held that under these acts the purchasers were bound to keep the canals in good repair and operating condition, although they may not have been in such repair when delivered to them; that the duty was immediate on taking possession as respects its obligation, but not as to the time of its performance; the purchasers were entitled to a reasonable time commensurate with the magnitude of the work of making the repair; and if the purchasers did not commence the repair in a reasonable time, and pursue it with diligence, they were liable for damages to the owner of canal boats for such injuries as he thereby sustained, but not for unavoidable accidents by sudden storms or floods. The following instructions on the measure of damages were approved by the appellate court: "1st. In cases of detention, the loss suffered by the expense of hands, horses, provisions consumed, and loss of the use of the boats, during the period of detention, would properly be allowed. 2d. In case of damage to the boats and tackle, caused by defective locks, shallow water, or other defect, producing unusual wear and tear, the damages thus sustained would be properly allowed. 3d. In cases of injuries caused by difficult and delayed navigation, owing to the negligence of defendant, the loss of ability to carry freight, if offered, and extra length of voyages, would be the subject of just compensation. 4th. If by such detentions a trip, which could, in a proper state of repair, be made in a certain time, should be prolonged for some days, the expense of the boats, horses, hands and provisions for this extra time would be properly allowed. 5th. If, in consequence of this difficulty of navigation, caused by defendant's negligence, a boat was compelled to forego a full load it had offered to it, or certainly could have had, and had to take so much less, the net amount of freight thus lost would be a proper allowance. 6th. If, for the same reason, the plaintiff was compelled to take two boats to carry

a load, which otherwise he would have carried in one boat, the expense of the extra boat, horses, hands and provisions, would be properly allowed. 7th. If, for the same reason, the plaintiff was compelled to hire extra teams of horses, and hands on his boats, to enable them to make their trips, he is entitled to his actual expenses and losses, and all other losses which he has proved were the legal, natural and immediate consequences of the neglect of the defendant. 8th. The plaintiff is entitled to interest from the date of each loss which he has sustained up to this date."[1]

COVENANTS NOT TO SUBLET OR ASSIGN.—These covenants have not generally raised any question of damage, but one of forfeiture.[2] In a recent case in England the action was brought on the covenants in a lease which bound the lessees and their assigns to maintain and keep in repair the forge and buildings demised, and all buildings which should be erected during the demise, and all additions and improvements thereto; and to maintain in good working order the fixtures, steam engines, tools, utensils, and other articles demised; also others that might be brought or set up on the premises, and to replace and make good all such fixtures, engines, tools, utensils and other articles as should be broken or worn out; and it was also covenanted that neither the lessees nor their assigns would assign or part with the possession of the demised premises without the consent in writing of the lessor. It was held, first, that so much of the covenant as to repairs as related to buildings, and to machinery, tools and utensils which were tenant's fixtures, ran with the land; second, that so much as related to tools and utensils which were not fixtures did not run with the land; third, that the assignee was not liable for breaches of the covenant after an assignment by him without the consent of the lessor; fourth, that the covenant not to assign without the lessor's consent ran with the land, and bound an assignee to whom the premises had been assigned with the consent of the lessor; fifth, that the lessor could recover damages indirectly in respect of those breaches which

[1] Pennsylvania R. R. Co. v. Patterson, 73 Pa. St. 491.

[2] Taylor's L. & T. ch. IX.

had already occurred, and future breaches; that the measure of damages was such sum as would, so far as money could, put the plaintiff in the same position as if he had retained the liability of the defendant, instead of having an inferior remedy against a person less able to perform the covenants or to compensate for the breach of them.[1]

Covenants to insure.—The bare covenant to insure is merely personal, extending only to the covenantor and his personal representatives, without binding the assignee of the term, and in general gives the landlord no right to receive the insurance money from the insurers; but when it contains a clause for reinstating the premises with the insurance money, he may not only require it to be so applied, but it becomes also a covenant running with the land, enabling the assignee of the reversion to maintain an action for its breach.[2] In case of a breach of such a covenant, the lessor is entitled to recover the value of the premises lost to the plaintiff by the defendant's neglect to insure, not exceeding the sum to which the defendant was by his covenant to have insured.[3] And it will make no difference that, on failure of the lessee to insure, the lessor was allowed by the lease to do so, and charge the premiums as rent.[4]

Where the plaintiff has paid the insurance premium and the covenant to insure has been broken, he may recover it back, no special loss having occurred.[5] The plaintiff being himself a lessee and under like obligation, such payment of the premium was not voluntary, but necessary for his own safety. And doubtless if an ordinary lessor had, on his tenant's default, insured for his own protection, he would be entitled to recover of his lessee the amount so paid.[6] This author says: "If, however, he has not paid the premiums, then the question is how much is the reversion the worse by reason of the lapse or non-existence of such a policy; no loss having as yet occurred? The answer to this would seem to be, that the loss to the reversion is measured by the amount which it would cost the plaintiff to put

[1] Williams v. Earle, 9 B. & S. 741.

[2] Taylor's L. & T. § 400; Douglass v. Murphy, 16 U. C. Q. B. 113.

[3] Douglass v. Murphy, supra.

[4] Id.

[5] Hey v. Wyche, 12 L. J. Q. B. 83.

[6] Mayne on Dam. Wood's ed. 374.

himself into the same position as he would now be in, had the defendant kept his contract. If no insurance has been effected, this amount would be the cost of entering into one; that is, all the charges which a party has to incur at starting, before his next premium falls due. If a policy has been effected, then the arrears of premiums (if the office will accept them), or the cost of a new policy, which ever is cheaper. It seems plain that this is all to which the plaintiff is entitled; he can claim nothing in respect of the past risk, for this is over; nor in respect of past payments, for he has made none. The cost of commencing an insurance will, at any moment, secure him against risk till default made in paying the premiums; and when this takes place, he may pay them himself, and recover their amount as damages."[1] Where the covenant does not fix the amount of insurance to be effected, but is general to insure against loss by fire, it will be intended that there should be full indemnity, and the value of the property lost by the failure to insure may be recovered.[2] Where a defendant agreed with the

[1] See Charles v. Altin, 15 C. B. 46.

[2] Ex Parte Bateman, 2 Jur. N. S. 265; Betteley v. Stainsby, 12 C. B. N. S. 477; Douglass v. Murphy, supra; Beardsley v. Davis, 52 Barb. 159. See Charles v. Altin, 15 C. B. 46. In this case, by a charter-party, it was agreed between the master and the charterers, that one-third of the stipulated freight should be paid before the sailing of the vessel,— the same to be returned, if the cargo was not delivered at the port of destination,— the charterers to insure the amount at the owners' expense, and deduct the cost of doing so from the first payment of freight. The charterers paid one-third of the freight, deducting the premium of insurance. In an action by the charterers to recover back the freight so paid, the owner pleaded that the loss of the freight to be returned was such a loss as was by the charter-party to be insured against by the charterers at the owners' expense, and such insurance, if effected, would have indemnified the defendant against the loss of the freight stipulated to be returned; that, although the plaintiff might, with the use of reasonable care and diligence, have effected an insurance whereby the defendant and the owners of the ship would have been fully indemnified against the loss of the one-third of the freight so to be returned, the plaintiffs effected the insurance so negligently and out of the usual course of business, that the same became of no use or value, and the defendant, by reason of such improper conduct, had sustained damages to the amount of said third freight so insured, and the plaintiffs thereby became liable to the defendant for the same, and liable to make good to the defendant such amount as he should have to return to the plaintiffs under this charter-party; and any sum paid or returned by the defendant to the plaintiffs in respect of the

plaintiff to have the building of the latter insured in some good company, and had made arrangements with an insurance company for that purpose, but before the insurance was effected the building was burned, and it appeared that the company so selected, in consequence of the great Chicago fire, had become insolvent, but was good when the arrangement was made, it was held that the sum at which the insurance was agreed to be made was not the proper measure of damages for breach of the agreement, but only such dividend as the insurance company would be able to pay in case the insurance had been perfected before the loss.[1]

Section 2.

TENANT AGAINST LANDLORD.

Breach of landlord's obligation for tenant's quiet enjoyment — Special and consequential damages — Lessor's covenant to repair, rebuild and improve — Recoupment.

Breach of landlord's obligation for tenant's quiet enjoyment.— Where a lease is made, there is either an express or implied engagement on the part of the lessor that he has such title to the premises as enables him to give the lease, and that the lessee shall not be disturbed in his possession during the term by the lessor, nor by a paramount title.[2] If the lease contains an express stipulation on this subject, although a restricted one, none will be implied.[3] A disturbance of posses-

freight. would be the damages sustained by the defendant, by reason of such improper conduct and deviation, and the defendant would be damnified to that extent. The plea was held bad on demurrer, inasmuch as the conclusion was not warranted by the facts stated, for the liability of the plaintiffs in respect of their negligence in effecting the issuance, was a liability to *damages*, which were not *necessarily* identical in amount with the claim set up by the plaintiffs in the action.

[1] Chicago Building Society v. Crowell, 65 Ill. 453.

[2] Smith's L. & T. 206; Taylor's L. & T. § 304; Mayor, etc. v. Maybie, 13 N. Y. 151; Tone v. Brace, 8 Paige, 597; Vernam v. Smith, 15 N. Y. 327; Graves v. Berdan, 26 N. Y. 498; Granger v. Collins, 6 M. & W. 458; Maule v. Ashmead, 20 Pa. St. 482; Bandy v. Cartwright, 8 Exch. 913; Carson v. Godley, 26 Pa. St. 117; Ross v. Dysart, 33 Pa. St. 452; Baugher v. Wilkins, 16 Md. 35.

[3] Gardner v. Keteltas, 3 Hill, 330; Howell v. Richards, 11 East, 642; Burr v. Stenton, 43 N. Y. 462; Merrill v. Frame, 4 Taunt. 329; Line v. Stephenson, 4 Bing. N. C. 578; S. C. 5 Bing. N. C. 183.

sion by a stranger, having no title, will not be a breach of the covenant for quiet enjoyment; but any interference with the possession of the lessee, more than a mere trespass, by the lessor himself, will be a breach of his engagement.[1] Hence, if a party accepts a lease and engages absolutely to pay rent for premises which the lessor owns and has power to lease for the term he undertakes to grant, the lessee will be bound to pay the rent though kept out of possession by a former tenant whose term has expired.[2] But an entry by the lessor himself, tortiously and without right or title, will amount to a breach.[3] Every grant of any right, interest or benefit carries with it an implied undertaking, on the part of the grantor, that the grant is intended to be beneficial; and that, so far as he is concerned, he will do no act to interrupt the free and peaceable enjoyment of the thing granted.[4]

When the lessee is prevented from taking possession, or is afterwards evicted by the lessor, or by any other person claiming under a paramount title, the general rule of damages in this country is the same as upon executory contracts for the sale of real estate, and the covenants for title in conveyances. In those states where the doctrine of Flureau v. Thornhill[5] prevails, the purchaser recovers the consideration money and interest, and not the value of the property; he recovers nothing for the loss of the bargain, where the sale is made in good faith, and fails by the vendor's inability, without his fault, to give a good title.[6] Following that analogy, the rents reserved in a lease, where no other consideration is paid, is regarded as a just compensation for the use of the premises.[7] In case of eviction, the rent ceases, and the lessee is relieved from a burden which is treated as equal to the benefit which he would derive from the enjoyment of the property. Having lost nothing, he can recover no damages. He is, however, entitled to

[1] Mayor, etc. v. Maybie, 13 N. Y. 151; Baugher v. Wilkins, 16 Md. 35; Taylor's L. & T. § 305.

[2] Gardner v. Keteltas, 3 Hill, 330. See Coe v. Clay, 5 Bing. 440; Trull v. Granger, 8 N. Y. 115; Underwood v. Birchard, 47 Vt. 305.

[3] Sedgwick v. Hollenback, 7 John. 376; Levitsky v. Canning, 33 Cal. 298; Bennet v. Bittle, 4 Rawle, 339.

[4] Dexter v. Manley, 4 Cush. 24.

[5] 2 W. Bl. 1078.

[6] Vol. II, p. 207.

[7] Kelly v. Dutch Church, 2 Hill, 105; Mack v. Patchin, 42 N. Y. 167.

the costs he has been put to in defending against the paramount title; and as he is answerable to the true owner for the mesne profits for a limited period, he may recover back the rent he has paid for the same time, with interest thereon.[1] Upon an executory contract to give a lease, and a refusal to give one, the rule of damages is the same, if the inability or refusal is without fault or fraud on the part of the party promising to execute one.[2]

In a late case in New York,[3] one of the two judges delivering opinions, treated the rules adopted upon the analogy of those governing between vendor and purchaser as settled in that state; but because the lessor was an actor in evicting the tenant, he was held liable for compensatory damages, measured, not by the rent, but the value of the lease. The judgment appealed from was based upon that view, and it was affirmed. Smith, J., in an opinion in favor of affirmance, says the mild rule which has been stated has not been very satisfactory to the courts in this country, and it has been modified more or less to meet the injustice done by it to lessees in particular cases. He refers to two English cases[4] as repudiating that rule, and mentions a New York case[5] as based on the same doctrine. The English cases do repudiate the rule except as between vendor and purchaser. Earle, C. J.,[6] said, "if there be a lease of land in possession, and the lessee enters under it, and is ousted or evicted by one against whose acts the lessor covenants, . . . the lessee is entitled to recover all he has lost, that is, the value of the term." Byles, J., in the same case, said that the rule firmly established between vendor and purchaser is that the purchaser

[1] Id.; Kinney v. Watts, 14 Wend. 38. In this case the court also say, in respect to improvements he may have made upon the premises, and money expended upon them, he stands upon precisely the same footing with a purchaser who recovers nothing for improvements or expenditures, nor can a lessee, upon an ordinary covenant for quiet enjoyment. McAlpin v. Woodruff, 11 Ohio St. 120; Mack v. Patchin, 42 N. Y. 167; Green v. Williams, 45 Ill. 206; McClowry v. Cloghan, 1 Grant's Cas. 307; Van Brocklin v. Brantford, 20 U. C. Q. B. 347; Chatterton v. Fox, 5 Duer, 64; Ricketts v. Lastetter, 19 Ind. 125.

[2] Noyes v. Anderson, 1 Duer, 342.

[3] Mack v. Patchin, supra.

[4] Williams v. Burrell, 1 C. B. 402; Loche v. Furze, 19 C. B. N. S. 96; affirmed, L. R. 1 C. P. 441.

[5] Trull v. Granger, 8 N. Y. 115.

[6] Loche v. Furze, supra.

is not to be placed in the position he would have been in if the vendor had performed his contract, but in the position he — the purchaser — would have been in if the contract had never been made; that is, he is entitled to a return of his deposit, with interest, and to any expenses he may legitimately have been put to in investigating the title, and to nominal damages and no more. "That," he adds, "is an anomalous rule, confined, for the sake of general convenience, to the case of vendor and purchaser. In all other cases of breach of contract, the measure of damages is the loss the plaintiff has proximately sustained by reason of the breach of the defendant's contract." [1]

In several states of the Union the doctrine of Flureau v. Thornhill has never been adopted between vendor and purchaser, and has no influence upon the adjudications between lessor and lessee.[2] Where a lessor knows, or is chargeable with notice, of such defect of his title that he cannot assure to his lessee quiet enjoyment for the term which such lessor assumes to grant; where he refuses in violation of his agreement to give a lease, or possession pursuant to a lease, having the ability to fulfil, as well as where the lessor evicts his tenant, he is chargeable with full damages for compensation, and the doctrine of Flureau v. Thornhill has no application. On this general proposition the authorities agree. In such cases the difference between the rent to be paid and the actual value of the premises at the time of the breach for the unexpired term, is considered the natural and proximate damages.[3] Where the lessee is de-

[1] See Rolph v. Cranch, L. R. 3 Ex. 44.

[2] Gore v. Brazier, 3 Mass. 523; Decta v. Manly, 4 Cush. 14; Horsford v. Wright, Kirby (Conn.), 3; Sterling v. Peat, 14 Conn. 245; Hardy v. Nelson, 27 Me. 525; Elder v. True, 32 Me. 104; Doherty v. Dolan, 65 Me. 87; Caswell v. Wendell, 4 Mass. 108; Sumner v. Williams, 8 Mass. 222; White v. Whitney, 3 Met. 81; Hertzog v. Hertzog, 34 Pa. St. 418; McNair v. Compton, 35 Pa. St. 23.

[3] Green v. Williams, 45 Ill. 206; Dobbins v. Duquid, 65 Ill. 464; Mack v. Patchin, 42 N. Y. 167; 29 How. Pr. 20; Trull v. Granger, 4 Seld. 115; Driggs v. Dwight, 17 Wend. 71; Tracy v. Albany Exp. Co. 3 Seld. 472; Chatterton v. Fox, 5 Duer, 64; Dean v. Roesler, 1 Hilt. 420; Myers v. Burns, 35 N. Y. 272; Porter v. Bradley, 7 R. I. 538; De La Zerda v. Kern, 25 Tex. Sup. 188; Dexter v. Manly, 4 Cush. 14; Townsend v. McKenon Wharf Co. 117 Mass. 501; Giles v. O'Toole, 4 Barb. 261; Yeager v. Weaver, 64 Pa. St. 425; Wolf v. Studebaker, 65 Pa. St. 459; Cilley v. Hawkins, 48 Ill. 308; Newbrough v. Walker, 8 Gratt. 16.

prived of possession and enjoyment under such circumstances, the lessor is either guilty of intentional wrong, or he has made the lease and assumed the obligation to assure the lessee's quiet enjoyment with a culpable ignorance of defects in his title, or on the chance of afterwards acquiring one. In neither case has he any claim to favorable consideration, and he is not excused on the doctrine of Flureau v. Thornhill from making good any loss which the lessee may suffer from being deprived of the demised premises for the whole or any part of the stipulated term. Nor would a vendor, who had contracted for the sale and conveyance of land, and, being able to fulfil, refused, or was unable to perform by reason of a known absence or defect of title, be held liable to the purchaser for less damages than the value of his bargain.[1] A lessee who is thus denied possession, or evicted, may recover the difference between the agreed rent and the actual rental value as general damages. It is not necessary to state them as special damages in the declaration.[2] A tenant at will, evicted by his landlord, without notice, may recover damages until the time when the tenancy at will might have been terminated by the landlord — even in an action brought before the expiration of that time.[3]

Special and consequential damages.— If the lessee has been put to costs in defending against the paramount title, he is entitled to recover them, and his right to them is governed by the same principles that apply when the action is brought upon other forms of warranty. There is included an implied indemnity against all such costs as have been properly and necessarily incurred.[4] These include not only the costs recovered by the claimant of the superior title, but also the costs incurred in the unsuccessful defense, where the lessee is justified in making a defense.[5] Such

[1] Vol. II, p. 216.

[2] Green v. Williams, 45 Ill. 206.

[3] Ashley v. Warner, 11 Gray, 43.

[4] Wynn v. Brooke, 5 Rawle, 106; Vol. I, p. 140; Vol. II, p. 302.

[5] Willson v. Willson, 25 N. H. 229; Williams v. Burrell, 1 C. B. 402; Howes v. Martin, 1 Esp. 162; Wrightup v. Chamberlain, 7 Scott, 598; Lewis v. Peake, 7 Taunt. 153; Mainwaring v. Brandon, 8 Taunt. Pennell v. Woodburn, 7 C. & P. 117; Blyth v. Smith, 5 Man. & Gr. 405; Leffingwell v. Elliott, 10 Pick. 204; Reggio v. Braggiotti, 7 Cush. 166; Ottuma v. Parks, 43 Iowa, 119; New Haven, etc. Co. v. Hayden, 117 Mass. 433; Rolph v. Crouch, L. R. 3 Ex.

costs must be specially claimed in the declaration; they are items of special damage.[1]

If other damages have resulted as the direct and necessary or natural consequence of the defendant's breach of the contract, these are also recoverable. For example, if the plaintiff in good faith, and relying on the contract, has made preparations to take possession, and these have been rendered useless by the defendant's refusal to comply with his contract, the authorities hold that there may be a recovery for the loss thus sustained.[2] Thus, where a party agrees to demise certain premises to another, who breaks up his establishment and proceeds with his family and furniture to the place where the premises are situate, and the landlord refuses to give possession, the tenant is entitled to recover the damages sustained by such removal of his family and furniture.[3] So where a defendant had leased a farm to plaintiffs, and permitted them to enter and break ground before the lease commenced, and afterwards when the lease commenced refused to let them have possession, it was held

44; McAlpin v. Woodbury, 11 Ohio St. 120; Harding v. Larkin, 41 Ill. 413; Levitsky v. Canning, 33 Cal. 299; Adamson v. Rose, 30 Ind. 380; Phipps v. Tarpley, 31 Miss. 433; Fernander v. Dunn, 19 Ga. 497; Blake v. Burnham, 29 Vt. 437; Baxter v. Ryerss, 13 Barb. 267; Sterling v. Peet, 14 Conn. 245; Welsh v. Kibler, 5 S. C. 405; Hardy v. Nelson, 27 Me. 525; Keeler v. Wood, 30 Vt. 242; Ryerson v. Chapman, 66 Me. 557.

[1] Green v. Williams, 45 Ill. 206.

[2] Adair v. Bogle, 20 Iowa, 238; Green v. Williams, supra. In Pratt v. Paine, 119 Mass. 439, a lease of a dwelling house for five years provided that the lessor might terminate the lease by notice, and that if this was done during the first three years of the term, the lessee should be paid such sum as a compensation for the loss he might "by such abridgment of the term sustain in consequence of expenditures incurred by the lessee in fitting up the premises, and expense incurred in removing." In an action by the lessee to recover for expenses incurred in fitting up the premises, the lease having been terminated by notice within the three years, it appeared that at the time the lease was made the building was in thorough repair, but the lessee made changes in it, and furnished it; held, that the term fitting up the premises included not only the fitting up the building and premises for the uses of the lessee, but also the fitting up of the furniture to the building; and that the measure of damages was the loss sustained by reason of his having incurred such expenditures, the full benefit of which he had lost by the abridgment of his term, and not the entire cost of the fitting up.

[3] Driggs v. Dwight, 17 Wend. 71; Giles v. O'Toole, 4 Barb. 261.

that they were entitled to recover not only the market value of this lease, but also for the worth of the labor they had bestowed upon the premises, together with such other losses as they had sustained by incurring expenses in preparing to carry out their agreement under the lease.[1]

A defendant in New Hampshire proposed by letter to the plaintiff residing in Wisconsin, that if the latter would come to the writer, he would give him and his wife a year's board, and allow him to carry on the defendant's farm. The defendant having refused, on the plaintiff complying with his proposition, to fulfil his agreement, it was held that the expenses incurred by the plaintiff in so removing his family, and compensation for his necessary loss of time, as well as the loss of other advantages offered him in the contract, might be recovered; but not his sacrifice in selling off his property with a view to such removal.[2]

If the tenant has expended money in improvements, these will not add to the damages a lessee is entitled to recover for eviction, except as such expenditures enhance the rental value, or the value of the premises for the particular use they may have been rented for, unless the tenant has some property in the improvements, and is entitled to be paid therefor, or to remove them;[3] in which latter case, to the extent to which the defendant's act of disturbing his possession injures his rights in the new erections, or entitles him to claim as for their destruction or conversion, his damages for eviction will be increased.[4] In an action for a tortious and illegal eviction, brought by a tenant against his landlord, where the former with his family and goods have been ejected from the premises demised to him, he may recover in addition to other damages for injury to his feelings; but not for injury to his health from exposure, in going two days afterwards from the premises to another place, or from attending his family when ill from the effects of the eviction, or from grief at their illness.[5]

Where premises are let for a particular purpose, if the lessor

[1] Cilley v. Hawkins, 48 Ill. 308.

[2] Woodbury v. Jones, 44 N. H. 206; Adair v. Bogle, 20 Iowa, 238; Yeager v. Weaver, 64 Pa. St. 425.

[3] Schlemmer v. North, 32 Mo. 206; Flagg v. Dow, 99 Mass. 18.

[4] Ricketts v. Lastetter, 19 Ind. 125.

[5] Fillebrown v. Hoar, 124 Mass. 580.

withholds them, or any part, he will be liable for the rental value of the premises for that purpose or the diminution of value from the loss of the part withheld.[1] And if an established business is suspended by eviction, or probably by refusal to renew a lease pursuant to agreement, the injury suffered in the breaking up of that business may be taken into consideration in the assessment of damages. A lease for years was made of real estate comprising a factory, water power, tools, machinery and apparatus for carrying on the manufacture of pails. In an action on the implied covenant for quiet enjoyment, the plaintiff was permitted to introduce evidence on the question of damages for the interruption of his business, and on the value of his lease; to show the condition and capacity of his works, the number of pails that could be made, the cost of making them, and their price at the shop and in the market. He also called a witness who had been engaged in making similar pails at a place twenty-five miles distant from the plaintiff's works, who was permitted to testify to the particular items of cost of the manufacture, to the price of pails at the shop and in the market, and to the profits of the business. The appellate court held there was no error in admitting such evidence, for it enabled the judge to approximate to the actual damage.[2]

How far the lessee is entitled to have his damages increased by including compensation for any loss he may suffer in having a business, contemplated or being done on the demised premises, thwarted or broken up, is not quite settled. The cases agree that, where possession is withheld or interrupted by the landlord, the tenant is entitled to damages on the basis of the rental value at the time of the breach. That is an element of damage or measure of redress to which he is manifestly entitled, because such value is the natural and direct product of the contract. This value, however, may not be the special value the premises may have for the lessee's use, but is the market value,—the value for general use, or which might be realized by subletting, or by assignment of the lease. It is not enhanced or affected by consideration of any profits which the lessee has by

[1] Hexter v. Knox, 63 N. Y. 561; Townsend v. Nickerson Wharf Co. 117 Mass. 501; Dobbins v. Duquid, 65 Ill. 464; Dexter v. Manley, 4 Cush. 14.

[2] Dexter v. Manley, 4 Cush. 14.

his plans in prospect, or is actually realizing, in a business projected or being conducted on the demised premises, and for which they are essential to him for the time being. The suspension of a profitable business, even if it can be re-established elsewhere, involves a loss of the gains which would be made in the interval, the expense of the change, and if a good will has been created, that will be in some measure, if not wholly, lost by the removal to a different place. The objection usually made to the allowance of damages for the loss of profits, when they are disallowed, is that such damages are remote and uncertain or speculative. They are not remote when the premises were leased for the particular business, and the action is against the lessor or his successor in interest, by the lessee or his assignee, whether the action is on the covenant for quiet enjoyment or in tort; nor are they remote to a wrongdoer who destroys or impairs a business open to his observation.[1] The objection that the damages are uncertain and speculative is insuperable when they are incapable of estimation and proof with that degree of certainty requisite to establish facts for the consideration of a jury. There should be no distinction as to the degree of certainty required in proof between this fact and any other upon which either the right to damages or their amount

[1] Townsend v. Nickerson Wharf Co. 117 Mass. 501; Hexter v. Knox, 63 N. Y. 561; Chapman v. Kerby, 49 Ill. 211; Smith v. Underlich, 70 Ill. 426; Dobbins v. Duquid, 65 Ill. 464; New York Academy of Music v. Hackett, 2 Hilt. 217; Allison v. Chandler, 11 Mich. 542; Seyfert v. Bean, 83 Pa. St. 450; Park v. C. & S. W. R. Co. 43 Iowa, 636; Lacour v. Mayor, etc. 3 Duer, 406; St. John v. The Mayor, etc. 13 How. Pr. 527.

In Eten v. Luyster, 60 N. Y. 252, the purchaser of the reversion had evicted the tenant, and the latter brought an action for the damages. The defendant had torn down and destroyed a building built by plaintiff on the premises; the plaintiff also gave evidence tending to show that he had a sum of money, in a box in that building, which was lost in the removal. It was held that the plaintiff was not bound to gather up the fragments of his scattered and broken chattels, but was at liberty to leave them where the defendant placed them, and to look to him for their value; that the plaintiff was entitled to recover for all losses occasioned by the trespass including the destruction of the building, the loss of the money, and the value of the unexpired term; that although the money was kept in an unusual place, and the defendant may not have suspected its presence, yet that he was liable for its loss, such loss being the direct result of his acts.

depends. A conservatism, however, pervades generally the law of damages; and it being the common experience that there is a wide difference between theoretical or speculative profits estimated in advance without any actual data, and the results usually achieved when the scheme is put in practice, it is necessary that the law should discard what is merely fanciful, or possible, and only permit those profits to be considered which have some basis of actual facts to support them.

In a New York case which went to the court of appeals, a tenant had been evicted by his landlord, by void summary proceedings before a justice, which were annulled on certiorari, and he brought an action for the damages resulting from such expulsion. On the trial, the plaintiff was the only witness as to the amount of damages. He estimated the damage to his property in items amounting to $4,645, and also testified, without objection, that he lost a large amount — four thousand dollars — which he supposed or estimated he would have made, if he had not been molested. This supposed loss, so stated, it was held he was not entitled to recover. No facts were stated which a jury could weigh; the profits claimed to have been lost were, so far as appeared, wholly conjectural. In an earlier case,[1] suit was brought against a municipal corporation for causing a nuisance in the street, by which the plaintiff, as proprietor of a restaurant and lodging-house, lost custom and the consequent profits. The plaintiff showed the actual receipts of his hotel the year previous to the obstruction complained of, the actual daily receipts during its continuance, and also the actual daily receipts for some months after the obstruction was removed; also that the expenses were in the same, or in about the same, ratio to the receipts during the whole period. On this state of facts, Woodruff, J., thus discussed the right to damages and the proof of them: "When it is borne in mind that the plaintiff kept a refectory and boarding-house for the resort of daily visitors for their various meals, and of transient persons for their lodgings, it is difficult to suggest any other mode of ascertaining the effect upon the plaintiff's business than this. To say that he must prove what

[1] St. John v. Mayor, etc. 13 How. Pr. 527.

persons were prevented from visiting his house, and what meals they would have taken and paid for, is to suggest a mode of proof obviously impracticable; and if it was done, it would still leave the same inquiry, what would have been the profits upon the meals they took and paid for, which is now objected to. The loss of custom, and the consequent loss of profits, is the very matter to be recompensed in this action, and the cases to which we are referred are not analogous.

"In De Winte v. Wiltse,[1] the plaintiff recovered for the loss of the rent he had been accustomed to receive for a house he erected to be let as an inn, or tavern, although, in general, in actions for the breach of contract, loss of profits are not recoverable;[2] and purely contingent or speculative profits, it is sometimes said, are not the subject of recovery. This is a somewhat loose statement of the proposition, which does not exclude all reference to probable profits. It is undoubtedly true [that profits are recoverable], under certain circumstances, in every sense; for example: A agrees to let a tavern-house to B, and afterwards refuses to give a lease. The actual value of the house, contrasted with the sum paid, or to be paid therefor, is the damage sustained, and yet the elements of value consist in location, good will, if any, the long habit of travelers to resort to a well, and like circumstances, and the experience of the past, must necessarily enter into the estimation of either the witnesses or the jurors. On the other hand, if the house be hired for a dwelling, the cost of another, having equal advantages, is the only guide in determining the damages."[3]

There is no reason for applying a rule more favorable to a party injuring another's business by an act which is both a tort and a breach of contract, as is the case when a landlord disturbs the possession of his tenant, than to one who so disturbs a possession and impairs a business merely as a tortfeasor; though in many cases of tort the jury is permitted to award compensation upon less certain proof than that ordinarily required in actions upon contracts. Hence, when the action for

[1] 9 Wend. 325.

[2] See Blanchard v. Ely, 21 Wend. 350; Downie v. Potter, 5 Denio, 306; Giles v. O'Toole, 4 Barb. 261.

[3] Wilkes v. Hungerford Market Co. 2 Bing. N. C. 281; Lacour v. Mayor, etc. 3 Duer, 406; Marquart v. La Farge, 5 Duer, 559.

disturbance of possession is based upon the tort, as it must be when brought against one standing in no privity to the plaintiff, and as it may be even against the landlord, the form of the action may have some influence on the required quantity of proof. But where there is a legal standard of damages, and this equally measures the compensation due to the injured party, whether the act complained of is a tort or a breach of contract, any evidence which would suffice in the one form of action to prove that act and its consequences ought to be accepted as sufficient in the other for the same purpose. If there be any such rule as that loss of profits constitutes no ground or element of damages, it is not a universal rule, nor a general rule. There are numerous cases, even for breach of contract, in which profits have been properly held to constitute not only an element, but the measure of damages.[1] When it is advisedly said that profits are uncertain and speculative and cannot be recovered, when there is an alleged loss of them, it is not meant that profits are not recoverable merely because they are such, nor because profits are necessarily speculative, contingent and too uncertain to be proved; but they are rejected when they are so; and it is probable that the inquiry for them has been generally proposed when it must end in fruitless uncertainty; and, therefore, it is more a general truth than a general principle, that a loss of profits is no ground on which damages can be given. In an early case,[2] a defendant agreed to let the plaintiff have the use of certain mills for six months for 10*l*., which was shown to be the full rental value; but damages for being deprived of the use to the amount of 500*l*. were given with the sanction of the court, by reason of the stock laid in by the plaintiff.[3]

[1] Allison v. Chandler, 11 Mich. 558.

[2] Nurse v. Barns, T. Raym. 77.

[3] In Green v. Williams, 45 Ill. 206, the defendant had rented a store to the plaintiff for a year, in which the plaintiff intended to carry on business as a milliner. Before the term commenced, the defendant leased and gave possession to another. The court said the plaintiff is entitled to recover all expenses necessarily incurred by her in consequence of the defendant's refusal to give possession, so far as said expenses are declared for; but she is not entitled to recover profits that she might have made by conducting her business upon the demised premises.

A landlord ousted his tenant during his term, and the latter brought trespass. Not having re-entered, it was held he could recover damages for the ouster, and all the necessary or natural consequences thereof, including those resulting from breaking up the plaintiff's business, but not for the value of the unexpired term or the mesne profits.[1]

Damages on the basis of the excess of the rental value above the stipulated rent is wholly independent of the consideration of any special use of the premises, the rental value being merely the actual or market value. Hence, if the lessee is prevented by the lessor from taking possession, and has incurred any expenses for that purpose, they are an additional item of damages; and for the same reason, if, after taking possession, the lessee establishes a profitable business, which is broken up by eviction, or impaired by enforced suspension or transfer to another place, any damage resulting therefrom which can be established with the requisite certainty, may be recovered, in addition to those computed on the basis of the rental value.

Such damages are remote, speculative and incapable of ascertainment. Besides, it does not appear that the plaintiff was not able to find another store equally favorable to her business. Olmstead v. Burke, 25 Ill. 86; Giles v. O'Toole, 4 Barb. 261.

"If, however, it had appeared that her business was unavoidably suspended in consequence of the defendant's breach of his contract, we are of opinion she should receive, not speculative profits, but interest, during such suspension, on the amount of capital invested in her business, and, for the time being, lying idle. Freeman v. Clute, 3 Barb. 424." See De La Zerda v. Korn, 25 Tex. Sup. 188; Rhodes v. Baird, 16 Ohio St. 573.

In Dobbins v. Duquid, 65 Ill. 464, the lessor of premises used by the lessees in carrying on the business of dealers in wood and coal, after the destruction of the buildings thereon by the great Chicago fire in 1871, and before the expiration of the term, leased the premises to other parties and put them in possession. This was supposed to be done by some forgetfulness or mistake. The court held that the lessor was liable to the prior lessees, in any event, for the difference between the rent to be paid, and the actual rental value of the property, and also for any loss to their business which could not reasonably have been avoided. The plaintiff was prevented from recovering anything under this last ruling, by having refused the defendant's offer of other premises near to those which had been demised, the court holding that it was the plaintiff's duty to make ordinary and reasonable effort to prevent any loss to their business. By declining the defendant's offer they failed in that duty.

[1] Smith v. Wunderlich, 70 Ill. 426.

The recovery of the value of the lease has sometimes been supposed to include any damage done to the lessee's business.[1] This

[1] In Smith v. Wunderlich, 70 Ill. 426, McAllister, J., thus discusses this question: "There is no evidence tending to show that after the ouster was consummated, they (the plaintiffs) made any lawful re-entry, or brought any action for forcible entry and detainer to recover possession; but, on the contrary, they brought this action to recover for the ouster, before the term expired, and, by the instructions now in question, the jury were directed, in assessing damages, to first allow plaintiffs the rental value of the premises above the rent they were paying, for the residue of the term, and then, *any* loss sustained in their business as a necessary consequence of the ouster, after the time it occurred. The words *any loss* would, of course, include the loss of profits which they would have realized, if they had not been ousted, by the use of the premises, in carrying on their business. The jury could not understand it otherwise, because the basis was laid for estimating prospective profits, by showing what had been the net profits of the business for the month next previous to the ouster, which included not only their own time and labor, but the use of the premises in producing them. It is obvious that the plaintiffs could not realize the advanced rental value over and above what they had to pay for rent, as an income independent of the profits derived from using the premises in conducting their business, without renting or otherwise disposing of them to another party; and common experience teaches us that they could not do that, and still retain them, to be used for carrying on their business.

"There may be cases where, from the peculiar circumstances of the disseizee's business, and the actual rental value of the premises, the difference between the actual rental value and what it was paying as rent would not be full compensation for the loss in having his business broken up by the disseizin. When such is the case, the plaintiff has been permitted to make his election, and instead of recovering the rental value, demand compensation for the loss of profits in his business, occasioned by the ouster. The case of Chapman et al. v. Kirby, 49 Ill. 211, though an action on the case, and not trespass, was decided upon that principle; but it seems to us that to allow as a measure of damages both the advanced rental value, and prospective profits, which could be realized only by the use of the premises by the plaintiffs themselves, would be to establish mere arbitrary rules of damage, devoid of sense or justice either in their basis or application. But aside from improperly uniting the two grounds of damage, is the rule as to the rental value, under the circumstances of this case, a correct one? It is laid down by the instruction under consideration, without qualification, and is in effect, that where a tenant for years is ousted by strangers — we say strangers, because there is no allegation in the declaration about the tenancy, or one of the defendants being lessor,— the disseizee, without subsequent reentry, may bring trespass for the disseizin immediately after it is effected, and recover as one species of damage the value of the unexpired term. Suppose the term has five, ten or twenty years to run. Surely

is obviously a mistake where the rental value rather than the special value to the lessee is estimated.[1]

there can be no such rule as that; because, if there were, as applicable to terms for years, why not upon the same principle extend it to any greater estate? Suppose, again, that the plaintiffs' unexpired term had five years to run, and, without any re-entry, they had waited four years before bringing this suit, and then another year had elapsed before trial, the statute of limitations would not have been transcended; but could they recover mesne profits, or the rental value for that entire period? If for five months, why not for five years? The answer to these queries is the established rules of the common law." . . .

"In the case at bar the plaintiffs' time had not expired, and did not expire until several months after this suit was brought. There was ample time for them to have brought an action of forcible entry and detainer, and thus have regained possession. That done, the law, by a kind of *jus postliminii*, or right of reprisal, would regard the possession as having been all along in them (3 Black. Com. 210); and then after the expiration of their term, they would be entitled to recover, as mesne profits, the value of their lease or term; for, as a general rule, the annual value of land is the measure of mesne profits. Adams on Eject. 391; Sedg. on Dam. 124. The theory on which such recovery could be had would be, that the trespass had continued to the end of the term." See Ashley v. Warner, 11 Gray, 43.

[1] Dobbin v. Duquid, 65 Ill. 464. In Rhodes v. Baird, 16 Ohio St. 473, the action was brought upon a contract made January 1, 1858, between the parties, by which the defendant agreed to furnish twenty-seven acres of land to the plaintiff, on which to plant a peach orchard; also a dwelling house, certain pasturage, fuel, and about thirty acres of tillable land. In consideration of this agreement on the part of the defendant, the plaintiff agreed to set out two thousand peach trees on the tract of twenty-seven acres, and to assist in the cultivation of a peach orchard thereon, and in the business of raising and selling fruit therefrom. It was further agreed that the expenses were to be borne by the parties in equal portions, and that the number of trees should be increased until the entire twenty-seven acres should be planted. The agreement was to continue for ten years, or longer, if the orchard should continue to bear fruit and prove profitable. A lease was to be made to the plaintiff embodying these terms. After the plaintiff had been in possession and planted two thousand peach trees, defendant refused to execute the lease, and he was evicted by the defendant from a part of the premises when the peach trees were about two years old. On the trial a witness who had the special knowledge to qualify him to testify as an expert, was asked the following questions:

"First. What is the average life of a peach orchard in this county?

"Second. Taking the average of crops for the last ten or fifteen years in this county, how many crops may be reasonably expected from a peach orchard during its life?

"Third. Taking the average of prices for the last ten or fifteen years, what would be the future profits of a peach orchard of budded

trees in this county upon an average crop?

"Fourth. Taking the probabilities of crops in the future, and the average price of peaches for the last ten or fifteen years, what would be the value per tree of such a peach orchard, two years old, with the privilege of having them stand on the land for the life of the orchard?"

The witness testified, under objection, in answer to these questions, "that the average life of peach orchards in this county, in ordinary good locations, is about twelve to fifteen years, and that taking the average of peach crops for the last ten or fifteen years in this county, he was of opinion that a peach crop might reasonably be expected, from an orchard in this county, about once in three or four years, after it began bearing and during its life. And that taking the average of prices for the last ten or fifteen years in this county, the future profits of a peach orchard of budded trees in this county, upon an average crop, would be probably, at a low estimate, about one dollar and fifty cents per tree in the orchard for each crop; that he knew no market value for peach trees about two years old in such an orchard; that he never knew or heard of one selling at that age, and that judging from what a peach orchard would probably produce, and the probable price of peaches, he would be of the opinion that such an orchard would be worth about one dollar and fifty cents per tree."

There was testimony tending to show that the plaintiff was to have a certain house to live in, and pasturage for five or six head of horses and cattle, and about thirty acres of other land of the defendant to till during the continuance of said contract, and that he had been prevented from the use thereof by the defendant. The plaintiff as a witness, being a farmer, gave evidence tending to show the yearly value of the rent of the house, the profits he might probably have realized from said thirty acres of land during the ten years which he said the contract was to continue, and the value of the pasturage to him for the same time. A judgment having been recovered of $1,000 by the plaintiff, it was reversed on error by reason of the admission of the foregoing testimony. White, J., delivering the unanimous opinion of the court, said: "The testimony excepted to by the plaintiff in error related to the probable future profits of a peach orchard not yet grown, to the profits the plaintiff would probably have made from the thirty acres; and to the value of the pasturage to him during the time. The testimony was offered in chief by the plaintiff, as furnishing the basis on which his damages were to be assessed by the jury. It was uncertain and speculative in its nature, and must have been, in a great degree, conjectural.

"The general rules as to the measure of damages are well understood. The difficulty lies in making a proper application of them to particular cases.

"It is a well established rule that the damages to be recovered for a breach of a contract must be shown with certainty, and not left to speculation or conjecture. In the practical application of this general rule, others have been adopted as guides in ascertaining the required certainty; as (1) that the damage must flow naturally and directly from the breach of the contract; that is, must be such as might be presumed to flow from its violation; and (2) must

be not the remote, but the proximate consequence of such breach.

"In cases where the damages may be estimated in a variety of ways, that mode should be adopted which is most definite and certain.

"In the present case, as respects the property, the immediate and proximate consequence of the breach of the contract by the eviction was the loss of the use of the premises for the term. To the extent that the damages depended on the loss of the use of the property, its market value, at the time of the eviction, subject to the performance of the contract on the part of the plaintiff, furnished the standard for assessing the damages. If it had no general market value, it should have been ascertained from witnesses whose skill and experience enabled them to testify directly to such value, in view of the hazards and chances of the business to which the land was to be devoted. Griffin v. Colver, 16 N. Y. 489; Giles v. O'Toole, 4 Barb. 261; Newbrough v. Walker, 8 Gratt. 16.

"This would only be applying the same principle for ascertaining the value of property which, by reason of its limited use, had no general market value, which is adopted with reference to proving the present worth of the future use of property, which, by reason of its being in greater demand, has such market value.

"In the case of property of the former description, the range for obtaining testimony as to the value is, of course, more circumscribed than it is in the case of property of the latter description. But in either case, the proving the value of the property by witnesses having competent knowledge of the subject, is more certain and direct than to undertake to do so by submitting to the jury, as the grounds on which to make up their verdict, the supposed future profits.

"The profits testified to in the present case were remote and contingent, depending on the character of the future seasons and markets, and a variety of other causes of no certain or uniform operation.

"Neither did the amount of the plaintiff's expenditures, made in obtaining or performing the contract, furnish the measure of his damages, or constitute the fact to which his evidence in chief, on the question of damages, ought to have been directed. For this would be to allow the plaintiff, in case he had made a bad bargain, to charge his losses resulting therefrom upon his adversary; and, on the other hand, if his contract had been a profitable one, to deprive him of its benefits.

"In regard to the question objected to, and kindred inquiries, it may also be remarked, that we do not doubt it would be the right of a party, on cross-examination, to propound such questions to the witnesses, who might have testified to the value of the property in question. This could be done in order to ascertain the grounds of their judgment and as tending to test its correctness."

This opinion seems to sanction the admission of the opinions of expert witnesses to prove the value of property having no market value; and yet that the statement in chief of the material facts on which the opinions are based is error; that such facts are only to be elicited on cross-examination.

If the damages for the loss of the use of the property is its value at the time of the eviction, subject to the performance of the contract on the part of the plaintiff in error, as

the opinion asserts, the meaning must be the value enhanced by considering the benefits which would have accrued from the performance of the contract by the party who has in fact abandoned it. How shall the value of those benefits be ascertained? Undoubtedly by consideration of all the facts *pro* and *con* which show what are the probabilities or certainties as well as hazards and chances of the business. It is believed to be the province of the jury to consider these, and that opinions derive their chief value, when sound, from them.

In Allison v. Chandler, 11 Mich. 542, trespass was brought against the landlord to recover damages for ousting his tenant from the demised premises. In the opinion of Christiancy, J., is an interesting discussion of the elements of damage as well as of the proper modes of proof. He says: "The law does not require impossibilities, and cannot therefore require a higher degree of certainty than the nature of the case admits. And we can see no good reason for requiring any higher degree of certainty in respect to the amount of damages, than in respect to any other branch of the cause. Juries are allowed to act upon probable and inferential, as well as direct and positive proof. And when, from the nature of the case, the amount of the damages cannot be estimated with certainty, or only a part of them can be so estimated, we can see no objection to placing before the jury all the facts and circumstances of the case, having any tendency to show damages, or their probable amount; so as to enable them to make the most intelligible and probable estimate which the nature of the case will permit. This should, of course, be done with such instructions and advice from the court as the circumstances of the case may require, and as may tend to prevent the allowance of such as may be merely possible, or too remote or fanciful in their character to be safely considered as the result of the injury. . . .

"The justice of the principles we have endeavored to explain will, we think, be sufficiently manifest in their application to the present case. The evidence strongly tended to show an ouster of the plaintiff for the balance of the term by the defendant's act. This term was the property of the plaintiff; and, as proprietor, he was entitled to all the benefits he could derive from it. He could not by law be compelled to sell it for such sum as it might be worth to others; and, when tortiously taken from him, against his will, he cannot justly be limited to such a sum, or the difference between the rent he was paying and the fair rental value of the premises, if the premises were of much greater and peculiar value to him, on account of the business he had established in the store, and the resort of customers to that particular place, or the good will of the place, in his trade or business. His right to the full enjoyment of the use of the premises, in any manner not forbidden by the lease, was as clear as that to sell or dispose of it, and was as much his property as the term itself, and entitled to the same protection from the laws. He had used the premises as a jewelry store and place of business for the repairing of watches, making gold pens, etc. This business must be broken up by the ouster, unless the plaintiff could obtain another fit place for it; and if the only place he could obtain was less fitted and less valuable to

An injury to business must consist mainly of a loss of profits, though it often involves other incidental losses. In an Iowa case,[1] where a lessee was refused possession of a farm to be worked on shares for a year, the court said: "By the contract, the plaintiff not only secured a place in which to live, but also employment for himself during a year's time. If the defendant, without cause, refused to let the plaintiff into possession, what is the direct consequence? It is that he may be deprived of employment, as well as a home in which to reside. Therefore, a reasonable allowance might, in proper cases, be made to the lessee of a farm for necessary loss of time in looking for another place, or seeking other employment, where such lessee sustains such loss as the direct result of the lessor's wrongful act, and uses due diligence and reasonable

him for that purpose, then such business would be injured to the extent of this difference; and this would be the natural, direct and immediate consequence of the injury. To confine the plaintiff to the difference between the rent paid and the fair rental value of the premises to others, for the balance of the term, would be but a mockery of justice. To test this, suppose the plaintiff is actually paying that full rental value, and has established a business upon the premises, the clear gains or profits of which have been an average of $1,000 per year; and he is ousted from the premises and this business entirely broken up for the balance of the time; can he be allowed to recover nothing but six cents for his loss? To ask such a question is to answer it. The rule which could confine the plaintiff to the difference between such rental value and the stipulated rent can rest only upon the assumption that the plaintiff might (as in case of personal property) go at once into the market and obtain another building equally well fitted for his business, and that for the same rent; and to justify such a rule of damages, this rule must be taken as a conclusive presumption of law. . . The plaintiff in this case did hire another store, the best he could obtain, but not nearly so good for his business; his customers did not come to the new store, and there was not so much of a thoroughfare by it, not one quarter of the travel, and he relied much upon chance custom, especially in the watch repairing and other mechanical business. This injury to the plaintiff's business was as clearly a part of his damages as the loss of the term itself. . . . . Now if the plaintiff is to be allowed to recover for this injury to his business, it would seem to follow, as a necessary consequence, that the value of that business, before the injury as well as after, not only might but should be shown, as an indispensable means of showing the amount of loss from the injury." Shafer v. Wilson, 44 Md. 268. See Glass v. Garber, 55 Ind. 336.

[1] Adair v. Bogle, 20 Iowa, 238.

exertions to prevent the loss or to reduce the amount.[1] The last proposition, as to loss of time, is quite near the line (often difficult to trace, if not mysterious) which divides direct and proximate from remote and consequential damages; but, qualified as above stated, we deem it correct. Damages claimed to result from failure to get another farm would, in ordinary cases, if not, indeed, in all cases, be beyond the boundary line which separates recoverable damages from those which are not recoverable."[2] In such a case, if the lessee finds other employment, it merely answers the claim for such loss, and will not otherwise reduce or mitigate the damages recoverable for breach of the contract. Where a defendant leased her farm to the plaintiff on shares for a year, and refused him possession, in an action for breach of the contract it was proved that the plaintiff, during the year, earned, in a different business, $1,000, and the trial court allowed this fact to go to the jury in mitigation of damages. This was held to be erroneous. Thompson, C. J., said: "The logic seemed to be, that because he was an industrious man he was not within the same rule of compensation that one not so would be. There are undoubtedly cases in which such facts do mitigate damages. Such commonly occur in cases of the employment of clerks, agents, laborers and domestic servants for a year or a shorter determinate period. But I have found no case where a disappointed party to a contract for a specific thing or work, who, taking the risk from necessity of a different business from that which his contract, if complied with, would have furnished, and shifting for himself and family for employment for them and his teams, is to be regarded as doing it for the benefit of a faithless contractor." After alluding to the rule which confines the plaintiff's recovery to damages which are the proximate consequence of the defendant's wrongful act, the learned judge added interrogatively: "Is it not, therefore, equally just and logical that whatever shall have the effect to mitigate damages shall have some proximate relation to the contract?"[3] It has been held

[1] See Attix & Co. v. Pelan, 5 Iowa, 336, arguendo, and cases there cited.

[2] William v. Oliphant, 3 Ind. 271. See Yeager v. Weaver, 64 Pa. St. 425.

[3] Wolf v. Studebaker, 65 Pa. St. 459.

to be the duty of a plaintiff who sues for compensation for injury to his business by eviction, to make reasonable efforts to moderate or prevent such loss by obtaining other premises on which to carry on the business.[1] And it has also been held that whether he is obliged to exert himself for that purpose or not, if he does, in fact, obtain other premises, and thus prevent an entire loss of the business, the damages will be mitigated accordingly.[2]

LESSOR'S COVENANT TO REPAIR, REBUILD AND IMPROVE.— The obligation of the landlord to repair rests solely upon express contract; an undertaking to repair will not be implied, nor enlarged by construction.[3] It is the same in respect to rebuilding after destruction by any casualty, and as to improvements or additions.[4] Where, however, there is an undertaking by the lessor to erect and complete a building for the use and occupation of a tenant, the liability of the former in respect to damages for a breach is not distinguishable from that which arises from a contract to give possession of one already erected. An omission to repair, however, is not an eviction.[5] The lessor will be chargeable with the difference between the rent to be paid and the rental value; and if the contract be made for a particular use by the lessee, the rental value for that use will be the standard of rental value.[6]

In a late case in New York, the defendant let to the plaintiff a hotel and certain adjoining premises, covenanting to tear down the old building and erect a new one on the adjoining premises, to be used in connection with the hotel; the new building to be completed and the plaintiff put in possession by a specified time. The plaintiff was then occupying the hotel

[1] Dobbins v. Duquid, 65 Ill. 464; Green v. Williams, 45 Ill. 206.

[2] Chandler v. Allison, 10 Mich. 460.

[3] Witty v. Matthews, 52 N. Y. 412; Doupe v. Genin, 45 N. Y. 119; Post v. Vetter, 2 E. D. Smith, 248; Clark v. Babcock, 23 Mich. 164; Sherwood v. Seaman, 2 Bosw. 127; Brown v. Barrington, 36 Vt. 40; Brewster v. De Fremery, 33 Cal. 341; Estep v. Estep, 23 Ind. 114; Kahn v. Love, 3 Oregon, 206.

[4] Id.; Vanderpool v. Smith, 2 Daly, 135; Loader v. Kemp, 2 C. & P. 375.

[5] Speckler v. Sax, 1 E. D. Smith, 253.

[6] Myers v. Burns, 35 N. Y. 269; Berrian v. Olmstead, 4 E. D. Smith, 279.

and a building upon a portion of the adjoining premises, under a former lease; he removed the furniture from the rooms in that building, and stored it while the new building was being erected. The defendant failed to complete the new building within the specified time; and in an action for breach of the covenant the court say: "The rent of the whole premises embraced in the lease was to commence with the term, although the plaintiff would necessarily be required to await the erection and completion of the new structure before he could have the beneficial enjoyment of that part of the demised premises. The lease was made with reference to these circumstances, and an allowance to the plaintiff of the rental value of the rooms in the new building during the time he was deprived of them by the defendant's default, based upon the consideration of the use to which they were to be applied, and which was contemplated by both parties when the lease was executed, affords to the plaintiff only a just indemnity, and subjects the defendant to no greater liability than it may fairly be supposed he intended to assume when the covenant was made."[1]

If the lessor undertakes to keep the premises in repair, the damages for breach will, in general, be the decrease in rental value resulting from the non-repair;[2] and in ascertaining this decrease it is proper to take into consideration the special use of the premises which was contemplated by the parties when the lease was made; and this consideration will also have a controlling influence in fixing the standard of repair.[3] He may recover for the loss of the use of certain rooms rendered untenantable for want of repair.[4] The damages recoverable are only such as can be ascertained and fixed with reasonable certainty; but the profits anticipated from the future public performance of a vocalist is not of that character.[5]

The lessee must give the landlord notice to make repairs when needed, unless the lease shows an intention that the lessor shall take notice from his own observation. This intention will not be implied where the lease does not give him the right to enter

[1] Hexter v. Knox, 63 N. Y. 561. Compare Prescott v. Otterslatter, 79 Pa. St. 462.

[2] Myers v. Burns, 35 N. Y. 269.

[3] Id.; Ward v. Kelsey, 38 N. Y. 80.

[4] Id.

[5] New York Academy of Music v. Hackett, 2 Hilt. 217.

and view the premises.[1] The rule is that notice to perform is necessary whenever the fact on the occurrence of which the right to claim performance depends lies more peculiarly within the knowledge of the party claiming such right.[2]

If the landlord refuses to repair on receiving notice, the tenant is entitled to make the repairs at the landlord's expense, and it is held to be his duty to do so where they may be made at trifling expense; he cannot neglect to make them and recover greater damages, suffered in consequence of the premises remaining out of repair, than the repairs would cost.[3] But if the landlord prevents the tenant from making the repairs, by repeated promises to make them himself; that is, if the tenant in good faith delays to make repairs, for that reason, he is not prejudiced in his claim to such damages as he may suffer from the continuance of a want of repair.[4]

[1] Gerzebek v. Lord, 33 N. J. L. 240; Wolcott v. Sullivan, 6 Paige, 117; Norfleet v. Cromwell, 64 N. C. 1.

[2] Id.; Chitty on Cont. 732; Hayden v. Bradley, 6 Gray, 425.

[3] Cook v. Soule, 56 N. Y. 420; Indiana Cent. R'y Co. v. Moore, 23 Ind. 14; Andrews v. Jones, 36 Tex. 169; Nicholson v. Munigle, 6 Allen, 215; Miller v. Mariners' Church, 7 Greenl. 51; Fort v. Andoff, 7 Heisk. 167; Hamilton v. McPherson, 28 N. Y. 72. See Terry v. Mayor, 8 Bosw. 504; Cole v. Buckle, 18 U. C. C. P. 286; Darwin v. Potter, 5 Denio, 306.

[4] In Keyes v. Western Vt. Slate Co. 34 Vt. 81, Poland, C. J., said: "If, when the plaintiff requested the defendants to repair the drain, they had refused to do so, it would have been the duty of the plaintiff himself to have done it, and all he could have recovered would have been the costs of the repair. He could not in such case lie by and incur loss for want of the repairs, far beyond the cost of fixing it, and make the defendants liable. If the defendants wrongfully refused to repair, still it was the duty of the plaintiff to conduct like a reasonable and prudent man, and take the course that would be the least detrimental to himself and to the defendants. But if the defendants, on having notice to repair the drain, admitted their liability to repair it, and promised to do so, and thus kept the plaintiff from making the repairs himself, and thus prolonged the period of loss to the plaintiff, so that it exceeded the cost of the repairs, that loss should justly fall on the defendants. It was rather a question whether the plaintiff acted in good faith, and with fair and reasonable prudence, in the course he took in waiting for the defendants to repair, under their assurance, instead of proceeding to make them himself. The defendants when called on should have immediately proceeded to make the repairs themselves, or else have refused, so that the plaintiff could have made them himself. If they omitted to make them, on being called on, and kept the plaintiff from doing it, by false and delusive promises, they

In an action by a tenant against his landlord, who has covenanted to keep the premises in repair, for damages for breach of that covenant, the defendant cannot excuse the non-performance of his contract by proof of the plaintiff's negligence and want of due care. Contributory negligence on the part of the plaintiff does not go to the cause of action upon contract; there is a right of action where the defendant is guilty of a breach by his negligence; but upon the question of damages, in reduction of them, the conduct of the plaintiff, in failing to exercise due care to prevent injury to himself by the defendant's failure to perform his contract, is proper for the consideration of the jury.[1] In New York, where the landlord agrees to repair and fails to do so, the tenant is held to have two different remedies, either of which he may pursue at his election. Hunt, J., said: "He could have made the repairs himself, and have called upon the plaintiff to refund the expense; . . . or he could have called upon . . (the lessor) . . to take the ordinary responsibility of a party failing to perform his contract, to wit, to pay the damages caused by such failure. . . . In the first case, the rule confines the damages to the actual expense, if no special damage is shown; but in the other, the cost of the repair is not an element in the case. It is as if there was no such right to repair on the part of the lessee, but the claim rested solely in damages."[2] This right of election to repair or to claim damages was declared in a case where the repairs actually made and damages recovered from the landlord for not making others were but a trifle in excess of the rent due. This decision was subsequently affirmed[3] in a case in which the trial court had refused a request to charge that the plaintiff could not recover for the use of rooms except for the time it would necessarily take to repair them; and that if the plaintiff knew of the defect which caused damage, he was bound to have it repaired as soon as it could reasonably have been done; and that if he did not do so, and damage subsequently occurred, he could not recover therefor. On this refusal the court of appeals

cannot complain of being made liable for the loss occasioned by the delay." Buck v. Rodgers, 39 Ind. 222.

[1] Flynn v. Nash, 11 Allen, 550.
[2] Myers v. Burns, 35 N. Y. 269.
[3] Hexter v. Knox, 63 N. Y. 561.

remarked that: "It is conceded that it was the duty of the defendant to repair the ceilings. Upon his failure to perform it, it was the right of the tenant to make the repairs and charge the expense to the landlord. But he was not bound to make the repairs. He (the lessor) had no right to cast upon the plaintiff the responsibility and the burden of repairs which he was bound to make. The plaintiff removed his furniture from these rooms; and so far as he could, short of making the repairs himself, limited the injurious consequence of the defendant's neglect."[1]

The tenant in making repairs, after default of the landlord to make them in pursuance of his contract, is not bound to make them in such manner as to restore the premises by the same materials and workmanship, literally, to their former state; he may exercise a prudent judgment to render the repairs more permanent and useful by substituting better material or workmanship.[2]

Special and consequential damages may be recovered against a lessor for breach of his contract to repair, where they are not remote and are shown with sufficient certainty. Loss of custom to a mill kept idle by the lessor's failure to repair the dam was held to be uncertain and speculative.[3] So of profits anticipated from the future public performance of a vocalist.[4] Where a landlord negligently suffered a chimney to remain in a ruinous condition upon the demised premises, and by its fall caused injury to his tenant's property, he was held liable for the resulting damage;[5] and also for a lessee's goods in a leased store, injured in consequence of gutters being obstructed.[6] In such a case, wool belonging to the tenant was alleged to have suffered injury from water escaping from a waste pipe by negligence of the landlord. The trial court in an action therefor gave these instructions, to which exceptions were overruled: that the evidence must be such that the jury may be able to decide thereon as to the amount of damages; that guesses of witnesses were

[1] Martin v. Hill, 42 Ala. 275; Hinckley v. Beckwith, 13 Wis. 31.

[2] Myers v. Brown, 35 N. Y. 269.

[3] Middlekauff v. Smith, 1 Md. 329; Fort v. Orndoff, 7 Heisk. 167.

[4] New York Academy of Music v. Hackett, 2 Hilt. 217. See McHenry v. Marr, 39 Md. 510.

[5] Eagle v. Swaze, 2 Daly, 140.

[6] Center v. Davis, 39 Ga. 210.

not sufficient to found a verdict upon; that the judgment of persons having sufficient knowledge and opportunity of judging as to the amount of the wool injured, and as to the extent of the injury, is competent; that exact accuracy in testimony is not required, but that the jury could not give damages exceeding what they are satisfied of on the evidence. That when the damage was occasioned by different causes, from each of which there was more or less damage to plaintiff's wool, if a portion of the damage was from causes for which the defendants were not liable, as from the tide water, the burden of proof was upon the plaintiff to show the damage to the wool from causes for which the defendants were liable, as distinguished from the other causes; and for this damage only could the plaintiff recover.[1] In an action against the lessors of a saw-mill for breach of their contract to repair, whereby the mill was rendered useless to the lessees during the latter portion of their term, it appeared that the lessees, at the time of the stoppage, had logs of their own in the mill yard sufficient to stock the mill for one-half of the balance of their term, which they were compelled to haul to another mill to be sawed. It was held that the lessees were entitled to recover as damages the amount paid by them for hauling their logs to such other mill, and the cost of getting them sawed there, above what it would have cost to saw them at their own mill, and also the profits which they would have made from manufacturing lumber in that portion of their term during which they lost the use of the mill through the fault of the defendants, deducting the time which it would have required to saw their own logs so hauled to another mill; and that to these damages interest might be added at the discretion of the jury.[2] The profits here held to be recoverable were the special rental value of the mill to the plaintiffs.[3]

[1] Priest v. Nichols, 116 Mass. 401.

[2] Hinckley v. Beckwith, 13 Wis. 31; S. C. 17 Wis. 413.

[3] Cole, J., said: "In the first place, we can see no objection to giving the respondents the fair value of the use of the mill for the unexpired portion of the term, subject to the qualifications hereafter mentioned. The mill was of no sort of use to them except to manufacture lumber. And when the motive power gave out, nothing further could be done with it. One of the respondents testified that it was worth for the residue of the term $10.50 per day

RECOUPMENT.— In actions by either party against the other upon stipulations in a lease, the defendant is generally allowed to set up by way of recoupment any cross claim he may have against the plaintiff arising upon the same contract.[1] In an

to manufacture lumber. This being so, why ought they not to recover damages at that rate during the continuance of the lease, excepting therefrom the time they would use it to saw their own logs? We know of no sound principle of law or reason which would be violated in permitting them to do so. It is said that this would be allowing damages on the basis of a calculation of profits, which, it is said, is inadmissible. But the case of Griffin v. Colver, 16 N. Y. 489, to which we are referred by counsel for the appellants, fully sustains the rule we have laid down." After stating the rule laid down in that case, the learned judge continues: "In the present case, it was very easy to ascertain the profits which were the direct and immediate results of operating the mill for sixty days. The respondents had logs enough on hand to stock the mill for about one-half of that time, and timber standing near the mill sufficient to supply it for the rest of the time. What, therefore, could be made in running the mill, per day, over and above all expenses of rent, labor, etc., was susceptible of exact and definite proof. It is not like profits anticipated from being able to perform some dependent and collateral undertaking to the principal business of running the mill, but related to gains or profits arising from the business itself, and constituting a portion of the contract. The respondents, when they rented the mill, considered what it would be worth to them per year or month. The profits upon the manufacture of lumber were so much per thousand, and it was therefore an easy matter to ascertain the gross earnings of the mill. We therefore suppose the profits or earnings of the mill would constitute a proper item in estimating the damages resulting from the breach of the agreement to repair. Masterton v. The Mayor, etc. 7 Hill, 61; Blanchard v. Ely, 21 Wend. 342."

See Jolly v. Single, 16 Wis. 280, where the lessor of a saw-mill removed part of the mill, and thereby made it impossible to run it. It was held that the damages were not confined to the cost of replacing it, leaving the lessee to pay his men out of employ, and lose the use of the mill during the time it necessarily lay idle by reason of the trespass. See Boynton v. Chase, 3 Wis. 455; Buck v. Rodgers, 39 Ind. 222. See also Crane v. Hardman, 4 E. D. Smith, 448; Chatterton v. Fox, 5 Duer, 64.

[1] Haven v. Wakefield, 39 Ill. 509; Nichols v. Dusenbury, 2 N. Y. 283; Mayor, etc. v. Mabie, 13 N. Y. 151; Darwin v. Potter, 5 Denio, 306; Thomas v. Wiggers, 41 Ill. 470; Shallies v. Wilcox, 4 Thomp. & C. 591; Cook v. Soule, 56 N. Y. 420; S. C. 45 How. Pr. 340; Wade v. Halligan, 16 Ill. 507; S. C. 21 Ill. 479; Commonwealth v. Todd, 9 Bush, 708; Lindley v. Miller, 67 Ill. 244; Fairman v. Flack, 5 Watts, 516; Blair v. Claxton, 18 N. Y. 529; Myers v. Burns, 35 N. Y. 269; Gathman v. Cattleberry, 49 Ga. 272; Westlake v. DeGraw, 25 Wend. 669;

action to recover rent the lessee has a right to set up as a counterclaim damages arising from breach of an agreement in the lease on the part of the lessor, to keep the premises in repair.[1] Where the lease is for a year, the fact that the lessee has paid the rent except for the last quarter does not deprive him of the right to counterclaim his damages for the entire year.[2] So if there has been a breach of the covenant for quiet enjoyment, the damages therefor may be recouped or counterclaimed in an action by the landlord for rent.[3] In an action by an underlessor, who was a tenant at will for rent, his lessee may

Wright v. Latten, 38 Ill. 293; Murray v. Pennington, 3 Gratt. 91; Benkard v. Babcock, 2 Robt. 175.

[1] Myers v. Burns, 35 N. Y. 269; Lunn v. Gage, 37 Ill. 19; Coleman v. Bunce, 37 Tex. 171; Crane v. Hardman, 4 E. D. Smith, 339; Gathman v. Cattleberry, 49 Ga. 272; Morgan v. Smith, 5 Han. 220.

[2] Cook v. Soule, 56 N. Y. 420.

[3] Mack v. Patchin, 42 N. Y. 167; Eldred v. Leahy, 31 Wis. 546; Mayor, etc. v. Mabie, 13 N. Y. 151; Chatterton v. Fox, 5 Duer, 64. In Mason v. Mayers, 2 Rob. (Va.) 606, pending a suit in chancery by creditors for the sale of their debtor's land, the heirs of the latter leased it for three years from the first of April, unless there should in the meantime be a decree of sale; in which case the tenant was to give possession on the first of April after the decree. A rent was reserved of $300, to be paid at the end of each year of the tenancy; and according to the true construction of the lease, the tenant had a right to the crops growing on the land at the end of every year for which rent should be received. In June of the third year the land was sold under a decree in the creditor's suit, and the tenant applied to the purchaser for permission to proceed with the cultivation of the land; but one of them in the presence of the other (who was one of the lessors) refused, declaring that if the tenant should sow the land, the purchasers would reap the crop; and in consequence of this refusal the tenant proceeded no farther with his preparations for a fall crop, though he remained in possession the third year. A few days before the expiration of that year, the purchasers sued out an attachment against the tenant for $300 rent to become due the first of April, upon the levy of which the tenant gave the sheriff bond and security for the rent. Judgment having been obtained on this bond, it was enjoined as to $200, upon a bill filed by the tenant praying an abatement of the rent according to equity. It was held by a majority of the court: 1, that under the circumstances the purchasers were not warranted in assuming the relation of landlord for the purpose of coercing the payment of $300; 2, that there not having been an actual eviction, there was no remedy at law, and it was competent for the tenant to come into equity upon the ground that he was entitled to an abatement; and 3, the evidence justifying the allowance of $200, as a fair abatement, the injunction should be made perpetual.

recoup as for breach of covenant, for rent paid to the plaintiff's lessor to save himself from eviction.[1] But in other cases an interference by the owner or chief landlord with the possession of a sub-tenant, is not an eviction for which the intermediate landlord is responsible, and does not, as between him and the sub-tenant, suspend the rent.[2]

If there was fraud or misrepresentation by the landlord in making the lease, by which the lessee suffered damage, he may recoup therefor in an action for rent;[3] but a mere trespass or tort of any character, not amounting to an eviction, in whole or in part, it has been held in New York, cannot be set up in defense to an action for rent.[4]

The right of recoupment does not appear to be as liberally recognized in that state, in actions for rent, as it is in favor of other defendants. In such actions there is, there, a restriction upon the right of recoupment inconsistent with the general principles which govern that defense in other cases, in that state as well as elsewhere. Unless there is such a disturbance of the tenant's possession as amounts to an eviction, and therefore to a full defense, the disturbance, although it may greatly impair the tenant's beneficial enjoyment, is no defense at all—is wholly excluded. The reasons which sustain the defense of eviction as a bar will equally entitle the tenant to an

[1] Holbrook v. Young, 108 Mass. 83.

[2] Lucky v. Frantzkee, 1 E. D. Smith, 47; Lansing v. Van Alstyne, 2 Wend. 563. See Ogilvie v. Hull, 5 Hill, 52.

[3] Allaire v. Whitney, 1 Hill, 484; Cage v. Phillips, 38 Ala. 382; Avery v. Brown, 31 Conn. 398; Staples v. Anderson, 3 Robt. 327; Moberly v. Alexander, 19 Iowa, 162; Wallace v. Lent, 1 Daly, 481. See Meeks v. Bowerman, 1 Daly, 99; Minor v. Sharon, 112 Mass. 477.

[4] Walker v. Shoemaker, 4 Hun, 579; Drake v. Cockroft, 4 E. D. Smith, 34; McKenzie v. Farrell, 4 Bosw. 202; Campbell v. Shields, 11 How. Pr. 565; Valet v. Horner, 1 Hilt. 149; Bogardus v. Parker, 7 How. Pr. 305; Gleason v. Moen, 7 Duer, 639; Edgerton v. Page, 10 Abb. 119; S. C. 20 N. Y. 281. See Benkard v. Babcock, 2 Robt. 175; McFadin v. Rippey, 18 Mo. 738.

In Cram v. Dresser, 2 Sandf. 120, an action was brought for rent upon a lease which provided for the landlord's entering on the premises to make repairs during the term; it was held that the tenant could not recoup his damages occasioned by the negligent and tortious behavior of the landlord and his servants in making such repairs; that the injury in such case does not arise from the breach of any covenant or stipulation of the landlord, but is a distinct and independent wrong. A wrong-

abatement of the rent or recoupment where the landlord, by unjustifiable acts, lessens the value of the demised premises to his tenant, though the landlord's interference does not amount to eviction; and whether such acts are confined to a brief period of time or are continuous, and whether they are acts for which an action of tort would lie or not. By the lease the tenant is vested with an estate which entitles him to sue his landlord as well as any stranger interfering with his rightful enjoyment, or evicting him. But in case of eviction, the tenant is not confined to his remedy by ejectment or other action of tort, but he may set up the eviction as a bar to an action by the landlord for rent; it is held to be a violation of the implied covenant for quiet enjoyment. The implied obligation of the lessor, however, is not simply that he will not evict his tenant, and that no other person shall do so under a superior title, but equally that he will do no act to prevent or impair the enjoyment of what he has granted by his lease.[1] This defense is

ful act of the landlord, causing great inconvenience and trouble to the tenant's family, and keeping the demised tenement in confusion and disorder for a long time, is not an eviction where the tenant has continued in possession for a year after the injury has ceased.

[1] Dexter v. Manley, 4 Cush. 14; Leadbeater v. Roth, 25 Ill. 587; Commonwealth v. Todd, 9 Bush, 708; Eldred v. Leahy, 31 Wis. 546; Sigmund v. Howard Bank, 29 Md. 324; Mack v. Patchin, 29 How. Pr. 20. See Morgan v. Smith, 5 Hun, 220. In Mayor v. Mabie, 13 N. Y. 151, a lease was made of the franchise or privilege of collecting wharfage, and an action was brought for the stipulated rent. The lease conveyed the right to collect such wharfage upon all vessels of over five tons. The answer set up as a defense that the agents of the plaintiff disturbed the defendant in the enjoyment of the right conveyed; that they entered upon the premises and assumed the entire control of all vessels coming to the slip and pier, etc., and gave preferences for compensation paid to plaintiff, by which the defendant suffered great losses. The defendant continued to act under the lease, and to collect wharfage during his term. Proof of the matters stated in the answer being excluded, the plaintiff appealed. Denio, J., said: "It is not denied but that the acts imputed to the plaintiffs in the answer would, if established, be an infringement of the rights of Mabie, under the grant from the corporation." The court held that there was an implied covenant for quiet enjoyment, and that the acts complained of in the answer were a violation of that covenant; that it was available by way of recoupment. "The main object," say the court, "of a covenant for quiet enjoyment is to protect the lessee from the lawful claims of third persons having a title paramount to the lessor; but such a cov-

enant, when freely written out, provides also for the protection of the lessee against the unlawful entry of the lessor himself. 2 Platt on Cov. 312. . . . It is not, however, every mere trespass by the lessor upon the demised premises which will amount to a breach of this covenant. Although the covenantor cannot avail himself of the subterfuge that his entry was unlawful, and he therefore a trespasser, to avoid the consequences of his own wrong, still, to support the action of covenant, the entry must be made under the assumption of title." Id. 319, 320.

In Tinsley v. Tinsley, 15 B. Mon. 458, Marshall, C. J., said: "This action is brought by Samuel Tinsley against Nancy Tinsley and John A. McClure, her surety, to recover damages upon an injunction bond, in the penalty of $300, executed by them for procuring an injunction against the execution of a judgment for restitution, rendered by the Shelby circuit court in favor of Samuel Tinsley against Nancy Tinsley upon a warrant for forcible entry and detainer. The petition alleges the dismissal of the bill and dissolution of the injunction, and claims damages for the costs incurred in defending the injunction suit, and for being kept out of the possession of the land from April, 1850, to September, 1851, alleging the rent for that period to have been worth $600. The defendants in their answers, besides certain denials, . . set up a defense and counterclaim on behalf of the defendant Tinsley, first, on the ground that during the pendency of the injunction, the plaintiff had, by his threats, prevented her from renting the land to solvent men for $150, and thus making the rent for which he sues; and second, upon the ground that since the injunction was obtained, the plaintiff had taken and disposed of the crop of corn growing thereon, and raised by said defendant, while the injunction was pending, of the value of at least $250. . . . Sec. 152 of the code authorizes a counterclaim in behalf of one of several defendants to be set up in answer to the action, and the only restriction which it makes as to the nature of such counterclaim is that it shall be a cause of action arising out of the contract or transaction set forth in the petition (as the foundation of the plaintiff's demand), or that it be connected with the subject of the action. It is not required that the counterclaim itself shall be founded in contract, or arise out of the contract set forth in the petition, but it is sufficient that it arises out of the transactions set forth in the petition, or be connected with the subject of the action. As the petition states the occupation of the land by Mrs. Tinsley during the pendency of the injunction, and claims damages therefor, any interference by the plaintiff which rendered such occupation less profitable, or less valuable to the occupant, constituted a cause of action arising out of the transaction set forth in the petition, and is connected with the plaintiff's cause of action; and although it amount to a trespass or other tort, it may constitute the ground of a counterclaim. If the crop growing on the land when the plaintiff was restored to the possession was his, to do with as he pleased, his taking and disposing of it would not constitute a cause of action or a counterclaim, but would surely be a good defense, partial or general, to the demand for the rent of that year, or should go in reduction of damages claimed for

available not only in actions for rent, but also in replevin or proceedings for recovery of property distrained.[1]

the withholding of the possession for that year. But as the injunction gave the protection of the law to the occupant during its pendency, and as the bond secures the other party in the rent during such occupancy, such occupant, when his original entry is lawful, and under a lease or permission of uncertain duration, may be regarded as in effect a tenant, or *quasi* tenant, under rent during the pendency of the injunction; and although the defendant may rightfully take the possession on the dissolution of the injunction, it does not follow that he is absolutely entitled to the crop then growing on the land. But as the duration of the occupancy, as dependent on the injunction, is uncertain, it would seem to be just and reasonable that, although, by improvidence or inadvertence, the decree directing immediate restitution, the possession of the land may be rightfully taken, the party turned out before the crop is gathered has the right to the emblements. In this view, which we think is correct, a cause of action arose upon the taking and disposing of the crop by the plaintiff when he obtained possession. This was, therefore, a good counterclaim under the code."

[1] Nichols v. Dusenbury, 2 N. Y. 283; Wade v. Halligan, 16 Ill. 507; Hatfield v. Fullerton, 24 Ill. 278; Lindley v. Miller, 67 Ill. 244; Fairman v. Flack, 5 Wall. 516; Westlake v. DeGraw, 25 Wend. 669. See Anderson v. Reynolds, 14 S. & R. 439.

CHAPTER XI.

CARRIERS.

SECTION 1.

ACTIONS BY CARRIERS.

For breach of contract to furnish goods for shipment — Measure of damages on charter-parties — Same, on charters to load with enumerated articles — Carrier's action for freight and other charges — Discriminations unlawful when the conditions the same — When freight due and earned — When pro rata freight may be demanded — Charges and expenses incurred where delivery hindered or prevented — Adjustment of freight under charters to load with enumerated articles — Recoupment against freight — Damages for detention of vessel.

FOR BREACH OF CONTRACT TO FURNISH GOODS FOR SHIPMENT.— Contracts of affreightment are sometimes made for the transportation of property generally, without reference to any particular route or mode of conveyance; this is a contract for particular work; other contracts are more specific, and consist of an undertaking on the part of the freighter to furnish cargo for a particular vessel for a voyage or a stated period of time; this is a contract to employ the vessel, and is like a contract of service.

On breach of the former by the party agreeing to provide goods for carriage, the measure of damages is the same as upon other contracts for particular works, the contract price less the expense and cost of earning it, or the profits of the contract, shown with the requisite certainty, lost by reason of the defendant's non-performance of its requirements.[1]

[1] Wolf v. Studebaker, 65 Pa. St. 459. In Utter v. Chapman, 38 Cal. 659, the contract appears to have been a general one, but the court say, "The case is argued upon the theory that the grain was to be transported by the plaintiff's steamer," and it was decided upon that theory. See S. C. 43 Cal. 279. An interesting case has lately been decided in Maine. The leading facts of the case are thus stated in the opinion of the court, by Barrows, J.: "The plaintiff, having been engaged since 1868 in running a stage between Dexter and Greenville, carrying railroad passengers on through tickets as well as local passengers, and having a contract for carrying the mail which was to expire July 1, 1873, and being agent of the Eastern Express Co., from which business and

MEASURE OF DAMAGES ON CHARTER-PARTIES.— Where, however, the action is against the charterer of a ship for not loading a cargo, or for not loading any particular vehicle, the measure of

the transportation of freight he realized considerable sums annually, and being the owner of stage property on the line to a considerable amount, and having purchased in the fall of 1871 a steamboat to run on the lake between Greenville and Mt. Kineo, on the 18th of June, 1872, made a written contract with the defendants whereby he agreed 'to run a first class stage line from Dexter to Greenville by the most direct line, for the conveyance of travel coming from or going to' the defendants' railroad, according to a certain time-table, the details of which were inserted in the contract and made subject to changes in the time-table of the R. R. Co.; in consideration of which the defendants agreed to give him 'the exclusive right of ticketing between Dexter and Greenville for the term of five years from the first day of July, 1872,' at a fixed rate. The time-table provided that he should leave Dexter at a certain hour, arrive at Greenville at a certain time, and leave Greenville for Kineo and arrive at Kineo at the times mentioned in the schedule. Round trip tickets were issued by the defendants from Boston and points east of Boston to Kineo and return by Frye's stages from Dexter and by steamboat. The plaintiff was to receive $2.50 per passenger each way for passengers carried on through tickets. Dissatisfaction arose between the parties. Defendants claimed that there was a failure to perform on the part of the plaintiff (which was negatived by the verdict), and notified him May 5, 1873, that for that reason they had contracted with other parties to do the work from July 1, *prox.*, and that he must discontinue operations under the contract at that time. His contract for carrying the mail expired at the same date. Another party secured it for the next four years; and he lost the express business because by the rule of the express company that was always given to those who had the mail contract, to whom also the defendants, under the contract bearing a general similarity to the one previously made with the plaintiff, gave the exclusive right of ticketing between Dexter and Greenville. . . . The defendants claimed that the measure of damages was the difference between what plaintiff was to receive, which was $2.50 each for carrying the through passengers, and what it would actually or probably cost to carry each passenger, and this without reference to any other contracts or any other business. The judge ruled *pro forma* that the contract did cover the distance between Greenville and Kineo, and instructed the jury to find specially what amount of damages, if any, the plaintiff had sustained between Greenville and Kineo, if the defendants had wrongfully and without sufficient cause terminated the contract, and include it with the other damages in their general verdict." The trial court instructed the jury as to the second position: "What was the plaintiff to do? Of what was the plaintiff deprived? The plaintiff is deprived of the exclusive right of ticketing from Dexter to Greenville at a specified rate, for the term of four years from July 1, 1873. The plaintiff had the exclusive right

damages is the amount of freight which would have been earned if the charter-party or other agreement to furnish loading had been performed, deducting the expense of earning it, and also

to transport passengers from Dexter to Greenville at a specified rate of compensation. Now the loss the plaintiff has sustained is the profits upon the carriage of passengers between the points indicated." Referring to the situation of the plaintiff in regard to his preparation and equipment for the transaction of this business, the jury were instructed that "the plaintiff had obviously the right and the expectation of passengers from other sources, such as way passengers, express profits, etc. Now, bearing this in mind, what are the elements of damage? The number of passengers; the price of carriage; the cost of carriage; if profits, the gains which would have been made are the losses which have been sustained. If Frye was so situated that he, in connection with other business, at little relative cost could carry passengers cheaply,— more cheaply than anybody else,— it is his good fortune, of which he is entitled to reap the benefits. The measure of damages, then, is the loss of profits which would have been made by carrying the passengers under the contract, as stipulated in the contract." . . . The jury were informed that "while the bargain itself might not be valuable to him, yet it might be of value to him in connection with his other business, situated as he was;" that upon the evidence produced, "loss upon the coaches and horses, if sold, would not be an element of damage;" nor could the loss of the plaintiff in attempting to carry on the contract after notice from the defendants that they had terminated it; nor the loss of the way travel by means of the competing line to which the defendants transferred their contract. "The only loss is his being deprived of the carriage of passengers from Dexter to Greenville and back. That is all the company agreed to give him; it is all he has lost. . . . The measure of damages is just what he has lost by not being permitted to perform the contract which he made; that is, what the gains would have been after deducting the expenses. Whatever the cost was, that should be deducted from the receipts, whatever they were, and the balance is the gain; and the gain only is that to which he is entitled. He is likewise entitled to interest, not as interest, but by way of damages, from the date of the writ." In reviewing exceptions to the instructions, Barrows, J., said: "We think the defendants have no just cause to complain of the substantial overruling of the second position which they took. If by reason of its connection with other business in which he was engaged, the plaintiff could transport passengers to and from the defendants' cars without largely increasing his outlay, the legitimate profits of the contract to him were proportionately increased, and the wrongful termination of it by the defendants, which the jury have found, necessarily occasioned to him a greater loss; and the matters to which reference was made by the presiding judge were so obvious in their nature that it cannot but be supposed that both parties entered into the contract with an eye to them as existing facts. The contract did not contemplate the exclusive devotion of the plaintiff's

any profit which the ship or vehicle earned during the period over which the charter extends.[1] A charge in such a case to the jury, which was affirmed, limited the deduction for the freight earned by the ship to the time "between the expiration of the lay days and the time when the employment of the ship under the charter would have ended." In a similar case in New York the instruction, which was affirmed, was, that "the defendant should be charged with the full amount of the freight which he had agreed to pay under the charter, and for the purpose of determining it the jury must find how much cargo the vessel could safely have carried. The defendant should then be credited with the amount of the schooner's earnings during the time that an average passage . . with the lay days would have occupied.[2]

Where the ship is described in the charter-party to be of a certain tonnage, the description is not a warranty, and an agreement to furnish a cargo will be construed to require the freighter to put on board as much goods as the ship was capable of carrying with safety.[3] The stipulation is not that the owner should receive and the freighter put on board a cargo equivalent to the tonnage described in the charter-party, but that the one should receive a full and complete cargo, not exceeding what the ship was capable of receiving with safety, and that the other should put such a cargo on board.[4] Abbott, C. J., said: "It is, indeed, quite impossible that the burden of a ship — as described in the charter-party — should, in every case, be

time and property to the transportation of the defendants' passengers, nor would there be any propriety in measuring the plaintiff's profits in the performance of the contract, and his consequent loss in being deprived of it, by the standard that the defendants claimed to set up. The nature of the contract was such that its terms would inevitably be affected by the other contracts and business to be carried on in connection with it; and the claim that damages for its breach should be estimated 'without reference to any other contracts or any other business,' cannot be sustained." Frye v. Maine Central, 67 Me. 414. See Richmond v. Dubuque, etc. R. R. Co. 40 Iowa, 264.

[1] Smith v. McGuire, 3 H. & N. 554.

[2] Ashburner v. Balcher, 7 N. Y. 262; Dean v. Ritter, 18 Mo. 182; Bradley v. Denton, 3 Wis. 557; Heilbroner v. Hancock, 33 Tex. 714; Loud v. Campbell, 26 Mich. 239.

[3] Hunter v. Fry, 2 B. & Ald. 421; Ashburner v. Balcher, 7 N. Y. 262.

[4] Hunter v. Fry, supra.

the measure of the precise number of tons which the ship is capable of carrying. That must depend upon the specific gravity of the particular goods; for a ship of given dimensions would be able to carry a larger number of tons, of a given species of goods, that were of a great specific gravity, than she would of another of less specific gravity, and the freighter would therefore pay freight in proportion to the specific gravity of the goods." [1]

The same rule applies as to the measure of damages where there is only a partial breach of the contract to furnish cargo. The controlling principle, whether the breach is total or partial, is full indemnity for all the carrier has lost through the shipper's default.[2] The mode of ascertaining the amount of damages for the breach of an executory agreement must, of course, differ in different classes of cases. If it were a contract to employ the plaintiff to build a house, and pay him an agreed price for the entire work, and the defendant had prevented the performance, the proper rule is the difference between the sum agreed to be paid and the sum that it would have cost the plaintiff to perform the contract. That rule does not meet the cases of contracts for freight as they are generally made. It does not meet the case of a vessel engaged in carrying mer-

[1] Id. In Bulkley v. United States, 19 Wall. 37, A contracted with the government to transport a large quantity of army supplies, the government agreeing that in order that he should be in readiness to meet its demands for transportation due notice should be given to him of the quantity to be transported at any one time. The government gave him notice that transportation would be required at a time mentioned for a certain large amount of supplies specified, and inquired if he would get ready. He replied affirmatively, and did get ready. The government at the time named furnished a small part of the supplies of which they had given notice, but not needing transportation for the much larger residue did not furnish it. On suit by the contractor against the government for profits which he would have made had the supplies been furnished as he received notice that they would be, it was held that the notice did not amount to an agreement to furnish the supplies specified, and therefore that the contractor could not recover the profits which he would have made had the freights withheld been furnished him. But it was also held, that the government having thrown upon him needless expense by requiring him to make ready for the transportation of freights under the contract, which they did not in the end require to be transported, he was entitled to recover for the expense to which he was thus subjected.

[2] Bailey v. Damon, 3 Gray, 92.

chandise generally for all who may apply, and making up her cargo from various owners of goods. Such ship usually must sail on or about a given day to fulfil her other contracts, thus having no time or opportunity to fill up a deficient cargo, and also unnecessarily incurring all the expenses that would have been incident to the voyage, had the shipper fulfilled his particular contract to furnish a certain amount of goods for the voyage. On the other hand, if the shipper's contract were to fill the entire ship with his goods at a certain freight, upon his refusal or neglect to fulfil his contract, the carrier might abandon the whole voyage, and engage in some new adventure equally or more profitable, and thus all future expenses incident to the first voyage be saved. Here it is quite obvious the damages would be much less than in the case of a voyage that must be performed notwithstanding the failure of a single individual customer to ship his goods according to his contract. So, too, if under no obligation to other shippers to sail at a given day, or if that day is so remote, and the demand for transportation of goods such as to afford full opportunity to fill up the ship before the day of sailing, these circumstances would materially affect the amount required to be paid by the shipper to the carrier, to indemnify him for the non-performance of the contract by such shipper. It seems, therefore, proper that all the attendant circumstances be brought before the jury in each particular case, to enable them to estimate the proper sum to be awarded as damages for a breach of a contract of this nature. The carrier is to receive full indemnity for the breach of contract on the part of the shipper. He is to be made as good, in a pecuniary point of view, as if the shipper had furnished the goods according to his contract, if the carrier has been guilty of no *laches* as to substituting other freight, or adopting other available arrangements to mitigate the loss, or to avoid the expenditure incident to the proposed voyage. But if by proper and reasonable efforts he can substitute other goods, he is bound to do so, and, to the extent of the freight thus received, this should go in reduction of the damages. Nor is the reduction necessarily confined to his receipts from goods actually substituted. The carrier may have been remiss in his attempts to fill up his ship, or have neglected to avail himself of oppor-

tunities presented by other offers of goods, and if guilty of negligence in these respects, this may be a ground for a deduction from the entire sum stipulated to be paid by a shipper for freight of certain articles, which were not furnished to the carrier. It may be also that the carrier was under no obligation to others to prosecute the proposed voyage, and might have abandoned it for another and more profitable employment of his ship; and in such a case he should not pursue the original voyage for the mere purpose of charging the defaulting shipper with the gross sum he stipulated to pay for transporting his goods to a distant port.[1]

Upon a contract to furnish three cargoes at a distant port, if the master pursues his voyage, but the freighter has no freight at the designated port, he is not bound to go to another port in search of freight, but is bound to seek for freight at the port designated, and obtain it if possible, and if after such endeavor he is compelled to return empty, the rule of damages is the contract price.[2] So when a party contracts to load a ship to a given amount of tons, at a stipulated price per ton, and falls short in shipping the whole number of tons, the owner or master of the vessel is entitled to recover, in the nature of damages, freight for deficiency; but where, in such case, goods are offered by a third person, to be shipped to an amount sufficient to make up the deficiency, though at a reduced rate of compensation, but still at current prices, the owner or master of the vessel is bound to receive such goods, and place to the credit of the original charterer the net earnings in respect to such substituted cargo, after making all reasonable deductions resulting from the circumstances of the case.[3]

[1] Id.; Bradley v. Denton, 3 Wis. 557; Utter v. Chapman, 38 Cal. 659; S. C. 43 id. 279; Heckscher v. McCrea, 24 Wend. 304; Harries v. Edmonds, 1 C. & K. 686; Murrell v. Whiting, 32 Ala. 54.

[2] Bradley v. Denton, supra; Daffe v. Hayes, 15 John. 327.

[3] Heckscher v. McCrea, supra. In Utter v. Chapman, 43 Cal. 279, the freighter made a total breach of the contract on his part, and the carrier earned during the time a performance of the contract would have occupied $341.24, but in earning this, and in a reasonable effort to earn other sums, and which efforts the court had decided it was the carrier's duty to make, he incurred an expense of $777. This net loss of $435.16 he claimed as part of his damages to be added to the net profit he would have made by performing the contract. The court

The carrier is not bound to anticipate a failure on the part of the shipper to furnish full cargo, and accept in advance an offer of other goods; but after a breach of his contract, it is the duty of the carrier to accept the offer of even the same goods the shipper had contracted to furnish, though offered at a reduced freight, to save the defendant from damages to that extent.[1]

It was covenanted in a charter-party providing for an outward and return cargo at a given freight per ton, on a voyage from London to St. Petersburgh, that if political or other cir-

said: "The correct interpretation of our decision on the former appeal is that the plaintiffs are entitled to recover only the actual loss which they suffered from the breach of the contract; and if it appeared that during the space of time which would have been requisite for the performance of the contract by them they had, or by the use of reasonable diligence might have realized a profit from the use of the boat or barge equal to or exceeding the profit which they would have made by performing the contract, in that event they would have suffered no loss, and would have been entitled to nominal damages only. The burden of proof was on the defendant to show that the boat and barge had or might have realized a profit. And if the net earnings did not equal or exceed the profit which the plaintiff would have made by performing the contract, then such net earnings would reduce, *pro tanto*, the amount of the plaintiffs' loss. But we did not decide nor intend to estimate that the defendant stood in the relation of a guarantor, incurring the hazard of whatever loss the plaintiff might sustain by reason of a fruitless effort to obtain a profitable employment for the boat and barge. It was incumbent on the defendant to show, if he could, that a profit had been or might have been realized by the boat and barge; and, failing in this, the only result would have been that the plaintiffs would have recovered the difference between the contract price and the cost of performing the contract. But if a person should charter a ship for a number of months, or for a long voyage, and should immediately thereafter repudiate the contract, and refuse to perform it, no one, I apprehend, would seriously contend that the owner could send the vessel on a long and expensive voyage, in a fruitless effort to obtain profitable employment for her during the term of the charter-party without the consent of the charterer, and thereby fasten upon the latter the whole expense of the voyage. In such case the proper measure of damages would be the difference between the contract price and the cost which the owner would have incurred if the contract had been performed, subject only to such reduction as the charterer would have been entitled to on his proving affirmatively that the ship had, or might by a reasonable effort have earned a profit during the term of the charter-party."

[1] Harries v. Edmonds, 1 C. & K. 686.

cumstances should prevent the shipping of a return cargo or discharging the outward cargo, after waiting a specified time, the master should be at liberty to return, and the freighters should at once pay him 2,500*l*. The freighters procured a policy of insurance by which the underwriters agreed to pay a total loss in case the ship was not allowed to load a cargo at St. Petersburgh on the chartered voyage. The contingency of not being permitted to unload, and consequently of reloading, happened; thereupon, the master judging for the best, instead of returning immediately to London, proceeded to Stockholm, where, after disposing of the outward cargo to disadvantage, he brought home a Swedish cargo and earned freight thereon. In an action by the freighters on the policy of insurance, it was held that, as the freighters would be entitled to deduct from the sum payable to the master for dead freight the amount of the freight received by him on the return cargo from Stockholm, though such intermediate voyage were not originally contemplated by the contracting parties, but was undertaken upon the emergency, therefore the underwriters were entitled to make the same deduction from the total loss stipulated for by the policy, every contract of insurance being in its nature a contract of indemnity.[1]

In a subsequent case, under a similar charter, the master returned direct, bringing back the outward cargo, but took in other goods as freight, and the court held that he was entitled to receive the gross sum stipulated, and also to retain the freight which the ship had earned. Lord Mansfield said: "Since the homeward cargo could not be obtained, the defendants were, I suppose, to have their load brought back, though it is not so expressed; and it may be conjectured that the reason why the deed is so inaccurately drawn, was that the parties inferred that if the load should not be unloaded it would come back to London on the same terms on which the ship would return empty in case there was no return cargo; but that is inconsistent with the other clause, which makes the dead freight payable on the ship's arrival at any port in England; for certainly the charter-party imposes on the plaintiff no obligations to bring back the

[1] Puller v. Stainforth, 11 East, 232.

load to London. This makes a very extraordinary case; and none of the cases mentioned by Mr. Abbott, or elsewhere, apply to afford a rule for the present case. Because, even supposing that the captain is bound by his covenant to bring back the load for the 2,700*l.*, it is nothing more than a contract to bring back a certain quantity of goods, not according to a rate of freight proportioned to any certain bulk or weight, but merely as a wagoner might agree for a gross sum to carry goods in his own wagon from London to Exeter, or elsewhere. Now considering this as a mere contract to bring certain goods to England, I see no reason why the captain may not earn what else he can by taking other goods on board for his own benefit. In common cases of charter-parties, there usually is a covenant that the freighter will supply a certain quantity of homeward freight at the freight port, and if he does not, the plaintiff has his action on the covenant against him. But suppose, instead of leaving the damages open, he stipulates, if I cannot provide a cargo for you, I will pay you so much; would not the owner in that case have a right to take goods on board for his own account. His ship is at full liberty for him to make any other profit of, and in such a case he doubtless would insist on more or less liquidated damages, according to the chance he foresaw of getting freight home from the place where he was going; and in such a case I see no reason why the person who had stipulated to pay such liquidated damages, should be discharged from any part thereof on account of the profit which the plaintiff might make by the cargo supplied by any other person. I was at first much staggered by the case in the court of king's bench, which is very similar;[1] but there the captain did not bring home the load, but instead thereof went to Stockholm, and there sold the load and got other goods and brought them home. . . . This strong difference subsists between the two cases: there the load was the property of . . . (the freighter), but the load was not brought back; it was sold at Stockholm; and for aught that appears, the means which the captain had of obtaining any freight at Stockholm might arise from the use he made of the load there; and on that account,

[1] Puller v. Stainforth, supra.

perhaps, the court of king's bench might think that the captain, who had not been authorized or directed to act thus, but had done all this for his own benefit, should not be entitled to that profit, leaving the underwriters to pay the whole 2,500*l.* But in this case, on the best consideration, we think that the defendants are not entitled to deduct from the 2,700*l.* the profit which the captain made."[1]

The burden of proof as to the carrier having obtained or having it in his power to obtain other cargo or employment for his ship or other vehicle, is on the defaulting freighter.[2]

SAME, ON CHARTER TO LOAD WITH ENUMERATED ARTICLES.— In an action for not supplying a cargo under a charter-party, according to the terms of which different articles of freight are to be paid for at different rates by weight, and the freighter is at liberty to supply which articles he pleases, the average value of freight, calculated upon the various rates of freight in the proportions of the articles usually carried on such a voyage, is the proper measure of damage.[3] If the freighter under a charter-party loads the vessel with commodities wholly or in great part different from those enumerated in the charter-party, he will be liable to damages as though he had performed the contract in the way most favorable to himself and least favorable to the ship owners;[4] that is, at the lowest amount of freight to which they would have been entitled for a full cargo of enumerated articles, taken in the proportions provided by the charter-party.[5]

[1] Bell v. Pullen, 2 Taunt. 285.

[2] Utter v. Chapman, 43 Cal. 279; Murrett v. Whiting, 32 Ala. 54; Dean v. Ritter, 18 Mo. 182.

[3] Thomas v. Clarke, 2 Stark. 450.

[4] Capper v. Forster, 3 Bing. N. C. 938.

[5] Cockburn v. Alexander, 6 C. B. 791, per Williams, J. Maule, J., said: "Suppose there were goods, which the charterer might have put on board if he had chosen to do so, and did not,— it may be that he had the option of shipping any one of the enumerated articles; there may have been goods at the port of loading which he might have shipped, but none of the enumerated goods; there may have been goods the loading of which would have been the most profitable to the owner, and the most onerous to the charterer, or the converse may have been the case. Again, suppose there were no goods at all at the place ready for shipment, that would present a totally different state of things; there the non-shipment of a cargo

CARRIER'S ACTIONS FOR FREIGHT AND OTHER CHARGES.— Service may be performed in the transportation of goods on request without any express or tacit agreement fixing the rate of freight. It is then a quantum meruit demand,[1] to be ascertained by the usage of the trade and the reason of the case.[2] Such transactions, however, are rare, and comparatively unimportant. Since the adoption of modern improved methods of transportation, the business has assumed large proportions, and it has been minutely systematized; fixed and detailed rates of through and local freight are generally scheduled and published. Even in the absence of an actual contract, the circumstances afford evidence of an implied agreement for specific freights, conformable to the published rates of the carrier. Sometimes questions arise in respect to them when there are discriminations inimical to the public interest or in conflict with statutory regulations. On common law principles, a reasonable compensation may be charged and recovered. The commonness of the duty of a common carrier to carry for all, it has been held, does not necessitate a commonness of compensation. The tariff of rates, or what is charged to one party, is but matter of evidence to determine whether a particular charge to another is reasonable.[3]

would result from the charterer's inability to ship a cargo. If you could show that there were goods which the charterer might have obtained, then the proper measure of damages would be the non-shipment of that cargo. But, if there were none, it may be that, in ascertaining the damages, an average is to be taken of all possible kinds of goods. It is in that way, I think, that Lord Tenterden arrived at the opinion he expressed in Thomas v. Clarke, viz.: that where there is no cargo at all to be had, the average is to be taken of all possible kinds of cargo; that is, that you are to assume, contrary to the fact, that there are goods of each of the kinds enumerated,— because the obtaining of goods of any one kind, where none are in truth obtained, cannot *a priori* be considered as more probable than the obtaining of any of the others; and, taking an average, and assuming that to be the way in which the contract, if performed at all, would probably have been performed, you are to make that the basis of the calculation of freight."

[1] Bastard v. Bastard, 2 Show. 81; Simmes v. Marine Ins. Co. 2 Cranch C. C. 618; Hollister v. Nowlen, 19 Wend. 238; Citizens' Bank v. Nantucket S. B. Co. 2 Story, 35.

[2] 3 Kent's Com. 202, 219; Harris v. Packwood, 3 Taunt. 264; Wallace v. Matthews, 39 Ga. 617; Halford v. Adams, 2 Duer, 471.

[3] Johnson v. Pensacola, etc. R. R. Co. 16 Fla. 623; Gaston v. Bristol & E. R'y Co. 1 B. & S. 112, 154; Baxendale v. Eastern, etc. R'y Co. 4 C. B. N. S. 63.

DISCRIMINATIONS UNLAWFUL WHEN CONDITIONS THE SAME.— But the duty to serve all who apply for the carriage of goods is founded in the consideration that the calling is a public employment, as the right to accept or reject an offer of business is necessarily incident to all private traffic.[1] "Recognizing this as the settled doctrine," says Beardsley, C. J., "I am not able to see how it can be admissible for a common carrier to demand a different hire from various persons, for the identical kind of service, under identical conditions. Such partiality is legitimate in private business, but how can it square with the obligations of a public employment? A person having a public duty to discharge, is undoubtedly bound to exercise such office for the equal benefit of all; and therefore to permit the common carrier to charge various prices, acoording to the person with whom he deals, for the same services, is to forget that he owes a duty to the community. . . . The law that forbids him to make any discrimination in favor of the goods of A, over the goods of B, when the goods of both are tendered for carriage, must, it seems to me, necessarily forbid any discrimination with respect to the rate of pay for the carriage. I can see no reason why, under legal rules, perfect equality to all persons should be exacted in the dealings of the common carrier, except with regard to the amount of compensation for his services. The rule that the carrier shall receive all the goods tendered, loses half its value, as a politic regulation, if the cost of transportation can be graduated by special agreement so as to favor one party at the expense of others. Nor would this defect in the law, if it existed, be remedied by the principle which compels the carrier to take a reasonable hire for his labor, because, if the rate charged by him to one person might be deemed reasonable, by charging a lesser price to another for similar services, he disturbs that equality of rights among his employers which it is the endeavor of the law to effect. Indeed, when a charge is made to one person, and a lesser charge, for precisely the same offices, to another, I think it should be held that the higher charge is not reasonable."[2] In the case in which this opinion was given, it was held that an

[1] Messenger v. Penn. R. R. Co. 36 N. J. L. 407, 410.

[2] Id.

agreement by a railroad company to carry for certain persons at a cheaper rate than they will carry under the same conditions for others, is void for creating an illegal preference.[1]

The commonness of the right necessarily implies an equality of right, in the sense of freedom from unreasonable discrimination; and statutes which require of carrying corporations equality in terms, facilities and accommodations, are held to be declaratory of the common law.[2]

A carrier may make a valid contract for conveying property at less than his usual rate, and for less than a reasonable compensation.

It is settled that when the carrier has not given notice that he would not be answerable beyond a specified sum, unless informed of the value, or has made a special acceptance, it is not the duty of the shipper to state the quality or value.[3] It is the duty of the carrier to make inquiry if he wishes to have a reward proportionate to the value, or to know whether the goods are of that quality for which he has a sufficiently secure conveyance.[4] If inquiry is made, the shipper must answer truly at his peril; and if such inquiry is not made, and the parcel is received at such price for transportation as is asked with reference to its bulk, weight or external appearance, the carrier is responsible for its loss whatever may be its value.[5]

If a carrier has, without inquiry, unwittingly received a package of great value and charged a disproportionately low freight, and on payment of it undertakes to transport it, he cannot, on discovering its true value, exact additional payment, where no fraud has been practiced to conceal the value.[6]

[1] Sandford v. Catawissa, etc. R. R. Co. 24 Pa. St. 378; Palmer v. Grand Junction R'y, 4 M. & W. 749; Parker v. Great W. R'y Co. 7 M. & G. 253; New England Express Co. v. Maine C. R. R. Co. 57 Me. 188; Chicago, etc. R. R. Co. v. Parks, 18 Ill. 460.

[2] Sandford v. Catawissa, etc. R. R. Co. 24 Pa. St. 378; New England Exp. Co. v. Maine C. R. R. Co. 57 Me. 188; McDaffee v. Portland R. R. Co. 52 N. H. 430.

[3] Batson v. Donovan, 4 B. & Ald. 29; Magnin v. Dinsmore, 62 N. Y. 35; Levois v. Gale, 17 La. Ann. 302; Story on Bailm. § 567.

[4] Id.

[5] Orange Co. Bank v. Brown, 9 Wend. 85; Walker v. Jackson, 10 M. & W. 168; Phillips v. Earle, 8 Pick. 182; Relf v. Rapp, 3 W. & S. 21; Little v. Boston, etc. R. R. Co. 66 Me. 239; Hollister v. Nowlen, 19 Wend. 234.

[6] Baldwin v. Liverpool, etc. Co. 74 N. Y. 125. See Magnin v Dinsmore, 62 N. Y. 35.

When freight due and earned.— No freight is due before the commencement of the voyage or transportation, although the goods may have been put in possession of the carrier and placed on board of his vessel or other vehicle;[1] but if the shipper retake his goods after delivery and acceptance for transportation, the carrier is entitled to compensation for any expense or trouble he has been put to, as well as damages for breach of any contract to furnish such goods for transportation.[2] A carrier may require prepayment of freight; but if he does not, and receives the goods, he can maintain no action for their carriage until the goods are delivered at their destination.[3]

Freight is not earned until the delivery, or what is equivalent thereto, to the consignee or owner at the place of destination,[4] unless delivery is prevented by the act or default of the shipper.[5] If it becomes impossible to deliver the cargo for a cause not attributable to the fault of either the shipper or the carrier, no freight can be demanded.[6]

Where some portion of a perishable cargo has been lost by decay, without the fault of the master, and was for that reason left behind on the voyage, the ship owners are entitled to recover freight on the residue duly transported and delivered,[7]

[1] Bailey v. Damon, 3 Gray, 92–94; Culing v. Long, 1 Bos. & Pul. 634; Clemson v. Davidson, 5 Binn. 392, 401; Burgess v. Gan, 3 Har. & J. 225; 3 Kent's Com. 223. But see 2 Par. on Cont. 287; Bartlett v. Carnley, 6 Duer, 194.

[2] Id.

[3] Barnes v. Marshall, 18 Q. B. 785. If common carriers undertake to carry goods without having been previously paid, the law presumes that they consider the possession of the goods as a sufficient security for their expected remuneration; and in conformity with this presumption, it authorizes them to retain their possession at the end of the transit, until they have received satisfaction for their labor, etc.; and this the foundation of a *lien*. Ang. on Car. § 356.

[4] Lorillard v. Palmer, 15 John. 12; Brown v. Ralston, 4 Rand. 504; Price v. Hartshorn, 44 Barb. 655; Clendaniel v. Tuckerman, 17 Barb. 184; Stevens v. Sagward, 8 Gray, 215; Harris v. Rand, 4 N. H. 555; S. C. id. 261; Adams v. Haught, 14 Tex. 243; The Ship Hooper, 3 Sumn. 542; Brittain v. Barnaby, 21 How. U. S. 527; The Ann D. Richardson, 1 Abb. Adm. 499.

[5] Id.

[6] Thibault v. Russell, 5 Harr. (Del.) 293; Halwenon v. Cole, 1 Spear, 321; Crawford v. Williams, 1 Sneed, 205; Withers v. Macon, etc. R. R. Co. 35 Ga. 273; McKibbin v. Peck, 39 N. Y. 262, 270.

[7] The Brig Collenberg, 1 Black, 170.

but no freight is payable in respect to the part not carried.[1] So, if molasses or liquids have wasted in bulk during the voyage, or live animals die, no freight on such part, not delivered, is earned.[2] So if a voyage be broken up by an interdiction of commerce with the port of destination, after its commencement, no freight is payable.[3] But where the cargo is taken at a lump freight, the whole may be recovered on right delivery of part, if the other part be lost without the carrier's fault.[4] Freight has been well defined to be the price payable for the carriage of goods from the port of loading to their port of discharge.[5]

If the cargo increase in bulk on the voyage, as by the birth of infants,[6] or the swelling of grain by heating, freight is payable only on the quantity shipped rather than on that delivered.[7] And if the property is delivered in specie, although in a damaged condition, and even if worthless, whether the damage be accidental or by the carrier's fault, freight is earned, subject in the latter case, in this country, to the right of recoupment for such damage.[8] But in the case of an actual loss or destruction by sea damage of so much of the cargo that no substantial part of it remains; as, if sugar in mats, shipped as sugar, and on freight to be paid at so much per ton, is washed away, so that only a few ounces remain, and the mats are worthless; or a valuable picture has arrived as a piece of spoilt canvas, cloth in rags, or crockery in broken sherds, it may be questioned that any freight would be due. In such instances the proper course seems to be to ascertain from the terms of the contract, construed by mercantile usage, if any, what was

[1] Dakin v. Oxley, 15 C. B. N. S. per Willes, J.

[2] Frith v. Barker, 2 John. 327; The Cuba, 3 Ware, 260; Dathie v. Hilton, L. R. 4 C. P. 138; Nelson v. Stephenson, 5 Duer, 538; Ang. on Carr. § 211.

[3] The Saratoga, 2 Gall. 164; Liddard v. Loper, 10 East, 526.

[4] Merchants' Shipping Co. v. Armitage, L. R. 9 Q. B. 99; 43 L. J. Q. B. 24; Galt v. Archer, 7 Gratt. 307; Leckie v. Sears, 109 Mass. 424.

[5] Gibson v. Sturge, 10 Exch. 637.

[6] Malley, Bk. 2, ch. 4, § 8.

[7] Gibson v. Sturge, supra.

[8] McGaw v. Ocean Ins. Co. 23 Pick. 405; Lord v. Neptune Ins. Co. 10 Gray, 109; Hugg v. Augusta Ins. & B. Co. 7 How. 595; Ogden v. General Ins. Co. 2 Duer, 204; Stedman v. Taylor, 3 Ware, 52; Nelson v. Woodruff, 1 Black, 156; Nelson v. Stephenson, 5 Duer, 538; Griswold v. New York Ins. Co. 1 John. 205; S. C. 3 John. 321. See post, p. 203

the thing for the carriage of which freight was to be paid, and by the aid of a jury to determine whether that thing, or any and how much of it, has substantially arrived.[1]

After the transportation commences, under a contract for a specified freight, if the shipper prevents the delivery at the place of destination, he is nevertheless liable for full freight on receiving the goods at an intermediate point.[2] When the goods are shipped and the voyage commenced, the right of the ship owner to full freight has attached; and in case of accident and detention, either by putting back to the port of departure, or by stopping at an intermediate port, more or less distant from the port of destination, the shipper has no right, without the consent of the ship owner, to demand and obtain the goods without paying full freight, in case the ship owner, or the master in his behalf, can either refit his own ship within a reasonable time, and proceeds to do so, or within a like reasonable time, will transport the goods in another vessel.[3]

If the master, without sufficient cause, refuse to repair his ship at the intermediate port, and to send on the goods, or to procure another vessel for that purpose, he can recover no freight.[4]

[1] Dakin v. Oxley, 15 C. B. N. S. 665.

[2] Palmer v. Lorillard, 16 John. 347; Ellis v. Willard, 9 N. Y. 529; Jordan v. Warren Ins. Co. 1 Story, 342; Nelson v. Stephenson, 5 Duer, 538; Merchants', etc. Ins. Co. v. Butler, 20 Md. 41; Violett v. Stettinius, 5 Cranch C. C. 559; Bradhurst v. Columbian Ins. Co. 9 John. 17; Bradstreet v. Baldwin, 11 Mass. 229; Murray v. Ætna Ins. Co. 4 Biss. 417. A railroad company having no interest in a contract for through transportation, made between other parties, cannot prevent the consignee from stopping the goods before reaching their line of road; and if they carry the goods over their line, in spite of the consignee's objection, they have no right to collect any freight or expenses. Withers v. Macon & W. R. R. Co. 35 Ga. 273.

[3] McGaw v. Ocean Ins. Co. 23 Pick. 405. In Hadley v. Clarke, 8 T. R. 259, the defendants contracted to carry the plaintiff's goods from Liverpool to Leghorn. On the vessel arriving at Falmouth, in the course of her voyage, an embargo was laid on her until the further orders of council; it was held that such embargo only suspended but did not dissolve the contract between the parties; and that even after two years, when the embargo was taken off, the defendants were answerable to the plaintiff in damages for the non-performance of the contract.

[4] Welch v. Hicks, 6 Cow. 504. In Palmer v. Lorillard, 16 John. 348, the bill of lading was for transportation from Richmond to New York. The jury found that the vessel, in the beginning of February,

In Bork v. Norton,[1] an action was brought for freight, and it appeared that the defendant shipped on the plaintiff's vessel at Buffalo merchandise consigned to Chicago. The vessel left Chicago in October, and having reached Detroit was prevented by ice from proceeding farther until navigation opened in the spring following. On reaching Detroit the cargo, being somewhat injured, was unladen. During the winter the defendant had the greater part of his goods conveyed to Chicago by land at a heavy expense. So soon as navigation opened in the spring, the vessel, with that part of the cargo which remained at Detroit, sailed for Chicago, and delivery was there made some time in March. The question was whether the plaintiff was entitled to full freight. The court say: "It may well be matter of doubt whether all the principles of maritime contracts of this nature can apply to the navigation of our lakes and rivers. The facts of this case may test this principle. The defendant is a merchant, and the cargo in question consisted of merchandise. It was important that his goods should be conveyed to Chicago expeditiously, as the fall and winter sales were of the utmost importance to him. This was known to the master of the vessel. Under such circumstances, was it incumbent on the defendant to wait some four or five months, until the navigation of the upper lakes opened, for the delivery of his goods? The vessel arrived at Chicago some time in March. This would have been very injurious to the defendant, and, indeed, might have been ruinous to him. Such a delay was not within the contemplation of the parties, nor any reasonable construction which can be given to the contract. . . . A

proceeded from Richmond, in the prosecution of the voyage, and came to Hampton Roads, but finding the Chesapeake blockaded by a hostile squadron, and that it would be impossible to put to sea without being captured, went into Norfolk, and finally returned to Richmond; that in September following the plaintiffs demanded their goods in order to transport them to New York by land, but the master refused to deliver them unless he was paid half freight. The court held that the contract of affreightment was not discharged by the blockade, and the carriers had a right to retain the goods until they could prosecute the voyage, unless the shipper tendered them the whole freight to which they would have been entitled on its completion.

[1] 2 McLean, 422.

distinction, it seems to me, may well be drawn between a contract for the transportation of goods upon the high seas and over lakes of but limited extent. In the former case the risks are numerous, and, being well understood, may, to some extent, at least, be protected by an insurance. In the latter, if the risks are of the same nature, they are more limited. But the main difference is, the transportation by sea is the only means of conveyance in the one case, while in the other, if obstructions on the water occur by ice or otherwise, a land transportation may be adopted; and the contract is made in reference to this fact. It must be an extraordinary case, indeed, where there is an obstruction of the navigation of the lakes by ice for four months, that the owner of the goods should be bound to wait this period for their delivery."

Various circumstances will entitle the shipper to demand and take possession of the goods at a place short of the port or place of destination, without subjecting him to the payment of full or *pro rata* freight. He may do so, for example, when the carrier refuses or is unable to carry them further;[1] when necessary to save the property from destruction, or when it has been wrongfully disposed of by the carrier.[2] If a ship be disabled from completing her voyage, the ship owner may still entitle himself to the whole freight by forwarding the goods by some other means to the port of destination; but he has no right to any freight if they be not so forwarded, unless the forwarding them be dispensed with, or unless there be some new bargain upon the subject. If the ship owner will not forward them, the freighter is entitled to them without paying anything. One party, therefore, if he forward them, or be prevented or discharged from so doing, is entitled to his whole freight; and the other, if there be a refusal to forward them, is entitled to have them without paying any freight at all. The general property in the goods is in the freighter; the ship owner has no right to withhold the possession from him, unless he has earned his freight or is going on to earn it.[3]

[1] Portland Bank v. Stubbs, 6 Mass. 422; Welch v. Hicks, 6 Cow. 504.

[2] Western T. Co. v. Hoyt, 69 N. Y. 236; Hunter v. Prinsep, 10 East, 378.

[3] Hunter v. Prinsep, 10 East, 378.

WHEN PRO RATA FREIGHT MAY BE DEMANDED.— The principle that an entire contract cannot be apportioned, and that full performance of conditions precedent is necessary to a right of action on the contract, applies to contracts of affreightment as well as to others.[1] And so does the principle that if the party entitled to such full performance waive it and voluntarily accept the benefit of partial performance, a promise will be implied to make compensation *pro tanto*. Therefore, where the owner voluntarily accepts the goods before the transportation is completed, and in fact discharges the carrier from further transportation, without being compelled thereto by any wrong done by or default or inability of the carrier, a contract to pay freight *pro rata* will be implied.[2] To justify a claim for *pro rata* freight there must be a voluntary acceptance of the goods at an intermediate place in such mode as to raise a fair inference that the further carriage of the goods is intentionally dispensed with;[3] mere acceptance at a place short of the destination without regard to other circumstances is not a decisive fact.[4]

The ground on which the right to receive *pro rata* freight rests is that the owner who receives the goods at an intermedi-

[1] Western Transp. Co. v. Hoyt, supra.

[2] Harris v. Rand, 4 N. H. 261; Rand v. Harris, id. 555; Liddard v. Lopes, 10 East, 526; Cook v. Jennings, 7 T. R. 381; Shields v. Davis, 6 Taunt. 65; Malloy v. Backer, 5 East, 316; Christy v. Row, 1 Taunt. 300; Vlierboom v. Chapman, 13 M. & W. 239; Luke v. Lyde, 2 Burr. 882; Post v. Robertson, 1 John. 24; Scott v. Libby, 2 John. 336; Parsons v. Hardy, 14 Wend. 215; Welch v. Hicks, 6 Cow. 504; Griswold v. N. Y. Ins. Co. 1 John. 205; 3 id. 321; Western T. Co. v. Hoyt, 69 N. Y. 230; Hunt v. Haskell, 24 Me. 339; Crawford v. Williams, 1 Sneed, 205; Rossiter v. Chester, 1 Doug. (Mich.) 154; Law v. Davy, 2 S. & R. 553; Gray v. Waln, 2 S. & R. 229; Caze v. Baltimore Ins. Co. 7 Cranch, 358; Herbert v. Hallett, 3 John. Ca. 93; Whitney v. N. Y. Ins. Co. 18 John. 208; McGaw v. Ocean Ins. Co. 23 Pick. 405; Hove v. Mason, 1 Wash. (Va.) 264; The Mohawk, 8 Wall. 153; Whitney v. Rogers, 2 Disney (O.), 421.

[3] Vlierboom v. Chapman, 13 M. & W. 238.

[4] See Hurtin v. Union Ins. Co. 1 Wash. Cir. Ct. 530; Marine Ins. Co. v. United Ins. Co. 9 John. 186; Penoyer v. Hallett, 15 John. 332; Bradhurst v. Columbian Ins. Co. 9 John. 17; Armroyd v. Union Ins. Co. 3 Binn. 445; Escopenicke v. Stewart, 2 Conn. 391; Brown v. Ralston, 4 Rand. 504; Christy v. Row, 1 Taunt. 300.

ate port has the benefit of their transportation to that place; this benefit is the foundation of an implied promise.[1] The original contract is not executed, and the stipulated freight is not earned; but by the consent of both parties the original contract is relinquished, and then from the beneficial service performed by the one party for the benefit of the other, the law raises a promise, upon equitable considerations, to pay a part of the stipulated freight, in the proportion that the service actually done bears to that undertaken to be done.[2] In case the vessel puts back to the port of departure, freights remaining as high as when the shipment was made; or if the detention be at a place from which to the port of destination freights are as high as the freight stipulated to be paid, then no benefit has been conferred on the shipper, no equitable obligation arises to pay freight *pro rata itineris;* and if the shipper consents to take back his goods, and the ship owner to surrender them, no freight is earned.[3] A mere agreement to accept goods at an intermediate port is not, for the purpose of *pro rata* freight, tantamount to an actual acceptance. To raise an implied promise to pay such freight, the goods must be actually delivered and actually received. Until this is done, the owner cannot be considered as having received any benefit from the transportation.[4]

If the vessel under charter is lost after the commencement of the voyage by one of the causes excepted in the charter, the master is required, in respect to the cargo, to do the best he can for all concerned. It is his duty to the ship owner, if freight can be saved, to send on the goods by another vessel, where it is practicable to do so; but where the cost of transshipment admits of no such saving, he seems to have no authority as agent of the ship owner to hire another vessel to forward the goods; but in such an emergency he owes a duty to the owner of the cargo to forward or otherwise dispose of it according to his interest, and the master may reasonably forward the goods at an enhanced freight where the interest of the freighter

[1] Harris v. Rand, 4 N. H. 261.
[2] McGaw v. Ocean Ins. Co. 23 Pick. 411.
[3] Id.
[4] Harris v. Rand, 4 N. H. 261.

will justify it. Where the goods are transshipped by the master in the performance of this duty, the increased freight for such transshipment is chargeable on the cargo and to the freighter.[1] And to ascertain the extra freight, the proper rule has been held to be to determine what would be the difference between the amount of freight under the original charter-party for the portion of the goods delivered at the port of destination, and the amount of a ratable freight to the port of necessity for the goods saved, added to the freight of the new ship.[2] This appears to be the rule where the freight is adjusted on the assumption that the master at the port of necessity was entitled to freight, *pro rata itineris*, on the goods being sent forward in the interest of the shipper. But where the delivery at the port of destination is a necessary condition, the authority of the master to transship as the agent of the ship owner depends on whether there can be any saving of freight. If the master must pay for the freight onwards more than the whole freight the owners are to receive for the whole voyage, he no longer acts, or has authority to act as their agent, because they have no interest in the transshipment, but as the agent of the shippers whose goods he forwards.[3] If he transship the goods, in case of necessity, at less than the original freight, the shipper will derive no advantage from it, but on the right delivery of the goods at the destination, he will be liable for the stipulated freight.[4]

The carrier cannot recover freight for goods lost merely because the owner insured them and collected insurance on the value at the place of delivery.[5] But where the loss in such case was not such as to absolve the carrier from the duty of making effort for the preservation of the property; nor so imminent as to preclude all hope of such preservation so as to

[1] Searle v. Scovell, 4 John. Ch. 218; 2 Par. on Con. 298.

[2] Id.

[3] 2 Par. on Con. 298; Crawford v. Williams, 1 Sneed, 295; Thwing v. Washington Ins. Co. 10 Gray, 443. The cases of Lemont v. Lord, 52 Me. 365, and Gibbs v. Grey, 2 H. & N. 22, discuss the principles which limit the powers of the master; the former, as agent of the ship owner, and the other, as agent of the owner of the cargo. See Coffin v. Storer, 5 Mass. 251; Featherston v. Wilkinson, L. R. 8 Exch. 122.

[4] Shipton v. Thornton, 9 Ad. & El. 314.

[5] McKibbin v. Peck, 39 N. Y. 262.

continue the transportation, and thus of earning the stipulated freight; and the owner interrupts such efforts by settling with the insurance company as for a total loss, thereby vesting in such company the *spes recuperandi*, and whatever could be saved, such settlement will be an acceptance of the property, and entitle the carrier to *pro rata* freight.[1]

Charges and expenses incurred where delivery hindered or prevented.— It is established that when a ship reaches the port of destination, and has waited a reasonable time to deliver goods from her side, the master may land and warehouse them at the charge of the merchant; this he should do rather than throw them overboard. Where the goods cannot be landed, nor remain where they are, it seems to be a legitimate extension of the implied agency of the master to hold that, in the absence of all advice, he has a right to carry or send them on to such other place as in his judgment, prudently exercised, appears to be most convenient for their owner; and that the expenses properly incurred in so doing may be charged to him. And if, in the exercise of such judgment, he carries the freight back to the place of shipment, he is entitled to freight, back freight and expenses.[2] The demurrage, and the expenses incurred in the ineffectual attempt to land at neighboring ports, are not allowable; but are looked upon as part of the expenses of the voyage.[3]

Adjustment of freight under charter to load with enumerated articles.— Where a ship is chartered to bring home a cargo of enumerated articles, at rates of freight specified for each, and the articles are not provided by the charterer, freight must be paid upon average quantities of all the articles, whether the ship return empty or laden with a cargo of articles different from those enumerated.[4] The ship owner, under such a charter, is entitled to earn the stipulated freight; the amount cannot be reduced either by total failure to load the vessel,

[1] McKibbin v. Peck, 39 N. Y. 262.

[2] Gandet v. Brown, L. R. 5 P. C. 134; 3 Kent's Com. 223.

[3] Id.; Bennett v. Byram, 38 Miss. 17; Morgan v. Insurance Co. 4 Dall. 455. See Burrill v. Clegman, 17 John. 72; Scott v. Libby, 2 John. 336.

[4] Capper v. Forster, 3 Bing. N. C. 938.

nor by loading her with goods of a different description.[1] If the charter-party limits the quantity of some of the enumerated articles, and these are loaded up to the limit, and there is a substitution as to the residue of the cargo, the above rule applies to the latter.[2] To effectuate the obvious intention in respect to certainty of the amount of freight, while the charterer takes a wide latitude in selecting cargo according to circumstances not foreseen, arbitrary rules of measurement will be adopted when necessary to conform the cargo to the standard of the contract. By a charter-party it was agreed that a ship should proceed to Baltimore, and there load a full cargo of *produce*, and proceed therewith to the United Kingdom, and deliver the same on being paid freight, "at and after the rate of 5*s*. 6*d*. per barrel of flour, meal and naval stores, and 11*s*. per quarter of four hundred and eighty pounds for Indian corn or *other grain;*" that the cargo was not to consist of less than three thousand barrels of flour, meal and naval stores; and that not less flour or meal than naval stores was to be shipped. The vessel arrived with a cargo consisting of seven hundred and sixty-nine hogsheads of tobacco, six thousand and forty-seven bushels of bran, two thousand bushels of oats, five thousand oak staves and three barrels of flour. The evidence showed that a quarter of Indian corn or wheat weighing four hundred and eighty pounds would occupy a space of ten and a half cubic feet, and that a quarter of American oats, which weighed, upon an average, two hundred and seventy-two pounds, would occupy a space of sixteen cubic feet. It also appeared that oats were not a usual shipment from America. Maule, J., said: "The ship arrived at her destination without a full cargo, the freighter being unable to furnish a full cargo. The owner, no doubt, is entitled to compensation for this breach of contract. The cargo the freighter engaged to furnish was a full and complete cargo of produce, which would be satisfied by a shipment of any article of commerce which was usually shipped from the loading port. That being what the parties contemplate and describe, they proceed to stipulate for the rate of compensation which the owner is to receive, which they

[1] See Thomas v. Clarke, 2 Stark. 450.

[2] Cockburn v. Alexander, 6 C. B. 791.

say is to be as mentioned above. Now, that enumerates and specifies certain articles of produce, and the respective prices to be paid for them; it applies the rate in terms to all produce. . . I . . think that the clause in question provides a rate of freight which is to be paid for any description of produce shipped under this charter-party. It is manifest that the intention of the parties was, that the cargo should be delivered only on payment of *some* freight; and unless the construction I have mentioned is put upon the charter-party, no freight at all would be provided for in respect to any but the actually enumerated articles. Taking it, then, to be a clause by which the parties intended to regulate the amount of freight to be paid for all descriptions of goods coming within the general term 'produce,' it helps us towards the construction of another part of the instrument, which depends upon the nature of the trade of the loading port. We think — not without some doubts crossing the minds of some members of the court — that the clause, when speaking of 'Indian corn or other grain,' must be construed to mean other grain, *exclusive of oats*, which are a description of grain but recently the subject of exportation from America to England. But as this clause was intended to regulate the freight, not for grain only, but for every description of goods — for which purpose it was necessary that it should ascertain a precise, or reasonably precise, rate of payment,— we think there is sufficient reason for excluding oats, as not being within the probable intention of the parties when speaking of 'other grain.' The relation in which oats, according to the evidence given in the cause, stand to other produce, confirm us in this view. With respect to Indian corn, which weighs about four hundred and eighty pounds per quarter, and wheat, 11*s.* per quarter is to be paid. But oats being a grain to which that is not applicable, and not having long been imported from that place, we think they are like any other produce to be brought, the freight of which is not regulated by that stipulation, but that they are to be paid for after a rate to be deduced from the rate of 5*s.* 6*d.* per barrel of meal, and 11*s.* per quarter of Indian corn or other grain of the average weight of four hundred and eighty pounds per quarter. The proper mode, therefore, of estimating the damages will be

to assume that the stipulated number of barrels of flour was put on board, and the residue of the vessel filled up with other goods, at an amount of freight calculated upon the rule which the parties have laid down, viz.: 5*s.* 6*d.* per barrel of flour, and 11*s.* for every four hundred and eighty pounds of Indian corn or other grain." [1]

RECOUPMENT AGAINST FREIGHT.— The shipper or consignee may recoup against freight any cross claim against the carrier for any negligence or violation of his contract of affreightment by which the former has suffered damage.[2] It is otherwise in England. An exceptional rule there prevails, and where there is an agreement for a specific freight, no evidence can be given of a deficient performance of contract not amounting to breach of a condition precedent, with a view to a reduction of damages.[3] But where the master had sold part of the cargo without authority, Lord Ellenborough held that the owner of the goods was entitled to set off the value against the freight, notwithstanding the freight had been assigned to a stranger.[4] And it seems also to be settled in England that advances made on freight cannot be recovered, although the ship be lost before coming to a delivery port, and the freight therefore not becoming payable.[5] But in this country the doctrine is settled the other way.[6]

[1] Warren v. Peabody, 8 C. B. 800.

[2] Bancroft v. Peters, 4 Mich. 619; Dedekam v. Vose, 3 Blatchf. 44; Byrne v. Weeks, 7 Bosw. 372; S. C. 4 Abb. App. Dec. 657; Relyea v. New H. R. M. Co. 42 Conn. 579; Kennedy v. Dodge, 1 Bene. 215; Nichols v. Tremlett, 1 Sprague, 367; Leech v. Baldwin, 5 Watts, 446; Edwards v. Todd, 2 Ill. 462; Ewart v. Kerr, 2 McMull. 141; Sears v. Wingate, 3 Allen, 103; Davis v. Patterson, 27 N. Y. 317; Merrick v. Gordon, 20 N. Y. 93; Glendell v. Thomas, 56 N. Y. 194; Snow v. Carruth, 1 Sprague, 324; Hensdell v. Weed, 5 Denio, 172; Edmundson v. Baxter, 4 Hayw. 112; Hill v. Leadbetter, 42 Me. 572; Kaskaskia Bridge Co. v. Shannon, 6 Ill. 15; Schwinger v. Raymond, 83 N. Y. 192; Dyer v. R. R. Co. 42 Vt. 441. See Lowenburg v. Jones, 56 Miss. 688.

[3] Mayne on Dam. 252; Bornman v. Tooke, 1 Camp. 377; Davidson v. Gwynne, 12 East, 381.

[4] Campbell v. Thompson, 1 Stark. 490.

[5] Byrne v. Schiller, L. R. 6 Ex. 325, per Lord Cockburn, C. J.; Hicks v. Shield, 7 El. & Bl. 633; 2 Shower, 283; De Caudra v. Swann, 16 C. B. N. S. 772; Jackson v. Isaac, 3 H. & N. 405.

[6] Riena v. Cross, 6 Cal. 29; Lawson v. Worms, 6 Cal. 365; Phelps v. Williamson, 5 Sandf. 578; Emery v. Dunbar, 1 Daly, 408; The Kimball, 3 Wall. 37; Lee v. Bereda, 16 Md. 190; Griggs v. Austin, 3 Pick. 20; Chase

Damages for detention of vessel.— Demurrage, in the strict sense of the term, means a sum of money due by express contract for the detention of a vessel in loading or unloading, one or more days beyond the time allowed for that purpose in the charter-party.[1] Charter-parties usually fix the sum to be paid per day for such delays; sometimes it is fixed by reference to the custom of the port.[2] Wherever payment of freight is the condition of the delivery of goods, and a consignee accepts them, he thereby becomes a party to the contract, and incurs not only the obligation to pay the freight, but also the demurrage for detention in unloading beyond the lay days.[3]

Damages in the nature of demurrage are recoverable for detention beyond reasonable time in unloading where there is no express stipulation to pay demurrage. They are in the nature of demurrage, because they are for the detention of the vessel, and measured by the day like demurrage; they are damages because they are recovered for breach of the implied contract of the shipper that he will receive the goods in a reasonable time.[4] What is a reasonable time will be determined upon the particular facts of each case. In one case,[5] the master was directed to deliver to a railroad company, but the bill of lading which contained the contract did not provide for such delivery; and after arrival of the vessel there was a detention for eight days for twenty other vessels which had arrived earlier to unload in their turn, and the court held that was no unreasonable detention. Butler, J., said: "Influenced by the equity of the case, I had at first some doubt whether the finding in respect to the excuse came up to the necessities of their defense. It is not

v. Alliance Ins. Co. 9 Allen, 311; Atwell v. Miller, 11 Md. 348; Hagedorn v. St. Louis Ins. Co. 2 La. Ann. 1005; Watson v. Duykinck, 3 John. 335; Pitman v. Hooper, 3 Sumn. 66. See Mashiter v. Buller, 1 Camp. 84; 3 Kent's Com. 226–228.

[1] Abb. on Shipping, 5 Am. ed. pt. 4, c. 1; Wordin v. Bemis, 32 Conn. 273; Cleudaniel v. Tuckerman, 17 Barb. 184; Bleck v. Balleras, 3 Ell. & Ell. 203; Sprague v. West, 1 Abb. Adm. 548.

[2] Morse v. Pesant, 2 Keyes, 16.

[3] Id.; Dobbin v. Thornton, 6 Esp. 16; Jesson v. Sally, 4 Taunt. 52. See Chappel v. Comfort, 10 C. B. N. S. 802; Wegener v. Smith, 15 C. B. 285; Cawthorn v. Trickett, 15 C. B. N. S. 753.

[4] Wordin v. Bemis, 32 Conn. 273; Esseltyne v. Elmore, 7 Biss. 69; Clendaniel v. Tuckerman, 17 Barb. 184.

[5] Wordin v. Bemis, supra.

found that the accumulation was owing to any *unexpected cause*, or that it might not have been foreseen and provided against by proper foresight and diligence. In several cases cited the vessels were detained by a storm or storms, and all arrived together when the weather cleared up. There the elements were the cause. Here the cause is not found, nor is it found that the accumulation was not the result of a previous want of diligence or other fault on the part of the company. Still, it is expressly found that the company did all they could do to hasten the discharge of the vessel after the arrival of the plaintiff, and there is no presumption that they or the defendants expected or could have foreseen the arrival of so many vessels, or were in any way the cause of the accumulation, and we are constrained to hold the excuse sufficient." A somewhat stricter rule was laid down by Judge Drummond in a case of detention from a similar cause. It was held that the plaintiff, the master, was not responsible for the arrival of vessels consigned to the defendants about the same time; that was a risk which the defendants themselves took. The plaintiff reported his arrival on the morning of the 18th of November, and was detained to the 22d of that month to commence unloading, on account of other vessels being there first; but it was held that the charterer of a vessel takes all the risks of delay from unforeseen circumstances, and only one day was allowed as reasonable time for commencing to unload.[1]

If a ship is detained beyond the days of demurrage allowed by the charter-party, the stipulated demurrage is *prima facie* the measure of compensation for the further time; but it is competent to the owner or the freighter to show that this would be more or less than fair compensation.[2] And in fixing the amount of demurrage to be paid for detention of a vessel during repairs, a deduction should be made from the gross freight of so much as would, in ordinary cases, be disbursed on account of the ship's expenses in the earning of the freight.[3]

[1] Esseltyne v. Elmore, 7 Biss. 69. See on the general subject of excusing detention, Farwell v. Thomas, 5 Bing. 188; Hill v. Idle, 4 Camp. 327; Randall v. Lynch, 2 Camp. 352; Burmster v. Hodgson, 2 Camp. 488; Robertson v. Jackson, 2 C. B. 412; Barrett v. Dutton, 4 Camp. 333; Hudson v. Ede, 8 B. & S. 631; 36 L. J. Q. B. 273; 8 B. & S. 640; L. R. 3 Q. B. 412; Erechsen v. Barkworth, 3 H. & N. 601; 27 L. J. Exch. 472; 28 L. J. Exch. 95.

[2] Moorsom v. Bell, 2 Camp. 616.

[3] The Gazelle, 2 W. Rob. Adm. 279.

Section 2.

ACTIONS AGAINST CARRIERS.

For refusal to receive goods offered for shipment — For negligent delay of transportation — Loss by fall in the market, or decrease of quantity or quality, during negligent delay of transportation — Vindication of the principle on which such items allowed — Increased expense of obtaining delivery of the property in consequence of such delay — Expense of further transportation for sale — Damages for delay in respect to a known special use of the property — Damages for injury to or loss of the property intrusted to a carrier — Interest on damages — Owner entitled to compensation for his proper acts to prevent damages — Circumstances may reduce damages below the value at the place of destination — Qualification of carrier's liability by notice — For what losses the carrier responsible — Destination for the purpose of damages where there are several successive carriers — Proof of value.

For refusal to receive property offered for shipment.— Common carriers, by holding themselves out as such, assume to do, and are bound to do, what is required of them in the course of their employment, if they have the requisite vessels or vehicles to carry, and are offered a reasonable and customary price; and if they refuse, without some just ground, equally as when they have contracted to carry, they are liable to an action.[1] For breach of this duty or contract, compensation to the injured party may involve the consideration of an increased expense of transportation otherwise, or an advance in rates of freight, as well as injury from delay or deprivation of transportation.

The object of all transportation being to have the use or opportunity to sell the property at the place of destination, the elements and amount of the loss will depend on the circumstances of each case. If, on the refusal of the carrier to receive the goods, another carrier can be found without trouble or delay who will take and convey the goods at the same or less expense or hire, only nominal damages could be recovered, for there would be no actual injury. If the subject to be transported be merchandise, and the purpose of the transportation is merely to obtain a better net price than it will sell for without transportation, then a refusal of the carrier to fulfil his contract or duty to convey the property will not wholly deprive the owner of that profit, if he can procure the convey-

[1] 2 Kent's Com. 599; Pickford v. Grand J. R'y Co. 8 M. & W. 372.

ance otherwise, at a price that enables him to make the transportation profitable; if the substituted conveyance, by being more expensive, reduces that profit, the increased expense of the transportation is the measure of damages; but if no other conveyance is available, that is, if none can be had at all, or if any which is attainable would be so expensive as to leave no margin of profit, then the owner suffers injury to the extent of the difference between the value of the property where it is, and the value it would have at the place of destination, less the expenses of shipment under the contract to that place.

In an action for the refusal by the defendant to perform an agreement to transport corn from New York to Liverpool in his ship, at a certain price, the plaintiff was held entitled to recover for his damages the difference between the contract price and what he would be compelled to pay for the same services. When a refusal is shown, and it appears that the price of transportation has risen before the sailing of the ship, the plaintiff is entitled to damages measured by the rise in the price, without showing that he had the corn to ship.[1] If sent by another route or conveyance, at a greater expense not unreasonably incurred, the excess of such expense is obviously a proper item of damage.[2] But if the subject to be transported is mere merchandise contracted to be shipped to a better market, the owner has not an absolute right to ship by another carrier at such greater expense as such shipment may involve. He has no right to send the goods forward for the mere purpose of charging the increased expense to the defaulting carrier, or where that will be the sole effect. Where the defendant had contracted to carry salt by vessel, and broke his contract, it was held that the owner had no right to send the salt by rail, and recover the difference between the expense agreed on with the defendant, and what was paid for transportation by rail.[3] The court say it is not an article of specific utility for preservation, but an article of merchandise, and only valuable as

[1] Ogden v. Marshall, 8 N. Y. 340. See Nelson v. Plimpton Fire P. E. Co. 55 N. Y. 480. See also Bohn v. Cleaver, 25 La. Ann. 419.

[2] Crouch v. Great N. R'y Co. 11 Exch. 742; Grand v. Pendergast, 58 Barb. 216.

[3] Ward's C. & P. L. Co. v. Elkins, 34 Mich. 439.

such. The only advantage he could have gained by a timely shipment, according to contract, would have been the excess of the value of salt in the Chicago market at the date when it should have arrived, beyond what it was worth in Bay City, and the expense of loading, shipment and delivery at his warehouse in Chicago. If there was no such excess in value at that time, then he was not damaged. If there was such an excess, then he was entitled to that and nothing more. He would not have been justified in procuring shipment by rail, if the railroad prices would have rendered it unprofitable. There are, no doubt, cases where property is of such a nature, or where the necessity of having it at a certain point is so imperative, that the circumstances may justify employing any transportation which is accessible, and may render the difference in cost of transportation a proper measure of damages. But this can never be proper in regard to ordinary articles of consumption, always to be found in the market, and only valuable to the owner for their merchantable qualities. A person has no right to put others to an expense of such a nature as he would not, as a reasonable man, incur on his own account.[1]

A contract to carry at a specified price gives a vested right to each party, and the value of it when performance is due should be the basis of recovery. It is not necessary, in analogous cases, to go into the market for, or to procure from another, what had been contracted for, in order to be entitled to have its value determined, and to recover damages accordingly.

But the difference between the agreed price and the actual cost or value of the service, is not the only measure or item of damages recoverable in such cases. The carrier's refusal to receive and convey the property may deprive the owner of an opportunity to market it at an advanced price, subject him to a loss by a decline, or consequential damage in ulterior transactions of which the carrier had notice at the time of making his contract. An important case in Iowa[2] is an instance of the allowance of such damages. The action was brought to recover damages on account of the failure and refusal of the

[1] Ward's C. & P. L. Co. v. Elkins, 34 Mich. 439; Le Blanche v. London & N. W. R'y Co. 1 C. P. Div. 286.

[2] Cobb v. Ill. Cent. R. R. Co. 38 Iowa, 601.

defendant to carry a large quantity of oats from Dubuque and other points on the defendant's railroad, to Cairo. The plaintiffs were government contractors, and engaged in the business of supplying forage for the United States armies during the late rebellion. The court say: "The measure of damages against a carrier for violation of his duty or contract in respect to the transportation of property, should be such as to do justice and award full compensation, and no more, to the party injured.[1] Plaintiffs must be compensated for the profit they would have realized, which is the difference between the price they paid, or contracted to pay, for the oats, and the price under their contract with the government, less the freight to Cairo. They must also recover for the sum they paid, or are liable to pay, for the oats purchased by them, or agreed to be delivered by the various parties with whom they contracted. If the oats were actually received by them, or were not, and only contracted to be delivered, in either case they must recover the sum paid by them on account of the oats, or on account of their liability upon their several contracts to purchase oats. They must be made whole on account of these outlays, and also, as we have seen, must recover the profits that would have accrued to them." The court also held that "interest on the sums lost by plaintiffs, and for which compensation in this action can be recovered," was also an element of damage.[2]

[1] Bridgman v. Steamboat Emily, 18 Iowa, 509.

[2] In Toledo, W. & W. R'y Co. v. Roberts, 71 Ill. 540, the company agreed to furnish fifty cars a week to ship 50,000 bushels of corn from Springfield to Baltimore, at sixty cents per hundred pounds, and failed to perform. On appeal the court say: "Upon the question of damages, it does not appear that the court was asked to give the jury any rule by which to measure them, and we are at a loss to perceive what rule they did adopt. In cases like this, compensatory damages only can be given, but what elements seemed to enter into the compensation the jury were not informed. That they allowed more than mere compensation is fairly inferable from the *remittitur*. Plaintiff stated his loss to be $2,175, but explains: 'That is what I would have made on the grain,' without counting his time lost. There is no proof in the record that the plaintiff had bought and paid for any of this corn, except $200 on a lot of 5,000 bushels, bought of W. . . . We are compelled to infer, from the testimony, that on the receipt of advices from Baltimore that sixty cents per bushel would be paid for corn delivered there, plaintiff, when he ascertained the rate for shipping, went, the same day,

In a late Massachusetts case, in an action against a carrier for breach of an executory contract to carry goods, it was held that the measure of damages is the market value of the goods at the place to which they should have been carried, less the value at the place where the carrier agreed to receive them, and less freight.[1] But it was also held that the fact that the owner of the goods informed the carrier, at the time of making the contract, that he made it because he *wished to make* contracts with third persons for the sale of goods to them, and that he did make such contracts afterwards, do not entitle him to recover of the carrier the profits he would have made by such contracts but for the breach of the contract of carriage. Endicott, J., said: "The damages for which a carrier is liable upon failure to perform his contract, are those which result from the natural and ordinary consequences contemplated at the time of making the contract of transportation, and a larger liability can be imposed upon him only when it is in the contemplation of the parties that the carrier is to respond, in case of breach, for special and exceptional damages. In such case, the extent and character of the obligation he assumes should be known to the carrier, which in this case was impossible, as the contracts were not then made. The mere knowledge on the part of the defendant, that the plaintiff intended to make contracts for the sale of the ties to be transported, cannot impose a liability upon the defendant for loss of profits on such contracts. Whether there would be a loss of profits, it was of

among the holders of corn, and bargained for the desired quantity, thereby getting the control of 50,000 bushels, but there is no proof that he ever shipped any of it, except fifteen car loads, under his contract, by 'The Globe Line,' and a small lot he sent to Pittsburgh. He furnishes no proof what portion of this 50,000 bushels was delivered to him, and that he was obliged to, and did, store it, or that he incurred any expense whatever in regard to it, or that he was compelled to sell at home, and did there sell, at a loss, or that he was obliged to pay, and did pay, damages to those with whom he had bargained for corn, for failing to take it, if such was the fact. As we have said, we cannot perceive on what ground the jury based their estimate of damages — what elements composed it. This being so, the case must go to another jury, on proper instructions from the court as to the true measure of damages."

[1] Bracket v. McNair, 14 John. 170; O'Connor v. Forster, 10 Watts, 418; Cowley v. Davidson, 13 Minn. 92.

course then impossible to determine, and probable profits would be incapable of estimation."[1]

The defendants, by charter party, agreed with the plaintiff that their ship should, at a specified time, load 1,300 tons of coal in the river Tyne to be carried to Havre for the plaintiff. They broke their contract, and the plaintiff had in consequence, first, to hire other vessels at an advanced freight, and also to buy 1,300 tons of coal at an enhanced price. He was unable, according to the custom of the colliery trade in the Tyne, to secure a cargo until he had chartered vessels to carry it. The plaintiff having sued the defendants in respect of both these heads of damage, the defendants admitted their liability to pay the advanced freight, but denied that they were liable for the enhanced price of the coal. At the trial, the rise in price at the pit's mouth was not disputed; but it was not directly proved that there had been an equivalent rise at Havre, and it was held that the fact of the plaintiff having paid the additional price was *prima facie* evidence of damage to that extent, and entitled him, in the absence of evidence to the contrary, to recover.[2] In a late case, decided in the House of Lords, it was held that damages were recoverable for loss of customers resulting from such a default of a carrier. The lord chancellor thus affirmed hypothetically that item of damage: "There may have been two or three collieries supplying with coal one of the towns or places mentioned in the case, the owner of one of these collieries being Mr. G., and the other collieries belonging to other persons; the restrictions and the impediments placed in the way of the carriage of coal for Mr. G. may have been such as to supplant him in the supply of coal to that particular place, and to give the supply of coal virtually into the hands of his rival or competitor in trade. That would clearly be a loss of customers, and the loss occasioned by that circumstance, among others, would be a head under which damages might be awarded."[3]

As is true in other cases, the plaintiff can recover only such

[1] Harvey v. Conn. & Passumpsic R. R. Co. 124 Mass. 421.

[2] Featherston v. Wilkinson, L. R. 8 Exch. 122.

[3] Lancashire & Yorkshire R'y Co. v. Gidlow, L. R. 7 App. Cases, 577. See Richmond v. D. & S. C. R. Co. 40 Iowa, 264.

damages as are the natural and proximate consequence of the defendant's breach of his contract. A ship's husband covenanted that his ship should at one port take in a quantity of brandy and convey it to another port and there receive a cargo of freight, etc., which the freighters of the ship covenanted to supply. The ship did not take the brandy, and the freighters did not furnish a full homeward cargo. In an action on the charter-party by the freighters for not taking the brandy, it was alleged that the failure to furnish the homeward cargo was the consequence, and that in an action by the ship's husband therefor he had recovered damages to a stated amount, and they were put to costs to a stated amount. On the trial Tindal, C. J., interrupted counsel, intimating that these sums could not be recovered, and said the breach of contract for not shipping the brandy should have been set up by the freighters in the former action. He held that the law will not allow so idle a ceremony as for one party to recover a sum that it might be recovered back by the other. In answer to the contention that though the damages were not the precise sum recovered before, still that recovery could be considered as a mode of showing the amount to which the plaintiff was entitled, the chief justice added: "The damages will be the loss in consequence of not shipping the brandy, and all such damages as are the natural and necessary consequences. Might you not have bought brandy yourselves, and charged the difference in the price. No man would be safe if your rule were to prevail. If I contract to transfer stock, and do not, the party with whom I contracted has no right to tell me a month afterwards that if I had transferred the stock he could have bought an estate with the money. There was a case of a man who brought an action against the keeper of a ferry-boat for refusing to carry him across a river, in consequence of which he sustained loss by not being able to keep an appointment. But it was held that he could not recover damages on any such ground." The damages were held to be too remote.[1]

In an action against a common carrier for refusing to receive and transport grain properly stored for transportation, it is

[1] Walter v. Fothergill, 7 C. & P. 392.

competent for the plaintiff to give evidence that because of such refusal his grain became heated and spoiled, notwithstanding the fact that such damage resulted from something inherent in the nature of the grain itself.[1]

A carrier who deviates from his agreement by dispatching the goods from the terminus of his route by a different conveyance or carrier, and thereby subjects the property to increased freight, is liable for the difference.[2]

For delay in transportation.— A carrier is liable for damages resulting from delay in transportation where he fails to convey and deliver within the time fixed by his agreement.[3] In the absence of any special contract, the law implies an agreement on the part of the common carrier to transport merchandise within a reasonable time.[4] The actual cause of delay, in the latter case, is open to inquiry and explanation, and unless the carrier be at fault he is not liable for the damages which ensue. He is bound to reasonable diligence, and accident or misfortune will excuse him.[5]

A common carrier by river navigation, who, owing to the low water, is unable to proceed to the end of the voyage, may unload and store the goods at an intermediate point during the existence of the obstruction, but he is liable for the expenses thereof, and is bound to take care of the goods whilst so detained.[6]

When a carrier is liable for a negligent delay in the trans-

[1] Pittsburgh, etc. R. R. Co. v. Morton, 61 Ind. 539.

[2] Proctor v. Eastern R. R. Co. 105 Mass. 512.

[3] Harmony v. Bingham, 1 Duer, 209; Wilson v. Newcastle & Ben. R. Co. 18 E. L. & Eq. 523; Cowley v. Davidson, 13 Minn. 92; Sangamon, etc. R. R. Co. v. Henry, 14 Ill. 156.

[4] Story on Bailments, § 554a; Ward v. N. Y. Cent. R. R. Co. 47 N. Y. 29; Parsons v. Hardy, 14 Wend. 215; Bowman v. Teal, 23 Wend. 306; Vicksburg, etc. R. R. Co. v. Ragsdale, 46 Miss. 458.

[5] Wibert v. N. Y. & E. R. R. Co. 12 N. Y. 245; Pittsburg, etc. R. R. Co. v. Hazen, 84 Ill. 36; Conger v. Hudson R. R. R. Co. 6 Duer, 375; Parsons v. Hardy, 14 Wend. 215; Steadman v. Western Transp. Co. 48 Barb. 97; Blackstock v. N. Y. & E. R. R. Co. 20 N. Y. 48; Nashville, etc. R. R. Co. v. Jackson, 6 Heisk. 271; East Tennessee & C. Co. v. Nelson, 1 Cold. 272; Leppard v. R. R. Co. 7 Rich. 409; Faulkner v. South Pacific R. R. Co. 51 Mo. 311.

[6] Bennett v. Byram, 38 Miss. 17.

portation and delivery of goods intrusted to him, he is liable for such proximate damages as naturally result therefrom.[1] Carriers may limit their common law liability by contract, but by the general current of authority not so as to exempt them from the consequences of their own negligence or misconduct, or that of their agents or servants.[2]

In New York, West Virginia, and to some extent in Illinois, contracts limiting the liability of carriers for negligence or misconduct of servants and agents are held valid and effectual.[3] In New York it has been held that when general words in the contract of a common carrier, limiting his liability, may operate without including the negligence of the carrier or his servants, it will not be presumed that they were intended to include it; every presumption is against such an intention, and the contract will not be construed as exempting from liability for negligence, unless it is expressed in unequivocal terms. Accordingly, when

[1] Colvin v. Jones, 3 Dana, 576; Briggs v. N. Y. C. R. R. Co. 28 Barb. 515; Hadley v. Baxendale, 9 Exch. 341.

[2] Reno v. Hogan, 12 B. Mon. 63; Hawkins v. Great W. R. R. Co. 17 Mich. 57; Louisville, etc. R. R. Co. v. Hodges, 9 Bush, 645; Rhodes v. Louisville, etc. R. R. Co. 9 Bush, 688; Welsh v. Pittsburg, etc. R. R. Co. 10 Ohio St. 65; Powell v. Penn. R. R. Co. 32 Pa. St. 414; Camden, etc. R. R. Co. v. Baldaaf, 16 Pa. St. 67; Goldey v. Penn. R. R. Co. 30 Pa. St. 242; Empire T. Co. v. Wamsutta O. R. & M. Co. 63 Pa. St. 14; Farnham v. Camden, etc. Co. 55 Pa. St. 53; Am. Express Co. v. Sands, 55 Pa. St. 140; Adams Exp. Co. v. Stettaness, 61 Ill. 184; The Pacific, Deady, 17; York M. Co. v. Illinois C. R. R. Co. 1 Biss. 377; Railroad Co. v. Lockwood, 17 Wall. 357; Michigan, etc. R. R. Co. v. Heaton, 37 Ind. 448; Bank of Kentucky v. Adams Exp. Co. 93 U. S. 174; Welch v. Boston, etc. R. R. Co. 41 Conn. 333; Jacobus v. St. Paul, etc. R. R. Co. 20 Minn. 125; Moses v. Boston, etc. R. R. Co. 24 N. H. 71; Bodenham v. Bennett, 4 Price, 31; Fish v. Chapman, 2 Ga. 349; Jones v. Voorhees, 10 Ohio, 145; Lee v. Raleigh, etc. R. R. Co. 72 N. C. 236; Ashmore v. Penn. S. T. Co. 28 N. J. L. 180; Atchison, etc. R. R. Co. v. Washburn, 5 Neb. 117; Ketchum v. Am. etc. Exp. Co. 52 Mo. 390; Lupe v. Atlantic, etc. R. R. 3 Mo. App. 77; School District v. Boston, etc. R. R. Co. 102 Mass. 552; Sager v. Portsmouth, etc. R. R. Co. 31 Me. 228; Fillebrown v. Grand Trunk R'y Co. 55 Me. 462; Little v. Boston, etc. R. R. Co. 66 Me. 239; Goggin v. Kansas, etc. R. R. Co. 12 Kan. 416; Railroad Company v. Pratt, 22 Wall. 122.

[3] Westcott v. Fargo, 63 Barb. 349; 61 N. Y. 542; Magnin v. Dinsmore, 56 N. Y. 163; Baltimore, etc. R. R. Co. v. Rathbone, 1 W. Va. 87; Baltimore, etc. R. R. Co. v. Skeels, 3 W. Va. 556; Arnold v. Illinois C. R. R. Co. 83 Ill. 273; Erie R'y Co. v. Wilcox, 84 Ill. 239.

by a contract of shipment, the carrier, or railroad company, in consideration of a reduced rate, was released for any damage or injury, "from whatsoever cause arising," it was held that the exemption did not include a loss arising from the carrier's negligence.[1] Where cattle were delivered to a railroad company for immediate shipment, but a written contract was exacted two days afterwards; in an action for damages for unreasonable delay, it was held that the contract would be the measure of the obligations of the parties from the time it was made, but that it would not merge any liability the company might have incurred previously, there being nothing in its terms to indicate such an intention.[2]

Common carriers of goods and passengers have a public employment, and owe the public a general duty, independent of any contract. They are bound to carry for all persons who apply, unless they have a reasonable excuse for the refusal to do so. They are bound to deliver goods at their destination, or at the end of their route to the next carrier, in a reasonable time, according to the usual course of business, with all convenient speed.[3] A carrier who has no notice that it is important that delivery of the goods be made at a certain time, is not liable for the value of any special use prevented by an unreasonable delay in delivery.[4]

The mere omission to transport and deliver property within a reasonable time does not necessarily make the carrier liable for its value. He is liable for the damages caused by such omission, but the owner cannot, on the sole ground of unreasonable delay in the conveyance and delivery of the property, refuse to receive it, and recover against the carrier as for its conversion.[5] The carrier is chargeable in all cases of negligent delay with the value of the ordinary use of the property having a usable value, after the time when he should have made the delivery at the place of destination. When the property is not

[1] Mynard v. Syracuse, etc. R. R. Co. 71 N. Y. 180.

[2] Cleveland, etc. R. R. Co. v. Perkins, 17 Mich. 296.

[3] East T. etc. R. R. Co. v. Nelson, 1 Cold. 272.

[4] Hales v. London & N. W. R'y Co. 4 B. & S. 56.

[5] Scovill v. Griffeth, 12 N. Y. 509; Nettles v. R. R. Co. 7 Rich. 190. See Hackett v. Railroad, 35 N. H. 390, 400.

of a perishable nature, and is not a common or ordinary object of sale in market, and subject to its fluctuations, but is designed for a special purpose in a special business, the rule of damages is very different from that applicable to merchandise. For delay in the transportation of machinery, the value of its use for the time it was detained is the measure of damages.[1] In the absence of special damage, interest may be recovered during the period of negligent delay in the transportation of money.[2] So where there is no change in the market value during a negligent delay of delivery, it has been held that interest may be recovered on the market value from the time when delivery ought to have been made.[3]

Loss by fall in the market or decrease in quantity or quality during negligent delay of transportation.— The carrier is also liable for any loss on the value of the property, pending his negligent delay of transportation, whether the diminution of value results from a decline in the market price or from intrinsic deterioration.[4] This is a damage that the parties are deemed to have contemplated when they made the contract, and are the direct and immediate consequence of the defendant's breach. As to the decline in market value, Peckham, J., said:[5] "Where a carrier from mere negligence, from plain violation of duty, omits to transport merchandise beyond a reasonable time, and its market value falls in the meantime, the true rule of damages, in my judgment, both upon principle and authority, is the difference in its value at the time and place it ought to have been delivered and the time of its actual delivery. The rule is simple, and, though it may sometimes operate harshly, easily applied. Sagacious business men rely upon their ability to judge of the market in undertaking large commercial projects. According to their views of the market they send the merchandise by a quick or a slow carrier, and make compensation accordingly. A contrary rule would deprive them

[1] Priestly v. N. I. & C. R. R. Co. 26 Ill. 205.

[2] United States Exp. Co. v. Haines, 67 Ill. 137.

[3] Cramer v. Am. etc. Express Co. 56 Mo. 524.

[4] Ill. Cent. R. R. Co. v. McClellan, 54 Ill. 58.

[5] Ward v. N. Y. C. R. R. Co. 47 N. Y. 29.

of all benefit of a rapid transit. It would be left to the caprice of the carrier when to transport, and the owner could have no relief. It would be no answer to say that the owner might make a special contract for the transportation at a given time. The contract would have to contain a special provision to pay these damages or the carrier's liability would not be altered. If a special contract be needed, I think it falls upon the defendant to make it, or the company will be liable for not delivering in a reasonable time. If the carrier would be liable for these damages upon a special contract to transport by a given time, he clearly would be for a violation of his duty. In the absence of any special agreement, the law implies that the carrier agrees to transport in a reasonable time. That is his duty. In failing to do so, he not only violates his duty, but also the contract upon which it is based. . . . It is well settled law that a carrier, on an entire failure to deliver, is liable to the market price of the goods at the time and place for delivery.[1] So as to a sale of goods. For all damages to the property while in the custody of the carrier, the measure thereof is to be settled by the market at the place for delivery. This is clearly so as to all inland carriage.[2] If liable for the market price at the time and place for delivery when not delivered at all, it would seem equally rational that if, by reason of the inexcusably negligent delay of the carrier, the value of the goods has depreciated in market, he should be liable to the owner to the extent of that depreciation. The purpose of the law is to make the owner whole in each case. . . . Had the goods been injured by improper exposure by the carrier, and thus had become depreciated in their market value, it is clear that the carrier would be liable for the loss. It was his negligence that caused it. Here his negligent delay caused the loss. It did not cause the decline in the general market, but it deprived the owner of his right to the higher market price. The defendant's negligent violation of duty thus deprived the plaintiff of his right, and placed this loss upon him. In substance, this loss is the same to the plaintiff as if the injury had

[1] O'Hanlan v. Great Western R'y Co. 6 B. & S. 484; Bracket v. McNair, 14 John. 170; Sands v. Lilienthal, 46 N. Y. 541.

[2] Bracket v. McNair, supra.

been done to the property itself, and thus diminished its market value. The injury also is natural and direct. There is no second step; no action of the owner with a third person by contract or otherwise."[1]

VINDICATION OF THE PRINCIPLE ON WHICH SUCH ITEMS ALLOWED. This rule is based on the general principle upon which damages generally are to be assessed for breach of a contract to deliver goods. It is compensation for the injury for not having the very thing, *propter rem ipsam non habitam*, at the time and place at which it should have been delivered, including the damages resulting naturally, or according to the usual course of things, from the breach of the contract itself, as well as such as may reasonably be supposed to have been in the contemplation of both parties when they made the contract, as the probable result of a breach of it.[2]

When there is a negligent delay in transportation, the thing which the owner does not receive when he is entitled to it is goods of their value at that time. The thing which he afterwards receives is goods of a value at a different time, which is not necessarily the same value. The general price of such goods in the market is the appropriate, if not the only legal evidence of the value of the goods at any time in question. If

[1] Sherman v. Hudson R. R. R. Co. 64 N. Y. 254; Ingledew v. Northern R. R. 7 Gray, 88; Kent v. Hudson R. R. R. Co. 22 Barb. 278; Medbury v. N. Y. & E. R. R. 26 Barb. 564; Griffin v. Colver, 16 N. Y. 489; Scott v. Boston, etc. Co. 106 Mass. 468; Smith v. N. H. & N. R. R. Co. 12 Allen, 531; Cowley v. Davidson, 13 Minn. 92; Weston v. R. R. Co. 54 Me. 376; King v. Woodbridge, 34 Vt. 565; Collard v. South E. R'y Co. 7 H. & N. 79; Wilson v. Lancashire, etc. Co. 9 C. B. N. S. 632; Wilson v. York, Newcastle & B. R. 18 E. L. & E. 557; Smith v. N. H. & N. Y. R. R. Co. 12 Allen, 521; New Orleans, etc. R. R. Co. v. Tyson, 46 Miss. 729; Peet v. Chicago & N. W. R. R. Co. 20 Wis. 594; Newell v. Smith, 49 Vt. 255; Sturgeon v. St. Louis, etc. Co. 65 Mo. 569; Ill. Cent. R. R. v. Cobb, 64 Ill. 128; Plummer v. Pen. L. Asso. 67 Me. 363; Sisson v. Cleveland & Toledo R. R. Co. 14 Mich. 489; Bares v. Steamship Co. 3 Wall. Jr. 229; Deming v. Railroad, 48 N. H. 469; Hackett v. B. C. & M. R. 35 N. H. 390, 400; Faulkner v. South P. R. R. Co. 51 Mo. 311; Devereaux v. Buckley, 34 Ohio St. 16; Kansas P. R. R. Co. v. Reynolds, 8 Kans. 623.

[2] Cutting v. Grand Trunk R'y Co. 13 Allen, 381; Hadley v. Baxendale, 9 Exch. 351; 1 Pothier on Obligations, 162, 163; 2 Kent's Com. (6th ed.) 480.

the market value of the goods is less when they are actually delivered than it was when they ought to have been delivered, the fall in the market value is not a cause, but an incident, or consequence, of the diminution in the intrinsic or merchantable value of the goods, and evidence of the degree of the injury which the owner has suffered by wrongful act of the carrier. A diminution in the market value of goods by the operation of general laws is a real and actual loss of a portion of the real and intrinsic value, as much as a change for the worse in the quality of the goods.[1] A fall in the market is no more a cause of the diminished value of the goods than a fall in the thermometer or barometer is the cause of a change in the weather.[2] If a common carrier unreasonably delays to transport and deliver goods intrusted to him for carriage, and their value meanwhile falls, the measure of damages in an action against him is the difference between their market value at the time when and the place where they ought to have been delivered and their market value at that place on the day when they were delivered; although there was no contract to deliver them within any certain time, and the goods were not intended to be used for any special purpose at any certain time, and the carrier finally delivered them in the same condition as when they were received by him.[3]

The principle is the same and the measure of damages is the same when the diminished value at the time of the delayed delivery has resulted from the perishable nature of the property.[4] In case of shipping live animals, the losses for negligent delay may include not only such as arise from fall in the market, but shrinkage or injury to the animals occasioned by detention, and care and expense bestowed upon them.[5]

[1] Stone v. Codman, 15 Pick. 301.

[2] Cutting v. Grand Trunk R'y Co. supra.

[3] Id.

[4] Wilson v. Lancashire, etc. Co. 9 C. B. N. S. 632; Ingledew v. Northern R. R. 7 Gray, 86; Illinois Cent. R. R. Co. v. Owens, 53 Ill. 391.

[5] Sangamon, etc. R. R. Co. v. Henry, 14 Ill. 156; Smith v. New Haven, etc. R. R. Co. 12 Allen, 531; Sturgeon v. St. Louis, etc. R. R. Co. 65 Mo. 569; Chicago, etc. R. R. Co. v. Erickson, 91 Ill. 613; Cutting v. Grand Trunk R'y Co. 13 Allen, 381; Welsh v. R. R. Co. 10 Ohio St. 65; Porterfield v. Humphreys, 8 Humph. 497; Black v. Camden, etc. R. R. Co. 45 Barb. 40; Kansas P. R. R. Co. v. Nichols, 9 Kan. 235; Wilson v. Hamilton, 4 Ohio St. 722.

The damages measured and recoverable by this rule are not consequential damages requiring notice to the carrier that the goods were contracted to be shipped for the purpose of sale,[1] nor are they special damages. This is very clearly illustrated in an English case. A cap manufacturer at C bought cloth at H, for the purpose of making it up into caps which he was in the habit of selling through the country by means of travelers. The cloth was delivered to the defendants on the 15th of March to be carried by their railway to M; but through the negligence of the company's servants it was sent to another station, and did not reach the plaintiff until the 12th of April, which was too late for the plaintiff's purpose; that is, he did not receive the cloth in time to manufacture it into caps, the season having passed before he could execute the orders obtained by his travelers. According to his evidence, which stood without contradiction, the cloth thereby became of less value to him by 100*l*. He also claimed by way of damages the loss of the profits he would have made by the sale of caps that season if the cloth which could not be procured at C, had arrived in due time. On the trial, the jury appealed to the judge for information as to how they were to assess the damages, and were informed by him that they were at liberty to take into consideration the fact that the plaintiff had lost the season in consequence of the non-arrival of the cloth in due time. Acting upon that information the jury found a verdict for the plaintiff, the cap manufacturer, for 80*l*. damages.

The expression, "loss of the season," being ambiguous, on a rule *nisi* to reduce the verdict to a nominal sum, Williams, J., said: "If by the expression, 'loss of the season,' the jury were induced, in assessing the damages, to take into their consideration the profits which the plaintiff might have made by the manufacture and sale of caps if the material had reached his hands in due time, we are all of opinion that they would have misconceived the proper principle on which the damages were

[1] Devereaux v. Buckley, 34 Ohio St. 16, is opposed to this view. This point was mentioned but not decided in Smith v. New Haven, etc. R. R. Co. 12 Allen, 531, but was expressly decided in accordance with the text in Cutting v. Grand Trunk R'y Co. 13 Allen, 381; Deming v. R. R. Co 48 N. H. 455.

to be estimated, and that there would be a failure of justice if the verdict were allowed to stand. But if we are to assume the meaning of 'loss of the season' to be that the goods, by reason of their not having been delivered in due time, had become lessened in value, that is, if, in consequence of the delay, they had become of less value to the plaintiff, because the articles to be made up would be less marketable as the time for finding customers had gone by, and so the goods were left on the plaintiff's hands, deteriorated or diminished in value, then we do not think there was any mistake in point of law in the direction of the learned judge." On the question whether the plaintiff was entitled to recover the difference between the value of the goods to him if they had been delivered in proper time, and their value at the time when they were actually delivered, he said: "I am of opinion that the consignee is entitled to recover such difference in value. If it were otherwise, great injustice would be done; for instance,—to put a familiar case,—suppose a tradesman at a fashionable watering place sends an order to a warehouseman in London for a quantity of ribbons or other fancy goods, and they are delivered to a carrier so that they ought to reach him at the beginning of the season, and through the negligence of the carrier their delivery is delayed until the season is over, so that the opportunity for offering them for sale is lost, and, as their novelty or fashion is gone, they remain on hand materially diminished in value, would it not be unjust if the carrier were not made liable in damages for the loss which thus resulted from his negligence? . . It was evidence for the jury that the defendants, by reason of their negligence, delivered the cloth to the plaintiff at a time when its value was less by 100*l.* than it would have been if they had been guilty of no negligence. But it is contended on the part of the defendants, that whatever may be the dictates of justice in the matter, such damages cannot be awarded to the plaintiff without violating the rule laid down by the court of exchequer in Hadley v. Baxendale.[1] It seems to me, however, that we shall not violate that rule if we hold that the plaintiff is entitled to recover damages in respect to such deterioration in value.

[1] 9 Exch. 341.

It is a damage which fairly and naturally, in the usual course of things, may be said to arise from the defendant's negligence; for if the goods are not delivered at the time they are expected, the delay must necessarily superinduce a considerable diminution in their value in the plaintiff's hands." Byles, J., concurred in the foregoing opinion, and added, referring to Hadley v. Baxendale, which he said must decide the case in hand: "It is there said that, 'where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either as arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it.' I agree . . that, as the defendants here knew nothing about the nature of the goods, or of the plaintiff's occupation, profits which might have accrued from making up the cloth into caps and selling them, clearly were not within the contemplation of both parties at the time they made the contract, as the probable result of the breach of it; and therefore loss of profits could not properly enter into the consideration of the jury in assessing the damages here. The difficulty, however, is to distinguish between loss of profits and the difference between the exchangeable value of the goods when received by the carriers, or rather when they ought to have been delivered, and when they were actually delivered. Profits include the increased value arising from the purpose to which the plaintiff intended to apply the goods; whereas, diminution in exchangeable value is only something subtracted from the inherent value of the articles themselves. When thoroughly considered, this, I think, will be found to be a sound distinction. It is admitted that deterioration in quality is to be taken into account in estimating the damage the plaintiff has sustained; it is admitted, also, that loss or diminution in the quantity is to be taken into account; and I do not see why a loss in the exchangeable value should not also be taken into account."[1]

[1] Wilson v. L. & Y. R'y Co. 9 C. B. N. S. 632; Cutting v. Grand Trunk R'y Co. 13 Allen, 381.

A similar decision was made in the court of exchequer about the same time. The plaintiff, a hop grower in Kent, sent to London by the defendant's railway some pockets of hops consigned to a purchaser. The defendants kept the hops for some days on their premises in an open vat, whereby a small portion was stained by wet, and the purchaser rejected the whole, as he was entitled to do by the custom of the market. The plaintiff dried the stained hops, and they were rendered as good as ever for actual use, but the staining had depreciated the market value of the bulk. The plaintiff sent the hops to a factor for sale, but at that time the market price of hops had considerably fallen from what it was at the time the hops ought to have been delivered. Martin, B., said: "It was proved that if they had been brought to market on the proper day they would have fetched a certain price, but, not being brought until a later day, the market price in the meantime fell, and the value of the hops was diminished by the amount of 65*l*. If that be not a direct, immediate and necessary consequence of the defendants' breach of duty, it is difficult to understand what would be. It is said that the defendants had no notice of the purpose for which the hops were sent to London, but I think they must have known that they were sent for one of two purposes, either for consumption by the person to whom they were sent, or, as was more likely to be the case, to be sold for profit."[1]

In a later case in the probate division, the question came up whether a diminution of market value during the time delivery of a cargo shipped in India for London was delayed by defect of the ship's engine, could be allowed as an item of damages, as well as a diminution of quantity by leakage of sugar. The latter only was allowed. The question upon the other item as stated by the court was whether, if there is undue delay on a long voyage by sea, it follows as a matter of course that, if between the time when the goods ought to have arrived and the time when they did arrive, there has been a fall in the price of such goods, damages can be recovered by the consignee. It was answered in the negative.[2]

[1] Collard v. G. E. R. Co. 7 H. & N. 79.

[2] The Parana, 2 P. D. 118, reversing on this question the decision of Sir Robert Phillmore in the Admiralty Division, 1 P. D. 452. Mellish,

Damages measured by the depreciation of the value of the property may be recovered for negligent delay of delivery

L. J., said: "There is no case, I believe, in which it has ever been held that damages can be recovered for delay in the carriage of goods on a long sea voyage, where there has been what may be called a merely accidental fall in price between the time when the goods ought to have arrived and the time when they did arrive,— no case that I can discover where such damages have been recovered; and the question is, whether we ought to hold that they ought to be recovered.

"If goods are sent by a carrier to be sold at a particular market; if, for instance, beasts are sent by railway to be sold at Smithfield, or fish is sent to be sold at Billingsgate, and, by reason of delay on the part of the carrier, they have not arrived in time for the market, no doubt damages for the loss of market may be recovered. So, if goods are sent for the purpose of being sold in a particular season when they are sold at a higher price than they are at other times, and if, by reason of breach of contract, they do not arrive in time, damages for loss of market may be recovered. Or if it is known to both parties that the goods will sell at a better price if they arrive at one time, than if they arrive at a later time, that may be a ground for giving damages for their arriving too late and selling for a lower sum. But there is in this case no evidence of anything of that kind. As far as I can discover, it is merely said that when the goods arrived in November they were likely to sell for less than if they had arrived in October, for the market was lower.

"But besides the cases of consignments of goods to be sold at a particular market, cases were cited— and it was on them that the court below proceeded — of the carriage of goods by railway, where damages on account of a fall in the market have been recovered. It is said that there can be no difference between the carriage of goods by railway and the carriage of goods by sea, but it appears to me there may be a very material difference between the two cases. When goods are conveyed by railway, if they are conveyed for the purpose of sale, it is usually for the purpose of immediate sale; and if the cases are examined, I think it will be found that the courts treated them as if the goods were consigned for the purpose of immediate sale. No doubt if goods are consigned to a railway company under such circumstances, the railway company may be reasonably supposed to know that they are consigned for the purpose of immediate sale, and if by breach of contract on the part of the company they do not arrive in time to be sold when the owner intends them to be sold, that may possibly be a ground for giving damages for what is called 'loss of market.'

"The strongest case in favor of the decision of the court below is that of Collard v. South Eastern Railway Co. (7 H. & N. 79), but there was a good deal of doubt about that case. The goods in that case were hops, and were consigned to a hop merchant, in fulfilment of an actual contract. The damages arising from the non-fulfilment of that particular contract could not be recovered, because, of course, the railway company would know nothing about it; but the court came to the conclusion that the case must be treated as if

after its arrival at the place of destination; as where the delay is occasioned by the carrier's neglect to give the consignee

the goods were consigned for the purpose of immediate sale. There were apparently very violent fluctuations going on in the hop market at that time, and it might be taken that the owner had selected his own time for selling his hops, when he thought the price was at its best, and by reason of a breach of contract on the part of the railway company — which consisted, it is to be observed, not in delay in delivering the hops, but in actual damage to the hops (the hops were damaged and had to be dried),— it might be considered that there was a loss of market." The same comment was made on the case of Ward v. N. Y. Cent. R. R. Co. 47 N. Y. 29. And the opinion continues: "The difference between cases of that kind and cases of the carriage of goods for a long distance by sea seems to me to be very obvious. In order that damages may be recovered we must come to two conclusions — first, that it was reasonably certain that the goods would not be sold until they did arrive; and, secondly, that it was reasonably certain that they would be sold immediately after they arrived, and that that was known to the carrier at the time when the bills of lading were signed. It appears to me that nothing could be more uncertain than either of these two assumptions in this case. Goods imported by sea may be, and are every day, sold whilst they are at sea. If the man who is importing the goods finds the market high, and is afraid that the price may fall, he is not usually prevented from selling his goods because they are at sea. The sale of goods to arrive, the sale of goods on transfer of bill of lading, with cost bills, and insurances, is a common mercantile contract, made every day. It may be that from not having samples of the goods, or from not knowing what is the particular quality of the goods, the consignee may have difficulty in selling them until they arrive, but that would not affect the question. Nor would it signify that the goods no longer belonged to the original consignee, but to a man who had acquired them by the assignment of the bill of lading whilst the goods were at sea. We were told that in this case the plaintiff was a person who had advanced money on the security of the bills of lading. That possibly may be the case; but whether he has done that, or is the purchaser, would make no difference. It was said that the goods were sold, and that if the person who sells them does not suffer the damage, then the purchaser would suffer the damage. But that is pure speculation. If a man purchases goods while they are at sea, no person can say for what purpose he purchases them. He may purchase them because he thinks that if he keeps them for six months they will sell for a better sum, or he may want to use them in his trade. It is pure speculation to enter into the question for what purpose he purchases them. In this particular case the plaintiff did not sell the goods when they arrived, for he sold them some months afterwards, when a further fall had taken place in the market. Of course, he does seek to recover from the defendant that additional loss, but this serves to illustrate how uncertain it is whether he would have sold them. If he did not sell

notice of the arrival, when necessary,[1] or when he there exposes it to actual injury, and thereby necessitates delay to prepare it for market.[2]

INCREASED EXPENSES OF OBTAINING DELIVERY OF THE PROPERTY IN CONSEQUENCE OF NEGLIGENT DELAY.— It being the duty of the carrier to deliver the property to the consignee upon application, and payment of freight, if he wrongfully refuses to so deliver it, and obliges the consignee to repeat his application for it, he is entitled to be compensated for the time and expense of the extra journey to remove the property.[3] Where expenses have been incurred, and time and trouble taken in looking for property, the delivery of which has been delayed, under circumstances justifying such search, they may be recovered for, if the delay has been caused by the carrier's negligence.[4] The

them when they did arrive, but kept them because he thought the market would rise, how can we tell that he would not have done exactly the same thing if the goods had arrived in time. Therefore it seems to me that to give these damages would be to give speculative damages — to give damages when we cannot be certain that the plaintiff would not have suffered just as much if the goods had arrived in time. According to the principles on which the courts have acted in all such speculative and uncertain cases, damages ought not to be recovered." See The Success, 7 Blatchf. 551.

The preceding English and American cases which have been cited do not appear to proceed on the principle that damages are given "for loss of market" when the market price declines during the delay of delivery; but on the principle that if the property is worth less when it is delivered, after a negligent delay, the owner suffers a loss proportioned to the diminution of market value whether he sells or not; that he sustains an injury as real as though the quality had been deteriorated, or the quantity reduced; in the language of Byles, J., already quoted, "diminution in exchangeable value is only something subtracted from the inherent value of the articles themselves." A sale is no more necessary to make the latter loss manifest than it is to sell the residue when a part has been lost in consequence of the delay, in order to demonstrate that a portion is less valuable than the whole. The qualification of the rule laid down in the text in Peet v. Chicago & N. W. R. R. Co. 20 Wis. 624, appears to be a departure from the general course of decision in requiring the property to be sold at the depreciated price.

[1] Linn v. N. J. S. B. Co. 49 N. Y. 442; New Orleans, etc. R. R. Co. v. Tyson, 46 Miss. 729.

[2] Collard v. S. E. R. R. Co. 7 H. & N. 79.

[3] Waite v. Gilbert, 10 Cush. 177.

[4] Deming v. Railroad Co., 48 N. H. 455. In Davis v. Cincinnati, etc. R. R. Co. 1 Disney (Ohio), 23, the action was brought for damages for

shipper or consignee can, however, recover only for such trouble and expenses as result directly and necessarily from the delay and negligence of the carrier. These he may recover in addition to the loss by depreciation during such delay.[1] Where the defendant had failed to carry and deliver iron according to agreement, the plaintiff was held entitled to recover the expenses incurred in searching for the iron, and the charges he had to pay a railroad company to get it from their depot.[2] He cannot recover for the time and expenses of going to the place of delivery and waiting there, without showing that the carrier had notice at the time of contracting that such journey would be made to receive the goods.[3]

The principle of compensation is flexible, and can be readily applied to do justice according to the varying circumstances of particular cases. A carrier, having undertaken the transportation of peas, shipped in Canada for New York, by his negligent delay was stopped on his way by the freezing of the lakes, and would be detained through the season; he refused to forward the peas by rail or deliver them to the owner, except on payment of freight; the owner replevied them and judiciously sent them to the Boston market, and he was held entitled to recover the difference between the net proceeds of the sale at Boston and their market value at New York at the time they should have been delivered.[4]

the carrier's failure to deliver, within a reasonable time, a boiler constructed to be used in a steam saw-mill. It was admitted that there had been a breach of the contract for the delivery, and the contest was as to the proper measure of damages. The plaintiff claimed, and was held entitled to recover, first, for the trouble and expense incurred in traveling to ascertain what had become of the boiler, which had been detained about a month beyond the period when it should have been delivered; second, the expenses incurred in the preparations for connecting the boiler with the fixtures and machinery of the saw-mill, it appearing obvious, from the character of the construction of the boiler, and the point of its destination, that it was intended for use, and not for sale in the market.

[1] Deming v. Railroad Co. 48 N. H. 455; Benson v. N. J. R'y & T. Co. 9 Bosw. 412; Rankin v. Pacific R. R. Co. 55 Mo. 167; Richmond v. Union St. B. Co. 87 N. Y. 240. See Simpson v. London & N. W. R'y Co. 1 Q. B. D. 274.

[2] Farwell v. Davis, 66 Barb. 73; Chicago & N. W. R'y Co. v. Stanbro, 87 Ill. 195.

[3] Briggs v. N. Y. Cent. R. R. Co. 28 Barb. 515; Woodger v. Great W. R'y Co. L. R. 2 C. P. 318; Ingledew v. Northern R. R. Co. 7 Gray, 86.

[4] Laurent v. Vaughn, 30 Vt. 90.

If the goods are being transported for an illegal traffic, and the carrier is guilty of unnecessary delay or tardiness, he is not liable for damages resulting from their being thereby exposed to seizure, and actually seized by the government by reason of such illegality.[1] But where a carrier contracted to transport wheat from Canada to the United States by a certain day, when, as he knew, the reciprocity treaty would expire, and he failed to deliver it at that time, he was held liable to the owner for the duty which the plaintiff had afterwards to pay; that it was immaterial that prices rose soon after the day fixed for the delivery, so that the plaintiff actually received more after paying the duty, than he could have done by selling it on that day.[2]

Expense of further transportation for sale.— Goods were delivered by the plaintiff to a carrier on Thursday, to be conveyed to B. It was expected by the plaintiff that the goods would arrive on the Saturday following, but no notice was given to the defendant, the carrier, of such expectation, that the goods might be ready for the market. On Saturday the plaintiff's clerk proceeded to B, and owing to the non-arrival of the goods until Monday, he was obliged to remove them to S to sell them there. The delay in delivering the goods being unreasonable, the jury were directed that they were at liberty to give as damages the expense of removal of the goods from B to S, and the expenses and wages of the clerk, if they thought fit. It was a question for the jury whether it was reasonable and proper to send a man to B to look after goods. If he went down unnecessarily, or remained there an unreasonable time, the defendants ought not to pay the expenses.[3]

Damages for delay in respect to a known special use of the property.— Damages are given against a carrier with reference to a particular use for which property is delivered to him for transportation, when that intended use is brought to his notice at the time of contracting. In a late English case the principle is stated, and said to be settled, that whenever either the object of the sender is specially brought to the notice of

[1] Gerhard v. Neese, 36 Tex. 635.
[2] Gibbs v. Gildersleeve, 26 U. C. Q. B. 471.
[3] Black v. Baxendale, 1 Exch. 410.

the carrier, or circumstances are known to the carrier, from which the object ought in reason to be inferred, so that the object may be taken to have been within the contemplation of both parties, damages may be recovered for the natural consequences of the failure of that object.[1] In this case, the plaintiff, a manufacturer, who was in the habit of attending agricultural shows to exhibit samples of his goods, and made a profit by the practice, delivered them upon a show ground, where he had been exhibiting them, to the receiving agent of the defendants, a railway company, to be carried by a particular day to a show ground at another place, when and where a similar show, at which he intended to exhibit, was to be held; but nothing was expressly said about this intention of the plaintiff. The samples did not arrive till after the day stipulated and when the show was over; and the plaintiff lost several days in going to meet them, and waiting for them. In an action for the breach of contract, a verdict was given for damages which included a sum for loss of time or loss of profit. The court inferred, as matter of fact, that the purpose of the plaintiff to exhibit was within the contemplation of the parties to the contract; and held that the plaintiff was entitled to damages, on the ground that loss of profit was a natural and probable result of the failure of that purpose; and that no evidence was necessary of his prospect of making profit at the particular show in question.[2]

The plaintiff is entitled to recover for damages naturally following under circumstances known when the contract is made to both parties. If the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendant, and thus known to both parties, the damages resulting from the breach of such a contract, are those which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly un-

[1] Simpson v. London & N. W. R'y Co. 1 Q. B. D. 274.

[2] See Booth v. Spuyten Duyvil R. M. Co. 60 N. Y. 487; Thorne v. McVeagh, 75 Ill. 81; Vicksburgh, etc. R. R. v. Ragsdale, 46 Miss. 458; Illinois Cen. R. R. Co. v. Cobb, 64 Ill. 128.

known to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract.[1] Where a broken part of the machinery of a mill was sent by a carrier to serve as a model for making a new one, and the mill in the meantime was stopped, but these circumstances were not made known to the carrier; the carrier was held not liable for unreasonable delay in the conveyance of the property for damages resulting from the stoppage of the mill.[2]

When a carrier undertakes to convey machinery necessary to the running of a mill, or material necessary to its working, and has notice at the time of making the contract, of these facts, the injury from the mill standing idle, as well as for loss of wages of operatives necessarily idle, may be recovered as damages resulting from unreasonable delay on the part of the carrier.[3]

[1] Hadley v. Baxendale, 9 Exch. 341.

[2] Id.; Cooper v. Young, 22 Ga. 269.

[3] Vicksburg, etc. R. R. Co. v. Ragsdale, 46 Miss. 458; Cincinnati Chronicle Co. v. White Line T. Co. 1 Cinc. (Ohio) 300; Cooper v. Young, 22 Ga. 269. In Gee v. L. & Y. R'y Co. 6 H. & N. 211, this subject came before the court of exchequer. The plaintiffs delivered to the defendants, who were carriers, ten tons of cotton to be carried from Liverpool to Oldham. In the usual course the cotton should have been received on the following day, but did not in fact arrive until four days afterwards. In consequence of the delay a new mill of the plaintiffs' was stopped for want of cotton to go on with. At the time of the delivery of the cotton to the defendant, nothing was said as to the particular inconvenience likely to result from delay in forwarding it. But on the day before it was delivered to the defendants, and repeatedly on each succeeding day, until it arrived at Oldham, one of the plaintiffs called to inquire about it; and on each occasion told the manager of the goods department at the Oldham station, that the mill was at a stand, solely on account of the non-delivery of the cotton. The plaintiffs proved that during the time the mill was at a stand, they had paid in wages 7*l.*; and that the profit which would have been made, if the mill had been at work, was 7*l.* 10*s.* It was held a misdirection to instruct the jury to allow these damages as matter of law. Pollock, C. B.: "He (the judge below) assumes this loss to have been sustained in consequence of the non-arrival of the cotton, while in fact it was not in consequence of the non-arrival of the cotton alone, but in consequence of that fact, *and of the plaintiffs having no other cotton in stock.* If it had been established that such is the practice amongst cotton spinners, so that every carrier must have known that the mill

In order to impose on the defaulting party a further liability than for damages arising naturally and directly, that is, in the ordinary course of things from a breach of contract, such unusual or extraordinary damages must have been brought within the contemplation of the parties, as the probable result of a breach, at the time of entering into the contract. Generally, notice then given of any special circumstances which would show that the damages to be anticipated from a breach would

would be at a stand-still until the cotton arrived, the damages would have been properly assessed. And that would be so whether the carrier had notice of the fact, or notice from the well understood course of business. But the business of life is conducted with reference to the necessity of guarding against certain accidents, and owners of cotton mills may fairly be expected to guard against the risk of being delayed, by having something in stock. Is a railway company bound to take notice that in a particular case a mill would be at a stand if goods were not delivered on a particular day? I think not. I think a carrier is not responsible for such consequences, unless distinct notice is given at the time of the sending of the goods to be carried. If the plaintiffs had said, 'Now, there must be no mistake, the cotton must be delivered immediately; it is required for a mill which is actually at a stand for want of it, and if it is not delivered in due time, you will be responsible for all the consequences,' probably the railroad company would not have taken it except at a high rate. Common carriers are bound to carry goods at a reasonable rate, but not to incur such responsibility as would be imposed upon them if the direction of the judge in this case were correct. I think that the rule as to damages of this sort was correctly laid down in Hadley v. Baxendale, 9 Exch. 341." Channell, B.: "It cannot be said, as a matter of law, that these were damages which naturally flowed from the breach of the contract; or that anything had passed to show that they were in the contemplation of the parties when the contract was entered into." Bramwell, B.: "The law on this subject is laid down correctly in Hadley v. Baxendale. To ascertain the damage, it is necessary to find out how much better off the plaintiffs would have been if the contract had not been broken. The plaintiffs are not necessarily entitled to recover the whole amount given. Hadley v. Baxendale decides that a defendant is not liable except for such damages 'as may fairly and reasonably be considered, either arising naturally, i. e., according to the usual course of things from the breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it.' I am not sure that another qualification might not be added which would be in favor of the plaintiffs in this case, viz., that in the course of the performance of the contract, one party may give notice to the other of any particular consequences which will result from the breaking of the contract, and

be enhanced, has been held sufficient for this effect.[1] It has been held sufficient to affect carriers equally with other parties;[2] though they are bound, by reason of their public employment, to serve all who apply. They may doubtless refuse to undertake the carriage of goods in contemplation of increased responsibility, unless their demand is acceded to of reasonable compensation, increased beyond their ordinary rates, according to the enlargement of their liability.[3]

then have a right to say: 'If, after that notice, you persist in breaking the contract, I shall claim the damages which will result from the breach.' But in any case, you must first find out the loss sustained by the plaintiff, and afterwards give it him minus any damages excluded by these rules. And I cannot but think that if the judge had left it to the jury to determine the damages in that way, they would probably have given the same sum which they have already given. . . . If the judge had said, as a proposition of fact, 'I think that you will consider that the plaintiffs are entitled to claim for wages,' I doubt if there would have been any objection to the summing up. But he says, 'Where, under circumstances such as exist in the present case, by the neglect of a carrier, a manufacturer has no material to carry on his business, he has a *right*, in my opinion, to charge as *legal damage* such loss as naturally and immediately arose *from the stopping of his mill.*' He should have added, 'If the jury are of opinion that the stoppage was the natural consequence of the non-delivery of the goods.' I say this in order that the county court may not suppose, on the next trial, that we think that these two sums are not recoverable; for I do not say so; and I do not understand that the other members of the court think so."

[1] Hadley v. Baxendale, 9 Exch. 341; Gee v. Lancashire & Y. R'y Co. 6 H. & N. 211; Baldwin v. U. S. Telegraph Co. 45 N. Y. 744; S. C. Allen's Tel. Cases, 613; Deming v. Railroad, 48 N. H. 455; Converse v. Burrows, 2 Minn. 191; Paine v. Sherwood, 19 Minn. 315; Sisson v. Cleveland & Q. R. R. Co. 14 Mich. 489.

[2] Id.

[3] Gee v. Lancashire & Y. R. Co. 6 H. & N. 217, per Pollock, C. B.; Riley v. Horne, 5 Bing. 217. In Horne v. Midland R'y Co. L. R. 8 C. P. 131, this obligation of carriers to serve all was supposed to neutralize the effect of mere notice. In that case, the plaintiffs being shoe manufacturers at K were under a contract to supply a quantity of military shoes to a firm in London for the use of the French army at 4s. per pair, an unusually high price. The shoes were to be delivered by the 3d of February, 1871, and the plaintiffs accordingly sent them to the defendant's station at K for carriage to London in time to be delivered there in the usual course in the evening of that day, when they would have been accepted and paid for by the consignees. Notice was given to the station master, — which for the purpose of the case was assumed to be notice to the company — at the time, that the plaintiffs were under a contract to deliver the shoes by the 3d, and that unless they were

Where goods are contracted to be sold at a price fixed, to be delivered at a particular place, and a carrier promises to transport and deliver them in due time, or receives the goods seasonably to be so delivered if there is no negligent delay; and

so delivered they would be thrown on their hands, but he was not informed that there was anything exceptional in the character of the contract. The shoes were not delivered in London till the 4th of February, and were consequently not accepted by the consignees, and the plaintiffs were obliged to sell them for 2*s.* 9*d.* a pair. Kelly, C. B.: "A question of very great importance has been raised in the course of the argument, to which it is proper to refer, though, for reasons I shall presently state, I do not think it will ultimately become necessary to decide it — that is to say, the question what the position of a railway company is when goods are intrusted to it for carriage with an intimation of the consequences of non-delivery, such as it was argued on behalf of the plaintiffs existed in the present case. The goods with which we have to deal are not the subject of any express statutory enactment; the case with respect to them depends on the common law taken in connection with the acts relating to the defendant's railway company. Now, it is clear, in the first place, that a railway company is bound, in general, to accept goods such as these, and to carry them as directed to the place of delivery, and there deliver them. But now, suppose that an intimation is made to the railway company, . . . in express terms, stating that they have entered into such and such a contract, and will lose so many pounds if they cannot fulfil it, what is then the position of the company? Are they the less bound to receive the goods? I apprehend not. If, then, they are bound to receive, and do so without more, what is the effect of the notice? Can it be to impose upon them a liability to damages of any amount, however large, in respect of goods which they have no option but to receive? I cannot find any authority for the proposition that the notice, without more, could have any such effect. It does not appear to me that the railway company has any power, such as was suggested, to decline to receive goods after such a notice, unless an extraordinary rate of carriage be paid. Of course, they may enter into a contract, if they will, to pay any amount of damages for non-performance of their contract in consideration of an increased rate of carriage, if the consignors be willing to pay it; but in the absence of any such contract expressly entered into, there being no power on the part of the company to refuse to accept the goods, or to compel payment of an extraordinary rate of carriage, by the consignor, it does not appear to me any contract to be liable to more than the ordinary amount of damages can be implied from mere receipt of the goods after such a notice as before mentioned." These views did not receive the sanction of the entire court, and the case was decided on the point that the notice was insufficient; it did not inform the carrier of the unusual price of the shoes. See Booth v. Spuyten Duyvil R. M. Co. 60 N. Y. 496.

the carrier so contracts or receives the goods, with full notice that they are to be forwarded for delivery on such contract, and of the importance of having them at their destination for a seasonable delivery to the purchaser, the measure of damages for breach of the carrier's contract, by which the consignor loses the sale, is the difference between the contract price, and the value of the goods when actually delivered.[1]

While the loss of another's money received for transportation by a carrier, without reasonable knowledge of the purpose for which it is sent, will lay the carrier under obligation merely to refund the principal sum with interest; still, when it is seasonably sent for the specific purpose of paying the sender's premium on his life policy which will lapse if the money be not paid at the particular time, and the carrier is reasonably informed in relation to the premises, and has a reasonable time to perform the duty undertaken, but negligently fails to perform it, the law will justly hold him primarily, at least, for the net value of the policy which lapsed in consequence of his negligence. Under such circumstance, both parties must be presumed to have contemplated such consequence, when the money was deposited with the carrier; but these damages may be reduced so far as it was in the plaintiff's power and knowledge to prevent loss by reinstatement or reinsurance.[2] And where in consequence of the carrier's unreasonable delay in the delivery of the plaintiff's account against a third person, it became barred by the statute of limitations, the carrier was held liable for the amount of the account.[3] The liability of the carrier in such an instance is analogous to that which attaches to him when he carries perishable property; he is liable for it if it becomes worthless by its inherent qualities in consequence of the carrier's negligent delay in its transportation.[4] It has been held that a dentist

[1] Deming v. Railroad, 48 N. H. 455.

[2] Grindle v. Eastern Express Co. 67 Me. 317.

[3] Favor v. Philbrick, 5 N. H. 358.

[4] See Knapp v. U. S. & C. Exp. Co. 55 N. H. 348; Parks v. Alta Cal. Tel. Co. 13 Cal. 422; Bryant v. Am. Tel. Co. 1 Daly, 585. In Vicksburg, etc. R. R. Co. v. Ragsdale, 46 Miss. 458, Simrall, J., concludes a masterly review of the cases on the measure of damages against carriers by saying, "We are constrained to concur in the observations of BB. Martin and Wilde, that a splendid effect was made in Hadley v. Baxendale, to state the principle in such form

cannot recover earnings prevented by the loss of his dentist tools.[1]

DAMAGES FOR INJURY TO OR LOSS OF PROPERTY INTRUSTED TO CARRIERS.— A common carrier is responsible for the safety of the goods intrusted to him; and bound for their delivery in as good condition as he received them, at the place to which he undertook to carry them, against all hazards, excepting losses caused by the act of God, or the public enemy. So the exception is often stated for brevity; but these others are also well settled: he is not liable for losses or injuries from any inherent

as to provide for the more difficult cases, but subsequent experience and discussions have tended to demonstrate that it is not possible, in the nature of things, to declare a fixed rule for many contracts. This much may be accepted as well settled: 1. The proximate and natural consequences of the breach must always be considered; 2. Such consequences as from the nature and subject matter of the contract may be reasonably deemed to have been in the contemplation of the parties at the time it was entered into; 3. Damages which fairly may be supposed not to have been the necessary and natural sequence of the breach, shall not be recovered, unless by the terms of the agreement, or by direct notice, they are brought within the expectation of the parties; 4. Losses of profits in a business cannot be allowed, unles the data of estimation are so definite and certain that they can be ascertained reasonably by calculation, and then the party in fault must have had notice, either from the nature of the contract itself, or by explanation of the circumstances, at the time the contract was made, that such damages would ensue from non-performance; 5. If the contract is made with reference to embarking in a new business (such as sawing lumber for market), the speculative profits which might be supposed to arise, but which were defeated because of a breach of contract, which delayed the business, cannot be looked to as an element of damages. These are dependent largely upon other contingencies, skill, industry, energy, the market, supply of material, keeping machinery in order, loss of time by weather or breakage of machinery; 6. If the delay is in the transportation of machinery, to be applied to a special use, and that is known to the carrier, he is responsible for such damages as are fairly attributable to the delay, such as the value of the use of the machinery, to be tested by its rental price, or other approximate means; the expenses of idle hands, the loss of gain on work contracted to be done if the machinery had been delivered, and the gain thereby definitely ascertained in proper time; 7. The party injured by the delay must not remain supine and inactive, but should make reasonable exertions to help himself, and thereby reduce his losses, and diminish the responsibility of the party in default to him."

[1] Brock v. Gale, 14 Fla. 523.

defect of quality or vice of the thing carried; nor for those caused by the seizure of the goods in his hands under legal process; nor for those caused by some act or omission of the owner of the goods.[1] His liability is not affected by the kind of motive power he employs.[2] That liability does not depend upon contract, but is imposed by law.[3] He is bound to carry for all persons who apply, and to carry on the common law liability;[4] though he may, as has been stated, contract with the shipper to abate in some degree its rigor.[5]

Where goods are delivered to a common carrier to be transported, a promise to pay freights will be implied, and it is not necessary to prove payment or tender of the charges in order to hold him liable. And in case of loss of the property, or injury to it, the burden is on the carrier to exonerate himself by proof that it happened by one of the causes for which he was not answerable. Proof of the delivery of the goods and their loss, or injury to them, while in the carrier's hands, makes out a *prima facie* case against him.[6] But when it appears in a suit against the carrier that the loss or injury proceeded from one of the excepted causes, then the burden is on the plaintiff to show that the injury or loss resulted nevertheless from the negligence or fault of the carrier.[7] It has, however, been held by respect-

[1] Lawson on Car. ch. I.

[2] Hall v. N. J. S. N. Co. 15 Conn. 539.

[3] Thurman v. Wells, 18 Barb. 500; Burkle v. Ells, 4 How. Pr. 288.

[4] Southern Exp. Co. v. Moon, 39 Miss. 822.

[5] See ante, p. 189.

[6] Winne v. Ill. Cent. R. R. Co. 31 Iowa, 583; Mitchell v. U. S. Exp. Co. 46 Iowa, 214; Ewart v. Street, 2 Bailey, 157; Jackson v. Sacramento, etc. Co. R. R. 23 Cal. 268; Davidson v. Graham, 2 Ohio St. 131; Western T. Co. v. Newhall, 24 Ill. 466; Westcott v. Fargo, 63 Barb. 349; Union Exp. Co. v. Graham, 26 Ohio St. 595; Drew v. Red L. T. Co. 3 Mo. App. 495; Grey v. Mobile T. Co. 55 Ala. 387; Choate v. Crowninshield, 3 Cliff. 184; The Mollie Mobler, 2 Biss. 505.

[7] Lamb v. Camden, etc. R. R. Co. 46 N. Y. 271; Read v. St. Louis, etc. R. R. 60 Mo. 199; American Exp. Co. v. Second Nat. Bank, 69 Pa. St. 394; Empire T. Co. v. Wamsutta, etc. Co. 63 Pa. St. 14; New Brunswick St. Nav. Co. v. Tiers, 24 N. J. L. 697; The Pereire, 8 Ben. 301; Six Hundred and Thirty Casks, 14 Blatchf. 517; Forbes v. Daclett, 9 Phil. (Pa.) 515; The Invincible, 1 Lowell, 225; Van Schaack v. Northern T. Co. 3 Biss. 394; Alden v. Pearson, 3 Gray, 342; Brauer v. The Almoner, 18 La. Ann. 266; French v. Buffalo, etc. R. R. Co. 4 Keyes, 108; Hays v. Millar, 77 Pa. St. 238; Hubbard v. Harnden Exp. Co. 10 R. I.

able authorities, that the burden is on the carrier, not only to show that the loss happened by one of the excepted causes, but also that it proceeded from that cause without any negligence on his part.[1]

In case of injury to the property, or loss of it, by the carrier's fault, he is required to make compensation on the basis of its value at the place of destination. In the former case, the measure of damages is the difference between the value of the goods as, or in the condition when, delivered, and what their value would have been if they had not been damaged in the course of transportation;[2] and for goods lost, their value at the place of destination. The owner is entitled to have the equivalent of the goods at the place of destination, in the condition in which the carrier undertook to deliver them, less the charges for transportation and delivery.[3]

251; Clark v. St. Louis, etc. R. R. Co. 64 Mo. 440; Clark v. Barnwell, 12 How. U. S. 272; Transportation Co. v. Downer, 11 Wall. 129; Lawrence v. N. Y. etc. R. R. Co. 36 Conn. 63.

[1] Davidson v. Graham, 2 Ohio St. 131; Graham v. Davis, 4 Ohio St. 362; United St. Exp. Co. v. Backman, 2 Cin. 251; 28 Ohio St. 144; Erie R. R. Co. v. Lockwood, 28 Ohio St. 358; Union Exp. Co. v. Graham, 26 Ohio St. 595; Berry v. Cooper, 28 Ga. 543; Southern Exp. Co. v. Newby, 36 Ga. 635; Swindler v. Hilliard, 2 Rich. 216; Baker v. Brinson, 9 Rich. 201; Cameron v. Rich, 4 Strobh. 168; Steele v. Townsend, 37 Ala. 247; Gray v. Mobile Trade Co. 55 Ala. 387.

[2] Smith v. New H. etc. R. R. Co. 12 Allen, 531; Cutting v. Grand T. R'y Co. 13 Allen, 381; McGregor v. Kilgore, 6 Ohio, 359; Colonel Ledyard, 1 Sprague, 530; Henderson v. Maid of Orleans, 12 La. Ann. 352; Black v. Camden, etc. R. R. Co. 45 Barb. 40; Ingledew v. Northern R. R. Co. 7 Gray, 86; Lewis v. Ship Success, 18 La. Ann. 1. See Marquette, etc. R. R. Co. v. Langton, 32 Mich. 251.

[3] Gray v. Mo. R. P. Co. 64 Mo. 47; Sturgess v. Bissell, 46 N. Y. 462; Marshall v. N. Y. Cent. R. R. Co. 45 Barb. 502; Spring v. Haskell, 4 Allen, 112; Whitney v. Chicago & N. W. R. Co. 27 Wis. 327; Chapman v. Chicago & N. W. R. Co. 26 Wis. 295; McGregor v. Kilgore, 6 Ohio, 358; Laurent v. Vaughn, 30 Vt. 90; Gillingham v. Dempsey, 12 S. & R. 183; Louis v. S. B. Buckeye, 1 Handy (Cincinnati Sup. Co.), 150; Warden v. Green, 6 Watts, 424; Rice v. Ind. & St. L. R. R. Co. 3 Mo. App. 27; Farwell v. Price, 30 Mo. 587; Nourse v. Snow, 6 Greenlf. 208; Shaw v. S. C. R. R. Co. 5 Rich. L. 462; Union R. R. & T. Co. v. Traube, 59 Mo. 355; Atkisson v. S. B. Castle Garden, 28 Mo. 124; Michigan S. etc. R. R. Co. v. Caster, 13 Ind. 164; Taylor v. Cottier, 26 Ga. 122; Arthur v. Ship Cassius, 2 Story, 81; Wallis v. Cook, 10 Mass. 510; Winchester v. Patterson, 17 Mass. 62; Harris v. Panama R. R. Co. 5 Bosw. 312; Sherman v. Wells, 28 Barb. 403; Van Winkle v. U. S. Mail Steam

Where goods are lost by the negligence of the carrier on the last part of the route, the owner is allowed to recover the value at the place of destination, less the freight. He cannot, however, recover, in addition, the freight paid to another carrier who carried the goods over the first part of the route.[1] Nor is the carrier entitled to an abatement from the value of cotton consigned to a factor, of the factor's commissions.[2] If a debt is lost by the carrier's default in the performance of his undertaking, the amount of the debt is *prima facie* the measure of damages.[3]

Where the carrier delivers the goods contrary to the instructions of the consignee as to place, at the destination, such carrier is liable for the value if the consignee does not obtain the goods; but the amount of freight for transportation from the place of shipment should be deducted from the value, though not earned. And if the consignee obtain the goods by means of a replevin, it has been held he cannot include in his damages the counsel fees incurred in the replevin suit.[4]

Interest on damages.—Interest is generally added, in this country, to the amount allowed as damages, and on the generally accepted principles which govern the allowance of interest, it should be added as a necessary part of the indemnity the shipper or owner is entitled to for the loss of or injury to his goods.[5] But in some instances, under the influence of some

Ship Co. 37 Barb. 122; Northern T. Co. v. McClary, 66 Ill. 233; Little v. Boston, etc. R. R. Co. 66 Me. 239; Cushing v. Wells, Fargo & Co. 98 Mass. 550; Bailey v. Show, 24 N. H. 297; Ringgold v. Haven, 1 Cal. 108; Hart v. Spalding, 1 Cal. 213; Wolf's Adm'r v. Lacy, 30 Tex. 349; Richmond v. Bronson, 5 Denio, 55; S. B. Emily v. Carney, 5 Kans. 645; Dean v. Vaccaro, 2 Head, 488; Blumenthal v. Brainerd, 38 Vt. 402; Sisson v. Cleveland, etc. R. R. Co. 14 Mich. 489; Ward C. & P. L. Co. v. Elkins, 34 Mich. 439.

[1] Northern T. Co. v. McClary, 66 Ill. 233.

[2] Kyle v. Laurens R. R. Co. 10 Rich. 382.

[3] Ziegler v. Wells, Fargo & Co. 23 Cal. 179; Knapp v. U. S. & C. Express Co. 55 N. H. 348; Whitney v. M. U. Exp. Co. 10 Mass. 152.

[4] The Boston, 1 Lowell, 464.

[5] Mote v. Chicago, etc. R. R. Co. 27 Iowa, 22; Spring v. Allen, 4 Allen, 112; Cowley v. Davidson, 13 Minn. 92; Woodward v. Ill. Cent. R. R. Co. 1 Biss. 403; Blumenthal v. Brainerd, 38 Vt. 403; Ludwig v. Meyre, 5 W. & S. 435; Hand v. Burnes, 4 Whart. 204; Whitney v. C. & N. W. R. Co. 27 Wis. 327; Kellogg v. Chi. & N. W. R. Co. 26

early decisions and the reasons upon which they proceeded, the allowance or withholding of interest is left to the discretion of the jury.[1]

Wis. 223; Robinson v. Merchants' D. T. Co. 45 Iowa, 470; Barton v. Steamship Co., 3 Wall. Jr. 229; Erie R'y Co. v. Lockwood, 28 Ohio St. 358; Chapman v. Chicago, etc. R. R. Co. 26 Wis. 295; Cushing v. Wells, Fargo & Co. 98 Mass. 550; Sherman v. Wells, 28 Barb. 403. See Magnin v. Dinsmore, 62 N. Y. 35, 45.

[1] See Wolf's Adm'r v. Lacy, 30 Tex. 349. In the early case, in New York, of Smith v. Richardson, 3 Caines, 221, the court say without qualification that interest ought not to be allowed. In subsequent cases the question of interest is treated as one for the jury; and they to be guided in their discretion by the circumstances of the case, allowing it where the carrier has been guilty of fraud or other improper conduct, and denying it when he becomes liable for the property without actual fault. Watkinson v. Laughton, 8 John. 213; Amory v. McGregor, 15 John. 24; Richmond v. Bronson, 5 Denio, 55. In Lakeman v. Grinnell, 5 Bosw. 625, the court say: "In most cases, interest, when allowed, is given in part, at least, upon some idea of an equivalent already received by the defendant, in the use of the money or property withholden. Hence, it is allowable, even in trover; but as against a carrier, in whose hands goods have been lost, or . . wholly destroyed without any fault whatever on his part, no such principle can be invoked. It is impossible that he should have received any advantage whatever from the possession of the goods." It is to be observed that in trover, the consideration of the defendant's benefit from the conversion does not control the right to interest. It is allowed as part of the compensation due to the plaintiff. The decision in Van Rensselaer v. Jewett, 2 N. Y. 135, has been adhered to: "Whenever a debtor is in default for not paying money, *delivering property*, or rendering services, in pursuance of his contract, justice requires that he should indemnify the creditor for the wrong which has been done him; and a just indemnity, though it may sometimes be more, can never be less, than the specified amount of money, or the value of the property or services, at the time they should have paid or rendered, with interest from the time of the default until the obligation is discharged." In Dana v. Fiedler, 12 N. Y. 40, which was an action for the non-delivery of property, the court said: "Interest is a necessary item in the estimate of damages in this class of cases. The party is entitled on the day of performance to the property agreed to be delivered; if it is not delivered, the law gives, as the measure of compensation then due, the difference between the contract and market prices. If he is not also entitled to interest from that time as a matter of law, this contradictory result follows, that while an indemnity is professedly given, the law adopts such a mode of ascertaining its amount, that the longer the party is delayed in obtaining it, the greater shall its inadequacy become. It is, however, conceded to be law, that in these cases the jury may give interest, by way of damages, in their

OWNER ENTITLED TO COMPENSATION FOR HIS PROPER ACTS TO PREVENT DAMAGES.— The owner being bound to exert himself to prevent damage, and to render the injury as light as possible where he is so situated in respect to the subject in question as to raise that duty, for his reasonable and necessary labor or expense for that object he may recover.[1] Thus, in an action against a railroad company for damages to a lot of flour, it was held that a judicious expense incurred by the plaintiff, after the flour had been delivered to him, in rendering it fit for market, might be recovered as damages, as it appeared that such expense was for the defendant's benefit, and lessened the amount for which the carrier would otherwise have been chargeable.[2] So the reasonable cost of recovering mules which the carrier had suffered to escape was held recoverable.[3]

discretion. Now, in all cases, unless this be an exception, the measure of damages in an action upon a contract relating to money or property, is a question of law, and does not at all rest in the discretion of the jury. . . . The case of Van Rensselaer v. Jewett establishes a principle broad enough to include this case, and has freed the law from this as well as other apparent inconsistencies in which it was supposed to be involved. The right to interest in actions upon contract depends not upon discretion, but upon legal right; and in actions like the present is as much a part of the indemnity to which the party is entitled as the difference between the market value and the contract price." The case of Andrews v. Durant, 18 N. Y. 496, was trover, and the court said: "It is as necessary a part of complete indemnity as the value itself. There is no sense in the idea that interest is any more in the discretion of the jury than the value." In McCormick v. Penn. Cent. R. R. Co. 49 N. Y. 303, the plaintiff's baggage was retained and carried off on defendant's train of cars after he decided not to become a passenger and he had demanded that such baggage be delivered to him. If liable for a conversion, the court held that interest on the value was recoverable, and as necessary a part of a complete indemnity as the value itself; and that in fixing the damages, it was no more in the discretion of the jury than the value. In Woodward v. Ill. Cent. R. R. Co. 1 Biss. 403, which was an action against a carrier for goods which had been lost by fire, Judge Davis charged the jury to add interest to the value, The jury failing to agree, the case was tried a second time (1 Biss. 447), and Judge Drummond instructed the jury that they might, if they chose to do so, allow additional damages by way of interest.

[1] Hamilton v. McPherson, 28 N. Y. 72.

[2] Winne v. Ill. Cent. R. R. Co. 31 Iowa, 583.

[3] North M. R. R. Co. v. Akers, 4 Kan. 453. See King v. Shepherd, 3 Story, 349.

CIRCUMSTANCES MAY REDUCE THE DAMAGES BELOW THE VALUE AT THE PLACE OF DESTINATION.— Circumstances may have the effect to modify and lessen the liability of a common carrier for the full value of lost goods which had been confided to him for transportation. Such circumstances may show that the plaintiff's actual loss was less than the actual value at the place of destination; they may show a loss of compensation due for carriage, by some artifice of the consignor; may show that the plaintiff has induced a want of the care necessary to the safety of the goods. Where the plaintiff sent by an express company from New York to Memphis, a package of watches and watch keys, giving the consignor the option to take and pay for them at a price fixed, or return them, the carrier was held liable for that price on a loss of the goods, though it was largely below the market price at the place of destination.[1] Folger, J., said: "It seems clear that the plaintiffs could not demand from the defendant more than would have resulted to them had the defendant made safe carriage, and prompt and correct delivery. In that case, the plaintiffs would, at the farthest, have had from their consignees payment for all the goods sent at the price, to the consignees, fixed upon them by the plaintiffs. The sum of that price, with interest thereon from the day when the goods should, in the usual course of carriage, have reached the consignees, and been accepted by them, will make the damage which would naturally and proximately result to the plaintiffs. Though a rule is sometimes stated thus: that the damages are the value of the goods agreed to be carried and delivered at the place and time of delivery,— that rule is but a branch of the more general one, that the damages for a failure to perform are a sum equal to the benefit which would have resulted from a performance of a contract.[2] When the owner and shipper of the goods is himself to take the goods at the place of destination, and there sell them for his own account for what they will there bring, the market value there is the measure of his damages, because that would have been his benefit from performance of the contract. But every case is to be governed by its own facts; and here the price of the goods at the place of

[1] Magnin v. Dinsmore, 62 N. Y. 35. [2] Sturgess v. Bissell, 46 N. Y. 462.

destination was fixed by the plaintiffs before they were committed to the carrier. Either that price was to be paid by the consignees, or the goods were to have been returned to the plaintiffs at New York, where they would have been worth to them the market price of them there. No other value could have been in the contemplation of both the contracting parties, nor any other damages than such as would result from a failure to obtain that value." This opinion is open to some criticism. It is true, as a general rule, that "the damages for a failure to perform are a sum equal to the benefit which would have resulted from a performance of the contract;" that is, the benefit which would result independent of any special use, of which the defaulting party had no notice. This rule does not apply to the benefit, in excess of market price, derivable from another contract not known to the carrier, when his contract was made.[1] The performance of the carrier's contract will give the consignee, whether he be the consignor or not, the benefit of the property at the place of destination, after paying the cost of transportation. The carrier can be charged with no more than the market value there, unless he has contracted to carry it there to fulfil a contract of sale at a greater price. Why, then, should he be entitled to reduce damages below the market value, when the subcontract, of which he had no notice, happens to provide for sale for less than the true value? Besides, the consignor's action exhausts also the remedy of the consignee, and the damages are, in effect, measured by the price at the place of shipment.[2] Looking at the possibility of the consignee exercising the option not to purchase, the consignor could have countermanded the direction to return the goods, and offered them for sale at the place of destination.[3]

Where the goods, after delivery to the carrier, are lost or destroyed at the port or place of shipment, the value at that place governs, instead of the price at the place of destination.[4]

A shipper may estop himself from claiming the full value by

[1] Caledonian R. Co. v. Colt, 3 L. J. N. S. 252; Chicago, etc. R. R. Co. v. Hale, 83 Ill. 360.

[2] Thompson v. Fargo, 58 Barb. 575; Blanchard v. Page, 8 Gray, 281; Fenn v. Western R. R. Corp. 112 Mass. 524.

[3] See Smith v. Griffith, 3 Hill, 333.

[4] Dusar v. Murgatroyd, 1 Wash. C. C. 13.

his conduct when he offers his property for transportation, as where it amounts to a representation of value.[1] Thus, where a bag, sealed up, was delivered to the carrier, the servant of the latter giving a receipt for 200*l*., which the sender stated it contained, while in fact it contained 450*l*., the court limited the recovery, the bag having been lost, to 200*l*., and said: "There was a particular undertaking by the carrier for the carriage of 200*l*. only; and his reward was to extend no further than that sum, and 'tis the reward that makes the carrier answerable; and since the plaintiffs had taken this course to defraud the carrier of his reward, they had thereby barred themselves of that remedy which is founded only on the reward."[2] The shipper is bound to deal fairly with the carrier, and, if required, must give true information of the value of a parcel offered for transportation; if he states the quality and value untruly, either in words or by the manner of marking the package, he will be guilty of a fraud, and if entitled to recover at all in case of an accidental loss, he will be allowed to recover only according to the value he gave out at the time of shipment.[3]

The carrier has the right to demand from the employer such information as will enable him to decide on the proper amount of compensation for his services and risk, and the degree of care which he ought to bestow in discharging his trust; and if the owner give an answer which is untrue in a material point, the carrier will undoubtedly be absolved, on general principles, from the consequences of any loss not occasioned by negligence or misconduct.[4]

Qualification of carrier's liability by notice.— A carrier may qualify his liability by a general notice to all who may

[1] Elkins v. Empire T. Co. 81 Pa. St. 315.

[2] Tyly v. Morrice, Carthen, 485.

[3] Belger v. Dinsmore, 51 N. Y. 166; Hayes v. Wells, Fargo & Co. 23 Cal. 185; Magnin v. Dinsmore, 62 N. Y. 35. See Rice v. Indianapolis, etc. R. R. Co. 3 Mo. App. 27.

[4] Hollister v. Nowlen, 19 Wend. 234; Orange Co. B'k v. Brown, 9 Wend. 116; Gibbon v. Paynton, 4 Burr. 2298; Pardee v. Drew, 25 Wend. 459; Batson v. Donovan, 4 B. & Ald. 21; Everett v. Southern Exp. Co. 46 Ga. 303; Earnest v. Express Co. 1 Wood, 573; Cincinnati, etc. R. R. Co. v. Marcus, 38 Ill. 219; Magnin v. Dinsmore, supra; Phillips v. Earle, 8 Pick. 182; Little v. Boston, etc. R. R. Co. 66 Me. 239.

employ him, among other things, that he will not be responsible for goods above the value of a certain sum, unless they are entered as such, and paid for accordingly.[1] To effect the employer by such notice, it must be brought home to him;[2] but slight evidence beyond its publication is necessary to warrant the inference that it was known to the shipper.[3]

Where the carrier is guilty of negligence or misconduct, resulting in the loss of goods intrusted to him, his liability is not limited by the valuation upon them at the time of the shipment.[4] A defendant company received at New York, for transportation to plaintiffs at St. Louis, one package, containing three gross of cases of "Shallenberger Pills," worth $113.50 per gross. The receipt or bill of lading contained a clause that the holder should not demand more than $50 for any loss or damage, at which "the article forwarded" is valued, and which shall constitute the limit of the liability of the company. The three cases were each separately addressed to plaintiffs, and were then wrapped up with a cover in a single package similarly addressed. But one of the cases reached plaintiffs. In an action to recover for the loss, it was held that the "article forwarded" was the single package, and that plaintiffs were not entitled to recover $50 upon each of the missing cases.[5]

For what losses the carrier responsible.—The carrier is liable for the goods which he delivers by mistake to the wrong person.[6] So is he liable for any damages resulting from a departure from the contract, or from the consignor's instructions as to the route, or mode of conveyance, or the condition of delivery; in other words, when a carrier accepts goods to be carried, with

[1] 2 Greenlf. Ev. § 215; McMillan v. Michigan, etc. R. R. Co. 16 Mich. 79; Moses v. Boston, etc. R. R. Co. 24 N. H. 71; Fish v. Chapman, 2 Ga. 349; Judson v. Western R. R. Corp. 6 Allen, 486; Cole v. Goodwin, 19 Wend. 251.

[2] Id.

[3] Oppenheimer v. U. S. Exp. Co. 69 Ill. 62.

[4] Harvey v. Terra Haute, etc. R. R. Co. 6 Mo. App. 585.

[5] Wetzell v. Dinsmore, 54 N. Y. 496.

[6] Price v. Oswego, etc. R. R. Co. 50 N. Y. 213; 58 Barb. 599; Adams v. Blankinsten, 2 Cal. 413; Winslow v. Vermont, etc. R. R. Co. 42 Vt. 700.

a direction on the part of the owner to carry them in a particular way, or by a particular route, he is bound to obey such directions; and if he attempts to perform his contract in a manner different from his undertaking, he becomes an insurer, and cannot avail himself of any exception in the contract.[1] But if it should be shown in such a case that the loss must certainly have occurred from the same causes, if there had been no default or deviation, the carrier should be excused. The burden of proof of this fact, however, is on the carrier.[2] Where the carrier was instructed to collect money from the consignee before delivery, and he delivered the goods without exacting a compliance with this condition, the carrier was held liable for the amount which he was instructed to collect.[3] A carrier was instructed to deliver to a factor, at a certain market, who had been instructed not to sell until he received an order to do so; the carrier delivered to a factor at a different market, who had no instructions concerning the article, and who sold it immediately. It appearing that the article rose in price from that day until the suit was brought against the carrier, it was held that the plaintiff was entitled to recover the highest price reached within that period, the suit having been brought within a reasonable time; and receipt of the proceeds from the factor making the sale was held to be no bar.[4]

Where a carrier conveys the property only for part of the way to its destination, and is instructed how to forward it from the end of his route, he acts as the shipper's agent in forwarding it. If without the happening of any exigency making it necessary to deviate from the instructions, he does so, he becomes an insurer; if a loss happens, he must make it good.[5]

[1] Maghee v. Camden, etc. R. R. Co. 45 N. Y. 514; Hinckley v. N. Y. C. R. R. Co. 56 N. Y. 429; Goddard v. Mallory, 52 Barb. 87; Hastings v. Pepper, 11 Pick. 41; Persse v. Cole, 1 Cal. 369; Steamboat John Owen v. Johnson, 2 Ohio St. 142; The Boston, 1 Lowell, 464; American Exp. Co. v. Lesem, 39 Ill. 312; U. S. Exp. Co. v. Keefer, 59 Ind. 263; Merrick v. Webster, 3 Mich. 268; Johnson v. N. Y. C. R. R. Co. 33 N. Y. 610; Wilcox v. Parmelee, 3 Sandf. 610; Whitney v. M. U. Exp. Co. 104 Mass. 152. See Bills v. N. Y. C. R. Co. 84 N. Y. 5.

[2] Maghee v. Camden, etc. R. R. Co. supra.

[3] Id.

[4] Arrington v. Wilmington, etc. R. R. Co. 6 Jones' L. 68.

[5] Ackley v. Kellogg, 8 Cow. 223; Wilcox v. Parmlee, 3 Sandf. 610; Forrestier v. Bordman, 1 Story, 45; Johnson v. N. Y. Cent. R. R. Co. 33 N. Y. 610.

Destination for the purpose of damages where there are several successive carriers.— If goods are marked and known to the carrier to be destined to a point beyond the terminus of his route, and he becomes liable for a loss of them, or for damages for a negligent delay, there is some diversity as to whether the damages should be estimated with reference to the market value at the end of his route, or at the ultimate destination. On principle, the value at the latter place should be the criterion. The value in one case and the depreciation in the other according to the market at the ultimate destination, less the cost of transportation, is the actual loss to the owner; and it is as direct and proximate where there are several carriers, as where the whole transportation is let to one person. The intermediate carrier who is liable has undertaken the carriage of the goods with a knowledge of their intended destination; therefore the benefit to the shipper of their delivery at that place, and the disadvantage to him of a failure to so deliver them, are within the contemplation of both parties. The damages recoverable from such a carrier should be estimated on the basis of the net value at the place where he knows the owner of the goods intends them to go, for the same reason, that, in other cases, damages are recoverable with reference to the value for any special use which was known to both parties at the time of making the contract. In this view, it is immaterial whether the through transportation is undertaken by one carrier, or the goods will be carried by several in a connected line, or by several not connected. In a well considered Michigan case,[1] the contract of the defendant was to transport cattle from Toledo to Buffalo. Their ultimate destination was Albany or New York, but this fact was not stated in the contract. The trial court charged the jury that the plaintiffs could not recover damages for loss by depreciation, on account of negligent delay, except by reference to the market at Buffalo. Cooley, J., delivering the opinion of the appellate court, said: "If the judge meant the jury to understand by this charge that the damages which the plaintiffs could recover must be confined to the fall in the market at Buffalo, between the time when the cattle should have reached that point, and that of their actual

[1] Sisson v. Cleveland & T. R. R. Co. 14 Mich. 489.

arrival, we think he erred. The defendants were informed, when they entered into the contract, that the ultimate destination was to an Albany or a New York market; and they must be held to have assumed their obligations in reference to that fact. If in fact there was no fall of prices before the cattle had reached Buffalo, but afterwards, and before they could be delivered at Albany, a loss had occurred as the direct consequence of defendants' delay, it would be both illogical and unjust to hold that defendants shall be discharged because the injurious consequence of their act did not result until the cattle were out of their hands. The consequences of delay would attend the cattle to their final destination, just as the consequences of a fatal injury to one of them would attend the animal until his death; and in neither case could the party responsible excuse himself by showing that the actual loss, or death, did not occur while the property was retained in his possession."

It has been held in some cases that the destination as regards the carrier on one of the several routes over which the goods are successively carried is the terminus of his particular route; that if he is liable for a loss, the value is to be taken at that point and not at the ultimate place of destination.[1]

Proof of value.— The value must be ascertained by a money standard from evidence, and cannot be taken upon conjecture.[2] If by the acts of the carrier the plaintiff is prevented from showing the value, the jury may allow the value of the best quality of such goods.[3] In a Georgia case it was held presumable, in the absence of positive evidence, that a commodity is worth as much at the place of destination as at that of shipment.[4] So, if there be no market for the goods in question at the place of delivery, the jury, it is said, must ascertain their value by taking the price at the place of shipment, adding the cost of carriage, and allowing a reasonable sum for the im-

[1] See Lewis v. Steam B. Buckeye, 1 Handy (Ohio), 150; Harris v. Panama R. R. Co. 6 Bosworth, 312; Marshall v. N. Y. Cent. R. R. Co. 45 Barb. 502.

[2] Traloff v. N. Y. etc. R. R. Co. 10 Blatchf. 16.

[3] Clark v. Miller, 4 Wend. 628; Van Winkle v. U. S. Steamship Co. 37 Barb. 122; Bailey v. Shaw, 24 N. H. 297.

[4] Rome R. R. Co. v. Sloan, 39 Ga. 636.

porter's profit.[1] In cases where the market value of goods is the test of damages, the law contemplates a range of the entire market and the average of prices as thus found, running through a reasonable period of time; not any sudden and transient inflation or depression of prices, resulting from causes independent of the operations of lawful commerce.[2]

The injured party is entitled to recover with reference to the market value at the time of the injury, though subsequent experiments in the use of such goods have resulted in showing that the market price was based on no intrinsic worth. Accordingly, in an action against common carriers for a negligent injury to a quantity of mulberry trees which had been delivered to them for transportation, after the plaintiff had given evidence of the market value of the trees at the time the injury occurred, the defendants offered to prove that trees of the same species have since been ascertained, from actual experiment, to be of no real value; that their market value, at the time of the injury, was factitious; that they were not worth cultivating with a view to the raising of the silk worm; that those in question were purchased by the plaintiff for the purpose of growing seedlings for sale, and that they were of no value for such purpose the next year after the purchase; and it was held that such evidence was inadmissible.[3] The purpose of the plaintiff in purchasing the trees to reproduce the article for the market the next year, was but an unexecuted intention; it bound nobody; and the plaintiff had a right to change it, and to turn the property to better account, if in his judgment the opportunity offered.[4]

Where goods damaged in the course of transportation were received by the consignee with the understanding that the depreciation should be made good to him, and the goods were sold at auction with the consent of the carrier, it was held that, for the purpose of ascertaining the amount due for such damages, the amount realized from their sale should be treated as the

[1] O'Hanlan v. Great Western R. Co. 6 B. & S. 484; 34 L. J. (N. S.) Q. B. 154; Richmond v. Bronson, 5 Denio, 55; Vroman v. Am. M. U. Exp. Co. 2 Hun, 512.

[2] Smith v. Griffith, 3 Hill, 333.

[3] Id.

[4] Id.

value of the goods in the damaged state.[1] And in an action against a railway company for damages arising from failure to deliver a certain quantity of whisky, as it had undertaken to do, the defendants were held entitled to prove that the whisky had been shipped by the plaintiffs in fraud of the United States revenue laws, and no tax had been paid thereon, for the purpose of determining the value; if the tax of two dollars per gallon had been paid, it was said, the value of the raw material would be enhanced to that extent, and if not paid, it would be decreased that amount.[2] The owner of a family portrait is entitled to recover its value to him.[3]

Section 3.

CARRIERS OF PASSENGERS.

Damages for refusal to receive, and for breaches of duty or contract to carry passengers, and to carry them safely — Mitigations of damages — Exemplary damages — Injury to wife, child or servant — Where the injury causes death — Excessive verdicts — Law of baggage — Measure of damages.

The obligations or responsibilities of public carriers do not arise altogether nor principally out of contracts; they are mostly imposed by law. The total refusal to undertake the conveyance of a passenger, without excuse, or when actionable, is merely a violation of a carrier's duty; he has refused to contract; so his duty to carry with care, though it may, to some extent, be regulated and restricted by contract, is imposed by law, and cannot, as is generally held, be contracted away; hence actions against these carriers are generally actions of tort for negligence, or for misconduct of some kind, involving a breach of duty. Contracts, however, are usually made, fixing the extent of the route, the mode of conveyance, the kind of accommodations, the time, etc.; and, therefore, actions founded upon such contracts may be maintained. Whether the action be upon the breach of duty or for violation of contract, to the extent that they involve the same acts and omissions, the damages, as measured by law, are substantially the same.

[1] The Columbus, 1 Abb. Adm. 97; Jellingham v. N. Y. Ins. Co. 4 Sandf. 18.

[2] Toledo, etc. R. R. Co. v. Kichler, 48 Ill. 438.

[3] Green v. Boston, etc. R. R. Co. 128 Mass. 221.

DAMAGES FOR REFUSAL TO RECEIVE, AND FOR BREACHES OF DUTY OR CONTRACT TO CARRY PASSENGERS, AND TO CARRY THEM SAFELY.—A refusal to take a party who applies in accordance with a carrier's regulations, is willing and offers to pay, or has done so in compliance with the carrier's rates; or a refusal, after a passenger has been carried over a part of the stipulated voyage or route, to carry him to the end, may entitle him to general, special or consequential damages, for a great variety of losses and injuries.

If the journey is delayed there will be a loss of time, and the passenger is entitled to compensation for it,[1] and also for any increased expense reasonably incurred during the delay, or to procure other conveyance when necessary. Where a bookkeeper, on his way to California, was detained by the fault of the carrier at New Orleans and Panama for an unreasonable time, it was held admissible to prove the rate of wages at the place of destination for the consideration of the jury in fixing the damages, but not as the measure of them; and that it should be left to the jury to weigh the probabilities that he would have immediate and continued employment had he arrived without such detention.[2] And it has been held in such an action, that the fact there is no evidence of the value of the plaintiff's time does not prevent the jury giving him such compensation as they think reasonable.[3]

In an action against a carrier for failure to carry the plaintiff from New York to San Francisco, via Nicaragua, according to his agreement; for neglect to furnish suitable accommodations, and for negligent detention on the way, and consequent unnecessary exposure to an unhealthy climate, it was held entirely proper to receive evidence as to how much the plaintiff was exposed to the sun and rains while crossing the isthmus, and to show that the climate there was bad, so that the jury could determine whether the plaintiff's sickness was caused by the defendant's negligence or breach of duty. It was also held that the time the plaintiff lost by reason of his detention on the isthmus, his expenses there and on his return to New York, the time he lost

[1] Penn. R. R. Co. v. Books, 57 Pa. St. 339.

[2] Yonge v. Pacific M. Steamship Co. 1 Cal. 353.

[3] Ward v. Vanderbilt, 34 How. Pr. 144; 4 Abb. App. Dec. 521.

by reason of his sickness after he returned, and the expenses of such sickness, so far as it was occasioned by the defendant's negligence or breach of duty, were legitimate and legal damages, which the plaintiff was entitled to recover. And the defendant having refused to convey the plaintiff from the isthmus to his destination, he was entitled also to recover back the money he had paid for his passage on the stipulated voyage.[1]

In another case the plaintiff was allowed to show, in aggravation of damages, his physical condition unfitting him to bear the exposure to which he was subjected in consequence of the carrier's neglect to stop his boat according to his advertisement and take him on board; and that exemplary damages might be recovered in such a case, if the carrier's conduct in such neglect were wilful or capricious.[2]

The right to recover back the passage money or fare paid in advance, where, by the carrier's fault, the plaintiff is not carried; his right to be compensated for loss of time while delayed by such fault; to have refunded any personal expenses reasonably incurred during such a detention, and any extra expense reasonably incurred to procure other conveyance to make or continue the journey, or to return when it has been interrupted and must be abandoned, is clear, and rests upon the most obvious principles of justice.[3]

If a carrier engages to put a person down at a given place, and does not put him down there, but puts him down somewhere else, it must be in the contemplation of everybody that the passenger put down at the wrong place must get to the place of his destination, or to his starting place, somehow or other. If there are means of conveyance for getting there, he may take those means and make the carrier responsible for the expense; but if there are no means, the carrier must compensate him for personal inconvenience, and other actual injurious con-

[1] Williams v. Vanderbilt, 28 N. Y. 217; Bonsteel v. Vanderbilt, 21 Barb. 26.

[2] Hiern v. McCoughan, 32 Miss. 17.

[3] The Zenobia, 1 Abb. Adm. 80; La Blanche v. London, etc. R. Co. 1 C. P. D. 286; Hamlin v. Great Northern R'y Co. 1 H. & N. 408; Porter v. St. B. New England, 17 Mo. 290; Hobbs v. London, etc. R. Co. L. R. 10 Q. B. 111; Denton v. G. N. R'y Co. 5 E. & B. 860; Cranston v. Marshall, 5 Exch. 395; Brown v. The Chicago, etc. R. R. Co. 54 Wis. 342.

comitants of such a predicament; and of any available method of extrication.[1] Where a passenger has bought a ticket and is carried beyond the station for which he is ticketed without any fault on his part, he has a right of action for at least nominal damages, though he suffers no actual injury, and for such actual injury as he may in fact suffer.[2] The immediate purpose of a traveler is to reach some given destination; but a journey is generally taken for some ulterior object. The carrier undertakes that the former shall be accomplished so far as his route is concerned; and if he is advised of the latter when his contract is made, he is held to contract with reference to it, and damages for a violation of his agreement or duty will be given accordingly. The same tests apply which govern generally, and by which remote, uncertain and speculative consequences are excluded from consideration. Each case must, therefore, be determined on its peculiar facts. An exceptional case was finally decided by the federal supreme court on appeal from a decree in admiralty.[3] The libellant took passage in 1856 on the respondent's vessel at Acapulco for San Francisco; he tendered his fare, and while on this vessel demeaned himself properly. On the voyage, the respondent transferred him against his will to another vessel, which took him back to Acapulco. The libellant was unable to obtain passage on any other vessel from that place to his intended destination. He went thence to Aspinwall, in the republic of New Grenada, to try and get a passage thence to San Francisco, but a line of steamers previously existing there, and on which he expected to go, had been discontinued, its last vessel having set off two or three days before his arrival. Finally, through charity, he obtained a passage to New York, in which city he was without means and dependent on charity for subsistence. He was confined in a hospital there for several months, and physically unable to attempt a voyage to San Francisco until 1860. The special circumstances which induced the respondent to put him off his

[1] Brown v. R. R. Co. 54 Wis. 342.

[2] Thompson v. New Orleans, etc. R. R. Co. 50 Miss. 315; New Orleans, etc. R. R. Co. v. Hunt, 36 Miss. 660; Porter v. St. B. New England, 17 Mo. 290; Sunday v. Gordon, 1 Blatchf. & H. 569; Pittsburgh, etc. R. R. Co. v. Nuzam, 50 Ind. 141; Thompson's Car. Pass. 66.

[3] Pearson v. Duane, 4 Wall. 605.

vessel and send him back, and which made it impossible for him to get other transportation to his intended destination, were not known to the respondent when he received him as a passenger, but were made known to him on the voyage. Those circumstances were the previous forcible expulsion of the libellant from San Francisco by the vigilance committee, and a certainty that if he returned by the respondent's vessel, or any other, while the vigilance committee held control of San Francisco, he would be killed. Four thousand dollars damages had been awarded to him in the court below, and on the basis and amount of damages, the supreme court say that this amount is excessive, bearing no proportion to the injury received; that he is entitled to compensation for the injury done him by being put on board the other vessel, so far as that injury rose from the act of the respondent in putting him there. But the outrages which he suffered at the hands of the vigilance committee; his forcible abduction from California and transportation to Acapulco; the difficulties experienced in getting to New York, and his inability to procure a passage from either Acapulco or Panama to San Francisco, cannot be compensated in this action. The obstructions he met with in returning to California were wholly due to the circumstances surrounding him, and were not caused by the respondent. Every one, doubtless, to whom he applied for passage, knew the power of the vigilance committee, and were afraid to encounter it by returning an exile against whom the sentence of death had been pronounced. The respondent had no malice or illwill towards the libellant, and, as the evidence clearly shows, excluded him from his boat in the fear that, if returned to San Francisco, he would be put to death. It was sheer madness for the libellant to seek to go there. Common prudence required that he should wait until the violence of the storm blew over and law and order were restored. That court reduced the recovery to $50.

If the object of a passenger's journey is known to the carrier when he undertakes his transportation, damages for delay or defeat of that object by the fault of the carrier may be recovered. A master of a schooner who had taken passage on a steamer to rejoin his vessel, and was carried past his destination, was held entitled to recover not only his personal expenses and

loss of time, but damages in the nature of demurrage for the detention of his vessel which was awaiting his return.[1] Such damages must be shown with certainty to have resulted necessarily and solely from the carrier's default. Thus, a carrier who failed to carry a passenger within the appointed time to the place for which he had taken passage, was held not liable for the passenger not being able to do an errand there, nor his expenses and the injury of absence from his business during a sojourn of several days, without some evidence that if he had seasonably arrived he might have performed his errand, and thereupon would have promptly returned, and that he could not with proper effort accomplish his errand by reason of such delay.[2]

If a carrier advertise to leave at particular times and to arrive at given places at stated times, or so as to make specified connections with carriers beyond, such advertisements are guaranties to persons acting upon them, and on his failure to fulfil he is liable for personal expenses at hotels, and those of substituted conveyances when necessary to the passengers' purposes, and loss of time, consequent on not leaving or arriving in accordance with the advertisement.[3]

Mere inconvenience will be ground of damages if it is capable of being stated in tangible form; the difference between what he ought to have and did have; the difference between the contracted conveyance and the necessity to go on foot or by such other means as were available.[4] And where the action is for a tort, the breach of duty, and sickness is the natural and proximate result, damages therefor may be recovered.[5]

It has been held that where the damages are produced by other agencies than those causing the injury, or even by agencies remotely connected with those causing the injury, they cannot be awarded as proximate or proper compensation, but only where the injury flows from the wrongful act as its nat-

[1] The Canadian, 1 Brown, Adm. 11.

[2] Benson v. New Jersey, etc. T. Co. 9 Bosw. 412.

[3] Cranston v. Marshall, 5 Exch. 395; Denton v. G. N. R'y Co. 5 E. & B. 860; Hamlin v. G. N. R'y Co. 1 H. & N. 408; Le Blanche v. London, etc. R'y Co. 1 C. P. D. 286.

[4] Hobbs v. L. & S. W. R'y Co. L. R. 10 Q. B. 111.

[5] Id.; Francis v. St. Louis T. Co. 5 Mo. App. 7; Walsh v. Chicago, etc. R. R. Co. 42 Wis. 23; Brown v. C. M. & St. P. R. R. Co. 54 Wis. 342.

ural concomitant, or as the direct result. Where speculation or conjecture has to be resorted to for the purpose of determining whether the damages result from the wrongful act or from some other cause, then the law rejects them for that reason.[1] This was declared in a case where a train failed to stop at a station where a passenger was waiting for it, to be carried to another station; he thereupon walked to his place of destination, in very cold weather, and in consequence became sick; it was held the sickness, and the loss which such sickness caused to him, did not result directly from the defendant's breach of duty. If his business required it, he was at liberty to hire another conveyance, and the company would have been liable for such loss or injury as he suffered in waiting or procuring other conveyance, and such as his business might suffer on account of the delay, but he had no right to inflict injury on himself to enhance the amount of his damages.

There is an obvious difference between the predicaments in which a carrier's breach of duty or contract may leave his customer; in one, the carrier refuses to receive him at a home station, or at an intermediate station where he can remain to choose between other modes of conveyance to pursue his journey or return; in another, he may be set down where there is no shelter and consequently where he cannot remain, whence there is no conveyance, and he is obliged to pursue his journey or seek the nearest shelter on foot in such weather as may happen at the time. In the former, there is no warrant to incur any personal hazard on the carrier's responsibility. In the latter, he has placed the passenger in a situation where he cannot remain and from which there is but one mode of escape. The ills incident to that situation, and the dangers incident to that mode of extrication, whether inevitable or fortuitous, the carrier is responsible for; if injury happens without contributory negligence of the plaintiff, it is an injury resulting from the carrier's fault and breach of contract by natural and necessary sequence.[2]

[1] Indianapolis, etc. R. R. Co. v. Birney, 71 Ill. 391.

[2] Williams v. Vanderbilt, 28 N. Y. 217; Brown v. Chicago, etc. R. R. Co. 54 Wis. 342. Certain items of damage in Hobbs v. L. & S. W. R'y Co. supra, were rejected, which, on the principle stated in the text, should have been allowed, unless the form of the action was such as to exclude

them. Plaintiff, with his wife and two children, five and seven years old respectively, took tickets on the defendant's railway from Wimbledon to Hampton Court by the midnight train. They got into the train, but it did not go to Hampton Court, but went along another branch to Esher, where the party were compelled to get out. It being so late at night, plaintiff was unable to get a conveyance, or accommodation at an inn, and the party walked to the plaintiff's house, a distance of between four and five miles, where they arrived at about three in the morning. It was a drizzling night, and the wife caught cold, and was laid up for some time, being unable to assist her husband in his business, as before, and expenses were incurred for medical attendance. In an action to recover damages for the breach of contract, the jury gave 28*l.* damages, viz., 8*l.* for the inconvenience of being obliged to walk home, and 20*l.* for the wife's illness and its consequences. It was held that as to the 8*l.*, that the plaintiff was entitled to damages for the inconvenience suffered in consequence of being obliged to walk home; but as to the 20*l.*, that the illness and its consequences were too remote from the breach of contract to be given as damages naturally resulting from it. Cockburn, C. J., said: "The plaintiffs did their best to diminish the inconvenience to themselves by having recourse to such means as they hoped to find at hand; they tried to get into an inn, which they were unable to do; they tried to get a conveyance, they were informed none was to be had; and they had no alternative but to walk; and, therefore, it was from no default on their part, and it cannot be doubted that the inconvenience was the immediate and necessary consequence of the breach of the defendant's contract to convey them to Hampton Court. Now, inasmuch as there was manifest personal inconvenience, I am at a loss to see why that inconvenience should not be compensated by damages in such an action as this. It has been endeavored to be argued, upon principle and upon authority, that this was a kind of damage which could not be supported. . . . The case of Hamlin v. Great Northern Railway Company, 1 H. & N. 408, 26 L. J. Ex. 20, was cited as an authority to show that for personal inconvenience damages ought not to be awarded. That case appeared to me to fall far short of any such proposition. . . . With regard to the second head of damage, the case assumes a very different aspect. I see very great difficulty, indeed, in coming to any other conclusion than that the 20*l.* is not recoverable; and when we are asked to lay down some principle as a guiding rule in all such cases, I quite agree with my brother Blackburn in the infinite difficulty there would be in attempting to lay down any principle or rule which shall cover all such cases; but I think that the nearest approach to anything like a fixed rule is this: that to entitle a person to damages by reason of a breach of contract, the injury for which compensation is asked should be one that may be fairly taken to have been contemplated by the parties as the possible result of the breach of contract. Therefore you must have something immediately flowing out of the breach of contract complained of, something immediately connected with it, and not merely connected with it through a series of causes intervening between the immediate

In a recent case,[1] which received very thorough consideration, it was held that "The carrier's obligation is to carry his passenger safely and properly, and to treat him respectfully, and, if he intrusts the performance of this duty to his servants, the law holds him responsible for the manner in which they execute the trust. The law seems to be now well settled that the carrier is obliged to protect his passenger from violence and insult,

consequence of the breach of contract and the damage or injury complained of. To illustrate that, I cannot take a better case than the one before us. Suppose that a passenger is put out at a wrong station on a wet night, and obliged to walk a considerable distance in the rain, catching a violent cold, which ends in a fever, and the passenger is laid up for a couple of months, and loses through his illness the offer of an employment which would have brought him a handsome salary. No one, I think, who understood the law, would say that the loss so occasioned is so connected with the breach of contract as that the carrier breaking the contract could be held liable. Here, I think, it cannot be said the catching cold by the plaintiff's wife is the immediate and necessary effect of the breach of contract, or was one which could be fairly said to have been in the contemplation of the parties. . . . The wife's cold and its consequences cannot stand upon the same footing as the personal inconvenience arising from the additional distance which the plaintiffs had to go. It is an effect of the breach of contract in a certain sense, but removed one stage; it is not the primary but the secondary consequence of it. . . . The party is entitled to take a carriage to his home. Suppose the carriage overturns or breaks down, and the party sustains bodily injury from either of these causes, it might be said, 'If you had put me down at my proper place of destination, where by your contract you engaged to put me down, I should not have had to walk or go from Esher to Hampton in a carriage, and should not have met with the accident in the walk or the carriage. In either of these cases, the injury is too remote, and I think that is the case here. It is not the necessary consequence, it is not even the probable consequence of a person being put down at an improper place, and having to walk home, that he should sustain either a personal injury or catch a cold. That cannot be said to be within the contemplation of the parties, so as to entitle the plaintiff to recover, and to make the defendants liable to pay damages for the consequences." See Thompson's Car. Pass. 566-7. In a similar case very recently decided in Wisconsin, where the action was for the tortious breach of duty, the injuries of the wife from the exposure were held to be the natural and proximate consequence of leaving her three miles short of her destination at night, under such circumstances that she had to walk that distance. She was made sick and had a miscarriage by reason of it. The verdict was for $2,500, and was sustained. Brown v. Chicago, etc. R. R. Co. 54 Wis. 343.

[1] Goddard v. Grand Trunk Railway, 57 Me. 202, 213.

from whatever source arising.[1] He is not regarded as an insurer of his passenger's safety against every possible source of danger; but he is bound to use all such reasonable precautions as human judgment and foresight are capable of, to make his passenger's journey safe and comfortable.[2] He must not only protect his passenger against the violence and insults of strangers and co-passengers, but, *a fortiori*, against the violence and insults of his own servants. . . . The law requires the common carrier of passengers to exercise the highest degree of care that human judgment and foresight are capable of, to make his journey safe. Whoever engages in the business impliedly promises that his passenger shall have this degree of care. In other words, the carrier is conclusively presumed to do what, under the circumstances, the law requires him to do. We say conclusively presumed, for the law will not allow the carrier by notice or special contract even to deprive his passenger of this degree of care. If the passenger does not have such care, but on the contrary is unlawfully assaulted and insulted by one of the very persons to whom his conveyance is intrusted, the carrier's implied promise is broken, and his legal duty is left unperformed, and he is necessarily responsible to the passenger for the damages he thereby sustains. The passenger's remedy may be either in assumpsit or tort, at his election. In the one case, he relies upon a breach of the carrier's common-law duty to support his action; in the other, upon the breach of his implied promise. The form of the action is important only upon the question of damages. In actions of assumpsit, the damages are generally limited to compensation. In actions of tort, the jury are allowed greater latitude, and, in proper cases, may give exemplary damage."

[1] Pittsburgh, etc. Railway v. Hinds, 53 Pa. St. 512; Flint v. Norwich, etc. Transportation Co. 34 Conn. 554; Chamberlain v. Chandler, 3 Mason, 242; Nieto v. Clark, 1 Cliff. 145; Baltimore, etc. R. R. Co. v. Blocher, 27 Md. 277.

[2] McElroy v. Nashua, etc. R. R. Co. 4 Cush. 400; Du Laurens v. First Div. etc. R. R. Co. 15 Minn. 49; Carroll v. Staten Island R. R. Co. 58 N. Y. 126; Johnson v. Winona, etc. R. R. Co. 11 Minn. 296; New Orleans, etc. R. R. Co. v. Allbritton, 38 Miss. 242; Bryant v. Rich, 106 Mass. 180; Bowen v. N. Y. Cent. R. R. Co. 18 N. Y. 408; Craker v. Ch. & N. W. R. R. Co. 36 Wis. 657; Memphis, etc. R. R. Co. v. Whitfield, 44 Miss. 466; Caldwell v. N. J. Steamboat Co. 47 N. Y. 282; Baltimore, etc. R. R. Co. v. Breinig, 25 Md. 378.

The carrier must make compensation according to the nature of the injury when the proper action is brought; such injury may consist of personal inconvenience,[1] sickness,[2] loss of time,[3] bodily and mental suffering, loss of capacity to earn money from personal injury, pecuniary expenses, disfigurement, or permanent physical or mental impairment. There is no precise rule by which the extent of recovery for pain and suffering can be measured; but it is well established they are to be compensated when they result from injuries received by the party suing from the wrongful acts or culpable negligence of the defendant. The determination of the amount is committed to the judgment and good sense of jurors, subject to practical revision by the court to correct and relieve from manifest excess;[4] and it seems to be now established, that not only bodily pain, but connected with bodily injury, mental suffering — anxiety, suspense, fright, sense of wrong from insult or indignity,— may be treated, when the facts will justify it, as an element of the injury for which damages, for compensation, should be allowed.[5]

[1] Hobbs v. London, etc. R'y Co. L. R. 10 Q. B. 111.

[2] Brown v. Chicago, etc. R. R. Co. 54 Wis. 343.

[3] Williams v. Vanderbilt, 28 N. Y. 217; Ward v. Vanderbilt, 34 How. Pr. 144; S. C. 4 Abb. App. Dec. 521; Penn. R. R. Co. v. Books, 57 Pa. St. 339.

[4] Walker v. Erie R'y Co. 63 Barb. 269; Ransom v. N. Y. & E. R. R. Co. 15 N. Y. 415; Blake v. Midland R'y Co. 10 E. L. & E. 437; S. C. 18 Q. B. 93; Linsley v. Bushnell, 15 Conn. 225; Lincoln v. Saratoga, etc. R. R. Co. 23 Wend. 425; Canning v. Williamstown, 1 Cush. 451; Klein v. Jewitt, 26 N. J. Eq. 474; McKinley v. Chicago, etc. R. R. Co. 44 Iowa, 314; Ohio, etc. R. R. Co. v. Dickerson, 59 Ind. 317; Whalen v. St. Louis, etc. R. R. Co. 60 Mo. 323; Morse v. Auburn, etc. R. R. Co. 10 Barb. 621; Curtiss v. Rochester, etc. R. R. Co. 20 Barb. 282; 18 N. Y. 534; Johnson v. Wells, Fargo & Co. 6 Nev. 224; Fairchild v. California Stage Co. 13 Cal. 599; Illinois Central R. R. Co. v. Barron, 5 Wall. 90; Merrill v. Minot, 31 Me. 299; Laing v. Colder, 8 Pa. St. 479; Penn. R. R. Co. v. Kelly, 31 Pa. St. 379; Penn. R. R. Co. v. Allen, 53 Pa. St. 276.

[5] Canning v. Williamstown, 1 Cush. 451; Penn. & Ohio Canal Co. v. Graham, 95 Pa. St. 290; Smith v. Pittsburgh, etc. R. R. Co. 23 Ohio St. 10; Chicago, etc. R. R. Co. v. Flagg, 43 Ill. 365; Muldowney v. Illinois Cent. R. R. Co. 36 Iowa, 462; Meagher v. Driscoll, 99 Mass. 281; Craker v. C. & N. W. R. R. Co. 36 Wis. 657; Ripon v. Bittel, 30 Wis. 614; Ransom v. N. Y. etc. R. R. Co. 5 N. Y. 415; Quigley v. C. P. R. R. Co. 11 Nev. 350; McKinley v. C. & N. W. R. R. Co. 44 Iowa, 314; Seger v. Barkhamsted, 22 Conn. 290; Masten v. Warren, 27 Conn. 293; Lawrence v. Housatonic R. R.

The mind is no less a part of the person than the body, and the sufferings of the former are sometimes more acute and lasting than those of the latter.[1] Indeed, the sufferings of each frequently, if not usually, act reciprocally on the other. The dismay, and the consequent shock to the feelings, which is produced by the danger attending a personal injury, not only aggravate, but are frequently so appalling as to suspend the reason and disable a person from warding it off.[2] Where a conductor on the defendant's railroad, by the use of some force, kissed the plaintiff, a female passenger, the jury assessed the damages at one thousand dollars, and the verdict was sustained on the ground that it was right and proper to take into consideration, and give liberal damages for, her terror and anxiety, her outraged feelings and insulted virtue, for all her mental humiliation and suffering, although exemplary damages was held not recoverable.[3]

In an Iowa case, an action was brought against a railroad company for personal injury caused by a brakeman beating the plaintiff while he was attempting to enter a car, and an instruction that the jury might allow the plaintiff damages, among other things, "for the outrage and indignity put upon him," was approved. The court say, "Mental anguish arising from the injury, that is, pain caused by the wound or broken arm, constitutes an element of compensatory damages, and we, on principle, are unable to see why mental pain arising from or caused by the nature and character of the assault whereby the wound was inflicted or the arm broken, should not also be an element of such damages. The one is as easily estimated and determined as the other, and practically the two cannot be separated or distinguished. The party injured cannot tell where one ends and the other begins. The . . damage arising from either or both cannot be accurately computed, and, from the

Co. 29 Conn. 390; Taber v. Hutson, 5 Ind. 322; Cox v. Vunderklad, 21 Ind. 164; Fairchild v. California Stage Co. 13 Cal. 599; Illinois, etc. R. R. Co. v. Barron, 5 Wall. 90; Hamilton v. Third Ave. R. R. Co. 53 N. Y. 25; Baltimore, etc. R. R. Co. v. Blocher, 27 Md. 277; Nones v. Northouse, 46 Vt. 587; 2 Greenlf. Ev. § 267.

[1] Seger v. Barkhamsted, supra; McKinley v. C. & N. W. R. R. Co. supra.

[2] Id.

[3] Craker v. C. & N. W. R'y Co. 36 Wis. 657.

nature of things, they are so blended together they cannot be separated or distinguished. The attempt, therefore, to draw a line or make a distinction between the two, and to assign one to the class of exemplary, and the other to compensatory, is futile. The distinction is too fine to serve any practical purpose in the determination of causes by courts and juries.[1]

The damages recoverable for bodily pain and suffering are not limited to that which is past, where the proof renders it reasonably certain that the injured party must suffer in the future. In estimating the pecuniary loss in such cases, all the consequences of the injury, future as well as past, are to be taken into consideration, including bodily pain which is shown by the proof to be reasonably certain will necessarily result from the injury.[2] Such injured party is entitled to recover one compensation for all his injuries, past and prospective; these are presumed to embrace indemnity for actual nursing and medical expenses, also loss of time, or loss from inability to perform ordinary labor, or capacity to earn money; he is to have a reasonable satisfaction for loss of both bodily and mental powers.[3]

Evidence of the loss sustained by the plaintiff in his business in consequence of the injury received, is proper, not as furnishing the measure of damages, but to aid the jury in estimating them; and for this purpose the nature of the plaintiff's business, its extent, and the importance of his personal oversight and superintendence in conducting it, may be shown.[4] The jury are to

[1] McKinley v. C. & N. W. R'y Co. supra; Smith v. Pittsburgh, etc. R. R. Co. 23 Ohio St. 10; Hamilton v. Third Avenue R. R. Co. 53 N. Y. 25; Quigley v. C. P. R. R. Co. 11 Nev. 350, 370.

[2] Curtiss v. Rochester, etc. R. R. Co. 18 N. Y. 534; Memphis, etc. R. R. Co. v. Whitfield, 44 Miss. 466; Caldwell v. Murphy, 1 Duer, 233; 11 N. Y. 416; Klein v. Jewett, 26 N. J. Eq. 474; Matteson v. N. Y. etc. R. R. Co. 62 Barb. 364; Fink v. Schroyer, 18 Ill. 416; Black v. Carrollton R. R. Co. 10 La. Ann. 33; Holyoke v. Grand Trunk R. R. 48 N. H. 541; Filer v. N. Y. Cent. R. R. Co. 49 N. Y. 42; Drew v. Sixth Avenue R. Co. 26 N. Y. 49; Aaron v. Second Avenue R. Co. 2 Daly, 127.

[3] Id.; Donaldson v. Mississippi, etc. R. R. Co. 18 Iowa, 280; Walker v. Erie R. R. Co. 63 Barb. 260; Penn. R. R. Co. v. Books, 57 Pa. St. 339.

[4] Lincoln v. Saratoga, etc. R. R. Co. 23 Wend. 425; Hurt v. Southern R. R. Co. 40 Miss. 391; The Oriflamme, 3 Sawyer, 397; New Jersey Exp. Co. v. Nichols, 33 N. J. L. 437; Taylor v. Dustin, 43 N. H. 493.

consider what, before the injury, was the health and physical and mental ability of the plaintiff to maintain his family or to earn money, as compared with his condition in these particulars afterwards, and up to the institution of the suit, in consequence of the injury complained of, and how far it is permanent in its results, as well as the physical and mental suffering he has endured, and will endure, from such injury as a cause, and should allow such damages as, in their judgment, will fairly compensate the plaintiff therefor.[1]

[1] Stockton v. Frey, 4 Gill, 406; Curtiss v. Rochester, etc. R. R. Co. 20 Barb. 282; Kinney v. Crocker, 18 Wis. 74; Ripon v. Bittel, 30 Wis. 614; Penn. & Ohio Canal Co. v. Graham, 63 Pa. St. 290; McLaughton v. Corry, 77 Pa. St. 109; Indianapolis v. Gaston, 58 Ind. 224; Shear. & Redf. on Neg. § 606. See Joch v. Dankwardt, 85 Ill. 331.

In Caldwell v. Murphy, 11 N. Y. 416, the plaintiff brought an action against a carrier of passengers for injuries received in consequence of a negligent upsetting of a stage or omnibus. The plaintiff was proved to have been considerably injured by the upsetting of the stage, but whether he was permanently disabled or not, was a matter earnestly litigated. To show that he continued to suffer from the effects of the injury down to the time of the trial, the plaintiff proved that he was a ship carpenter, and that he had not been able to work constantly more than a few weeks after the injury occurred. On cross-examination, the defendant raised the question whether his being without work was not occasioned by his not attempting to procure employment. The witness was made to answer, that he was never present when the plaintiff applied for work, and that what he knew about his inability to labor was founded principally on what the plaintiff had told him. After several other questions by the counsel and the court, the object of which was to ascertain whether he was voluntarily idle, whether his being without work was on account of his not being able to get employment at his trade, or whether it was, as the plaintiff contended, on account of his inability to labor, by reason of his injuries, the plaintiff's counsel put this question: "Had he the means of support for himself and family, except his labor?" It was objected to. The objection being overruled, he answered: "He had no means of support except what he got from the charity of his friends." The defendant's view of the matter was still pressed by a further cross-examination of the same witness, and then the judge put some questions to ascertain the number of persons in the plaintiff's family, and in what manner they were supported after the injury, it having been shown that before that he had constant employment. It was held on appeal that this evidence was admissible. Denio, J., said: "I think the evidence was admissible to show that the plaintiff's circumstances were such that he would probably have been engaged in laboring in his calling if he had not been disabled by his injuries, and that he was in a considerable degree

In a case which came before the supreme court of the United States,[1] the declaration charged that the plaintiff was wounded on the head by a blow from a piece of iron that had been broken off the boat on which he was a passenger, in a collision, and thrown against him. That in consequence of the wound, his brain was affected and injured, so that his understanding was impaired; that for some time he was insensible, and his life dispaired of; and before his recovery he suffered much mental and bodily pain; that he was detained in New York at a distance from his home, and subjected to much expense about his care, support and maintenance, and had been hindered and prevented for a long period from transacting and attending to his necessary and lawful affairs by him during all that time to be performed and transacted; and lost and was deprived of great gains, profits and advantages, which he might and otherwise would have derived and acquired. Under this general declaration, the question decided was whether the plaintiff was entitled to prove that before, and up to the time of the alleged injury, the particular business in which he was engaged was that of a distiller and manufacturer of turpentine, and that he was largely and extensively engaged in that business; and by the physician who attended him in New York, that when the plaintiff after his convalescence left New York to return to North Carolina, he could not safely attend to any business or occupation. The evidence was held admissible. Campbell, J., delivering the opinion of the court, thus cautiously remarks upon the proof so offered: "The precise object for which this evidence was adduced is not stated in the certificate of the judges; but if the evidence tends to support any issue between the parties, or has a direct connection with other evidence competent to maintain the averments of the declaration, either to illustrate its meaning, or to ascertain its probative effect, it can-

unable to labor. Had he been a person of pecuniary means, his being out of employment would have been slight if any evidence of disability; but having a family dependent upon him, and being without means of support except his labor and the charity of his friends, his omission to employ himself, in connection with the other evidence of his injuries, had a bearing upon the extent to which he had been disabled by the occurrence in question."

[1] Wade v. Leroy, 20 How. 34.

not be rejected as impertinent, or as founded upon matter that does not appear in the pleadings in the cause. The evidence objected to conduces to prove that the plaintiff was seriously injured; that he had been confined in New York, at a distance from his home, and had incurred expense in consequence. That, before that time, he had been concerned in conducting a business that required a degree of mental and bodily vigor, and that his time was of some pecuniary value; or, that he had suffered a loss of some profit; and that after some detention in New York, he had returned to his home in an infirm condition — so infirm that his medical attendant and adviser deemed him incapable of pursuing any ordinary business or occupation, and had advised him to abstain from personal exertion. This evidence would certainly assist the jury to determine that the plaintiff had sustained an injury of no slight character — an injury to his person, and which was followed by expense, suffering and loss of time, which had for him a pecuniary value. These were the direct and necessary consequences of the injury, and sustained strictly and almost exclusively as an effect from it. This evidence may have an application without any inquiry into any remote or contingent consequences, which could not have been foreseen, or which were peculiar to the circumstances or condition of the plaintiff. The record does not inform us that the evidence was designed to aid in such irrelevant inquiries." [1]

In a subsequent case in Massachusetts where the declaration alleged the plaintiff's business, and his impaired capacity, after the injury, to pursue it, the court held that the plaintiff might introduce evidence to show the kind and amount of physical and mental labor which he was accustomed to do before receiving the injury, as compared with that which he was able to do afterwards, for the purpose of aiding the jury to determine the compensation he should receive for his loss of mental and physical capacity.[2] The declaration alleged that by defendant's act in question, he was hurt, and being before able to earn

[1] It was insisted that damages for the injury to the particular business of the plaintiff were special, and therefore the business and the fact of the loss should be particularly set forth in the declaration. See Laing v. Colder, 8 Pa. St. 497.

[2] Ballou v. Farnum, 11 Allen, 73.

large sums by his business, was rendered unable to labor in and conduct his business, and deprived of the earnings which he would otherwise have made. He had been allowed to show on the trial, in order to prove his bodily and mental capacity before the accident, and the extent of his injury, that before the accident he owned and carried on a large mill for the manufacture of fancy cassimeres; used to select the patterns and colors, which required constant attention and thought; bought part of the stock, hired the workmen and agreed with them for their wages; superintended the putting in of machinery; conducted an extensive correspondence, and twice a year took an account of stock; and that since the accident he had been able to do very little that required mental application or physical labor. It was contended for the defendant that the law makes no distinction between men; that evidence of the plaintiff's wealth in owning and carrying on a large mill afforded no evidence of the amount of damages sustained. Evidence that he was skilled in his occupation, and able to perform a large amount of work therein, does not prove any special damages therein, without evidence that his occupation was profitable; that damages estimated upon the ground of loss of peculiar skill and business capacity must in their nature be conjectural and uncertain; that if different passengers are entitled to different amounts of damages for similar injuries, railroad companies must charge a higher rate of fare for those whose occupation or capacity will entitle them to heavy damages. Colt, J., said: "In general, the profits of a future business are indeed too remote and uncertain to be relied on as an element in the estimate of damages. It does not follow that superior education, experience or ability in the management of business, insures pecuniary success. The uncertainty of the continuance of health and life, with the taste and disposition for such pursuits, and especially the proverbial uncertainty of trade, preclude the making of any estimate which can have weight beyond the merest conjecture. If this evidence had been offered by the plaintiff with a view of increasing the damages on account of his wealth, or peculiar skill as a manufacturer, or the large profits he would be able to realize in his future business, and it had been admitted for that purpose, the argument of the defendant would be entitled to

further consideration. But it was offered to show the extent of the personal injury by reason of the loss of mental vigor and endurance thereby occasioned. The diminution, whatever it was, could only be shown by evidence of strength before the weakness, afterwards as manifested in the ordinary pursuits of the plaintiff. The presiding judge admitted it only for this restricted purpose, and carefully instructed the jury that it was admissible to enable them to judge of the injury to his capacity, and that the action was for an injury to the man, and not for interfering with his business.[1] In all actions of this description, and particularly in those in which damages for mental suffering or loss of mental capacity are sought to be recovered, the difficulty of furnishing by evidence the means of measuring the extent of the injury, so that the jury may be able to award with any certainty a pecuniary equivalent therefor, is at once apparent; and in this difficulty, the defendants find arguments for the support of their objection. But the answer is, that the law does not refuse to take notice of such injury on account of the difficulty of ascertaining its degree. In a variety of actions founded on personal torts, and in many where no positive bodily harm has been inflicted, the plaintiff is permitted to recover for injury to the feelings and affections, for mental anxiety, personal insult, and that wounded sensibility which follows the invasion of a large class of personal rights. The impossibility, in all such cases, of precisely appreciating in money mental suffering of this description, is certainly as great as is suggested, as where the question is what shall be allowed for a permanent injury to mental capacity.

"The compensation for personal injury occasioned by the neg-

[1] In Kinney v. Crocker, 18 Wis. 74, the plaintiff was allowed to give evidence of the character and extent of his business, and of the effect of his inability to attend to it by reason of the injury; and not only was this held proper, but also this instruction to the jury, that "he would be entitled to recover, in addition to other damages sustained, for all damages to his legitimate business, but not for speculations that he might be engaged in; but that if a man had an ordinary business, yielding ordinary receipts, he would be entitled to recover the diminution of these receipts resulting from his inability to attend to his business, occasioned by the injury." Nebraska City v. Campbell, 2 Black, 590; Indianapolis v. Gaston, 58 Ind. 224.

ligence or misconduct of others, which the law promises, is indemnity, so far as it may be afforded in money, for the loss and damage which the man has suffered as a man. Some of its elements may be bodily pain, mutilation, loss of time and outlay of money; but of the more important consideration oftentimes is the mental suffering and loss of capacity which ensues. Of these several items of injury, if compensation is to be confined to those capable of accurate estimate, it will include but a small part, and must exclude all those injuries commonly regarded as purely physical; for the difficulty in ascertaining a pecuniary equivalent for the last named is precisely the same and quite as great as any that have been suggested. In fact, it will be found impossible to fix a limit to injuries of a physical nature so as to exclude from consideration their effect on the mental organization of the sufferer. The intimate union of the mental and physical, the mutual dependence of each organization,— if, indeed, for any practical purpose, in this regard, they can be considered as distinct — the direct and mysterious sympathy whenever the sound and healthy condition of either is disturbed, render useless any attempt to separate them for the purpose indicated. It is obvious, upon a moment's reflection, that the powers and usefulness of the limbs and senses in ministering to the necessities and pleasures of the individual are in a great extent to be measured by the knowledge, experience and taste which he possesses, and which are purely qualities of the mind. Take the case of an injury to the right arm of a skilful painter or musician, for example. To show the extent of his injury, the plaintiff produces evidence of the use he was able to make of the arm before and after the accident. From such evidence alone could the jury judge of the plaintiff's loss. Such proof is constantly resorted to without objection in those cases. And still the chief value of the limb to its possessor consists in its skilful use, as controlled and directed by the cultivated taste and education of the plaintiff; and the chief loss to him is the loss of the power to make these purely intellectual endowments available for his pleasure or benefit. Or suppose the injury be to one of the five senses. Can any rule be adopted which shall limit the damages to that portion of the injury which may be called only bodily? There is a class of injuries, especially those

which affect the brain and nervous system, to which this case seems to have belonged, where, by common observation, the most satisfactory symptom and proof of the physical injury is to be found in the weakness and derangement of the intellectual faculties. Upon the whole, then, upon principle we can see no error in the admission of the evidence, with the accompanying instructions. In the main it must always be left to the discretion of the jury to give such reasonable damages in those cases as in their opinion will afford compensation for the entire injury which the plaintiff proves he has sustained, subject to that power which remains in the court to set aside the verdict in those cases where the damages awarded are so excessive as to warrant the inference that some passion or prejudice or other improper considerations influenced them."[1] If there be a loss of employment, a provable loss in business, or any other special loss resulting from the injury, although it occur in consequence of the peculiar circumstances in which the injured party is placed at the time, it may be taken into consideration in the estimate of damages, if specially claimed in the declaration.[2]

[1] Ransom v. N. Y. & E. R. R. Co. 15 N. Y. 415; Collins v. Council Bluffs, 32 Iowa, 324; Russ v. Steamboat War Eagle, 14 Iowa, 363; Laing v. Colder, 8 Pa. St. 497; Pa. R. R. Co. v. Books, 57 Pa. St. 339; McKinley v. C. & N. W. R. R. Co. 44 Iowa, 314; Whalen v. St. Louis, etc. R. R. Co. 60 Mo. 323; Pittsburgh, etc. R. R. Co. v. Andrews, 39 Md. 329.

[2] Laing v. Colder, 8 Pa. St. 497; Walker v. Erie R'y Company, 63 Barb. 260; Caldwell v. Murphy, 11 N. Y. 416; Chicago v. O'Brennan, 65 Ill. 160; Kinney v. Crocker, 18 Wis. 74; Hunter v. Stewart, 47 Me. 419. In this case there is an implication that an unmarried female might recover damages on account of her prospect of marriage being impaired by the injury, if declared specially for and proved. The charge was that if the jury should be satisfied that the injury sustained would be lasting, they were at liberty to consider whether the prospects for being well married would not thereby be impaired; and if so, they were at liberty to allow such damages in this respect as they were satisfied would arise from this cause, if any. On exception to this instruction the court said: "Now, the loss of marriage may be of itself a special ground of action. In the present case it was not alleged in the declaration, nor sustained by the proof. It does not necessarily arise from a bodily injury, though it might be consequent thereupon. The defendant had no notice that damages would be claimed for any such cause, and, therefore, could not be prepared to provo or disprove its existence. As damages have been given for a special injury, having no necessary connection with the wrongful acts of the defendant, and

MITIGATIONS OF DAMAGES.— The damages recoverable by the injured party cannot be abated or mitigated by showing that he has received money on account of the injury from an insurance company on an accident policy;[1] nor because he has received gratuitous nursing or medical attendance or benefactions from friends in any form.[2] And it has been held that the value of gratuitous nursing may be allowed as an item of damage.[3] Where a passenger is injured by the violence of the carrier or his servants, his liability is not subject to mitigation by proof that the injured party was suffering from a disease which aggravated his injuries, and rendered their cure more difficult.[4] But if the plaintiff's action is for expulsion from the carrier's vehicle, any fraudulent conduct on the part of the plaintiff con-

neither set forth in the declaration nor established by the evidence, the exceptions must be sustained."

In The Oriflamme, 3 Sawy. 397, 404, Deady, J., said of the female libellant who had been injured while a passenger on board the vessel: "I find that she is entitled to recover for expenses of her sickness and injury to her clothing, $100; for loss of time and labor on account of the injury, $100; for the expense of employing counsel to maintain this suit to recover the damages to which she is entitled, $300; for the physical and mental pain and suffering caused by the injury and treatment of the libellant while on board the vessel after the accident. $1,000; and for the permanent disfigurement of the libellant's face from the wound on the forehead, $500. It may be that the sum of $500 is an insufficient compensation for such a blemish upon the personal appearance of the libellant. But it does not appear that the scar will affect her personal appearance, so as to make her presence offensive or painful to others. For this reason it is not likely to interfere with or prevent her from obtaining employment in her calling and sphere of life. It will in no way affect her ability to labor and earn her living. In manners and appearance she is a plain girl, moving in an humble walk in life, and not like many others, dependent upon her beauty for her dowry or support.

"Still the scar will be a permanent disfigurement of her person, for which she is entitled to some compensation. Karr v. Parks, 44 Cal. 49. In this country, at least, it is open to every woman, however poor or humble, to obtain a secure and independent position in the community by marriage. In that matter, which is said to be the chief end of her existence, personal appearance, comeliness — is a consideration of comparative importance in the case of every daughter of Eve."

[1] Pittsburgh, etc. R. R. Co. v. Thompson, 56 Ill. 138; Bradburn v. Great Western R'y Co. L. R. 10 Exch. 1.

[2] Indianapolis v. Gaston, 58 Ind. 224; Ohio, etc. R. R. Co. v. Dickerson, 59 Ind. 317.

[3] The D. S. Gregory, 2 Ben. 226.

[4] Brown v. Hannibal, etc. R. R. Co. 66 Mo. 588.

nected with the cause of such expulsion, or the pretext therefor, may be shown as part of the *res gestæ*, and in mitigation of damages.[1] So, his declarations may be given in evidence, tending to show that his object in taking passage on the defendant's cars was to make money by suing the railroad company for demanding more than the statutory rate of fare. An article subsequently to the injury, published by the plaintiff, was held admissible, because it tended to show, as the court remarked, the *quo animo* of the plaintiff, and that the case was not one in which he should recover damages for supposed injury to his "feelings." It tended to show that he entered the car expecting to be ejected, as he was ejected, and for the purpose of making money out of the transaction. So far as injury to "feelings" is concerned, it tended to show that it was a fair case for the application of the maxim that to the willing mind there is no injury.[2]

EXEMPLARY DAMAGES.—A carrier's conduct may be so culpable in causing the injury or in connection with it, as to subject him to exemplary damages, as a punishment to him and as an example to others.[3] To justify such damages, however, there must be fraud, malice, oppression, insult, or other wilful misconduct, or that entire want of care which would raise the presumption of conscious indifference to consequences.[4]

Private business corporations may be sued in trespass for the

[1] Terra Haute, etc. R. R. Co. v. Vanatta, 21 Ill. 188.

[2] Cincinnati, etc. R. R. Co. v. Cole, 29 Ohio St. 126.

[3] New Orleans, etc. R. R. Co. v. Hurst, 36 Miss. 660; New Orleans, etc. R. R. Co. v. Statham, 42 Miss. 607; Caldwell v. New J. Steamboat Co. 47 N. Y. 282; Graham v. Pacific R. R. Co. 66 Mo. 536; Penn. R. R. Co. v. Books, 57 Pa. St. 339; Goddard v. Grand Trunk R. R. Co. 57 Me. 217; Quigley v. C. P. R. R. Co. 11 Nev. 350.

[4] Milwaukee, etc. R. R. Co. v. Arms, 91 U. S. 489; Doss v. Missouri, etc. R. R. Co. 59 Mo. 27; McKeon v. Citizens' R. R. Co. 42 Mo. 79; Kentucky, etc. R. R. Co. v. Dills, 4 Barb. 593; Western Union Tel. Co. v. Eyser, 91 U. S. 495, note; Thompson v. New Orleans, etc. R. R. Co. 50 Miss. 315; Caldwell v. N. J. Steamboat Co. 47 N. Y. 282; Hamilton v. Third Ave. R. Co. 53 N. Y. 25; Du Laurans v. St. Paul R. R. Co. 15 Minn. 49; Pullman, etc. Co. v. Reed, 75 Ill. 125; Toledo, etc. R. R. Co. v. Patterson, 63 Ill. 304; Paine v. Chicago, etc. R. R. Co. 45 Iowa, 569; Seymour v. Chicago, etc. R. R. Co. 3 Biss. 43; Pittsburgh, etc. R. R. Co. v. Slusser, 19 Ohio St. 157.

authorized acts of their servants; and if a trespass or other wrong is committed by their authority, with circumstances of violence and outrage, such as would authorize exemplary damages against a natural person, it is now settled that the same rule would apply to such a corporation. If a corporation, like a railroad company, is guilty of an act or default, such as in the case of an individual would subject him to exemplary damages, they would be equally liable to such damages.[1] Where the servants of a corporation, engaged in the carriage of passengers, are guilty of such acts or conduct in the performance of their duties in the transportation of the injured party as a passenger, as would subject them to damages of this nature, there are authorities which hold the corporation is also liable to punitive damages, without proof that they directed or ratified such acts or conduct.[2] As the corporation can only act through natural persons, its officers and servants, and as it of necessity commits its trains or vehicles absolutely to the charge of persons of its own appointment, passengers of necessity commit to them their safety and comfort *in transitu*, the whole power and authority of the corporation, *pro hac vice*, is vested in such employés; and as to such passengers, they are the corporation.[3]

[1] Hopkins v. Atlantic, etc. R. R. Co. 36 N. H. 9; Pittsburgh, etc. R. R. Co. v. Slusser, 19 Ohio St. 157; Atlantic, etc. R. R. Co. v. Dunn, 19 Ohio St. 162; Graham v. Pacific R. R. Co. 66 Mo. 536; New Orleans, etc. R. R. Co. v. Bailey, 40 Miss. 395; New Orleans, etc. R. R. Co. v. Hurst, 36 Miss. 660; Vicksburgh, etc. R. R. Co. v. Patton, 31 Miss. 156; Illinois, etc. R. R. Co. v. Hammer, 72 Ill. 353; Hamilton v. Third Ave. R. R. Co. 53 N. Y. 25; Cleghorn v. New York, etc. R. R. Co. 56 N. Y. 44; Western Union Tel. Co. v. Eyser, 2 Col. 141.

[2] Mr. Thompson, in his work on Carriers of Passengers, says the rule which is in accord with reason and the weight of authority is that passenger carriers, although corporations, may be liable, in a proper case, in exemplary damages for injuries to passengers carried by their agents without direct authorization or subsequent ratification of the act complained of (p. 575). Atlantic, etc. R. R. Co. v. Dunn, 19 Ohio St. 162; New Orleans, etc. R. R. Co. v. Bailey, 40 Miss. 453; Quigley v. C. P. R. R. Co. 11 Nev. 350; Goddard v. Grand Trunk R. R. Co. 57 Me. 202; Hopkins v. Atlantic, etc. R. R. Co. 36 N. H. 9; Sherley v. Billings, 8 Bush, 147; Milwaukee, etc. R. R. Co. v. Arms, 91 U. S. 489; Baltimore, etc. R. R. Co. v. Blocher, 27 Md. 277. See Redf. on R. 231, note.

[3] Bass v. Chicago, etc. R. R. Co. 36 Wis. 450. In Goddard v. Grand Trunk R. R. Co. supra, Walton, J., said: "But it is said that if the doctrine of exemplary damages must be regarded as established in suits against natural persons for

It cannot be denied that this view is based upon considerations of great weight, and is supported by respectable, and probably by a preponderance of, authority. The old doctrine was that a master is not liable for a wilful or malicious tres-

their own wilful and malicious torts, it ought not to be applied to corporations for the torts of their servants, especially where the tort is committed by a servant of so low a grade as a brakeman on a railway train, and the tortious act was not directly nor impliedly authorized nor ratified by the corporation; and several cases are cited by the defendants' counsel, in which the courts seem to have taken this view of the law; but we have carefully examined these cases, and in none of them was there any evidence that the servant acted wantonly or maliciously; they are simply cases of mistaken duty; and what these same courts would have done if a case of such gross and outrageous insult had been before them, as is now before us, it is impossible to say; and long experience has shown that nothing is more dangerous than to rely upon the abstract reasoning of courts, when the cases before them did not call for the application of the doctrines which their reasoning is intended to establish.

"We have given to this objection much consideration, as it was our duty to do, for the presiding judge declined to instruct the jury that if the acts and words of the defendants' servant were not directly or impliedly authorized nor ratified by the defendant, the plaintiff could not recover exemplary damages. We confess that it seems to us that there is no class of cases where the doctrine of exemplary damages can be more beneficially applied than to railroad corporations in their capacity of common carriers of passengers; and it might as well not be applied to them at all, as to limit its application to cases where the servant is directly or impliedly commanded by the corporation to maltreat and insult a passenger, or to cases where such an act is directly or impliedly ratified; for no such cases will ever occur. A corporation is an imaginary being. It has no mind but the mind of its servants; it has no voice but the voice of its servants; and it has no hands with which to act but the hands of its servants. All its schemes of mischief, as well as its schemes of public enterprise, are conceived by human minds and executed by human hands; and these minds and hands are its servants' minds and hands. All attempts, therefore, to distinguish between the guilt of the servant and the guilt of the corporation, or the punishment of the servant and the punishment of the corporation, is sheer nonsense; and only tends to confuse the mind and confound the judgment. Neither guilt, malice nor suffering is predicable of this ideal existence, called a corporation; and yet, under cover of its name and authority, there is in fact as much wickedness, and as much deserving punishment, as can be found anywhere else. And since these ideal existences can neither be hung, imprisoned, whipped or put in the stocks — since in fact no corrective influence can be brought to bear upon them, except that of pecuniary loss — it does seem to us that the doctrine of

pass of his servant;[1] if the servant be guilty of anything which is not a mere want of skill or want of care, the master was

exemplary damages is more beneficial in its application to them than in its application to natural persons. If those who are in the habit of thinking that it is a terrible hardship to punish an innocent corporation for the wickedness of its agents and servants, will for a moment reflect upon the absurdity of their own thoughts, their anxiety will be cured. Careful engineers can be selected who will not run their trains into open draws; and careful baggagemen can be secured who will not handle and smash trunks and handboxes as is now the universal custom; and conductors and brakemen can be had who will not assault and insult passengers; and if the courts will only let the verdicts of upright and intelligent juries alone, and let the doctrine of exemplary damages have its legitimate influence, we predict the great and growing evils will be very much lessened, if not entirely cured. There is but one vulnerable point about these ideal existences, called corporations, and that is the pocket of the monied power that is concealed behind them; and if that is reached, they will wince. When it is thoroughly understood that it is not profitable to employ careless and indifferent agents, or reckless and insolent servants, better men will take their place, and not before.

. . .

"But the defendants say that the damages awarded by the jury are excessive, and they move to have the verdict set aside and a new trial granted for that reason. That the verdict in this case is highly punitive, and was so designed by the jury, cannot be doubted; but by whose judgment is it to be measured to determine whether or not it is excessive? What standard shall be used? It is a case of wanton insult and injury to the plaintiff's character, and feelings of self respect, and the damages can be measured by no property standard. It is a case where the judgment will be very much influenced by the estimation in which character, self respect and freedom from insult are held. To those who set a very low value on character, and think that pride and self respect exist only to become objects of ridicule and sport, the damages will undoubtedly be considered excessive. . . .

"A careful examination of the case fails to satisfy us that the jury acted dishonestly, or that they made any mistake in the application of the doctrine of exemplary damages. We have no doubt that the highly penal character of their verdict is owing to the fact that, after Jackson's misconduct was known to the defendants, they still retained him in their service. The jury undoubtedly felt that it was due to the plaintiff, and due to every other traveler upon the road, to have him instantly discharged; and that to retain him in his place, and thus shield and protect him against the protestation of the plaintiff, made to the servant himself at the time of the assault, that he would lose his place, was a practical ratification and approval of the servant's conduct, and would be so understood by him and every other servant on the road."

[1] Wright v. Wilcox, 19 Wend. 343.

held not responsible,[1] unless the act was done by his command; that is, unless the particular act was ordered to be done by the principal, or some act which comprised it.[2] In some early cases this rule exonerated the master where the tortious act of the servant was very closely connected with his legitimate duties. In an English case,[3] where the servant in charge of and driving his master's chaise wilfully collided with another chaise, it was held the act of the servant, and not of the master. Lord Kenyon, adopting the words of Holt, C. J., in a previous case, said: "No master is chargeable with the acts of his servant but when he acts in the execution of the authority given him;" and added, that when a servant quits sight of the object for which he is employed, and, without having in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and, according to the doctrine of Lord Holt, his master will not be answerable for the act." The principle is sound, but the application is not in harmony with the rulings in later cases.[4] It has been followed in some cases in New York.[5] In a case decided in 1857,[6] on the assumption that the conductor had wrongfully ejected the plaintiff, a passenger, from the defendant's cars, on some punctilio relating to the plaintiff refusing to show a ticket or pay his fare, the trial court refused to instruct the jury that the defendant was not liable for the injuries which the plaintiff might have sustained in consequence of the assault in question by their agents and servants, and did charge "that if, in pursuance of the defendant's orders and instructions, the plaintiff was wrongfully ejected from the cars, and was wantonly treated by the conductor or agents of the defendant in so ejecting him,

[1] Seymour v. Greenwood, 6 H. & N. 363, 364.

[2] Sharrod v. London, etc. R'y Co. 4 Exch. 580, 585; Morley v. Gaisford, 2 H. Black, 442.

[3] McManus v. Crickett, 1 East, 106.

[4] Seymour v. Greenwood, 7 H. & N. 355; Huzzey v. Field, 2 Cromp. M. & R. 432, 440; Eastern, etc. R'y Co. v. Brown, 6 Exch. 314. In Seymour v. Greenwood, 6 H. & N. 364, Pollock, C. B., said: "At the time of the decision of Scott v. Shepherd, 2 W. Black, 892, and McManus v. Crickett, 1 East, 106, the subject had not been so thoroughly considered as it since has been."

[5] Wright v. Wilcox, 19 Wend. 343; Richmond Turnpike Co. v. Vanderbilt, 1 Hill, 480; S. C. 2 Comst. 479.

[6] Hibbard v. New Y. & E. R'y Co. 15 N. Y. 455.

the defendant is liable for the injuries resulting from such ejection," including in their discretion compensation for the "personal ill treatment to which the plaintiff had been subjected in ejecting him." This refusal to charge and this instruction were held erroneous. Brown, J., said: "The object of the request was that the court should discriminate between those acts of the company's agents done in the execution of its directions and those done in excess of its instructions, and without authority or approbation. This, I think, should have been done. The plaintiff may have been injured by the use of unnecessary force to effect what the company had a right to do. The conductor and those who aided him are not the company. They are its agents and servants, and whatever tortious acts they commit by its direction they are responsible for and no other. This is upon the principle that what one does by another he does by himself. But for the wilful acts of the servant the master is not responsible, because such wilful acts are a departure from the master's business.[1] In removing a passenger from the cars, who refuses to pay his fare or exhibit his ticket, the servants of the company are limited to the use of so much force as may effect that object and no more. They are not to resort to force at all, until it becomes absolutely necessary, by refusal of a passenger to depart upon request; and when they do resort to it, they are to use no more than becomes sufficient, and they are to do no unnecessary injury to the party. This is the extent of their authority, and if they exceed it, they, and not the company, are responsible for the consequences."[2]

[1] Wright v. Wilcox, 19 Wend. 343.

[2] In this case Comstock, J., said: "If the plaintiff had forfeited his right to be carried as a passenger, by refusing to show his ticket when requested to do so by the conductor, and if the right was not restored by subsequently complying, then his expulsion was lawful, and he has nothing to complain of, unless greater force and violence were used than his own resistance rendered necessary. The verdict of the jury was for a wrongful expulsion and not for an excess of force

"If, on the other hand, the conductor had no right to eject the plaintiff from the train after he had complied with the request and produced the ticket, then I do not see on what principle the defendant can be made liable for the wrong. The regulation, and instructions to the conductor, as we have said, were lawful, and they did not, in their terms or construction, profess to justify the trespass and eviction. The result is, that the wrong was done without any authority, and therefore that those who actually

This strictness has been very much relaxed by later cases. In a case decided in 1871, it was held, in the court of appeals, that where a conductor on a railroad, under a mistake of facts, or of judgment, ejected a person from the car in which he was a passenger, the act not being justified by any misconduct of the passenger, the company was liable; and so if there was justifiable cause for ejection, but excessive force was used. There was no evidence of wanton violence or malice, and the effect of such elements in a case was not decided. The court say: "It is sufficient to make the master responsible *civiliter*, if the wrongful act of the servant was committed in the business of the master, and within the scope of his employment, and this, although the servant, in doing it, departed from the instructions of his master. This rule is founded upon public policy and convenience. Every person is bound to use due care in the conduct of his business. If the business is committed to an agent or servant, the obligation is not changed. The omission of such care by the latter is the omission of the principal, and, for injury resulting therefrom to others, the principal is justly held liable. If he employs incompetent or untrustworthy agents, it is his fault; and whether the injury to third persons is caused by the negligence or positive misfeasance of the agent,

did it are alone answerable. The judge was requested to charge the jury that the plaintiff, if entitled to recover at all, could only recover such damages as he had sustained in consequence of the defendant's not performing its contract to carry him to Scio, to wit, damages to his business. The judge refused so to charge, but did charge that the plaintiff could recover, if at all, for personal ill treatment; in other words, for the unlawful assault and battery. It seems to me that the request was essentially right, and that the refusal and charge were erroneous. The request was made and the charge given upon the theory that the plaintiff's expulsion was unlawful. But if unlawful, then the company had not authorized it. There was, no doubt, an implied contract to carry the plaintiff to the place for which he had bought his ticket, and that contract was broken. The defendant, being bound to carry him to Scio, might be liable for the breach of the engagement, even if the plaintiff had been expelled by another passenger. The defendant was bound even to prevent an unlawful expulsion and to carry the passenger through. But this is a liability entirely different from the one enforced at the trial. The conductor, according to the plaintiff's own showing, without authority from his principal, assaulted and expelled him from the train; and, under the charge given to them, the jury rendered their verdict for the personal wrong and outrage. This, I think, is contrary to the law of the case."

the maxim *respondeat superior* applies, provided only that the agent was acting at the time for the principal, and within the scope of the business intrusted to him."[1] Such is the established doctrine. As a general rule, the master is liable for what his servant does in the course of his employment; but in regard to matters wholly disconnected from the service to be rendered, the master is under no responsibility for what the servant does or neglects to do. The reason is, that in respect to such matters he is not a servant.[2]

The fact that the injurious act of the agent or servant in the course of his employment was wanton and malicious will not excuse the master,[3] nor will the master be exonerated, though the act was committed in violation of his instructions,[4] but any element of wanton violence or malice will aggravate the damages.[5]

The liability of masters or employers, thus recognized and exemplified, for the negligence and misfeasances of their servants, augmented in cases where the injury has been aggravated by malice, or insult, or excessive violence, and to which such employer was privy only by his relation of employer to the guilty actor, is founded on the legal unity and identity of employer and employé in respect to all that is done by the latter within the sphere of his employment. There are considerations of public policy to support it; the wrongs done by the servant are imputed to the master, and there is an assumption of actual culpability on his part. But in some of the states exemplary damages are not allowed against a carrier of passengers for the act of the servant without some proof of previous direction, of participation, or subsequent ratification. Thus, in Wisconsin, it was ruled in a late case, that although a principal is liable to

[1] Higgins v. Watervliet F. Co. 46 N. Y. 23. See Sandford v. Eighth Avenue R. R. Co. 23 N. Y. 343; Weed v. Panama R. R. Co. 17 N. Y. 362; Hamilton v. Third Avenue R. R. Co. 53 N. Y. 25; Rounds v. Delaware, etc. R. R. Co. 64 N. Y. 129; Cohen v. Dry Dock, etc. Co. 69 N. Y. 170.

[2] Bryant v. Rich, 106 Mass. 180; Aldrich v. Boston, etc. R. R. Co. 100 Mass. 31; Philadelphia, etc. R. R. Co. v. Quigley, 21 How. U. S. 202; Moore v. Fitchburg R. R. Co. 4 Gray, 465.

[3] Weed v. Panama R. R. Co. 17 N. Y. 362.

[4] Philadelphia, etc. R. R. Co. v. Derby, 14 How. U. S. 468.

[5] Hawes v. Knowles, 114 Mass. 518.

full compensatory damages for a malicious injury inflicted by his agent acting within the scope of his employment, yet that he was not liable to punitory damages, unless he directed the injurious act or subsequently adopted or confirmed it; but that retention, by the principal, in his service, of the guilty servant, after notice of his wrongful act, was sufficient evidence of ratification.[1] The law is so held in California [2] and in Rhode Island.[3] So in New York it has been ruled that "for injuries by the negligence of a servant, while engaged in the business of the master, within the scope of his employment, the latter is liable for compensatory damages; but for such negligence, however gross or culpable, he is not liable to punitive damages unless he is himself also chargeable with gross misconduct. Such misconduct may be established by showing that the act of the servant was authorized or ratified, or that the master employed or retained the servant, knowing that he was incompetent, or from bad habits unfit for the position he occupied. Something more than ordinary negligence is requisite; it must be reckless and of a criminal nature, and clearly established. Corporations may incur this liability as well as private persons. If a railroad company, for instance, knowingly and wantonly employs a drunken engineer or switchman, or retains one after knowledge of his habits is clearly brought home to the company, or to a superintending agent authorized to employ and discharge him, and injury occurs by reason of such habits, the company may and ought to be amenable to the severest rule of damages." [4]

In New Jersey it has been held that where a railroad company adopts all rules and regulations needful to the safety of the passengers, and employs competent agents, whose duty it is to see that those rules and regulations are observed, the company, in case of injury to the passengers, happening by reason of the failure of the agent to perform this duty, cannot be held liable for punitive damages. If, however, the company, as

[1] Bass v. Chicago, etc. R. R. Co. 42 Wis. 654; M. & M. R. R. Co. v. Finney, 10 Wis. 388; Craker v. Chicago, etc. R. R. Co. 36 Wis. 676.

[2] Turner v. N. B. & M. R. R. Co. 34 Cal. 594; Wade v. Thayer, 40 Cal. 578; Mendelsohn v. Anaheim L. Co. 40 Cal. 657.

[3] Hagan v. Providence, etc. R. R. Co. 3 R. I. 88.

[4] Cleghorn v. New York, etc. R. R. Co. 56 N. Y. 44.

such, is in fault, a different rule applies. The company, for its own carelessness, may be justly held liable for smart money. This rule does not prevail when the carelessness is that of a subordinate agent. The principle is not admitted that the company is guilty of gross negligence whenever its agent is.[1]

Injury to wife, child or servant.— Where a husband or parent brings the action for the injury sustained by his wife or child, there can be no recovery for suffering either bodily or mental, but only for loss of services or society, and the expenses attending the cure. For these he is entitled to recover.[2]

He can maintain but one action for the same injury to his wife, from a particular act or default. All the damage past, present and prospective proceeding therefrom is from one cause and indivisible. The wrong in such a case is entire and complete at once, though the injurious consequences remain for an indefinite period afterwards. The party liable is guilty of but

[1] Ackerson v. Erie Railway Co. 32 N. J. L. 254. See Perkins v. Missouri, etc. R. R. Co. 55 Mo. 201; Graham v. Pacific R. R. Co. 66 Mo. 536; New Orleans, etc. R. R. Co. v. Allbritton, 38 Miss. 242.

In Great Western Railway Co. v. Miller, 19 Mich. 314, Campbell, J., said: "It was urged on the hearing that the railroad company could not be held liable for any wrongful expulsion under this statute, because it would be the personal wrong of the conductor in violation of law, for which he must be held to have exceeded his known agency. And the same exemption was claimed for them from liability for any expulsion, unless under circumstances where they may be supposed to have authorized it by their instructions, general or special. There is, however, so far as we have seen, no authority which would exempt them from some amount of responsibility for any wrongful expulsiou of a passenger by a conductor. He represents them in the whole management of his train, and the power to do any serious mischief is chiefly derived from their investing him with the control of this large agency. He occupies the same position as the master of a ship, and his action in the case supposed must be regarded as done in the line of his employment. But it does not follow that the responsibility of his employers is the same as his. For those aggravations which may arise out of his wantonness and malice, we have held that the employer is not on the same footing with the agent." Detroit Daily Post Co. v. McArthur, 16 Mich. 447.

[2] Dennis v. Clark, 2 Cush. 347; Klein v. Jewett, 26 N. J. Eq. 474; Cowden v. Wright, 24 Wend. 429; Ransom v. The New Y. & E. R. R. Co. 15 N. Y. 415, 419; Ford v. Monroe, 20 Wend. 210; Mary's Case, 9 Co. 111; Hall v. Hallander, 7 Dowl. & R. 133.

one wrong and can be subjected to but one action for it to one party. The real extent of the injury received and the amount of the damages do not depend on the time when the action is brought or tried. The husband may commence his suit forthwith or delay it for years; in either case the same question would be tried and the same damages recoverable; though, if the trial be delayed, the delay will be likely to afford more satisfactory means of ascertaining the real extent of the wife's injury, and the actual amount of the husband's damages. If the condition of the wife is such at the time of the trial as to disable her for the future, and require further expenses for medical treatment and nursing, the jury may give damages for prospective expenses and loss of society and services.[1] These are general, not special damages, in the sense of those terms as used in the law of pleading and evidence. They are not caused by any incidental fact, or by the peculiar situation and circumstances of the party, but are the natural and uniform effects of the injury itself. And when the injury to the wife is once shown to be of such a nature, the damages to the husband, from the loss of her services and society, and the expenses of her cure, follow uniformly and by legal necessity from the relation of husband and wife, which entitles him to her services and society, and charges him with her support.[2] Where the injury is permanent, or must continue after the trial, prospective damages may be recovered. The jury will be obliged to estimate as well as they can from the condition in which they found the wife at the time of the trial, the whole ultimate loss and damage of the husband, in the same way and on the same principle that they would estimate such damage for a like injury to himself.[3]

In a California case, where an infant child had been wounded by a vicious animal, and had thereby been disfigured or deformed, it was held that the father of the child could recover from the owner of the animal only for such expenses as he had incurred in healing the original wound, and not for any expense incurred in removing the deformity or disfiguration. The injury arising from the permanent deformity would be an item

[1] Hopkins v. The Atlantic, etc. R. R. Co. 36 N. H. 9.
[2] Id.
[3] Id.

properly allowable in the daughter's own claim for damages; but the cost of its removal, after the wound was healed, would be a voluntary expenditure by the father.[1]

In New York, it has been held in an action of trespass by a father for assaulting and beating his son *per quod servitium amisit*, a jury in assessing the damages are not authorized to take into account the wounded feelings of the parents. The court remarked on the difference between such cases and those for seduction where the only remedy for the injury is the action by the parent; whereas in case of an assault and battery the child may also maintain an action against the defendant, in which the measure of redress depends very much upon the sound discretion of the jury, because his personal injury and suffering then constitute the gravamen of the suit.[2] In an earlier case, the same court held in an action on the case for negligence in driving a carriage whereby the son of the plaintiff was run over and killed, that the loss of service of the child, and expense occasioned by the sickness of the plaintiff's wife, caused by the shock to her maternal feelings, were proper items of damage, the same being laid as special damages in the declaration.[3]

Where the injury causes death.— By the common law all right of action for personal injury, whether it be the cause of death or not, is extinguished by the death of the injured party; the cause of action dies with the person entitled to sue.[4] This rule, so far as it applied to an act or neglect which causes death, has been generally abrogated by statute. In England and many of the states the statutes are general, and to the effect that whenever the death of a person shall be caused by such wrongful act, neglect or default, as would, if death had not ensued, have entitled the party injured to maintain an action to recover damages therefor, the guilty party shall be liable to an action for damages notwithstanding the death, and that such action may be brought in the name of personal representatives of the deceased. In other states the statutes are not

[1] Karr v. Parks, 44 Cal. 46.
[2] Cowden v. Wright, 24 Wend. 429.
[3] Ford v. Monroe, 20 Wend. 210.
[4] 1 Saund. 216; Broom's Leg. Max. 400, 401; Zabriskie v. Smith, 13 N. Y. 322.

general, but apply to carriers and where death is caused under particular circumstances.

This legislation does not liquidate damages; there is generally, but not invariably, a maximum limit, not exceeding which the actual damages of a pecuniary nature sustained may be recovered for the particular beneficiaries whom the statutes designate. The statutes do not transfer the right of action which the deceased would have had, but create a new right of action on different principles. The measure of damages is not the loss or suffering of the deceased, but the injury resulting from his death to his family.[1]

It is only for pecuniary injuries that this statutory right of action is given. Although it can be maintained only in cases in which an action could have been brought by the deceased, if he had survived, damages are given on different principles and for different causes. Neither the pain and suffering of the deceased, nor the grief and wounded feelings of his surviving relatives, can be taken into account in the estimate of damages.[2] But as a right of action is given whenever the injured person, had he lived, could have maintained an action, at least nominal damages may be recovered.[3] And the substantial damages recoverable are for injuries of a pecuniary nature sustained by the survivors for whose benefit the action is given. There should be at least a reasonable expectation of benefit from the life of the deceased to warrant such a recovery. While there can be no recovery for loss of society, or wounded feelings, or anything which cannot be measured by money and satisfied by a pecuniary recompense;[4] the word pecuniary is not construed

[1] Blake v. Midland R'y Co. 18 Q. B. 93; Whitford v. Panama R. R. Co. 23 N. Y. 465; Cleveland, etc. R. R. Co. v. Rowan, 66 Pa. St. 393; Telfer v. Northern R. R. Co. 30 N. J. L. 188; Penn. R. R. Co. v. Butler, 57 Pa. St. 335; Taylor v. West Pacific R. R. Co. 45 Cal. 323; Castello v. Landwehr, 28 Wis. 522.

[2] Id.; Ohio, etc. R. R. Co. v. Tindall, 13 Ind. 366; Chicago, etc. R. R. Co. v. Morris, 26 Ill. 400; Chicago, B. & Q. R. R. Co. v. Harwood, 80 Ill. 88; Pym v. Great N. R'y Co. 4 B. & S. 396; Penn. R. R. Co. v. Vandever, 36 Pa. St. 298; Penn. R. R. Co. v. Goodman, 62 Pa. St. 329; Caldwell v. Brown, 53 Pa. St. 453.

[3] Chicago v. Scholten, 75 Ill. 468; Johnston v. Cleveland, etc. R. R. Co. 7 Ohio St. 336. But see Blake v. Midland R'y Co. 18 Q. B. 93.

[4] Telfer v. Northern R. R. Co. supra.

in a strict sense.[1] It will not exclude the loss of nurture, of the intellectual, moral and physical training which a mother only can give to children.[2] Nor is the same certainty of loss required to be established as in ordinary actions. The damages are largely prospective, and their determination committed to the discretion of juries upon very meagre and uncertain data. A parent may recover for loss of expected services of children, not only during minority,[3] at their estimated net value, but afterwards, on evidence justifying a reasonable expectation of pecuniary benefit therefrom.[4]

It is not essential that this expectation of pecuniary benefit from the life of the deceased should be based on a legal or moral obligation on the part of the latter to confer it; but it may be proved by any circumstances which render it probable that such benefit would in fact be realized.[5] The period of such expected benefit may be ascertained, both in respect to its beginning and duration, from proof of the age of the deceased from whom it must have proceeded, as well as from the age of the beneficiary; and to assist the jury in the estimate of the probable duration of life, mortuary tables may be put in evidence.[6]

For the death of a wife a husband should be allowed the value of her services and companionship, estimated in a pecuniary sense.[7] So a wife and children, for the loss of a husband and father, should be allowed such sum as would be equal to the probable earnings of the deceased, taking into consideration

[1] Tilley v. Hudson R. R. R. Co. 44 N. Y. 471; McIntyre v. N. Y. C. R. R. Co. 37 N. Y. 287; Penn. R. R. Co. v. Keller, 67 Pa. St. 300.

[2] Id.

[3] Telfer v. Northern R. R. Co. 30 N. J. L. 188; Duckworth v. Johnson, 4 H. & N. 653; Ewen v. Chicago, etc. R. R. Co. 38 Wis. 613; Potter v. Chicago, etc. R. R. Co. 21 Wis. 372.

[4] North Penn. R. R. Co. v. Kirk, 90 Pa. St. 15; Terry v. Jewett, 17 Hun, 395.

[5] Chicago, etc. R. R. Co. v. Bayfield, 37 Mich. 205; Illinois Cent. R. R. Co. v. Barron, 5 Wall. 90; Grotenkemper v. Harris, 25 Ohio St. 510; Chicago & A. R. R. Co. v. Shannou, 43 Ill. 338; Kesler v. Smith, 66 N. C. 154; Penn. R. R. Co. v. Keller, 67 Pa. St. 300.

[6] Donaldson v. M. & M. R. R. Co. 18 Iowa, 281; David v. Southwestern R. R. Co. 41 Ga. 223; Sawter v. N. Y. etc. R. R. Co. 66 N. Y. 50; Rowley v. London, etc. R'y Co. L. R. 8 Ex. 221; Denver, etc. R. R. Co. v. Woodward, 4 Col. 1.

[7] Penn. R. R. Co. v. Goodman, 62 Pa. St. 329.

his age, health, business capacity, habits and experience, and adding thereto the value of his services in the superintendence, attention to, and care of his family, and the education of his children.[1] Nor can any deduction be made for moneys received on a life insurance policy on his life for the benefit of the wife and children, and paid to them after his death.[2] Nor for any property received from the estate of the deceased by inheritance.[3]

These statutes have no such extra-territorial force that if the injury from which death ensues was done beyond the limits of the state enacting them, the statutory right of action for the damages resulting from such death can be enforced in the courts of that state.[4] The law of the state or country where the action is brought governs only the remedy, and cannot be invoked to create a right, or to make an act tortious, which was not such at the time and place of its commission.[5] A party who has suffered a personal injury or tort in another state or country, and comes here, brings with him his cause of action therefor; and if he finds here the party who committed the injury or tort in such other country or state, can sue him here; but it is presumed that in ordinary cases he can do so only upon the ground that he brought the cause of action with him; that is, that the act or acts of the defendant, by which the injury or wrong was effected, were unlawful when and where committed; in other words, that the injury or tort complained of was an injury or tort by the law of the country or state when and where committed.[6]

In actions brought for injuries committed in another state or country, where the common law is presumed to prevail, the court gives the common law remedies for such injuries, upon the presumption that they will give the injured party the same redress he would obtain if the action had been brought where the injury was done.[7] Where, however, the injury is such that

[1] Baltimore, etc. R. R. Co. v. Wightman, 29 Gratt. 431.
[2] Id.
[3] Terry v. Jewett, 17 Hun, 395.
[4] Whitford v. Panama R. R. Co. 23 N. Y. 465.
[5] Mahler v. Norwich, etc. Co. 45 Barb. 226.
[6] Beach v. Bay State S. B. Co. 30 Barb. 433.
[7] Id.

the common law gives no right of action for it, as is the case with that resulting from death, and a right of action therefor exists by virtue of the statutes in force in the state where the wrongful act or neglect causing the death was committed, it is not a matter of course to allow that right of action to be enforced in the courts of another state. An Ohio case[1] involved the right of a local administrator to enforce a right of action given by a statute of Illinois for damages resulting from a death happening and caused in that state by the alleged wrongful act or neglect of a railroad company. The action did not succeed. The court said: "We take it to be clear that no such right of action existed at common law. It is a right of action given by statute, not to the intestate, but to his personal representatives, not as general assets, but as a trust for the widow and next of kin, in respect to a pecuniary loss they are supposed to have sustained. There are serious difficulties in allowing an Ohio administrator to undertake and discharge such a trust conferred by the laws of another state. It would be difficult to maintain that, without legislation, his oath or bond would extend to such a case. The jurisdiction of the court under which he acts does not extend to trusts to be carried out in pursuance of the laws of other states, for it may well happen that the next of kin, under the law of Illinois, may not be the same persons, or take in the same proportion, as under the law of Ohio. Certainly, to determine who are the *cestui que trusts*, the laws of Illinois must be regarded, and it is therefore the intention of the statutes of that state, that the tribunal under which the personal representative in whom the right of action is vested, and upon whom the trust is imposed, in acting, should administer the trust and distribute the fund among the proper parties. It is more than questionable, whether, if an authority in another state should undertake to do so, it would be regarded as a bar to other proceedings in Illinois."[2]

Similar obstacles to recovery have been recognized in Massachusetts.[3]

[1] Woodard v. Mich. L. & N. I. R. R. Co. 10 Ohio St. 121.

[2] Hover v. Penn. etc. R. R. Co. 25 Ohio St. 667.

[3] Richardson v. New York C. R. R. Co. 98 Mass. 85. Hoar, J., said: "There is great difficulty in ascertaining what cause of action this

But in a decision, at special term of the supreme court in New York, a like action was held on demurrer maintainable, for damages resulting from a death from alleged negligence of the defendant in the state of New Jersey, on the ground that

plaintiff has against the defendants. . . . The plaintiff's counsel . . . have placed their claim to recover upon the ground that the statute of New York vested a right of property in the widow and her children at the moment of the husband's death, and designated a trustee to receive and enforce this right, whose capacity to sue will be sustained in any forum.

"The right of property which the statute defines is of a very peculiar nature. In the first place, the act or default which caused the death must be such as would, if death had not ensued, have entitled the party injured to an action to recover damages in respect thereof. This the statute makes requisite to give the personal representative an action for damages, and it would thus seem that the action was designed to be for the purpose of compensating the injury to the deceased. But we next find that the compensation is not to go to the personal representative of the deceased, to be disposed of as other property or rights of property belonging to the deceased. It is not to be applied in payment of his debts, nor is it subject to the provisions of his will. It is not the injury to the deceased which is to be estimated at all. The whole amount is not to exceed five thousand dollars; and, with that limitation, the jury may give such damages as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person. The damages, therefore, are to be for the pecuniary injuries to the wife and next of kin. But, when the pecuniary interests of the wife and next of kin in the death have been ascertained, the sum recovered on this basis is not to be paid over to these several parties in the proportion to their respective pecuniary interests thus determined or regarded, but is to be distributed to them in the proportion provided by the laws for the distribution of intestate personal property. If we take some one of the next of kin, therefore, it may follow that, because the defendants caused by negligence the death of the plaintiff's intestate, this person may recover by virtue of the statute, through the plaintiff as administratrix, a sum of money which has no relation to the extent of the injury done to the deceased, and no relation to the extent of the injury done to the person who is to receive it. If the jury should deem $3,000 a fair and just compensation for the pecuniary injury resulting to the wife, and $1,000 to one of tho next of kin, and $500 to another, and should be of opinion that there was no pecuniary injury to the others of the next of kin, from the death, they would assess as damages $4,500; and this the plaintiff would be bound to distribute according to the statute of distributions, which makes no reference to the pecuniary interest of the distributees in the death. . . . If we understand that the limitation of the defendant's responsibility to cases in which the deceased

the act of New Jersey was in entire consonance with the policy of the state of New York as declared by similar legislation. And the court deduced from the cases this rule: that causes of action of the kind set forth in the complaint in that case[1] are not recognized by the common law, and that statutes of any particular state giving such rights of action have no extra-territorial jurisdiction; that causes of action of this character, arising under statutes of one state, may be enforced in another state, provided it is made to appear that the maintenance of such causes of action is in conformity with the policy of the state in which the action is brought and are recognized by the laws of that state.[2] A late case arose under the statute of New Jersey,

would have had a right of action, if he had survived, is not intended to make his right of action survive to his representatives, but is only meant to define and describe the cases in which the right of property and of action is recognized in the widow or next of kin, we have still the question to meet, how can that be regarded as anything else than a statute penalty, which the personal representative of the deceased is to recover by an action; which is limited in amount, although that amount may be much less than the extent of the injury sustained by those whose loss is to be computed in estimating it; and which is to be distributed among the parties entitled to receive it, not in proportion to the injuries which they have respectively sustained, but in proportion to the shares to which they would be severally entitled in the distribution of an intestate estate? We do not readily find a satisfactory answer to this question. But a complete and decisive objection to the maintenance of the action by this plaintiff remains.

"The plaintiff is the administratrix appointed under the law of Massachusetts. Her right to sue in this commonwealth, in her representative capacity, is upon causes of action which accrued to her intestate, or which grow out of his rights of property or those of his creditors. The remedy which the statute of New York gives to the personal representatives of the deceased as trustees of a right of property in the widow and next of kin, is not of such a nature that it can be imparted to a Massachusetts executor or administrator, *virtute officii*, so as to give him a right to sue in our courts, and to transmit the right of action from one person to another in connection with the representation of the deceased. The only construction which the statute can receive is, that it confers certain new and peculiar powers upon the personal representative, in New York. The administrator in Massachusetts is in privity with the New York administrator only to the extent which our laws recognize. A succession in the right of action, not existing by the common law, cannot be prescribed by the laws of one state to the tribunals of another."

[1] Stallknecht v. Penn. R. R. Co. 53 How. Pr. 305.

[2] See Needham v. Grand Trunk R'y Co. 38 Vt. 294; McCarthy v C. R. I. etc. R. R. Co. 18 Kan. 46.

upon which an action was brought in the state of New York by an administrator appointed in the latter state.[1] The supreme court of the United States in deciding the case reviewed and dissented from the foregoing decisions in Ohio and Massachusetts. It was held that a personal action, when the remedy given for the demand or injury is statutory, if it is of a transitory nature, may be brought in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties. The demand on the statute under consideration was held to be of this nature. The action, as brought, was held maintainable, and the legal objections found insurmountable in those states are answered by Mr. Justice Miller, who delivered the opinion of the courts, with great cogency of argument.[2]

[1] Dennick v. Central R. R. Co. 103 U. S. 11.

[2] Miller, J., said: "The action in the present case is in the nature of trespass to the person, always held to be transitory, and the venue immaterial, and the local court in New York and the circuit court of the United States for the northern district, were competent to try such a case when the parties were properly before it. See Mostyn v. Fabrigas, 1 Cowp. 161; Rafael v. Verelst, 2 W. Bl. 1055; M'Kenna v. Fisk, 1 How. 242. We do not see how the fact that it was a statutory right can vary the principle. If the defendant was legally liable in New Jersey, he could not escape that liability by going to New York. If the liability to pay money was fixed by the law of the state where the transaction occurred, is it to be said it can be enforced nowhere else because it depended upon statute law and not upon common law? It would be a very dangerous doctrine to establish, that in all cases where the several states have substituted the statute for the common law, the liability can be enforced in no other state but that where the statute was enacted and the transaction occurred. The common law never prevailed in Louisiana, and the rights and remedies of her citizens depend upon her civil code. Can these rights be enforced or the wrongs of her citizens be redressed in no other state of the Union? The contrary has been held in many cases. See Ex parte Van Riper, 20 Wend. 614; Lowry v. Inman, 46 N. Y. 119; Pickering v. Fisk, 6 Vt. 102; R. R. Co. v. Sprayberry, 8 Baxt. 341; R. R. Co. v. Miller, 19 Mich. 305. But it is said that, conceding that the statute of the state of New Jersey established the liability of the defendant and gave a remedy, the right of action is limited to a personal representative appointed in that state and amenable to its jurisdiction. The statute does not say this in terms. 'Every such action shall be brought by and in the name of the personal representatives of such deceased person.' It may be admitted that for the purpose of this case the words 'personal representatives' mean the administrator. The plaintiff is, then, the only personal representative of the deceased in existence, and the construction thus given the statute is, that such a suit shall not be brought by her. This is in

EXCESSIVE VERDICTS.— It is the exclusive province of a jury to decide facts; and to decide causes depending upon controverted facts, applying thereto the law as given to them by the court. In actions for personal injuries, and in cases generally

direct contradiction of the words of the statute. The advocates of this view interpolate into the statute what is not there, by holding that the personal representative must be one residing in the state or appointed by its authority. The statute says the amount recovered shall be for the exclusive benefit of the widow and next of kin. Why not add here also, by construction, 'if they reside in the state of New Jersey?' It is obvious that nothing in the language of the statute requires such a construction. Indeed, by inference it is opposed to it. The first section makes the liability of the corporation or person absolute where death arises from their negligence. Who shall say it depends on the appointment of an administrator within the state? The second section relates to the remedy, and declares who shall receive the damages when recovered. These are the widow and next of kin. Thus far the statute declares under what circumstances a defendant shall be liable for damages, and to whom they shall be paid. In this there is no ambiguity. But fearing there might be a question as to the proper person to sue, the act removes any doubt by designating the personal representative. The plaintiff here is that representative. Why can she not sustain the action? Let it be remembered that this is not a a case of an administrator, appointed in one state, suing in that character in the courts of another state, without any authority from the latter. It is the general rule that this cannot be done. The suit here was brought by the administratrix in a court of the state which had appointed her, and of course no such objection could be made. If, then, the defendant was liable to be sued in the courts of the state of New York on this cause of action, and the suit could only be brought by the personal representative of the deceased, and if the plaintiff is the personal representative of the deceased, whom the courts of that state are bound to recognize, on what principle can her right to maintain the action be denied? So far as any reason has been given for such a proposition, it seems to be this: that the foreign administrator is not responsible to the courts of New Jersey, and cannot be compelled to distribute the amount received in accordance with the New Jersey statute. But the courts of New York are as capable of enforcing the rights of the widow and next of kin as the courts of New Jersey. And as the court which renders the judgment for damages in favor of the administratrix can only do so by virtue of the New Jersey statute, so any court having control of the administratrix can compel distribution of the amount received in the manner prescribed by that statute. Again, it is said that by virtue of her appointment in New York, the administratrix can only act upon or administer that which was of the estate of the deceased in his lifetime. There can be no doubt that much that comes to the hands of administrators or executors must go directly to heirs or devisees, and is

where there is no fixed legal rule of compensation, the theory of the law is that the decision of the jury is conclusive, unless they have been misled, or their verdict has been influenced by corruption, passion or prejudice.[1] Unless the verdict in a given case finds an amount of damages so out of proportion to the actual injury as to evince such misleading, or the presence of

not subject to sale or distribution in any other mode, as the amount set apart in most of the states to the family, devises of specific property to individuals, all of which can be enforced in the courts; and no reason is perceived why the specific direction of the law on this subject may not invest the administrator with the right to receive or recover by suit, and the duty of distributing under that law. There can be no doubt that an administrator invested with the apparent right to receive or recover by suit property or money, may be compelled to deliver or pay over, to some one who establishes a better right, or that what was so recovered was held in trust for some one not claiming under the will or under the administrator. And so here. The statute of New Jersey says the personal representative shall recover, and the recovery shall be for the benefit of the widow and next of kin. It would be a reproach to the laws of New York to say that when the money recovered in such an action as this came to the hands of the administratrix, her courts could not compel distribution as the law directs. It is to be said, however, that a statute of New York, just like the New Jersey law, provides for bringing the action by the personal representative, and for distribution to the same parties, and an administrator appointed under the law of that state would be held to have recovered to the same uses, and subject to the remedies in her fiduciary character which both statutes require. We are aware that the case of Woodward v. R. R. Co. 10 Ohio St. 121, asserts a different doctrine, and has been followed by the cases of Richardson v. R. R. Co. 98 Mass. 85, and McCarthy v. R. R. Co. 18 Kan. 46. The reasons which support that view we have endeavored to show are not sound. These cases are opposed by the latest decision on the subject in the court of appeals of New York, in the case of Leonard, Adm'r, v. Columbia Steam Nav. Co., not yet reported, but of which we have been furnished with a certified copy. [84 N. Y. 48.] The right to recover for an injury to the person, resulting in death, is of very recent origin, and depends wholly upon statutes of the different states. The questions growing out of these statutes are new, and many of them unsettled. Each state court will construe its own statute on the subject, and differences are to be expected. In the absence of any controlling authority or general concurrence of decision, this court must decide for itself the question now for the first time presented to it, and with every respect for the courts which have held otherwise, we think that sound principle clearly authorizes the administrator in cases like this to maintain the action."

[1] Schmidt v. M. & St. Paul R. R. Co. 23 Wis. 186; Duffy v. Chicago, etc. R. R. Co. 34 Wis. 188; Thomas v. Womack, 13 Tex. 580; Lambert v. Craig, 12 Pick. 199; Wiggin v. Coffin, 3 Story, 1.

some malign influence, it will be sustained, although it may materially differ from the judgment of the court.[1] But if the amount of the verdict so far exceeds or falls short of what to the court appears to be just compensation, as to induce the belief that the jury have not given the case a fair and dispassionate consideration, the verdict will be set aside.[2] In such actions it is within the discretion of the court, on a motion for new trial, to indicate a sum for which the verdict may be retained on remitting an excess, or adding to the deficient verdict, to make the amount suggested by the court.[3]

Loss of baggage.— The responsibility of common carriers of passengers for the safe transportation of the baggage of passengers, is, in general, the same as that of common carriers in respect to merchandise which they receive for carriage.[4] The money paid for passage by the passenger is a consideration for the carrier's undertaking or duty in respect to his baggage.[5]

What is baggage has often been a subject of conflicting discus-

[1] Bierbauer v. N. Y. etc. R. R. Co. 15 Hun, 559; Collins v. Albany, etc. R. R. Co. 12 Barb. 492; Bass v. Chicago, etc. R. R. Co. 42 Wis. 654, 672; Hammond v. Mukwa, 40 Wis. 35; Plath v. Braunsdorff, 40 Wis. 107; Davis v. Central R. R. Co. 60 Ga. 329; Cummins v. Crawford, 88 Ill. 312; Illinois Central R. R. Co. v. Parks, 88 Ill. 373; Solen v. Virginia City, etc. R. R. Co. 13 Nev. 106.

[2] Nashville, etc. R. R. Co. v. Smith, 6 Heisk. 174; Bass v. Chicago, etc. R. R. Co. 39 Wis. 636; Goodno v. Oshkosh, 28 Wis. 300; Diblin v. Murphy, 3 Sandf. 19; Nettles v. Harrison, 2 McCord, 230; Spicer v. Chicago, etc. R. R. Co. 29 Wis. 580; Wiggin v. Coffin, 3 Story, 1; Price v. Severn, 7 Bing. 316; Armytage v. Haley, 4 Q. B. 917; Tinney v. New Jersey S. B. Co. 5 Lans. 507; Gains v. Western R. R. Co. 59 Ga. 426; Collins v. Albany, etc. R. R. Co. 12 Barb. 492; Chicago, etc. R. R. Co. v. Hughes, 87 Ill. 94; Chicago, etc. R. R. Co. v. Payzant, 87 Ill. 125; Union P. R. R. Co. v. Hause, 1 Wyo. 27.

[3] Collins v. Albany, etc. R. R. Co. 12 Barb. 492; Clapp v. Hudson R. R. Co. 19 Barb. 461; Durell v. Carver, 9 Ohio St. 72; Hegeman v. Western R. R. Co. 16 Barb. 353; 13 N. Y. 9; Peck v. N. Y. C. etc. R. R. Co. 8 Hun, 286; Whitehead v. Kennedy, 69 N. Y. 462–470; Goodno v. Oshkosh, 28 Wis. 300; Spicer v. Chicago, etc. R. R. Co. 29 Wis. 580; Patten v. Chicago, etc. R. R. Co. 32 Wis. 524; Potter v. Chicago, etc. R. R. Co. 22 Wis. 615; Lombard v. Chicago, etc. R. R. Co. 47 Iowa, 494; Murray v. Hudson R. R. Co. 47 Barb. 196; Bierbauer v. N. Y. C. etc. R. R. Co. 15 Hun, 559.

[4] Merrill v. Grinnell, 30 N. Y. 594; Powell v. Myers, 26 Wend. 591; Chamberlain v. Western T. Co. 45 Barb. 218; Hannibal, etc. R. R. Co. v. Swift, 12 Wall. 262; Perkins v. Wright, 37 Ind. 27; Baylis v. Lintott, L. R. 8 C. P. 345; Chicago, etc. R. R. Co. v. Fahey, 52 Ill. 81.

[5] Id.; Orange Co. Bank v. Brown, 9 Wend. 85; Woods v. Devin, 13 Ill. 746; Hutchins v. Western, etc. R. R. Co. 25 Ga. 51.

sion and decision. The implied undertaking of safety is not unlimited, but extends only to such kinds of articles and valuables, and to such quantity, as are ordinarily taken by travelers for their personal use and convenience, varying according to the station of the party, the object and length of his journey, and many other circumstances.[1] It is safe to say generally that baggage, entitled to protection under the rule stated, embraces anything which travelers usually carry for their personal use, comfort, instruction or amusement, considering the circumstances before mentioned, the occupation of the traveler, the mode of conveyance, and any others which affect his needs, including, according to the weight of authority, a sufficient amount of money for expenses.[2] But property of other persons, not members of his family, or intended to be presented to others at the end of the journey, is not baggage;[3] nor are masonic regalia or engravings;[4] nor samples of goods carried by a commercial traveler;[5] nor valuable papers carried by a lawyer on his way to court;[6] nor the manuscript of a work intended for publication.[7] But it has been held that a reasonable quantity of tools is proper baggage for a mechanic.[8]

[1] Hannibal, etc. R. R. v. Swift, 12 Wall. 262; New York Cent. etc. R. R. Co. v. Fraloff, 100 U. S. 24; Angell on Car. § 115; Thompson's Car. Pas. 510.

[2] Id.; Duffy v. Thompson, 4 E. D. Smith, 178; Doyle v. Kiser. 6 Ind. 242; Baltimore Steam Packet Co. v. Smith, 23 Md. 402; Dibble v. Brown, 12 Ga. 217; Woods v. Devin, 13 Ill. 746; Van Horn v. Kennit, 4 E. D. Smith, 454; Hopkins v. Westcott, 6 Blatchf. 64; Toledo, etc. R. R. Co. v. Hammond, 23 Ind. 379; Porter v. Hildebrand, 14 Pa. St. 129; McCormick v. Penn. etc. R. R. Co. 4 E. D. Smith, 181; 49 N. Y. 303; Jones v. Voorhies, 10 Ohio, 145; Bomar v. Maxwell, 9 Humph. 621; Fraloff v. N. Y. C. etc. R. R. Co. 10 Blatchf. 16; American Contract Co. v. Cross, 8 Bush, 472; Orange Co. Bank v. Brown, 9 Wend. 85.

[3] Dunlap v. International St. B. Co. 98 Mass. 371; Chicago, etc. R. R. Co. v. Boyce, 73 Ill. 510; Dexter v. Syracuse, etc. R. R. Co. 42 N. Y. 326; First Nat. Bank v. Marietta, etc. R. R. Co. 20 Ohio St. 259; Becher v. Great E. R'y Co. L. R. 6 Q. B. 241; Nevins v. Bay State S. B. Co. 4 Bosw. 225; The Ionic, 5 Blatchf. 538. See Baltimore, etc. Co. v. Smith, 23 Md. 402.

[4] Nevins v. Bay State S. B. Co. 4 Bosw. 225.

[5] Stimpson v. Conn. R. R. Co. 98 Mass. 83; Alling v. Boston, etc. R. R. Co. 126 Mass. 121; Hawkins v. Hoffman, 6 Hill, 586.

[6] Phelps v. London, etc. R. R. Co. 19 C. B. N. S. 321; Thomas v. Great Western R'y Co. 14 U. C. Q. B. 389.

[7] Hannibal, etc. R. R. Co. v. Swift, 12 Wall. 262.

[8] Porter v. Hildebrand, 14 Pa. St. 129; Davis v. Cayuga, etc. R. R. Co. 10 How. Pr. 330.

If a passenger's baggage includes only what he is entitled to have carried as such, he will not be prevented from recovering its full value, in case of loss, by having failed to inform the carrier of its nature and value; unless the carrier has made inquiry of him, or he has notice of reasonable regulations of the carrier requiring such disclosure and payment of extra charges, where the value of the baggage is above the standard of ordinary baggage; or unless the passenger is guilty of some fraud to conceal the true value.[1]

Where such inquiries are made, or regulations brought to the passenger's notice, and he makes true disclosure and pays any extra charges demanded, either for baggage or merchandise, the carrier is bound for the safe conveyance of the property.[2] But where the passenger delivers to the carrier, as baggage, what is not such, there is no implied undertaking in respect to it; the undertaking of the carrier is to carry the passenger and his baggage — no more; and if articles not properly baggage are packed with others that are, in case of loss there can be no recovery, in the absence of negligence or misconduct, except for the latter, unless the carrier is informed of the true value and accepts them for carriage as baggage without objection.[3]

Measure of damages.— If the property lost has a market value, that is the measure of recovery,[4] including interest.[5] Where the property lost was valuable laces, which had been made by the

[1] New York C. etc. R. R. Co. v. Fraloff, 100 U. S. 24; Camden, etc. R. R. Co. v. Baldauf, 16 Pa. St. 67; Kuter v. Mich. Cent. R. R. Co. 1 Biss. 35.

[2] Stoman v. Great Western R. Co. 67 N. Y. 298; Stoneman v. Erie R. R. Co. 52 N. Y. 429.

[3] Ross v. Missouri, etc. R. R. Co. 4 Mo. App. 582; Doyle v. Kiser, 6 Ind. 242; Nevins v. Bay State St. B. Co. 4 Bosw. 225; Michigan, etc. R. R. Co. v. Oeher, 56 Ill. 293; Hillman v. Halliday, 1 Woolw. 365; Cahill v. London, etc. R'y Co. 10 C. B. N. S. 154; Hollister v. Nowlen, 19 Wend. 234; S. C. 13 C. B. N. S. 818; Pardee v. Drew, 25 Wend. 459; Millard v. Mo. Kan. & T. R. R. Co. 20 Hun, 191; Lee v. Grand Trunk R'y Co. 36 Upp. Can. Q. B. 350; Belfast, etc. R'y Co. v. Keys, 9 H. L. C. 556; Great Northern R'y Co. v. Shepherd, 8 Exch. 30; Stoneman v. Erie R. R. Co. 52 N. Y. 429; Minter v. Pacific R. R. Co. 41 Mo. 503.

[4] Illinois Central v. Copeland, 24 Ill. 332; New O. etc. R. R. Co. v. Moore, 40 Miss. 39.

[5] Mote v. Chicago, etc. R. R. Co. 27 Iowa, 22.

plaintiff's ancestors, and had come to her by gift or inheritance, it was held necessary, nevertheless, to prove their value by a money standard, otherwise there could be no recovery beyond nominal damages.[1] In a late case in New York,[2] in regard to the mode of fixing the value of lost clothing constituting part of a traveler's baggage, and which had gone into defendant's possession by their own mistake, to be carried to New York, instead of by boat, as the checks on the same indicated, the court said: "The court did not err in charging the jury that the plaintiff was entitled to recover the full value of the clothing for use to him in New York, and not merely what it could be sold for in money. The clothing was made to fit plaintiff, and had been partly worn. It would sell for but little, if put into market to be sold for second hand clothing, and it would be a wholly inadequate and unjust rule of compensation to give plaintiff the value of the clothing thus ascertained. The rule must be the value of the clothing for use by the plaintiff. No other rule would give him a compensation for his damages. This rule must be adopted, because such clothing cannot be said to have a market price, and it would not sell for what it was really worth."

[1] Fraloff v. N. Y. C. etc. R. R. Co. 10 Blatchf. 16. See Illinois, etc. R. R. Co. v. Copeland, 24 Ill. 332.

[2] Fairfax v. N. Y. C. etc. R. R. Co. 73 N. Y. 167.

CHAPTER XII.

TELEGRAPH COMPANIES.

Nature of the duty of these companies — They may adopt reasonable regulations — Measure of damages — What messages and accompanying explanations bring substantial damages within contemplation of the parties — Action may be brought on contract or for tort.

NATURE OF THE DUTY OF THESE COMPANIES.— These companies, by reason of their public employment, their contracts, and, to some extent, by force of statutes, are bound to receive, transmit and deliver messages with impartiality, care and diligence. They do not undertake with the same absoluteness, as common carriers, to convey and deliver messages furnished to them for that purpose. Though they have sometimes been regarded as common carriers, the decided weight of authority now is that their liabilities are not to be measured by that standard.[1] They are bound to employ competent and faithful agents, who will perform their duties with a degree of care and diligence proportioned to their delicacy and importance. The omission to send a message, or to deliver one which has been transmitted, or the occurrence of an error in the tenor of the message, is *prima facie* evidence of neglect on the part of the company, and the burden of proof is upon them to show that such failure or mistake happened without their fault, and the means of doing so is peculiarly within their power.[2]

[1] Baldwin v. U. S. Tel. Co. 45 N. Y. 744; Leonard v. N. Y. etc. Tel. Co. 41 N. Y. 544; Bartlett v. Western U. Tel. Co. 62 Me. 209; Camp v. Western U. Tel. Co. 1 Met. (Ky.) 164; De Rutte v. N. Y. etc. Tel. Co. 30 How. Pr. 403; S. C. 1 Daly, 547; New York, etc. Tel. Co. v. Dryburg, 35 Pa. St. 298; Passmore v. Western U. Tel. Co. 78 Pa. St. 238; Birney v. N. Y. etc. Tel. Co. 18 Md. 341; Wann v. W. U. Tel. Co. 37 Mo. 472; Washington Tel. Co. v. Hobson, 15 Gratt. 122; Western U. Tel. Co. v. Carew, 15 Mich. 525; Aiken v. Tel. Co. 5 S. C. 358.

[2] Baldwin v. U. S. Tel. Co. 45 N. Y. 744; Bartlett v. W. U. Tel. Co. 62 Me. 209; Rittenhouse v. Independent L. T. 44 N. Y. 263; Western U. Tel. Co. v. Carew, 15 Mich. 525; Tyler v. Western U. Tel. Co. 60 Ill. 421; S. C. 74 Ill. 168.

Such companies may adopt reasonable regulations.—They may make reasonable regulations for the safe and proper conduct of their business, and have power to contract with the sender of a message so as to relieve themselves from liability for inadvertencies, but not for gross negligence, misconduct, or bad faith.[1]

Regulations and contracts exempting the company from the payment of damages for errors in the transmission of messages, unless repeated at an extra compensation, to be paid by the sender, have been sustained as reasonable. Bigelow, C. J., said: "In view of the risks and uncertainties attendant on the transmission of messages by means of electricity, and the difficulties in the way of guarding against errors and delays in the performance of such service, . . . and also of the very extensive liability to damages which may be incurred by a failure to deliver a message accurately, we think it just and reasonable that the conductor of a telegraph should require that additional precautions should be taken to ascertain the accuracy of the messages as received, at the request and expense of the parties interested, if they intend to hold him responsible in damages for any mistake which may have taken place in the transmission of the messages. There is nothing in this regulation which tends to embarrass or hinder the free use of the telegraph, or to impose on those having occasion to transmit or receive messages any onerous or impracticable duty."[2]

The practice very generally prevails of requiring messages to be written on blanks furnished by the company, on which are

[1] Western U. Tel. Co. v. Carew, supra; United States T. Co. v. Gildersleeve, 29 Md. 248; Western U. Tel. Co. v. Graham, 1 Colo. 230; Same v. Fontaine, 58 Ga. 433; True v. International T. Co. 60 Me. 9; Western U. Tel. Co. v. Buchanan, 35 Ind. 429; Same v. Meek, 49 Ind. 53; Same v. Fenton, 52 Ind. 1; Candee v. Western U. Tel. 34 Wis. 471; Sweatland v. Illinois, etc. T. Co. 27 Iowa, 433; Manville v. W. U. Tel. Co. 37 Iowa, 214; Breese v. U. S. Tel. Co. 48 N. Y. 132; S. C. 45 Barb. 274; Grinnell v. W. U. Tel. Co. 113 Mass. 299; Passmore v. Western U. Tel. Co. 78 Pa. St. 238.

[2] Ellis v. Am. Tel. Co. 13 Allen, 226; Western U. Tel. Co. v. Carew, 15 Mich. 525; U. S. Tel. Co. v. Gildersleeve, 29 Md. 341; Birney v. N. Y. etc. Tel. Co. 18 Md. 341; Western U. Tel. Co. v. Graham, 1 Colo. 230; Wolf v. W. U. Tel. Co. 62 Pa. St. 83; Wann v. W. U. Tel. Co. 37 Mo. 472; Sweatland v. Illinois, etc. Tel. Co. 27 Iowa, 433; True v. International Tel. Co. 60 Me. 9.

printed the terms and conditions in such form that the message-sender not only assents to such an exemption from damages, but also for delay in the delivery or for non-delivery of any unrepeated message. The repetition of a message has no legitimate effect to induce a delivery of it, nor to expedite such delivery; but it is true that the repetition will convey a warning that the message is deemed important, and implies that the company has received, or, on delivery, will receive, additional compensation. It is obvious that if such a condition, assented to, is sustained, as having the force of a condition or contract, the company is under no obligation to deliver any unrepeated message. For this reason, such conditions exacted and assented to are generally treated as unreasonable and void.[1]

[1] Tyler v. Western U. Tel. Co. 60 Ill. 421; 74 id. 168; Western U. Tel. Co. v. Graham, 1 Colo. 230; Birney v. N. Y. etc. Tel. Co. 18 Md. 341; True v. International Tel. Co. 60 Me. 9; Manville v. W. U. Tel. Co. 37 Iowa, 214; Baldwin v. U. S. Tel. Co. 45 Barb. 505; 1 Lans. 125; Bryant v. Am. Tel. Co. 1 Daly, 575; Sprague v. W. U. Tel. Co. 6 Daly, 200; W. U. Tel. Co. v. Fenton, 52 Ind. 1; New York, etc. Tel. Co. v. Dryburg, 35 Pa. St. 298; Redpath v. W. U. Tel. Co. 112 Mass. 71. In Candee v. W. U. Tel. Co. 34 Wis. 471, Dixon, C. J., said such "regulations were intended to secure the company against liability for the injurious consequences flowing from its own negligence and omissions, and from those of its agents and operators, in and about the performance of its contract entered into with the sender of the message. The supposed exemption is broad and sweeping, and calculated, no doubt, to relieve the company from all responsibility for the improper or insufficient performance or attempted performance of the contract, or the entire failure to perform it, from whatsoever cause occurring. Aside from the objections resting on grounds of public policy, and which forbid the company from stipulating for immunity from the consequences of its own wrongful acts, it seems very clear to us that there can be no consideration for such stipulation on the part of the sender of the message, and that, so far as he is concerned, it is void for that reason, although exacted by the company and fully assented to by him. Either the company enters into a contract with, and takes upon itself the burden of some sort of legal obligation to send the message, or it does not. It would be manifestly against reason, and what all must assume to be the intention of the parties, to say that no contract whatever is made between them; and nobody, not even the officers and representatives of the company, asserts such a doctrine. It would seem utterly absurd to assert it. Holding itself out as ready and willing and able to perform the service for whosoever comes and pays the consideration itself has fixed and declared to be sufficient, and actually receiving such consideration, it cannot be denied, we think, that a legal obliga-

Measure of damages.— The injuries which telegraph companies are called upon to make compensation for arise from neglecting altogether to transmit or to deliver, or delaying the transmission or delivery of messages, or from delivering them changed so as to mean something different from what the sender intended. If not transmitted or not delivered at all, the damages may be more serious than where there is merely delay; but if a different message is delivered, there is at once a failure to deliver the intended message, and also a substituted communication made which may be still more detrimental. And the transmission and delivery of a forged or spurious message may occasion great injury to the receiver.

The general rule of compensatory damages stated and defined in the leading cases of Hadley v. Baxendale [1] and Griffin v. Colver,[2] applies in these telegraph cases, and they afford very striking examples to illustrate the justice and comprehensiveness of that rule. In the latter case, Selden, J., says: "The party injured is entitled to recover all his damages, including gains prevented as well as losses sustained; and this rule is subject to but two conditions: the damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract,— that is, they must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed." Under this rule, only nominal damages or the price paid for transmitting the mes-

tion arises and duty exists on the part of the company to transmit the message with reasonable care and diligence, according to the request of the sender. Such being the attitude of the company, and the obligation which it assumes by accepting the payment, the question arising is, whether it can, at the same time, and as part of the very act of creating the obligation, exact and receive from the other party to the contract a release from it. The regulations under consideration, if looked upon as reasonable and valid, completely nullify the contract by absolving the company from all obligation to perform it, and the party delivering the message gets nothing in return for the price of transmission paid by him." Bartlett v. W. U. Tel. Co. 62 Me. 219; Passmore v. Western U. Tel. Co. 78 Pa. St. 238. But see U. S. Tel. Co. v. Gildersleeve, 29 Md. 232; Grinnell v. W. U. T. Co. 113 Mass. 299; Schwartz v. Atlantic, etc. Tel. Co. 18 Hun, 157.

[1] 9 Exch. 341.

[2] 16 N. Y. 489.

sage can be recovered for neglecting to transmit or to deliver it, if its purport is not explained to the agent of the company or its operator, or if it is written in cypher, or is wholly unintelligible to him; for no other damages in such a case could be within the contemplation of the parties. The operator who receives, and who represents the company, and may for this purpose be said to be the other party to the contract, cannot be said to look upon such a message as one pertaining to transactions of pecuniary value and importance, and in respect to which pecuniary loss or damages will naturally arise in case of his failure or omission to send it. If ignorant of its real nature and importance, it cannot be said to have been in his contemplation, at the time of making the contract, that any particular damage or injury would be the probable result of a breach of the contract on his part.[1]

Telegraph agents must take it to be true that when the telegraph is resorted to as a means of communication the message is deemed by the sender to be important enough to justify the increased expense over postage, and that fact implies no more; there is no standard for measuring this importance; there is no known average; no data to stimulate to the exercise of special care; none for the assessment of damages, as upon supposed contemplation of any particular loss, direct or consequential, beyond that of the cost of telegraphing. Where, therefore, there is a studied concealment of the meaning of a telegram, whether by writing it in cypher or otherwise, there is an intention on the part of the sender manifest not to permit the subject in any of its bearings to come within the contemplation of the company. In the sense of the law of damages, he thereby elects to employ the company in a mechanical capacity, and to take the risks of all errors and negligence upon himself. But where the telegram offered and accepted to be transmitted expresses the object of the sender, and by actionable negligence of the company in not transmitting or not delivering it, or by unreasonably delaying the transmission, or by change of its

[1] Candee v. W. U. Tel. Co. 34 Wis. 471; Sanders v. Stuart, 1 C. P. D. 326; Beaupri v. Pacific, etc. Tel. Co. 21 Minn. 155; Baldwin v. U. S. Tel. Co. 44 N. Y. 744, 748; Belun v. W. U. Tel. Co. 8 Cent. L. J. 445; Shields v. Washington Tel. Co. 9 West. L. J. 283.

tenor so that it fails to be the communication intended, then, independent of any contract or valid regulation affecting the measure of damages, the company is liable for such injury as is the direct natural and necessary consequence of defeating the object which would have been accomplished by the seasonable delivery of the correct message,— or such injury as so results from any negligent change in the purport of the message. Thus if the message be a direction from a principal to a broker, factor or correspondent to purchase or sell stocks or property, or is an acceptance of an offer for either, and by negligent non-delivery or delay in delivery of the message, such transactions do not take place at all, or not until a later day, the telegraph company is liable for the loss which the sender sustains by not having his directions executed or his acceptance delivered. Where a sale is thus prevented and the property declines in price before the injured party, by the use of due diligence after notice of the delinquency in respect to his message, could give new directions, he is entitled to recover damages against the company, measured by such decline.[1] So, if a purchase is thus defeated or delayed, and the property advances in value before he is advised of the company's neglect, he is entitled to recover damages to the extent of such advance.[2] For like reasons, if the sender's purpose in respect to such transactions is defeated, by a negligent change in the wording of his message, he may hold the company liable for loss of a bargain where it occurs, and also for any other injurious consequence which ensues from such change.[3]

A plaintiff's message to his broker directed him to sell his stock of a certain kind, and to buy a given amount of another named stock. By a change in the message as delivered it directed simply a purchase of an additional amount of the kind of stock directed to be sold, which was done by the broker. As soon as the plaintiff was apprised of the mistake and of this purchase, he ordered the stock to be sold, which was done at a

[1] Strasberger v. W. U. Tel. Co. N. Y. Sup. Ct. 1867, Allen's Tel. Cas. 661; Manville v. W. U. Tel. Co. 37 Iowa, 414. See Turner v. Hawkeye Tel. Co. 41 Iowa, 458.

[2] True v. International Tel. Co. 60 Me. 9; U. S. Tel. Co. v. Wenger, 55 Pa. St. 262.

[3] Sweatland v. Illinois, etc. Tel. Co. 27 Iowa, 433.

loss of $475, and repeated his order to purchase, but the price had advanced in the meantime so that it cost $1,875 more to make the purchase than would have been required at the time the erroneous message was received; it was held that the plaintiff was entitled to recover both of these sums. It was said by the court that the loss from the advance on stock ordered to be purchased would be recoverable without an actual purchase of the stock at the increased price, by showing that immediately or soon after the delivery of the erroneous message the stock rose in market so that the order could not have been filled for less than the advanced price.[1] In a Massachusetts case,[2] Bigelow, C. J., after adverting to the rule of damages applicable to a carrier who had negligently delayed to transport and deliver goods intrusted to him — namely, the difference in their market value at the time when and place where they ought to have been delivered, and their market value at the same place on the same day when they were delivered,— said: "We can see no reason why an analogous rule is not applicable to the case before us. The defendants, as a contracting party, are liable for the injury actually caused by their breach of duty. There is nothing in the nature of the business which they undertake to carry on, that should exempt them from making compensation for any neglect or default on their part.[3] The only question then is as to the effect of the application of the general rule of damages, already stated, to the contract between the parties. This necessarily depends on the subject matter. The defendants undertook to transmit a message which on its face purported to be an acceptance of an offer for the sale of merchandise. The agreement was to transmit and deliver it with reasonable diligence and dispatch, having reference to the ordinary mode of performing similar services by persons engaged in the same business. The natural consequence of a failure to fulfil the contract was that the party to whom the message was addressed, not receiving a reply to his offer to sell the mer-

[1] Rittenhouse v. Independent Line Tel. 44 N. Y. 263; S. C. 1 Daly, 474; N. Y. etc. Tel. Co. v. Dryburg, 35 Pa. St. 298; De Rutte v. New York, etc. Tel. Co. 1 Daly, 547; S. C. 30 How. Pr. 403; Bowen v. Lake E. Tel. Co. 1 Am. L. Reg. 685.

[2] Squire v. W. U. Tel. Co. 98 Mass. 232.

[3] Ellis v. Am. Tel. Co. 13 Allen, 226.

chandise in due season, would dispose of it to another person; that the plaintiff might be unable to procure an article of like kind and quality at the same price, and in order to obtain it would be obliged to pay a higher price for it in the market than he would have paid if the prior contract for its purchase had been completed by the seasonable delivery of his message by the defendants. The sum, therefore, which would compensate the plaintiffs for the loss and injury sustained by them would be the difference, if any, in the price which they agreed to pay for the merchandise by the message which the defendants undertook to transmit, if it had been duly and seasonably delivered in fulfilment of their contract, and the sum which the plaintiffs would have been compelled to pay at the same place in order by the use of due diligence to have purchased the like quantity and quality of the same species of merchandise."[1]

An interesting case, illustrative of the principles under discussion, arose in New York, and after repeated arguments and thorough consideration, was finally decided in 1870. The plaintiffs' agent at Chicago telegraphed for five thousand sacks of salt to be sent immediately from Oswego, the plaintiffs' shipping port; the message came over the defendant's line; was delivered by them, and by carelessness of their servants *casks* was written for "*sacks*." The order was executed accordingly. A sack was a fourteen pound package of fine salt; a cask contained three hundred and twenty pounds of coarse salt. On the arrival of the salt at Chicago there was no market for it; it was stored at the expense of the plaintiffs' agent, and finally sold at less than the market price at Oswego. The plaintiffs were held entitled to recover damages for that mistake; and that the difference between the market value of the salt at Oswego, where but for the mistake the salt would have remained, and what it sold for at Chicago, together with the expense of transportation to the latter place, was not an improper measure of damages. This rule was sustained, although there was no evidence as to what it would have cost to return the salt to Oswego, and the difference in the market price of the two cities was

[1] True v. International T. Co. 60 Me. 9, 26; Manville v. W. U. Tel. Co. 37 Iowa, 214; Tyler v. W. U. T. Co. 60 Ill. 421.

greater than the whole cost of the outward transportation. Earl, C. J., thus vindicated this ruling: "The cardinal rule (of damages) undoubtedly is, that the one party shall recover all the damages which has been occasioned by the breach of contract by the other party. But this rule is modified in its application by two others. The damages must flow directly and naturally from the breach of contract, and they must be certain, both in their nature and in respect to the cause from which they proceed. Under this latter rule, speculative, contingent and remote damages, which cannot be directly traced to the breach complained of, are excluded. Under the former rule, such damages only are allowed as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, as might naturally be expected to follow its violation. It is not required that the parties *must* have contemplated the actual damages which are to be allowed. But the damages must be such as the parties may be *supposed* to have contemplated when they made the contract. Parties entering into contracts usually contemplate that they will be performed, and not that they will be violated. They very rarely actually contemplate any damages which would flow from any breach, and very frequently have not sufficient information to know what such damages would be. As both parties are usually equally bound to know and be informed of the facts pertaining to the execution or breach of a contract, which they have entered into, I think a more precise statement of this rule is, that a party is liable for all the direct damages which both parties to the contract would have contemplated as flowing from the breach, if, at the time they entered into it, they had bestowed proper attention upon the subject, and had been fully informed of the facts. In this case, then, in what may properly be called the fiction of law, the defendant must be presumed to have known that this dispatch was an order for salt, as an article of merchandise, and that the plaintiff would fill the order as delivered; and that if the salt was shipped to Chicago, it would be shipped there as an article of merchandise, to be sold in the open market. And the market price in Chicago being less than the market price in Oswego, that they would lose the cost of transportation, and the difference between the

market price at Chicago and the market price at Oswego. . . . The damages allowed were certain, and they were the proximate, direct result of the breach."[1] There was some contention that it was the duty of the plaintiff, on being apprised of the mistake, to reship the salt to Oswego, and there was some division of judicial opinion on that point. The learned judge from whom we have just quoted remarked in support of the final opinion of the court, from which only one member dissented: "For anything that appears in this case, the cost of transportation to Oswego would have been equal to the difference in the market between the two places. Then there was the risk of the lake transportation at that season of the year, and the uncertainty in the Oswego market, when the salt should again be landed there. If the plaintiff had shipped, and it had been lost upon the lake, the total loss would not have been chargeable to the defendant. By the wrongful act of the defendant, the salt had been placed in Chicago, one of the largest commercial centers of the country, and the plaintiffs had a right to sell it there in good faith, and hold the defendant liable for the loss." The rule supported in this case was sanctioned as sufficiently favorable to the defendant. It does not decide that it was a rule sufficiently favorable to the plaintiffs. Nothing was allowed by the trial court for profits that might have been made on the fine salt ordered, if it had been shipped; nor for the casks of salt at Oswego, if it had not been sent.

In a Virginia case,[2] the plaintiff sent over the defendant's line a message to his factor in Mobile, directing him to buy 500 bales of cotton; this message was altered, and as delivered required the factor to buy 2,500 bales. He proceeded to execute it, and bought 2,078 bales before the mistake was discovered. It was ruled that if the defendants were liable for the alteration, the measure of damages was what was lost on the sale at Mobile of the excess of the cotton above the amount ordered; or if not sold there, what would have been the loss on the sale at Mobile in the condition and circumstances in which it was when the mistake was ascertained, including the

[1] Leonard v. New York, etc. Tel. Co. 41 N. Y. 544.

[2] Washington, etc. Tel. Co. v. Hobson, 15 Gratt. 122. And see Smith v. Independent L. Tel. Scott & J. on Tel. § 412, note.

proper costs and charges. The factor's commissions upon the purchase were held to be a part of the damages. And it appearing that a part of the cotton was on board a ship to be sent to Liverpool when the mistake was ascertained, it was ruled that, in the estimate of damages, the whole should still be valued as if sold at Mobile, a part on shipboard and a part under contract of affreightment. The court held further, that if the plaintiff intended to hold the company responsible for the excess, he should, as soon as apprised of the purchase, have made a tender of such excess to the company, on the condition of its paying the price and all the charges incident to the purchase; giving it notice, in case of a refusal of such tender, that he would proceed to sell the excess at Mobile, and after crediting the company with the net proceeds, would look to it for any difference between the amount of such proceeds and the cost of such excess, including the commissions, costs and charges.

A telegraph company negligently omitted to deliver a message containing the plaintiff's direction from Denver to his agent at Nebraska City: "Ship oil as soon as possible at the best rates you can." The plaintiff alleged that by reason of the consequent delay he was obliged to pay higher rates of freight and lost great profits on the oil. Of what the lost profits consisted is not shown by the case; damages for the increase of freight were allowed; and doubtless, on the same principle, if there had been a fall in the market price of the oil, the amount of such decrease of value would also have been allowed.[1]

A telegraph company negligently delayed for a day to forward plaintiff's message to his agent, stating amount of the debt, and directing attachment if he could find property. During the delay the property was seized by other creditors. The court say: "To ascertain the damages sustained by the breach of this contract, these inquiries are pertinent: if the message had been sent, was the plaintiff's agent in Stockton at the time, and would he have received it; next, would he have taken out an attachment on the debt; at what time could

[1] Western U. Tel. Co. v. Graham, 1 Col. 230. See Manville v. W. U. Tel. Co. 37 Iowa, 214.

he have done this; could he have given security; could he have procured attorneys to issue the writ; at what hour could, and would, it have been put in the hands of the sheriff; was property there of the debtor's subject to the writ? If a telegraphic dispatch had reached the agent at eight o'clock on the seventh, the agent would have been bound to act at once; it is to be presumed that he would have done so; at least, he can testify whether he would. If he had, the sheriff is to be presumed willing to do his duty; if he did not, he would be liable to the plaintiff, and thereby the plaintiff's debt would be secured." It was held that the company was liable for the cost of the dispatch, and the amount of the claim, on the assumption that the whole claim might have been secured by a seasonable attachment, and was prevented by the defendant's default.[1]

[1] Parks v. Alta Cal. Tel. Co. 13 Cal. 422; Bryant v. Am. Tel. Co. 1 Daly, 575. In Turner v. Hawkeye Tel. Co. 41 Iowa, 458, the company undertook to furnish the plaintiff at a specified place daily dispatches, showing the prices of grain both in Chicago and New York, for the consideration of ten dollars per month. During the engagement defendant's agent delivered to plaintiff a dispatch, showing the market price of wheat in Chicago to be $1.24¼ per bushel for a certain day. This report was incorrect; on that day the price was $1.56. Upon that dispatch the plaintiff acted; he bought 5,000 bushels. In an action upon the contract he recovered damages measured by that discrepancy. Beck, J., said: "It is claimed that as plaintiff was engaged in buying grain at S. R., and gave defendant no notice that the market report furnished was intended to guide him in purchases of wheat in Chicago, he cannot recover as damages the loss which he sustained by reason of the error in the dispatch in the purchase of 5,000 bushels of wheat. Such damages, it is claimed, did not enter into the contemplation of the parties when the contract was made. There is nothing in the evidence upon the subject further than that plaintiff was a purchaser of grain at S. R. and that he sold in Chicago. It also appears that he made contracts for the delivery of grain at that city at a future day. All of his transactions were based upon his information of the Chicago market; and that he might have speedy and accurate information, he entered into the contract sued upon. It is within the ordinary course of business for a dealer to make contracts for future delivery, and to depend upon future purchases to enable him to fulfil his obligation. The purchases are made whenever the grain can be had at a price offering an inducement to the dealer, and such purchases are often made by business men of this state in Chicago to fill their contracts for delivery in that city. These facts, it will be presumed, entered into the contemplation of the parties to the contract in suit. The defendant, then, cannot claim that it is released from liability for the loss sustained by

A party having a case in court at a distance gave a telegraph company a message addressed to his attorney: "Hold my case until Tuesday or Thursday. Please reply." Receiving no answer, and inferring, therefore, that there could be no postponement, he went with his counsel to attend the trial; he found that the message had not been sent and that his case had been adjourned to a future day; so that his journey and that of his counsel were wholly useless. In an action against the company for neglect to send the message, it was held that he was entitled to recover as damages the expenses of himself and counsel, and the counsel fee, found reasonable, which he was obliged to pay for his counsel making the trip.[1] Where through the negligent delay of a telegraph company to deliver a message the plaintiff lost a situation, he was allowed to recover substantial damages in view of the salary and the time for which he would have been employed.[2]

WHAT MESSAGES AND ACCOMPANYING EXPLANATIONS BRING SUBSTANTIAL DAMAGES WITHIN CONTEMPLATION OF PARTIES.— Independent of all other considerations, damages, to be recoverable, must be the proximate and natural consequence of the defendant's act or default. This is the universal requirement; remote

plaintiff on the ground of a want of notice of the transaction in which defendant used the information furnished by the report of the market. It appears to us that as the defendant contracted to furnish reports of the Chicago grain market to plaintiff, it was sufficiently notified that plaintiff's transactions were to be in that market, and there is no evidence raising a presumption that defendant was authorized to regard him as a seller only of grain there."

In Davis v. Western U. Tel. Co. 1 Cin. Sup. Ct. 100, the plaintiff, a commercial news agent, engaged in furnishing customers information and reports of the state of the market, brought an action against the defendant for delaying such information sent to him by his agents, and purposely doing it, to injure his business and giving precedence to a rival in the same business. The court said: "It is evident that the mere allowance of the amount of loss the plaintiff proved he actually sustained would not, in justice, remunerate him for the violation by the defendant of its agreement, and the jury might very properly have given an additional sum." The court favored a liberal course in the assessment of damages for a wilful and causeless violation of contract by the defendant.

[1] Sprague v. W. U. Tel. Co. 6 Daly, 200.

[2] Western U. Tel. Co. v. Fenton, 52 Ind. 1.

and speculative effects are always excluded in the assessment of compensatory damages. What are such requires no special elucidation in this place. Where a telegram was sent by the defendant's line to plaintiff, asking for $500, and by negligence of the defendant's employé it was changed as to the sum to $5,000, which the plaintiff sent to the party making the request, and he upon receipt of it appropriated it to his own use and absconded, it was held that the defendant's negligence was not the proximate cause of the loss; the embezzlement did not naturally result therefrom, and could not reasonably have been expected.[1] To maintain an action for special damages, it has sometimes been stated that they must appear to be the legal and natural consequences arising from the tort or breach of contract, and not from the wrongful act of a third person induced thereby; in other words, the damages must proceed wholly and exclusively from the injury complained of.[2] The law does not undertake to hold a person who is chargeable with a breach of duty toward another, with all the possible consequences of his wrongful act. It in general takes cognizance only of those consequences which are the natural and probable result of the wrong complained of, and may reasonably be expected to result under ordinary circumstances from the misconduct.[3] This rule, as we have seen, excludes all but nominal damages; or the price paid for sending the message, where the message is written in cypher or unintelligible terms, and is

[1] Lowery v. Western U. Tel. Co. 60 N. Y. 198.

[2] Crain v. Petrie, 6 Hill, 522; First Nat. Bank v. Western U. Tel. Co. 30 Ohio St. 555; 2 Pars. on Cont. 257. In the syllabus of McCall v. W. U. Tel. Co. 12 Jones & Spencer, 487, it is stated that, "Where the damages claimed is a loss of that which might have been obtained, depending on the contingency of a certain expected action of a third party in the event of the contract being carried out, it is too remote to be regarded as within the contemplation of the party breaking the contract." The case does not warrant so absolute a statement, nor can such a proposition be maintained as law; there may be a legal loss in being deprived of benefits from future dealing depending on the voluntary action of a third person; damages are often estimated and limited by reference to such action. The case of Western U. Tel. Co. v. Fenton, 52 Ind. 1, is an instance. See Beaupri v. Pacific, etc. Tel. Co. 21 Minn. 155.

[3] Lowery v. W. U. Tel. Co. supra; Baldwin v. U. S. Tel. Co. 45 N. Y. 744; Rigby v. Hewitt, 5 Exch. 240, per Pollock, C. B.

accompanied with no explanation. From this limit the contemplation of damages will expand with the surface of disclosure. This proposition is well illustrated and supported by a New York case,[1] which has often been cited and approved. The plaintiffs, at San Francisco, California, contracted with L of that place to purchase for him in New York, on commission, three hundred pistols, and to deliver them in San Francisco, by the steamer which should leave New York on the 20th of January, 1857; for which the plaintiffs were to receive a commission of seven and a half per cent. on the cost of the pistols. They agreed to hold themselves responsible to the sum of $500 to be paid to L by them, if they failed to fulfil the agreement. For the purpose of executing this agreement the plaintiffs remitted from San Francisco by the Pacific Mail Co. $10,000, which arrived in New York January 13th. The plaintiffs delivered to defendants at New Orleans on the 16th of January a dispatch, addressed to plaintiffs' firm in New York, in these words: "Get $10,000 of the Mail Company." On the following day the telegram was transmitted to and received at the defendants' office in New York; but the address had been so changed that it could not be delivered until the correct address was sent, which was on the morning of the 23d of January. By reason of the non-delivery of the dispatch before the 20th of January, the plaintiffs' agreement with L could not be performed for want of the money mentioned in the dispatch. The plaintiffs' paid L the $500 stipulated damages. It appeared that the sole cause of the non-delivery of the dispatch was the negligent error in the address. The actual loss of the plaintiffs was $970.09; viz., $500 paid L; $462 loss of commissions they were to receive; $6.50 paid for transmitting the message; and $9.59 interest on the $10,000 for five days, while its use was delayed by the erroneous address of the message. But because the defendants had no information whatever in relation to the subject of the dispatch, or the purposes to be accomplished by it, except what could be derived from the dispatch itself, the recovery of damages against the defendant was limited to the last two items.

[1] Landsberger v. Magnetic Tel. Co. 32 Barb. 530.

It does not appear to be necessary that the company should be apprised of details, if the purpose of the message is made known; they will be liable for the actual injury which directly results from thwarting that object by a negligent performance of their duties, though there is no mention of facts material to the attainment of that object. A party in Portland, Maine, addressed a message to a party in Baltimore in these words: "Ship cargo named at ninety, if you can secure freight at ten. Wire us result." In an action against a telegraph company to whom this message was delivered, they admitted their liability for failure to deliver it, and in determining the damages therefor, the court assumed the company's knowledge of the object of the sender to be derived from the message itself. And the court say: "We assume that the plaintiffs can prove that the firm in Baltimore to whom the telegram was addressed, had offered and agreed to sell a cargo of corn at ninety cents per bushel to the plaintiff; that the telegram contained notice of acceptance of the proposition; that the condition named, 'if you can secure freight at ten' (cents), could have been complied with, if the message had been delivered when it should have been; that, if it had been thus delivered, the bargain would have been closed, and the plaintiffs would at that moment have obtained the cargo at ninety cents per bushel, with freight at ten cents. The pecuniary value, then, of this telegraphic message was in this, that it contained a part of a contract, and that the final and binding and effectual act, by which the bargain would become operative and complete. It seems clear that such a message has a distinctive and clear pecuniary value, and demands of the party, who, for a reward, undertakes to convey it, knowing its contents, the same care and diligence, and that he is subject, at least, to like rules and liabilities, as if he (not being a common carrier) had undertaken to transport an article of merchandise. On its face it gives clear intimation that it is of a business character, relating to a distinct and specific contract, and that, according to the well known custom of merchants, it must have been understood by the operator or agent as an acceptance of an offer to sell a cargo at the price named, if freight at ten cents could be procured. In this respect it differs from a class of cases to be found in the reports, where the message was so brief,

or enigmatical, or so obscure, that it gave the operator no notice that it was of any value pecuniarily." The defendant was held liable for the value of the bargain.[1] In another case the telegraph company negligently delayed the delivery of this message: "Will take your hogs at your offer," and the same rule of damages was applied. This message does not state the number of hogs nor the price. It was sufficient that on its face it purported to be an acceptance of an offer for the sale of merchandise.[2] Non-delivery of a telegram: "Hold my case until Tuesday or Thursday. Please reply," subjected the company to damages for the expense of a journey by the party and his counsel, and a fee for the time to the latter.[3] For delay in delivery of the message: "Ship your hogs at once," the company were held liable for decrease in market value of one hundred and eighty fat hogs.[4]

It is to be observed that in these instances there was sufficient on the face of the dispatches to show not only that they related to business of pecuniary concern, but they were likewise explicit enough to suggest the nature, though not the extent, of the consequences of any negligence touching their transmission or delivery. They support the conclusion that a telegraph company may be made liable for the actual damages resulting directly and proximately from the non-receipt or the delayed receipt of the telegram, through their negligence, where the business to which it relates, and the purpose to which it is intended to contribute, are stated or disclosed in a general way. It is not essential that the company be informed of the magnitude, or of any of the usual incidents of the transaction; that all the requisite agencies and conditions to accomplish the object indicated have been or will be so arranged as to insure success. It is the duty of the telegraph company to inquire for such particulars, if they desire them.[5] Telegraphic messages are very generally brief for purposes of economy, even when there is no

[1] True v. International T. Co. 60 Me. 9.

[2] Squire v. W. U. T. Co. 98 Mass. 232.

[3] Sprague v. Western U. Tel. Co. 6 Daly, 200.

[4] Manville v. Western U. T. Co. 37 Iowa, 214.

[5] Rittenhouse v. Independent Line Tel. 44 N. Y. 263; Candee v. W. U. Tel. Co. 34 Wis. 471.

thought of concealment. Relating to certain subjects on which there is much traffic by telegraph, certain abbreviated or condensed expressions are in general use among those who conduct this traffic, and telegraphic operators ought to know their convential meaning, whether intelligible to the general public or not.

There are some cases which do not confirm the foregoing observations, and which seem out of harmony with the decisions that suggested them. Thus, in Maryland, a suit was brought by a broker to recover damages resulting from the failure to transmit a dispatch containing this order: "sell fifty gold," and it was proved that the dispatch would be understood among brokers to mean $50,000 of gold, but it was not shown that the company's agent so understood it; and it was held that the nature of this dispatch should have been communicated to the company's agent at the time it was offered to be sent, in order that the company might have observed the precautions necessary to guard itself against the risk; and that it was error to instruct the jury that the plaintiff was entitled to recover to the full extent of his loss by the decline in gold.[1] Where the plaintiff intrusted the defendant, a Canada telegraph company, with this message, addressed to a person in Oswego: "Do accept your offer — ship, to-morrow, fifteen or twenty hundred," Robinson, C. J., said: "What would the message . . . have informed the man or boy whose duty it was to take it from the wire, and to send it by another man to the office of the American company? Nothing but that the plaintiff had accepted an offer, he could not tell for what, and would ship fifteen or twenty hundred, whether of staves or shingles, or barrels of flour, or bushels of grain, he could not tell; nor could he guess what might be the occasion for haste, or the consequences of delay or neglect. A possible loss or gain to the plaintiff, depending on the time at which the message would arrive, was a consequence which the defendants could not appreciate, and cannot be supposed to have contemplated at the time they received the message."[2] In a Minnesota case,[3] an order for mer-

[1] U. S. Tel. Co. v. Gildersleeve, 29 Md. 232. See Shields v. Washington Tel. Co. 9 West. L. J. 5.

[2] Kinghorne v. Montreal Tel. Co. 18 U. C. Q. B. 60.

[3] Beaupri v. Pacific & Tel. Co. 21 Minn. 155.

chandise, contained in a message, was negligently delayed for several days, and the price advanced in the meantime; when received, the dealer refused to fill the order at the price current on the day of its date, or at any less than the advanced market price current at the time of its arrival. It was properly held that the sender was only entitled to recover the price paid for the message, because, if sent, it would not have concluded a bargain for the merchandise, and it was not shown as a fact that the plaintiff would have obtained it at the then market price if the dispatch had been duly delivered. But the court said that the findings implied that the defendant had only such information as was afforded by the message itself. "The message purports to relate to some business transaction the nature of which is not disclosed. It gives no intimation of the magnitude or importance of the business involved, or of the amount of damage that might result from a delay in transmitting it. The company might have known from the tenor of the message that it related to a purchase of goods, and was presumably of some value; but the message itself, 'will take two hundred extra mess, price named, would hardly have informed the defendant of the nature, quantity, price or value of the goods which the plaintiff offered to take. The damage the plaintiff might suffer from a rise in the market price of pork, if this message were not seasonably delivered, could hardly have entered into the contemplation of the defendant, at the time he received and undertook to transmit this message, as a probable consequence of the breach of its contract."[1] The court add, however, that whether the information conveyed to the company by the message was sufficient to render it liable for any consequential damages the plaintiff might have sustained from its delay, it was not necessary to decide, and announced the general principle which all the cases affirm, that "considering the magnitude of the damages which may result from mistake or delay in transmitting important messages, damages often out of all proportion to the price paid for transmission, it is simple justice to the company that it

[1] Citing Stevenson v. Montreal Tel. Co. 16 U. C. Q. B. 530; Allen's Tel. Cases, 71, 98; Kinghorne v. Montreal Tel. Co. 18 U. C. Q. B. 60; U. S. Tel. Co. v. Gildersleeve, 29 Md. 232; Baldwin v. U. S. Tel. Co. Co. 45 N. Y. 744.

should not be held liable for such consequential damages, unless the character and object of the message appear upon its face, or the nature of the risk assumed by the company is made known to it by the sender."

ACTION MAY BE BROUGHT ON CONTRACT OR FOR TORT.— In England, the only duty of a telegraph company is that arising out of contract, and, therefore, only the sender or party making the contract has a right of action.[1] The company is not liable to the receiver of a telegram, even for a misfeasance.[2] In this country, however, a different doctrine prevails. The company's employment is of a public character, and it owes the duty of care and good faith to both sender and receiver. For the gross negligence of a telegraph company's agent in sending a dispatch over the wires, purporting to be that of a cashier of a bank, at the request of one known to the operator not to be such cashier, and without evidence of such cashier's authority, to the effect that such cashier would honor the drafts, for a large amount, of the person so procuring the transmission of such message, whereby a banking house to which such message was presented was induced to pay money to the person so recommended, the company was held liable to make good the loss.[3] So a telegraph company was held liable in damages to the recipient of a message for the misfeasance of their agent in sending a different message from that addressed to him.[4] It was ruled that, though not insurers of the safe delivery of what is intrusted to them, their obligations, like those of common carriers, spring from the public nature of their employment, and the contract under which the particular duty is assumed. If they negligently or wilfully violate their duty of sending the very message furnished, they are responsible to the party to whom the erroneous message is addressed, in an action on the case. Even if the telegraph company be considered only as the agent of the sender of the message, they are liable

[1] Playford v. United Kingdom Tel. Co. L. R. 4 Q. B. 706; S. C. 10 B. & S. 769; Dickson v. Reuter Tel. Co. 2 C. P. Div. 62; 3 id. 1. See Feaver v. Montreal Tel. Co. 23 U. C. C. P. 150; S. C. 24 id. 258.

[2] Dickson v. Reuter Tel. Co. supra.

[3] Elwood v. West. U. Tel. Co. 45 N. Y. 549; Allen's Tel. Cases, 594.

[4] New York, etc. Tel. Co. v. Dryburg, 35 Pa. St. 298.

to third persons, as wrongdoers, for any misfeasance in the execution of the duties confided to them.[1] Accordingly, where they delivered a message for *two hand bouquets*, changed so as to read *two hundred bouquets*, they were held liable to the receiver for the damages resulting from the expense of partial execution of the erroneous order before the mistake was discovered and corrected.[2], A telegraph company, by changing a telegram sent to plaintiff, informed him that eight thousand bushels of wheat could be furnished him for transportation from Chatham to Oswego, three thousand being the amount in the message furnished for transmission. In consequence of this information, he gave up a contract for a cargo from another place, and sent his vessel to Chatham, where he obtained only the three thousand bushels. It was held that a reasonable compensation for sending his vessel to Chatham and back was all the plaintiff was entitled to recover as damages; that his real damage arose from giving up the contract for the other cargo, but that could not be taken into consideration, because the defendant had no notice of it; that he was not entitled to freight on five thousand bushels which his vessel did not carry, and it did not appear that he could have obtained this freight if the message had been correctly transmitted.[3]

[1] New York, etc. Tel. Co. v. Dryburg, 35 Pa. St. 298.

[2] Id.

[3] Lane v. Montreal Tel. Co. 7 U. C. C. P. 23.

CHAPTER XIII.

BREACH OF MARRIAGE PROMISE.

Nature of the action for this cause — Seduction is an aggravation — Injury to feelings, and other elements of damage — Damages for loss of marriage — What will excuse a breach of the contract — What may be proved in mitigation.

NATURE OF THE ACTION FOR THIS CAUSE.— The action for this cause is peculiar. While it is in form an action upon contract, and in truth based upon contract and the breach of it, the damages are governed by principles which apply to actions for personal torts. The motive of the breach may be inquired into, and may be very material in respect to the amount of damages. The right of action is so personal in its nature that it will not survive to or against personal representatives. Nor are the damages confined to the mere pecuniary loss. Either party may sue for breach by the other,[1] though, in the large majority of instances, the female is the plaintiff; and she may recover, according to the general language of the cases, for injury to her feelings, her affections and wounded pride, as well as for loss of marriage.[2]

SEDUCTION IS AN AGGRAVATION.— The result of an ordinary breach of promise is the loss of the alliance and the mortification and pain consequent on the rejection.[3] If the defendant, during the subsistence of the promise, has seduced the plaintiff, this fact may be proved in aggravation of the damages. The common law practice is substantially uniform in allowing it. The seduction which is allowed to be proven in these cases is brought about in reliance upon the contract, and is, in itself, in

[1] There are several instances given in the reports of actions by the male party to the contract. Baker v. Cartwright, 100 Eng. C. L. 124; Harrison v. Cage, 1 Ld. Raym. 386; S. C. 1 Salk. 24; Alchinson v. Baker, Peake Ad. Cas. 103, 104.

[2] Wilbur v. Johnson, 58 Mo. 600 Holloway v. Griffith, 32 Iowa, 409; Royal v. Smith, 40 Iowa, 615; Wells v. Padgett, 8 Barb. 323; Harrison v. Swift, 13 Allen, 144.

[3] Sheahan v. Barry, 27 Mich. 217.

no indirect way, a breach of its implied conditions. Such an engagement brings the parties necessarily into very intimate and confidential relations, and the advantage taken of those relations by the seducer is as plain a breach of trust in all its essential features as any advantage gained by a trustee or guardian, or confidential adviser, who cheats a confiding ward, or beneficiary, or client, into a losing bargain. It differs from ordinary breaches of trust in being more heinous. A subsequent refusal to marry the person whose confidence has thus been abused cannot fail to be aggravated in fact by the seduction. The contract is twice broken; for to the results of an ordinary breach there are added loss of character and social position, and not only a deeper shame and sorrow, but a darkened future. All of these spring directly and naturally from the broken obligation. The contract involves protection and respect as well as affection, and is violated by the seduction as it is by the refusal to marry. A subsequent marriage condones the first wrong, but a refusal to marry makes the seduction a very grievous element of the injury that cannot be lost sight of in any view of justice.[1] But in Wisconsin and Indiana this

[1] Id.; Coil v. Wallace, 24 N. J. L. 291; Whalen v. Layman, 2 Blackf. 194; Green v. Spencer, 3 Mo. 318; Hill v. Maupin, 3 Mo. 323; Conn v. Wilson, 2 Overt. 233; Goodall v. Thurman, 1 Head, 209; Williams v. Hattingsworth, 6 Baxt. (Tenn.) 12; Mathews v. Cribbitt, 11 Ohio St. 330; Fidler v. McKinley, 21 Ill. 308; Tubbs v. Van Kleck, 12 Ill. 446; Ispey v. Jones, 1 Alw. Sel. C. 454; Kniffen v. McConnell, 30 N. Y. 285; Wells v. Padgett, 8 Barb. 323; Sherman v. Rawson, 102 Mass. 395; Kelly v. Riley, 106 Mass. 339; Sauer v. Schulenberg, 33 Md. 288; Jarvis v. Johnson, 2 West. L. Monthly, 389. Parker, C J., in Wightman v. Coates, 15 Mass. 1, thus vindicates the general usefulness of this remedy:

"We can conceive of no more suitable ground of application to the tribunals of justice for compensation, than that of a violated promise to enter into a contract, on the faithful performance of which the interest of all civilized countries so essentially depends. When two parties, of suitable age to contract, agree to pledge their faith to each other, and thus withdraw themselves from that intercourse with society which might probably lead to a similar connection with another,—the affections being so far interested as to render a subsequent engagement not probable or desirable,—and one of the parties wantonly and capriciously refuses to execute the contract which is thus commenced, the injury may be serious, and circumstances may often justify a claim of pecuniary indemnification.

"When the female is the injured

party, there is generally more reason for a resort to the laws than when the man is the sufferer. Both have a right of action, but the jury will discriminate and apportion the damages, according to the injury sustained. A deserted female, whose prospects in life may be materially affected by the treachery of the man to whom she has plighted her vows, will always receive from a jury the attention which her situation requires; and it is not disreputable for one, who may have to mourn for years over lost prospects and broken vows, to seek such compensation as the laws can give her. It is also for the public interest, that conduct tending to consign a virtuous woman to celibacy, should meet with that punishment which may prevent it from becoming common. The delicacy of the sex which happily, in this country, gives the man so much advantage over the woman, in the intercourse which leads to matrimonial engagements, requires for its protection and continuance the aid of the laws. When it shall be abused by the injustice of those who would take advantage of it, moral justice, as well as public policy, dictates the propriety of a legal indemnity.

"This is not a new doctrine. As early as the time of Lord Holt, it was enforced, as the common law, by that wise and learned judge and his brethren, that a breach of promise of marriage was a meritorious cause of action (Hutton v. Mansel, 3 Salk. 16; 2 Comyn on Contracts, 408); and although the value of a marriage in money might have had some influence on that decision, there is no doubt that the loss sustained in other respects — the wounded spirit, the unmerited disgrace, and the probable solitude, which would be the consequences of desertion after a long courtship — were considered to be as legitimate claims for pecuniary compensation, as the loss of reputation by slander, or the wounded pride in slight assaults and batteries."

Mr. Schouler, in 7th Southern L. Review, 57, advances a different view of the action. He says: "On the whole, we may question whether the right to sue for breach of promise is not productive of more evil than good. It is admitted that only one sex makes practical use of such a remedy, though its logical application should be mutual. It is admitted, too, that the marriage state ought not to be lightly entered into; that it involves the profoundest interests of human life, transmitting its complex influences direct to posterity, and invading the happiness of parents and near kindred. From such a standpoint, we view the marriage engagement as a period of probation, so to speak, for both parties,— their opportunity for finding one another out; and if that probation results in developing incompatibility of tastes and temperament, coldness, suspicion, an incurable repugnance of one to the other, though all this may impute no vice to either, nor afford matter for judicial demonstration, duty requires that the match be broken off. What then shall be the consequence to the party who takes the initiative? Analyze our reported breach of promise cases, and you will see that the fair plaintiff is frail on the point most essential to womanly self-respect in the majority of instances; that she has unwisely granted to her lover the indulgences of a husband, or that she was a soiled dove when he offered himself, or, more brazen still, that she has been loose with other

matter of aggravation cannot be proved unless specially alleged.[1]

Injury to feelings and other elements of damage.— As the plaintiff is entitled to recover damages for injury to her feelings, any circumstances may be proved which tend to increase or mitigate this injury. The plaintiff may show that she announced the fact of her engagement to her friends and invited them to her wedding.[2] She may prove that the defendant assigned as a reason for discontinuing his attentions to her, that she was a thief, and that she had submitted her person to his pleasure; evidence may be given of defamatory words, actionable in themselves, or otherwise, as circumstances of contumely and aggravation which attended the defendant's refusal to perform his contract;[3] but it has been held not an indecent and an insulting letter written by the defendant to the plaintiff after the commencement of the action.[4] Any misconduct of the defendant, however, in which the plaintiff did not participate, at the time of the breach, or before or afterwards, tending to increase the injury therefrom, may be shown, as well as loss of time and expense incurred in preparations for marriage.[5] The jury in estimating the damages, therefore, may well take into account, as has been stated, the seduction of the plaintiff by the defendant, as tending to increase the mortification and distress suffered by her.[6] In the exercise of their right to draw inferences from facts proved, it is competent for the jury, in estimating the damages, to consider the period of time that had

men while plighted in affection. That the man's virtue in such cases will usually bear comparison, we need not contend, since in practice it is not he that invites litigation. In the interest of morality, then, and for the sake of compensating the innocent few who complete this record (like the plaintiff in Heman v. Earle, 53 N. Y. 267), and whose vows, moreover, were made in a befitting spirit (as, *semble*, was not the case in Miller v. Rosier, 31 Mich. 475), should so much festering corruption be yearly exposed to a jesting community, under the misnomer of a blighted affection?"

[1] Leavitt v. Cutler, 37 Wis. 46; Cates v. McKinney, 48 Ind. 562.

[2] Reed v. Clark, 47 Cal. 194.

[3] Chesley v. Chesley, 10 N. H. 327.

[4] Greenleaf v. McColley, 14 N. H. 303.

[5] Baldy v. Stratton, 11 Pa. St. 316. See Smith v. Sherman, 4 Cush. 408; Thorn v. Knapp, 42 N. Y. 474.

[6] Sherman v. Rawson, 102 Mass. 395.

elapsed pending the engagement,[1] the intimacy of the parties, the frequency of the defendant's visits, the time, place and circumstances of making such visits; the imputations, if any, cast upon the plaintiff's character, under the circumstances, by the defendant's denial, on oath, that notwithstanding all these considerations, he ever promised or intended to marry her.[2] In such a case, if the jury discredit the defendant's testimony in such denial, they have a right to regard it as an attempt on the part of the defendant, in the most public and solemn manner, to excite groundless suspicions against the plaintiff's character.[3] In fixing the amount of damages the jury may take into consideration the nature of the defense set up by the defendant; if by pleading or evidence he attempt to justify or palliate his abandonment or breach of the contract to marry, on the ground of any misconduct or bad character of the plaintiff, and he fails to establish the same, and had no reasonable grounds for believing any such objections to exist, such defamatory and fraudulent defense may be considered by the jury as increasing the injury and justifying a larger verdict.[4] To justify any increase of damages on account of such defense not established, the jury should be satisfied that it is interposed in bad faith.[5]

It is the policy of the law to encourage matrimony, and society has an interest in contracts of marriage both before and after they are consummated. A man who enters into a contract of marriage with improper motives, and then ruthlessly and unjustifiably breaks it off, does a wrong to the woman, and, also, in a more remote sense, to society; and he needs to be punished in the interest of society, as well as the man who commits a tort under circumstances showing a bad heart. The rule of damages applicable to ordinary contracts would be wholly inadequate; — so much depends upon the circumstances surrounding it, and upon the conduct, standing and character of

[1] Grant v. Willey, 101 Mass. 356; Miller v. Rosier, 31 Mich. 475.

[2] Lawrence v. Cooke, 56 Me. 187.

[3] Id.

[4] Denslow v. Van Horn, 16 Iowa, 476; Southard v. Rexford, 6 Cow. 254; Reed v. Clark, 47 Cal. 194; White v. Thomas, 12 Ohio St. 312; Kniffen v. McConnell, 30 N. Y. 285; Thorn v. Knapp, 42 N. Y. 474.

[5] Leavitt v. Cutler, 37 Wis. 46; Simpson v. Black, 27 Wis. 206; Powers v. Wheatly, 45 Cal. 113; Clark v. Reese, 35 Cal. 89; Blackburn v. Mann, 85 Ill. 222.

the parties. Accordingly, in actions for breach of promise of marriage, where it appears that the contract was made and broken, exemplary damages may be given if the defendant was actuated by such motives and has been guilty of such a ruthless and unjustifiable breach.[1] The jury may give such an amount of damages, not flagrantly excessive and disproportionate to the injury, as will mark their disapprobation, and deter others from the violation of such sacred promises.[2] For this purpose the jury may take into consideration all the facts and circumstances of the case, and the conduct of both parties towards each other, and particularly the conduct of the defendant, in his whole intercourse with, and treatment of, the plaintiff, in connection with the making and breach of the contract, and afterwards up to and including the defense and trial of the action. It is, among other facts, a legitimate subject for the consideration of the jury, if the fact is so, that the defendant not only abandoned the plaintiff and trifled with her affections, but had sought to disgrace her and ruin her character.[3]

[1] Thorn v. Knapp, 42 N. Y. 474; Coryell v. Colbaugh, 1 N. J. L. 77; Johnson v. Jenkins, 24 N. Y. 252.

[2] Coil v. Wallace, 24 N. J. L. 291.

[3] Thorn v. Knapp, supra, per Smith, J. The general principles here stated, it is believed, are sustained by the best authorities, and, considering the exceptional character of the action, are just and reasonable. They are also ably discussed and illustrated by Earl, C. J., in the same case. He says: "In such actions it is not only proper to show the main transaction, but any facts bearing upon or relating to it, showing that it was done wantonly, maliciously and wickedly, with the view of enhancing the damages. It is upon this theory that, in an action of slander, the plaintiff is permitted to prove the repetition of the slanderous words subsequent to the time alleged in the complaint, even down to the trial. This proof is allowed, not to sustain the action, and for the purpose of recovering damages for the words thus repeated, but solely for the purpose of proving the malice which prompted the utterance of the words counted on, and thus bearing upon the damages to be allowed on account of them. And so, if, instead of repeating the slanderous words orally, they are repeated by being set up as a justification or in mitigation in the answer, and thus placed upon the records of the court, and the defendant fails to prove them, for precisely the same reason, and upon the same theory, the damages may be enhanced. So in an action for breach of promise of marriage, it is always competent, for the purpose of enhancing the damages, to prove the motives that actuated the defendant; that he entered into the contract and broke it with bad motives and a wicked heart; and it is competent for him to prove, in

If the abandonment of the plaintiff by the defendant was wanton and ruthless, and so accomplished as to manifest an intent unnecessarily to wound her feelings, injure her reputation, and destroy her future prospects, all the circumstances showing the defendant to have been influenced by bad motives may be proved, and then the largest measure of damages, not only by way of compensation to the plaintiff, but by way of punishment to the defendant, are proper.[1] On the contrary, if the breach of promise was occasioned by a change of circumstances, which, without legally justifying, took from the abandonment all its character of cruelty and wantonness, and the defendant, in withdrawing from his engagement, was tender of

mitigation of damages, that his motives were not bad, and that his conduct was neither cruel nor malicious. In the case of Johnson v. Jenkins, 24 N. Y. 252, it was held competent, in mitigation of damages, for the defendant to prove, when asked by the plaintiff why he had discontinued his visits to her, he declared that his affection and regard for her were undiminished, but that he could not marry her, because his parents were so violently opposed to the match. Judge Allen, writing the opinion of the court, says: 'Every circumstance attending the breaking off of the engagement becomes part of the *res gestæ*. The reasons which were operative and influential with the defendant are material, so far as they can be ascertained; and whether they are such as, tending to show a willingness to trifle with the contract and with the rights of the plaintiff, should enhance the damages, or, on the contrary, showing a motive consistent with any just appreciation of and regard for his duties, should confine the damages within the limit of a just compensation, will always be for the jury to determine.' 'Had the defendant, by his declarations, shown a wicked mind in the transaction, it is evident that they very properly would have been submitted to the jury further to enhance the damages.' Suppose he had told the plaintiff, at any time before the trial of the action, that he had discontinued his visits and broken the contract because she was a prostitute; could she not, upon the same principles, have proved this in enhancement of damages? No damages could be allowed for defaming her by the utterance of these words, but they could be proved as showing the *mind* with which the contract was broken, and as thus bearing upon the damages to be allowed for that. So if this language, instead of being uttered orally, is placed upon the record in the answer, for the same reason, and upon precisely the same principle, if the defendant fails to prove it, and it turns out to be untrue, it may be taken into consideration by the jury in aggravation of damages." On this principle it would seem proper that the jury should consider the letter excluded in Greenleaf v. McColley, 14 N. H. 303, and the affidavit excluded in Leavitt v. Cutler, 37 Wis. 46.

[1] Johnson v. Jenkins, 24 N. Y. 252.

the feelings and reputation of the plaintiff, and so accomplished his purpose as to leave no stain upon her reputation, and do the least injury to her feelings and future prospects, it would be a case for compensatory damages merely.[1]

DAMAGES FOR THE LOSS OF MARRIAGE.— In determining the damages for the loss of marriage, where no special damages are alleged, the jury may take into view the money value or worldly advantages, separate from considerations of sentiment and affection, of the marriage which would have given her a permanent home and an advantageous establishment; and if her affections were in fact implicated, and she had become attached to the defendant, the injury to her affections may be considered as an additional element of damage.[2]

It is proper for the jury to consider the pecuniary as well as the social standing of the defendant, as tending to show the condition in life which the plaintiff would have secured by the marriage.[3] In these cases the jury should take into consideration the rank and condition of the parties, the estate of the defendant, and all the facts proven in the case.[4] And the amount of damages not being capable of measurement by any precise rule, it is left for decision to the discretion of the jury, on the circumstances of each particular case,[5] subject to the power of the court to set aside the verdict, when it appears that the jury has been misled or influenced by passion or prejudice.[6]

[1] Johnson v. Jenkins, 24 N. Y. 252.

[2] Harrison v. Swift, 13 Allen, 144.

[3] Holloway v. Griffith, 32 Iowa, 409.

[4] Id.; Jarvis v. Johnson, 2 Western L. Monthly, 389; Royal v. Smith, 40 Iowa, 615; Reed v. Clark, 47 Cal. 194.

[5] Southard v. Rexford, 6 Cow. 254; Welbar v. Johnson, 58 Mo. 609; Holloway v. Griffith, 32 Iowa, 409; Lawrence v. Cooke, 56 Me. 187; Goodall v. Thurman, 1 Head, 209; Denslow v. Van Horn, 16 Iowa, 476.

[6] Wilbur v. Johnson, 58 Mo. 600; Collins v. Mack, 31 Ark. 684; Douglass v. Gausman, 68 Ill. 170; Gough v. Farr, 1 Younge & J. 477; Goodall v. Thurman, 1 Head, 209. In Smith v. Woodfine, 1 C. B. N. S. 660, Creswell, J., said: "I am far from denying that there may be cases in which it may be the duty of the court to interfere with the verdict of the jury. If, for instance, it appeared that it had been obtained by means of perjury, that would be ground for setting aside the verdict. So, if it were shown that evidence was given which had taken the defendant by surprise, and which he could have had no opportunity to meet. It is said here that the defendant was surprised at the amount at which

Where the plaintiff introduces no proof as to the defendant's pecuniary condition, it has been held that the latter cannot bring in such testimony on his own behalf to reduce the amount of damages.[1] But as damages for loss of marriage are to be ascertained by considering the rank and condition of the parties, and as the pecuniary standing of the defendant is a material element, the offer of proof of that condition by the defendant is not so much to reduce damages as to exhibit the state of facts from which they are primarily to be determined. The true principle is well stated in an Iowa case.[2] While in such action the question, whether the defendant will, in view of his pecuniary circumstances, be able to pay the damages awarded, should have no influence with the jury in estimating the amount of their verdict, they may, nevertheless, properly consider the pecuniary as well as social standing of the defendant, as tending to show the condition in life which the plaintiff would have secured by a consummation of the marriage contract.[3] In a Maine case the instruction of the trial court to the jury was approved, to the effect that, if the jury found for the plaintiff, the rule in actions of this sort, as in other cases, is, that the plaintiff is entitled to such damages as will place her in as good condition as she would have been in if the con-

his property was estimated by the plaintiff's witnesses. . . . But at all events, it cannot be said that the plaintiff artfully relied on the statements of the defendant, and abstained from giving other evidence in her power, in order to mislead the jury as to the value of the defendant's property. Was it surprise that the question as to his circumstances was entered into? Certainly not; for that is an inquiry that is invariably gone into in cases of this sort, and therefore it was his duty to be prepared for it. . . . There has been no perjury, and no fraud or misconduct on the part of the plaintiff to deprive the defendant of a fair opportunity of laying his case before the jury; nor is there any suggestion that the jury were acting under any prejudiced view, or that they misunderstood any particular piece of evidence. There has been no perjury, no surprise, no prejudice, no mistake. But it is said that the jury have awarded the plaintiff an unreasonable and excessive amount of damages. No legitimate ground being laid for it, it seems to me that we should be guilty of a most inconvenient and unconstitutional exercise of our power, if we took upon ourselves to interfere with the discretion which the law has, in a peculiar manner, vested in the jury in cases of this sort." See Berry v. Vreeland, 21 N. J. L. 184.

[1] Wilbur v. Johnson, 58 Mo. 600.

[2] Holliday v. Griffith, 32 Iowa, 409.

[3] Royal v. Smith, 40 Iowa, 615.

tract had been fulfilled. The instruction was construed as referring to her pecuniary condition. Her loss of pecuniary support is one of the elements of damage. Evidence of the defendant's pecuniary ability was properly introduced to show the probable character of such support. The instruction was treated as calling for the judgment of the jury upon the question of the pecuniary value to the plaintiff of a matrimonial alliance with the defendant, and in that view was held unobjectionable.[1]

WHAT WILL EXCUSE A BREACH OF THE CONTRACT.— A man is not legally holden on his promise of marriage, and he may justify his refusal to fulfil it, if he entered into the engagement in ignorance of the fact that the woman has had an illegitimate child, or has committed fornication with other men, and on that ground declines entering into the marriage.[2]

All promises of this kind are founded upon the presumption of chastity on the part of the woman. This is the consideration of the contract, and where that consideration is discovered

[1] Lawrence v. Cooke, 56 Me. 187. In Miller v. Rosier, 31 Mich. 475, the court held such an instruction erroneous; that the elements of such a rule are too complicated and conjectural to be of service as a guide to the jury.

[2] Bench v. Merrick, 1 C. & K. 463; Irving v. Greenwood, 1 C. & P. 350; Boynton v. Kellogg, 3 Mass. 189; Berry v. Bakeman, 44 Me. 164. In Wharton v. Lewis, 1 C. & P. 529, it was held that if it appear that the defendant was induced to make the promise, or to continue the connection, either by misrepresentation or wilful suppression of the real state of the circumstances of the family, and previous life of the plaintiff, this goes in bar, and not to the damages only. And in Baddeley v. Mortlock, 1 Holt. N. P. 151, which was an action against a woman for breach of a promise of marriage, it was held a sufficient justification for non-performance, that the person to whom she had given the promise turned out upon inquiry to be a man of bad character. The bad conduct charged against the plaintiff was dishonesty in some pecuniary concerns and perjury.

In Foulker v. Sellway, 3 Esp. 236, Lord Kenyon ruled that where the defendant relies upon general bad character, a witness may be examined as to representations made to him by third persons.

In Berry v. Bakeman, 44 Me. 164, Tenny, C. J., said no case has been found which sustains the principle that a breach of the criminal law by the plaintiff, accruing after the promise, or before the promise, of which the party contracting is ignorant, will necessarily be a bar to a suit, but such conduct would be material on the question of damage.

to have failed, she has herself been guilty of the first breach.[1] And if she be guilty of such immorality after the promise, it will be a bar.[2] But if the defendant made his promise with knowledge of such past misconduct with other men, or if such misconduct occur afterwards with his connivance, it is no bar.[3] In an early Massachusetts case,[4] the following distinctions were declared as law, and they appear to be generally recognized by later adjudications: 1. That if the woman was of bad character at the time of the contract, and that was unknown to the defendant, the verdict ought to be in his favor. 2. If the plaintiff after the promise had prostituted her person to any other than the defendant, she thereby discharged the defendant. 3. If her conduct was improperly indelicate, although not criminal, before the promise, and it was unknown to the defendant, it ought to be considered in mitigation of damages. 4. If such was her conduct after the promise, it was proper, in the same view, for the consideration of the jury. So, when a man breaks off the engagement after he has seduced the woman, and does so on grounds furnishing no excuse or reason, and on the trial produces evidence of her previous incontinence before or during the engagement, of which he had no knowledge or suspicion before he so broke off the engagement, such evidence, if believed, will go in mitigation only, and not in bar of damages.[5]

What may be proved in mitigation.— If a man promise to marry a woman, knowing at the time that she had borne an illegitimate child, or that she is a loose and immodest woman, he is bound by his contract, and if he refuse, he must respond to an action for damages.[6] Such actions, however, are brought to recover, among other things, for injury to reputation, and therefore it is involved in such actions; and must necessarily

[1] Budd v. Crea, 6 N. J. L. 370.

[2] Boynton v. Kellogg, 3 Mass. 189; Burnett v. Simpkins, 24 Ill. 264.

[3] Denslow v. Van Horn, 16 Iowa, 476; Burnett v. Simpkins, 24 Ill. 264; Johnson v. Smith, 3 Pittsb. 184.

[4] Boynton v. Kellogg, supra.

[5] Sheahan v. Barry, 27 Mich. 217.

[6] Irving v. Greenwood, 1 C. & P. 350; Bench v. Merrick, 1 C. & Ker. 463; Denslow v. Van Horn, 16 Iowa, 476; Morgan v. Yarborough, 5 La. Ann. 316; Woodard v. Bellamy, 2 Root, 354; Johnson v. Caulkins, 1 John. Cas. 116; Johnson v. Smith, 3 Pittsb. (Pa.) 184.

depend on the general conduct of the party subsequent as well as previous to the injury complained of.[1] It may be the subject of inquiry on the question of damages, for a loose and immodest woman cannot be said to be entitled to so large a compensation as one on whose reputation no imputation has ever rested.[2] Any misconduct showing that the party complaining would be an unfit companion in married life may be given in evidence in mitigation of damages.[3] But the defendant cannot reduce damages by showing his want of affection for the plaintiff, and on the assumption that he would not fulfil the duties of a husband.[4] She may, however, show that she is sincerely attached to defendant.[5] So it has been held that declarations by the plaintiff, made after the breach, that she would not marry the defendant but for his money, may be proved by the defendant in mitigation.[6] But such declarations made after the commencement of the action have been excluded.[7] The defendant may show instances of licentious conduct in the plaintiff, and her general character as to sobriety and virtue.[8] A defendant, however, who was shown to have seduced the plaintiff and gotten her with child, was held not entitled to prove her general reputation. Parker, J., said: "It appears from the declaration in this case, that the plaintiff had been seduced by the defendant, and that pregnancy was the consequence of the seduction. This, of itself, would degrade her in the estimation of the public; and the defendant wishes to avail himself of this degredation, a consequence of his own misconduct, to avoid the plaintiff's action, or to reduce the sum she may recover in damages. No argument can show the absurdity of such a proposal in a

[1] Willard v. Stone, 7 Cow. 22; Johnson v. Caulkins, 1 John. Cas. 116; S. C. 3 id. 437.

[2] Bench v. Merrick, 1 C. & K. 463; Johnson v. Caulkins, supra; Von Storch v. Griffin, 77 Pa. St. 504; Budd v. Crea, 6 N. J. L. 370; Butler v. Eschleman, 18 Ill. 44; Burnett v. Simpkins, 24 Ill. 264; Denslow v. Van Horn, 16 Iowa, 476; Palmer v. Andrews, 7 Wend. 142.

[3] Button v. McCauley, 5 Abb. N. S. 29.

[4] Piper v. Kingsbury, 48 Vt. 480. See Hall v. Wright, 96 Eng. C. L. 745, 763.

[5] Sprague v. Craig, 51 Ill. 288.

[6] Miller v. Rosier, 31 Mich. 475.

[7] Miller v. Hayes, 34 Iowa, 496.

[8] Johnson v. Caulkins, supra; Foulkes v. Sellway, 3 Esp. 236; Williams v. Hollingsworth, 6 Baxt. (Tenn.) 12; Cole v. Holliday, 4 Mo. App. 94; Button v. McCauley, 38 Barb. 413, 417, 418; S. C. 5 Abb. N. S. 29.

stronger light than the bare statement of it. A gentleman, under pretense of courtship, pursues a lady to seduction, leaves her to suffer the pain and ignominy which necessarily follow, and when she appeals to the laws of her country for a pecuniary satisfaction, even that, inadequate as it is, is to be resisted or reduced, by arguing her ignominy as a reason why she should not recover. To permit such a defense would be a reproach upon the administration of justice."[1] Nor will a defendant be permitted to show, by general reputation, that after the promise, another had supplanted him in the affections of the plaintiff.[2] The defendant may prove in mitigation of damages, that, at the time of the breach, he was afflicted with an incurable disease.[3] The defendant cannot affect his liability for breach by subsequently offering to fulfil the contract.[4] Where seduction is proved by way of aggravation, its consideration in that view cannot be excluded on account of the existence, or even the prior actual enforcement, of the parent or master's right of an action for that wrong; for such action is not for the same injury; although the damages they may recover for loss of service are allowed to be much larger than the value of wages could have been, they are, nevertheless, in legal contemplation, the damages of the parent or master and not of the woman.[5]

[1] Boynton v. Kellogg, 3 Mass. 187; Espy v. Jones, 37 Ala. 379.

[2] Willard v. Stone, 7 Cow. 22.

[3] Sprague v. Craig, 51 Ill. 288. See Hall v. Wright, 96 Eng. C. L. 745.

[4] Southard v. Rexford, 6 Cow. 254; Holloway v. Griffith, 32 Iowa, 409.

[5] Sheahan v. Barry, 27 Mich. 217; Wells v. Padgett, 8 Barb. 323.

CHAPTER XIV.

EJECTMENT.

REMEDY FOR DAMAGES IN THIS COUNTRY GENERALLY STATUTORY.— The damages for withholding possession of real property are recoverable in this country by proceedings to a great extent regulated by statute; either in the action for recovery of possession of real estate, or in a supplementary suit or proceeding.[1]

[1] In Alabama it is provided by statute that actions to recover the possession of land may be brought in the nature of an action of ejectment (Code 1876, § 2959), or the plaintiff may proceed by the action of ejectment as established at common law. Id. Damages may be recovered in the statutory action, and must be computed to the time of the verdict. § 2957. Where there are more defendants than one, the jury may assess damages arising from the detention of the land, and injury thereto, in severalty, against each defendant for distinct damages. § 2964. But a tenant in possession, and asserting his right thereto, under a lease or license from another, is not liable beyond the rent in arrear at the time of suit brought, and that which may accrue during the continuance of his possession. § 2965. And persons holding possession under color of title, in good faith, are not responsible for damages or rent for more than one year before the commencement of the suit. § 2966. The defendant may suggest upon the record that he, and those whose possession he has, had adverse possession for three years next before the commencement of the suit. In such case, if the jury find for the plaintiff, they must also ascertain by their verdict whether such suggestion be true or false. § 2951. If found true, the verdict must show the value of the land, the improvements and the rents; if found to be false, the jury must return a verdict as in ordinary cases for damages. If the value of the improvements is greater than the rents, the possession of the land may be retained by the defendant for one year, unless the excess of the assessed value thereof be paid by the plaintiff; and if the same is not paid within one year, then the defendant, on payment of the value of the land, acquires a good title. Code, §§ 2952–2954.

In Arkansas the action of ejectment may be maintained in all cases where the plaintiff is legally entitled to possession of the premises. Ark. Dig. 1858, ch. 61. And the plaintiff may claim damages in his declaration. § 8. If the plaintiff prevail in the action, he may recover, by way of damages, the mesne profits, except where the plaintiff, or those under whom he claims title, may have entered, in any United States land office within the state, the improvements of the defendant, and the action is brought to recover the

possession of such improvements; in that case the plaintiff can recover no damages. § 15. If the right of the plaintiff to the possession expire after the commencement of the action, and before the trial, the verdict must be returned according to the fact, and judgment entered only for damages and costs. § 16.

In California the plaintiff may unite in his complaint claims to recover specific real property, with or without damages for the withholding thereof, or for waste committed thereon, and the rents and profits of the same. Code 1876, § 427; Statutes of Nevada, Code 1869, § 1127; Arizona C. L. 1877, § 2500; Utah C. L. § 1289. Where the plaintiff shows a right to recover at the time the action was commenced, but it appears that his right has terminated during the pendency of the action, the verdict and judgment are required to be according to the fact; and the plaintiff may recover damages for withholding the property. § 740; Utah Statutes, § 1481; Statutes of Nevada, Code 1869, § 1319; Ohio Code, § 61. Also Statutes of Minnesota, R. S. 1866, p. 539, § 4; Arizona C. L. 1877, § 2694; Kansas Stat. Gen. St. p. 748, § 598; Nebraska R. S. pt. 2, tit. 7, ch. 6, § 133; tit. 18, ch. 1, §§ 626-632. When damages are claimed for withholding the property recovered, upon which permanent improvements have been made by a defendant, or those under whom he claims, holding under color of title adversely to the claims of the plaintiff, in good faith, the value of such improvements shall be allowed as a set-off against such damages. § 741; Statutes of Nevada, Code 1869, § 1320; Arizona C. L. 1877, § 2695.

In Connecticut the action of disseizin or ejectment is commenced and prosecuted like a personal action. Gen. St. 1875 tit. 19, ch. 5, §§ 7, 8. Any defendant in possession, who has purchased the lands believing that he accquired an unconditional title by such purchase, or who holds under those who have purchased, or who have derived a supposed title by devise, inheritance, or otherwise, from those who have thus purchased, and such defendant, or those under whom he holds, or from whom he claims to have derived a title, have made valuable improvements thereon, under a belief that he or they acquired a good title by such purchase, devise, inheritance, or other conveyance, and the verdict of the jury shall be for the plaintiff, the court before whom such action may be pending may allow the defendant for the improvements, after deducting a reasonable sum for the use of such land, to be adjusted by an accounting; and if the plaintiff so elect in such case, the court may confirm the title to such land in the defendant, on payment of such sum as the court shall find in equity ought to be paid to the plaintiff. Id. title 18, ch. 7, § 17.

In Colorado, by the territorial statutes of 1867, p. 279, it is provided:

Sec. 32. The plaintiff recovering judgment in ejectment in any of the cases in which such action may be maintained, shall also be entitled to recover damages against the defendant for the rents and profits of the premises recovered.

Sec. 33. Instead of the action of trespass for mesne profits heretofore used, the plaintiff seeking to recover such damages shall, within one year after the entering of the judgment, make and file a suggestion of such claim, which shall be entered with

the proceedings thereon upon the record of such judgment, or be attached thereto as a continuation of the same.

Sec. 34. Such suggestion shall be substantially in the same form as is now in use for a declaration in an action of assumpsit for use and occupation, as near as may be; and it shall be served on the defendant in the same manner hereinbefore prescribed, respecting the service of a summons in ejectment; and the same rules of pleading thereto shall be observed as upon a declaration in personal actions.

Sec. 35 provides that if issue be found for the plaintiff, the same jury shall assess his damages to the amount of the mesne profits received by the defendant since he entered into possession of the premises, subject to certain restrictions.

Sec. 38. The plaintiff is required to establish, and the defendant may controvert, the time when the defendant entered into possession,—the time during which he enjoyed the mesne profits is not evidence of such time. The defendant is to have the same right to set off any improvements made on the premises, to the amount of the plaintiff's claim, as may be allowed by law, and in estimating the plaintiff's damages, the value of the use by the defendant of any improvements made by him is not to be allowed to the plaintiff.

Sec. 43. Every person who may hereafter be evicted from any land for which he can show a plain clear and connected title in law or equity, deduced from the record of some public office, without actual notice of an adverse title, in like manner derived from record, shall be exempt and free from all and every species of action, writ or prosecution, for or on account of any rents or profits, or damages which shall have been done, accrued or incurred, at any time prior to receipt of actual notice of adverse claim, by which the eviction may be effected, provided such person obtained peaceable possession of the land.

Dakota (Revised Code of 1877, ch. 29):

§ 635. An action may be brought by any person against another who claims an estate or interest in real property adverse to him.

§ 640. In such action, where the plaintiff shows a right to recover at the time the action was commenced, but it appears his right has terminated during the pendency of the action, the verdict and judgment must be according to the fact, and the plaintiff may recover damages for withholding the property.

§ 641. Where improvements have been made by a defendant or those under whom he claims, holding under color of title adversely to the claim of the plaintiff, in good faith, the value of such improvements must be allowed as a counter-claim to such defendant.

§ 644. The judgment of the court upon such finding, if in favor of the plaintiff for the recovery of the real property, and in favor of the defendant for the counterclaim, shall require such defendant to pay to the plaintiff the value of the land as determined by such finding, and the damages, if any, recovered, for withholding the same, and for waste committed upon such land by the defendant, within sixty days from the rendition of such judgment, and in default of such payment by the defendant, that the plaintiff shall pay to the defendant the value of the improvements as determined by such finding, less the amount of

damages so recovered by plaintiff for withholding the property, and for any waste committed upon such land by the defendant; and until such payment or tender and deposit no execution or other process shall issue in such action to dispossess such defendant, his heirs or assigns.

In Delaware the common law action of ejectment is in use.

In Florida the party claiming may bring his suit directly against the party in possession or one claiming adversely; the declaration must contain a plain statement of the cause of action to entitle him to recover the land in controversy, together with the mesne profits. Digest of Laws, 1881.

In Georgia it is provided by statute that the plaintiff in ejectment may add a count in his writ or declaration, and submit the evidence to the jury, and recover by way of damages all such sums of money to which he may be entitled by way of mesne profits, together with the premises in dispute. The count for mesne profits may be in the name of the nominal or real plaintiff in the action; and no plaintiff in ejectment can have and maintain a separate action in his behalf for the recovery of mesne profits which may have accrued to him from the premises in dispute. Rev. Code, 1873, §§ 3356, 3357.

Idaho (Revised Laws, 1875, §§ 275, 278):

Actions may be brought by any person against another, who claims an estate or interest in real property adverse to him, for the purpose of determining such claim.

If the defendant disclaim any interest or estate in the property, or suffer judgment to be taken, the plaintiff shall not recover costs.

In such action, when the plaintiff shows a right to recover at the time it was commenced, but it appears his right was terminated during the pendency of the action, the verdict and judgment shall be according to the fact, and the plaintiff may recover damages.

Where permanent improvements have been made, their value shall be allowed as a set-off.

In Indiana, under the statutes of 1881, the plaintiff cannot recover for the use and occupation of the premises for more than six years next before the commencement of the action; but may recover in the same action for use and occupation up to the time of its termination. § 1058.

If the interest of the plaintiff expire before the time in which he could be put in possession, he shall obtain judgment for damages only. § 1059.

When the plaintiff, in an action of this nature, is entitled to damages, for withholding, or using, or injuring his property, the defendant may set off the value of any permanent improvements made thereon, to the extent of such damages, unless he prefers to avail himself of the law of occupying claimants. § 1061.

In case of wanton aggression on the part of a defendant, the jury may award exemplary damages. § 1062.

When an occupant of land has color of title thereto, and in good faith has made valuable improvements, and is afterwards, in a proper action, found not to be the rightful owner thereof, no execution shall issue to put the plaintiff in possession until certain provisions are complied with.

These consist in a finding by a jury: 1. The value of all lasting improvements made previous to the commencement of the action. 2. The

damages, if any, from waste or cultivation to the time of rendering judgment. 3. The fair value of the rents and profits which may have accrued, without the improvements, to the time of rendering judgment. 4. The value of the estate which the successful claimant has in the premises, without the improvements. 5. The taxes, with interest, paid by the defendant, and by those under whose title he claims. Then the plaintiff may pay the appraised value of the improvements, and the taxes paid, with interest, deducting the value of the rents, profits and damages, as assessed on the trial, and take the property. If he fails to do this within a reasonable time, fixed by the court, the defendant may take the property upon paying the appraised value of the land, aside from the improvements. If this be not done within a reasonable time, to he fixed by the court, the parties are tenants in common of all the lands, including the improvements, each holding an interest proportionate to the value of the property, as ascertained by the jury. §§ 1076, 1077, 1078, 1079.

By the statutes of Iowa, 1880, § 3250, the petition in actions for the recovery of real estate may state generally that the plaintiff is entitled to the possession of the premises, particularly describing them; also the quantity of his estate and the extent of his interest therein, and that the defendant unlawfully keeps him out of possession, and the damages, if any, which he claims for withholding the property; but if he claims other damages than the rents and profits, he shall state the facts constituting the cause thereof.

If the interest of the plaintiff expire before the time in which he could be put in possession, he can obtain judgment for damages only. § 3260.

The plaintiff cannot recover for use and occupation of the premises for more than six years prior to the commencement of the action. § 3261.

When the plaintiff is entitled to damages for withholding, or using, or injuring his property, the defendant may set off the value of any permanent improvements made thereon to the extent of the damages, unless he prefers to avail himself of the law for the benefit of occupying claimants. § 3262. In case of wanton aggression on the part of the defendant, the jury may award exemplary damages. § 3263. A tenant in possession in good faith, under a lease or license from another, is not liable beyond the rent in arrear at the time of the suit brought for the recovery of the land, and that which may afterwards accrue during the continuance of his possession. § 3264. The statute also provides for a defendant retaining, as security for rent, the possession, for a limited time, where he alleges that he has a crop sowed, planted or growing on the premises, and that fact is found by the jury. § 3265.

The statute of this state for relief of occupying tenants is like that of Indiana. § 1976 et seq.

By statute in Illinois, the plaintiff recovering judgment in ejectment in any of the cases in which the action may be maintained is entitled to recover damages against the defendant for the rents and profits of the premises recovered; but instead of the action of trespass for mesne profits, the plaintiff seeking to recover such damages must file a suggestion of the claim aud have it entered upon the record of the judg-

ment in ejectment, or attached thereto as a continuation of the same. It is substantially like a declaration for use and occupation; the defendant may plead to it the general issue of non-assumpsit, and under this plea give notice of, or plead specially, any matter in bar, except such as might have been controverted in the action of ejectment. If the issue be found in favor of the plaintiff, the jury must assess his damages to the amount of the mesne profits received by the defendant since he entered into the possession of the premises. On the trial of such issue, the plaintiff is required to establish, and the defendant may controvert, the time during which he enjoyed the mesne profits thereof, and the value of such profits, and the record of the recovery in the action of ejectment will not be evidence of such time. On such trial the defendant has the same right to set off any improvements made on the premises, to the amount of the plaintiff's claim, as is allowed by law; and in estimating the plaintiff's damages, the value of the use by the defendant of any improvements made by him is not to be allowed to the plaintiff. If no issue be joined on such suggestion, or if judgment by default, on demurrer or otherwise, be rendered, a writ of inquiry to assess the value of the mesne profits is to be issued, and on the execution of it the plaintiff must establish the same matters as on an issue, and the defendant may controvert the same, and make any set-off to which he is entitled, and the jury must assess the damages in the same manner. Cothran's ed. of Stats. of Ill. 1881, ch. 45.

Kansas, C. L. 1879, ch. 80, article 25, § 601:

In all cases, any occupying claimant, being in quiet possession of any lands or tenements for which such person can show a plain and connected title, in law or equity, derived from the records of some public office, or being in quiet possession of, and holding the same by deed, devise, descent, contract, bond or agreement, from and under any person claiming title, as aforesaid, derived from the records of some public office, or by deed duly authenticated and recorded; or being in quiet possession of, and holding the same under sale on execution or order of sale, against any person claiming title as aforesaid, derived from the records of some public office, or by deed duly authenticated and recorded; or being in possession of, and holding any land under any sale for taxes, authorized by the laws of this state or the laws of the territory of Kansas; or any person or persons, who have made a *bona fide* settlement and improvement which he, she or they still occupy, upon any of the Indian lands lying in this state, or any lands held in trust for the benefit of any Indian tribe at the date of such settlement, or which may have heretofore been Indian lands, and which were vacant and unoccupied at the date of such settlement, and where the records of the county show no title or claim of any person or persons to said lands at the time of such settlement; or any person in quiet possession of any land, claiming title thereto, and holding the same under a sale and conveyance, made by executors, administrators or guardians, or by any other person or persons, in pursuance of any order of court, or decree in chancery, where lands are or have been directed to be sold, and the purchaser or purchasers thereof

have obtained title to and possession of the same without any fraud or collusion on his, her or their part, shall not be evicted or thrown out of possession by any person or persons who shall set up and prove an adverse and better title to said lands, until said occupying claimant, his, her or their heirs, shall be paid the full value of all lasting and valuable improvements made on said lands by such occupying claimant, or by the person or persons under whom he, she or they may hold the same, previous to receiving actual notice by the commencement of suit on each adverse claim by which eviction may be effected.

§ 604. The jury shall assess the value of all lasting and valuable improvements made on the lands previous to the party receiving actual notice of such adverse claim; and shall also assess the damages which said land may have sustained by waste, together with the net annual value of the rents and profits which the occupying claimant may have received from the same after having received notice of the plaintiff's title, and deduct the amount thereof from the estimated value of such lasting and valuable improvements; and said jury shall also assess the value of the land in question at the time of rendering judgment as aforesaid, without the improvements made thereon, or damages sustained by waste.

§ 607. If the jurors shall report a sum in favor of the plaintiff or plaintiffs in said action, for the recovery of real property on the assessment and valuation of the valuable and lasting improvements, and the assessment of damages for waste, and the net annual value of the rents and profits, the court shall render a judgment therefor without pleadings, and issue execution thereon as in other cases; or if no excess be reported in favor of said plaintiff or plaintiffs, then, and in either case, the said plaintiff or plaintiffs shall be thereby barred from having or maintaining any action for mesne profits.

§ 608. If the jurors shall report a sum in favor of the occupying claimant or claimants, on the assessment of the valuation of the valuable and lasting improvements, deducting the damages to said land, the court shall render judgment in favor of the said occupying claimant or claimants for the sum or sums so assessed; and no writ or process for the eviction of the said claimant or claimants shall be issued until the said judgment shall be paid.

Gen. St. 1868, p. 646, § 83. The plaintiff may unite in the same petition claims to recover real property, with or without damages for the withholding thereof, and the rents and profits of the same. See California.

Minnesota statute same. Rev. St. 1866, p. 642, § 98.

Nebraska statute same. L. 1867, p. 71, § 3.

In Kentucky, by the civil code of 1854, the claim for recovery of specific real property, and the rents, profits and damages for withholding the same, may be united in the same petition, where each affects all the parties to the action. See §§ 93, 111; 17 B. Mon. 325. If any person, believing himself to be the owner, by reason of a claim in law or equity, the foundation of which being of public record, hath or shall hereafter peaceably seat or improve any land, which shall, upon judicial investigation, be decided to belong to another, the value of the improvements shall be paid by the successful party to

the occupant, or the person under whom and for whom he entered and holds, before the court rendering judgment or decree of eviction shall cause the possession to be delivered to the successful party. Gen. St. ch. 80.

In Maine when a demandant recovers judgment in a writ of entry, he may recover damages for the rents and profits of the premises, and also for any destruction or waste of the buildings or other property for which the tenant is by law answerable. The tenant is not liable for the rents and profits of the premises for more than six years, nor for waste or other damages committed before that time, unless the rents and benefits are allowed in set-off to his claim for improvements. When the demanded premises have been in the actual possession of the tenant, or those under whom he claims, for six years or more before the commencement of the action, the tenant will be allowed for his betterments. Provision is made by the statute for the allowance to the tenant for his betterments where the cause is determined in favor of the demandant upon demurrer, default, or by verdict; and the tenant may also obtain compensation for buildings and improvements on the premises, to be estimated by the jury according to the increased value of the premises by reason thereof, and the jury may also appraise the value of the premises without such improvements, whereupon the demandant may abandon the premises, or he may pay for use of the tenant the sum assessed for the buildings and improvements, with interest thereon, as he may elect; but if he elects to abandon the premises to the tenant, then the tenant must pay the demandant for his premises their value without the improvements. R. S. 1871, tit. 9, ch. 104; Tyler on Ejectment, 638-9.

In Michigan the action of ejectment is retained, and mesne profits are recoverable after judgment in the ejectment suit upon suggestion, in the form, upon like issue, and proof, as in Illinois. 2 Comp. L. 1871, §§ 6204-6212.

When the defendant in ejectment, or any person through whom he claims title, shall have been in actual possession of the premises for six successive years, or more, and before the commencement of the action, and claiming either by virtue of or in opposition to a sale made by any executor, administrator or guardian, or the auditor general, or any county treasurer, or other person or body corporate authorized by any statute to make sale of land for non-payment of taxes, such defendant shall be allowed a compensation for the value of any buildings and improvements on the premises made by him, or any person through whom he claims title. In all cases of such possession of the premises by the defendant, he may file a claim in writing to compensation for buildings and improvements on the premises, and a request for an estimation by the jury of the increased value of the premises by reason thereof, and the plaintiff may file a request in writing that the jury would also estimate what would have been the value of the premises at the time of trial if no buildings had been erected, or improvements made, or waste committed, both which estimates it shall be their duty to make, and in their verdict state to the court. If, after the rendition of the verdict, the plaintiff shall, at the same or next subsequent term of the court, make his election on

record to abandon the premises to the defendant at the value estimated by the jury, then judgment shall be rendered against the defendant for the sum so estimated by the jury, with costs of suit. If the plaintiff shall not so elect, he shall within a year after the rendition of the judgment for recovery of the premises, pay the defendant such sum as shall have been assessed for the buildings and improvements, with interest thereon, and no writ of possession shall issue on the judgment rendered on the verdict, nor any new action be sustained for the land, until such sum is paid, and a default in making payment as aforesaid shall be deemed an abandonment of all claim of title to the premises, and be a bar to the recovery thereof. Id. §§ 6252–6255.

If the right or title of a plaintiff in ejectment expire after the commencement of the suit, but before trial, the verdict shall be returned according to the fact, and judgment shall be rendered that he recover his damages by reason of the withholding of the premises by the defendant, to be assessed.

As to Minnesota, see California and Kansas, ante, pp. 330, 334.

Damages for withholding the property recovered shall not exceed the fair value of the property, exclusive of the use of the improvements made by the defendant for a period not exceeding six years; and when permanent improvements have been made by a defendant, or those under whom he claims, holding under color of title adversely to the claims of the plaintiff, in good faith, the value thereof shall be allowed as a set-off against the damages of the plaintiff for the use of the property. Gen'l Stats. Minn. 1878, p. 815, § 13.

Rev. Code Mississippi, 1880, ch. 68, provides that the action of ejectment shall be brought in the name of the person claiming as plaintiff against the tenant or possessor as defendant. § 2479. And the plaintiff may add to his declaration a claim for mesne profits (§§ 2487, 2512), or he may have his action for mesne profits after recovery in ejectment. Id.

When the jury shall find for the plaintiff, in the action of ejectment, if the defendant has a crop then planted, and growing upon the premises, they shall assess a reasonable rent for the plaintiff to receive for the use of the premises for such time as they may think necessary for the defendant to make and gather his crop. And if the defendant shall, during the term of the court at which the action was tried, enter into bond, with security to be approved by the court, in a penalty of double the amount of the rent so assessed by the jury, payable to the plaintiff, conditioned for the payment of the rent assessed as aforesaid, at the expiration of the term fixed by the jury for the defendant to hold possession of the premises, then no writ of possession shall issue upon the judgment in such action until the expiration of the time so allowed by the jury, and such bond shall be filed in the court, and, if forfeited, shall have the force and effect of a judgment, and execution may issue thereon against the principal and sureties, as upon other judgments in such court. § 2507.

§ 2512 provides that it shall be lawful in all cases for the defendant in ejectment, or in an action for mesne profits, to plead the value of all permanent, valuable, and not ornamental improvements, made by the defendant on the land, or by any one under whom he claims, before notice

of the intention of the plaintiff to bring the action.

The plaintiff can have no execution until he has paid the excess of the value of such improvements over the amount of mesne profits and damages.

After three months, if the plaintiff has failed to make such payment, the defendant may retain the land by paying within three months the assessed value of the land, with interest and costs.

After this time has elapsed, if the defendant has not availed himself of this option, the land is to be sold, and the proceeds to be applied to pay the costs, the assessed value of the land, and out of the residue the defendant is to be paid the assessed value of the improvements above the value of the mesne profits and damages. Any surplus is to be divided between the parties in the proportion of the payments for the land and the improvements.

In Missouri, if the plaintiff prevail in the action, he may recover damages for all waste and injury, and, by way of damages, the rents and profits down to the time of assessing the same, or to the time of the expiration of the plaintiff's title, under the following limitations: First, when it shall not be shown on the trial that the defendant has knowledge of the plaintiff's claim prior to the commencement of the action, such recovery must be only from the time of the commencement of the action; second, when it shall be shown on the trial that the defendant had knowledge of the plaintiff's claim prior to the commencement of the action, and that such knowledge came to the defeudant within five years next preceding the commencement of the action, such recovery will be from the time that such knowledge came to the defendant; third, when it shall be shown on the trial that knowledge of the plaintiff's claim came to the defendant more than five years prior to the commencement of the action, such recovery will only be for the term of five years next preceding the commencement of the action. Rev. Stat. 1879, § 2252.

If the right of the plaintiff to the possession of the premises expire after the commencement of the suit, and before the trial, the verdict must be returned according to the fact, and judgment will be entered only for the damages and costs. If the plaintiff prevail in his action, and it appear in evidence that the right of the plaintiff to the possession is unexpired, the jury must find the monthly value of the rents and profits; in which last case the judgment will be for the recovery of the premises, the damages assessed, and the accruing rents and profits, at the rate found by the jury, from the time of rendering the verdict until the possession of the premises is delivered to the plaintiff. Id. §§ 2253, 2254, 2255.

If a judgment or decree of dispossession shall be given in an action for the recovery of possession of premises, or in any real action in favor of a person having a better title thereto, against a person in possession (held by himself or by his tenant) of any lands, tenements or hereditaments, such person may recover in a court of competent jurisdiction compensation for all improvements made by him in good faith on such lands, tenements or hereditaments, prior to his having had notice of such adverse title. Id. § 2259.

Montana (Rev. Stats. 1879, ch. 3):

§ 354. An action may be brought by any person in possession, by him-

self or his tenant, of real property, against any person who claims an estate or interest therein adverse to him, for the purpose of determining such adverse claim, estate or interest.

§ 355. If the defendant in such action disclaim in his answer any interest or estate in the property, or suffer judgment to be taken against him without answer, the plaintiff shall not recover costs.

§ 356. Where the plaintiff shows the right to recover at the time the action was commenced, but it appears that his right has terminated during the pendency of the action, the verdict and judgment shall be according to the fact, and the plaintiff may recover damages for withholding the property.

§ 357. When damages are claimed for withholding the property recovered, upon which permanent improvements have been made by a defendant, or those under whom he claims, holding under color of title adversely to the claims of the plaintiff, in good faith, the value of such improvements shall be allowed as a set-off against such damages.

As to Nebraska, see California and Kansas, ante, pp. 330, 334.

As to Nevada, see California and Kansas, ante, pp. 330, 334.

New Hampshire (Gen. Stat. 1878, p. 538, §§ 6–8): Any person against whom any action is brought for the recovery of real estate, who has been in the actual, peaceable possession thereof under a supposed legal title for more than six years before the action was commenced, may claim the amount which buildings erected and improvements made by him have increased the value, after deducting for any injury or waste, and the plaintiff will not be entitled to a writ for possession unless he pays the amount allowed for such betterments within a year.

New Jersey: In all actions where the defendant in ejectment would be liable for mesne profits and damages, the plaintiff may declare for and recover the same in the same action, under such regulations, as to pleadings and proceedings, as the justices of the supreme court may prescribe; or, after judgment in ejectment, an action may be brought for the mesne profits and damages according to the former practice. Rev. Stats. 1877, p. 332.

In the action for mesne profits, the plaintiff shall be entitled to recover of the defendant as damages the full value of the use and occupation of the premises for the time such defendant was in possession thereof, not exceeding six years before the commencement of such action; but such damages shall not include the value of the use of any improvements made by the defendant; and where permanent improvements have been made in good faith on the premises by the defendant, or those under whom he claims, while holding adversely to the plaintiff under color of title obtained by a fair *bona fide* purchase from some person in possession, and supposed to have a legal right and title thereto, the value of such permanent improvements shall be allowed to the defendant, and set off against the damages of the plaintiff to the extent of such damages, and no further.

New Mexico, Gen. Laws 1880, p. 486:

§ 3. When any person or his assignors may have heretofore made any valuable improvements on any lands, and he or his assignors have been or may hereafter be deprived of the possession of said improve-

ments in any manner whatever, he shall have the right, either in an action of ejectment which may have been brought against him for the possession, or by an appropriate action at any time thereafter within ten years, to have the value of his said improvements assessed in his favor, as of the date he was so deprived of the possession thereof; and the said value so assessed shall be a lien upon the said land and improvements, and all other lands of the person who so deprived him of the possession thereof situate in the same county until paid; but no improvements shall be assessed which may or shall have been made after the service of summons in the action of ejectment on him in favor of the person against whom he seeks to have said value assessed for said improvements.

New York: By the code the plaintiff may unite in the same complaint claims to recover real property, with or without damages for the withholding thereof, and the rents and profits of the same. § 167.

North Carolina: The action for recovery of real property is called ejectment, in which the practice is statutory — and in form trespass,— and the plaintiff after judgment in this action may bring trespass for mesne profits. Rev. Code, 1855; Tyler on Eject. pp. 797, 800, 806; Porter v. Jones, 2 Dev. & Batt. L. 294.

Ohio: The plaintiff may unite in one petition claims to recover real property, with or without damages for the withholding thereof, and the rents and profits of the same. Ohio Code, § 80.

The parties in an action for the recovery of real property may avail themselves, if entitled thereto, of the relief of the statutes in force for the relief of occupying claimants of land. Id. § 564.

Oregon (General Laws of 1872, p. 175):

§ 313. Any person who has a legal estate in real property, and a present right to the possession thereof, may recover such possession, with damages for withholding the same, by an action at law. Such action shall be commenced against the person in the actual possession of the property at the time, or if the property be not in the actual possession of any one, then against the person acting as the owner thereof.

§ 314. A defendant, who is in actual possession, may for answer plead that he is in possession only as tenant of another, naming him, and his place of residence, and thereupon the landlord, if he apply therefor, shall be made defendant in place of the tenant, and the action shall proceed in all respects as if originally commenced against him.

§ 315. The plaintiff, in his complaint, shall set forth the nature of his estate in the property, whether it be in fee, for life, or for a term of years, and for whose life, or the duration of such term, and that he is entitled to the possession thereof, and that the defendant wrongfully withholds the same from him to his damage, such sum as may be therein claimed. The property shall be described with such certainty as to enable the possession thereof to be delivered, if a recovery be had.

§ 318. The plaintiff shall only be entitled to recover damages for withholding the property for the term of six years next preceding the commencement of the action, and for any period that may elapse from such commencement to the time of giving a verdict therein, exclusive

of the use of permanent improvements made by the defendant. When permanent improvements have been made upon the property by the defendant, or those under whom he claims, holding under color of title adversely to the claim of the plaintiff, in good faith, the value thereof at the time of trial shall be allowed as a set-off against such damages.

§ 319. If the right of the plaintiff to the possession of the property expire after the commencement of the action, and before the trial, the verdict shall be given according to the fact, and judgment shall be given only for the damages.

Pennsylvania: In the statutory action of ejectment, mesne profits may be recovered. Dawson v. McGill, 4 Whart. 230; Tyler on Eject. 680.

South Carolina: The action for trying title to real property is trespass — between the real parties. If the jury find for the plaintiff, they are empowered in the same verdict to award damages for mesne profits, and judgment will be entered on the verdict as well for the damages as for the recovery of the land, to be executed by writ of possession and execution. 5 St. at Large, p. 170.

Tennessee: The action for the recovery of real property is called ejectment; the plaintiff is the real claimant, and it is brought against the actual occupant, or, where the premises are vacant, against any person claiming an interest therein or exercising acts of ownership at the commencement of the action. Damages are claimed in the declaration. Statutes 1871, § 3230 et seq.

If the right of the plaintiff expire after the commencement of the action, and before trial, the verdict must be according to the facts, and judgment will be entered for damages for the withholding of the premises by the defendant. Id.

The plaintiff may have an action for mesne profits after verdict and judgment in ejectment. Statutes, § 3259.

Texas: Trespass is the action for trying title to land, and where the plaintiff succeeds, he recovers not only the land but damages for mesne profits. Damages are limited to two years prior to commencement of suit. Improvements made in good faith allowed as offset. Rev. Stats. 1879, art. 4784 et seq.

Vermont: Damages in the action of ejectment for mesne profits may be recovered, but only as shall be just and equitable in view of improvements made upon the premises by the defendant or those under whom he claims. Rev. Laws, 1880, tit. 11, ch. 69. If the plaintiff's title shall expire or be conveyed by him after the commencement of the action, the suit will not thereby fail, but the plaintiff may recover judgment for his damages during the continuance of his title, with costs. Id. And if the declaration is properly framed, damages may be recovered in that action for wanton acts of the defendant to the injury of the premises. Lippett v. Kelley, 46 Vt. 516.

Virginia: If the plaintiff file with his declaration in ejectment a statement of the profits and other damages which he means to demand, and the jury find in his favor, they are required at the same time, unless the court otherwise order, to assess the damages for mesne profits of the land for any period not exceeding five years previously to the commencement of the suit until the verdict, and also the damages, for any destruction or waste of the build-

ings or other property, during the same time, for which the defendant is chargeable.

There is the usual provision for recovery of damages where the plaintiff's title expires after suit brought and before trial.

If the defendant intends to claim allowance for improvements made upon the premises by himself or those under whom he claims, he must file with his plea, or subsequently, a statement of his claim therefor, in case judgment be rendered for the plaintiff. In such case the damages of the plaintiff and the allowance to the defendant for improvements will be estimated, and the balance ascertained, and judgment therefor rendered, as prescribed by the statute in respect to allowance for improvements. Instead of filing such statement, the defendant may wait until after judgment in the ejectment suit, and at any time before execution of the decree or judgment, present a petition for relief in respect to improvements, by obtaining an order which either party may apply for, that the assessment of damages and allowance for improvements be postponed until after the verdict on the title has been recorded. Code of 1873, chs. 131, 132.

Washington Territory (Code of 1881, § 541): The plaintiff shall only recover damages for withholding the property for six years preceding the bringing of the action, and for any period that may elapse from such commencement to the time of giving a verdict therein. When permanent improvements have been made upon the property by the defendant, under color of title, the value thereof at the time of trial shall be allowed as a set-off against such damages.

West Virginia (Rev. Stats. 1878, chs. 71, 72): The action of ejectment is retained, and may be brought in the same cases in which a writ of right might have been brought prior to July 1, 1850, in Virginia. If the plaintiff file with his declaration a statement of the profits and other damages which he means to demand, and the jury find in his favor, they shall at the same time, unless the court otherwise order, assess the damages for mesne profits of the land for any period not exceeding five years previously to the commencement of the suit until the verdict, and also the damages for any destruction or waste of the buildings or other property during the same time.

If the defendant intends to claim allowance for improvements, made upon the premises, he shall file with his plea, or before the trial, a statement of his claim therefor, in case judgment be rendered for the plaintiff. In such cases the damages of the plaintiff, and the allowance to the defendant for improvements, shall be estimated, and the balance ascertained, and judgment therefor rendered.

Any defendant against whom a decree or judgment shall be rendered for land, where no assessment of damages has been made as above provided, may, before the execution of the decree or judgment, present a petition to the court, stating that he, while holding the premises under a title believed to be good, made permanent improvements thereon, and praying that he may be allowed for the same over and above the value of the use and occupation of the land; and thereupon the court may suspend the execution of the judgment or decree, and impanel a jury to assess the damages of the

The action for recovery of the land is made in many states a bar to any other action or proceeding to recover mesne profits. But in most cases, even though mesne profits may be recovered in the same action in which the land is recovered, the common law action for mesne profits may be maintained after the action for the recovery of the land has been determined in favor of the plaintiff.[1]

Section 1.

MESNE PROFITS.

The remedy for — What may be allowed as damages — Remedy for, under the code.

The remedy for.— The action of trespass for mesne profits is consequential to the recovery in ejectment.[2] The plaintiff in the latter, upon the introduction of the fictions by which the proceedings were distinguished, was a nominal party, and the damages assessed became nominal also.[3] As these nominal damages are not given in satisfaction of the mesne profits,

plaintiff and the allowances to the defendant for such improvements. The jury, in assessing such damages, shall estimate against the defendant the clear annual value of the premises during the time he was in possession thereof, for not longer than five years before suit brought, and the damages for waste.

In Wisconsin, the plaintiff in any action for the recovery of any specific real property, or of the possession thereof, is entitled in the same action to recover damages for the withholding of the premises, including the rents and profits of the premises recovered, during the time they were unlawfully withheld, in cases in which the plaintiff is entitled to recover such rents and profits. And, on the trial of the action, the defendant has the same right to set off permanent improvements made on the premises to the amount of the plaintiff's claim, as is allowed by law. In estimating the plaintiff's damages, the value of the use by the defendant of any improvements made by him is not to be allowed. If the title of the plaintiff expire after the commencement of the action, but before trial, the verdict must be according to the fact, and judgment entered that he recover his damages by reason of the withholding of the premises by the defendant to be assessed. R. S. 1878, ch. 133.

[1] Tyler on Eject. 838.

[2] Lord Mansfield in Astin v. Parkin, 2 Burr. 668; Mitchell v. Mitchell, 1 Md. 55; Morgan v. Varick, 8 Wend. 587; Benson v. Matsdorf, 2 John. 369; Blount v. Garen, Haywood, 88; Van Alen v. Rogers, 1 John. Cas. 283, note; S. C. 3 id. 457; Cushwa v. Cushwa, 9 Gill, 242.

[3] It has been held in some cases that it is not error to assess the actual damages in ejectment. Miller v.

but only entitle the plaintiff to costs,[1] the recovery of them will not preclude the plaintiff from the recovery of mesne profits by action[2] — that is, in trespass.[3] Where the plaintiff's title expires after the commencement of the ejectment suit, and before trial, he cannot recover the land, but he is entitled to damages and costs; and these he is entitled to recover in the ejectment suit. This was allowed at common law,[4] and is a right now very generally declared by statute.

In this action of trespass for mesne profits, after recovery in ejectment, the tenant or defendant is estopped from controverting the title, from the time of the ouster complained of in the ejectment; or date of the demise laid in the declaration;[5] but if the plaintiff proceed for antecedent profits, he must prove his title to the premises whence they arose, to show his right to recover them.[6] Only the lessor of the plaintiff can proceed for

Melcher, 13 Ired. L. 439; Boyd's Lessee v. Cowan, 4 Dall. 128; Lessee of Battin v. Bigelow, 1 Pet. C. C. 452; Osbourn v. Osbourn, 11 S. & R. 58, per Duncan, J.

[1] Van Alen v. Rogers, supra; Davis v. Doe, 25 Miss. 445.

[2] Van Alen v. Rogers, supra, and note.

[3] Bac. Abr. tit. Ejectment (H.): "The object at this day proposed to be recovered by it (ejectment) is quite changed from what it was in its original state; for as, formerly, damages were only recoverable by it, and not the term; so now the term only is sought for by it, and not damages. For a satisfaction in damages, therefore, a subsequent action is to be brought, which subsequent action is in *form* an action of trespass *vi et armis*, but in *effect* to recover the rents and profits of the estate. It is *in form* an action of trespass, because it is consequent, and, as it were, supplemental to the action of ejectment, and, therefore, must necessarily be of the same species with it. It may be brought by the lessor of the plaintiff in his own name, or in the name of the nominal lessee; but in either shape it is equally *his* action; for it is not in any manner affected by the fiction in the ejectment."

[4] Jackson v. Davenport, 18 John. 295; Wilkes v. Lion, 2 Cow. 333; Woodhull v. Rosenthal, 61 N. Y. 393.

[5] Id.; Benson v. Matsdorf, 2 John. 369; Avent v. Hard, 3 Head, 458; Van Alen v. Rogers, 3 John. Cas. 457; Crockett v. Lashbrook, 5 T. B. Mon. 531; Man v. Drexel, 2 Pa. St. 202; Myers v. Sanders' Heirs, 8 Dana, 65; Drexel v. Man, id. 271; Doe exd. Marshall v. Dupey, 4 J. J. Marsh. 388; Graves v. Joice, 5 Cow. 261; Postern v. Jones, 2 Dev. & Batt. 294; Brewer v. Beckwith, 35 Miss. 467; Chirac v. Reinecker, 11 Wheat. 280; Leland v. Tousey, 6 Hill, 328; Den v. McShane, 13 N. J. L. 35.

[6] Id.; Masterson v. Hagan, 17 B. Mon. 328; Avent v. Hard, 3 Head, 458; Kille v. Ege, 82 Pa. St. 102; Brewer v. Beckwith, supra; West v. Hughes, 1 Har. & J. 574.

damages anterior to the demise.[1] No party can recover mesne profits for any time prior to his obtaining title; an heir or devisee cannot recover those which accrued in his ancestor's time.[2]

WHAT MAY BE ALLOWED AS DAMAGES.— The plaintiff must prove the value of the mesne profits, for the judgment in ejectment does not prove anything as to that. In estimating them, however, the jury are not confined to the mere rent of the premises; they may give extra damages; and the costs in ejectment are recoverable, whether the judgment be by default against the casual ejector, or upon a verdict against the tenant or landlord, and are therefore usually declared for as damages in the action for mesne profits.[3]

The general principle is that the plaintiff in this action is entitled to recover all damages fairly resulting from his having been wrongfully kept out of possession.[4] They may be computed during the whole period that the defendant has withheld the premises from the plaintiff, down to the time of the verdict, unless the statute of limitations is pleaded,[5] if the defendant has kept possession; and the time and extent of the defendant's possession are open to proof.[6] On this principle, he is entitled to recover *the costs of the ejectment suit*, both of the trial and in error. In England, if the costs have been taxed, the recovery is confined to the taxed costs, and no extra costs will be allowed; but it is not essential to the recovery that the costs be taxed.[7] And where the costs cannot be taxed, it has been held there that

[1] Tyler on Eject. 839; Denn v. Chubb, Coxe, 466.

[2] Hotchkiss v. Auburn, etc. R. R. Co. 36 Barb. 600; Brown v. McCloud, 3 Head, 280. See Cook v. Webb, 21 Minn. 428.

[3] Bac. Abr. tit. Ejectment (H.); Goodtitle v. Tombs, 3 Wils. 118.

[4] Symonds v. Page, 1 Cromp. & J. 29; Doe v. Perkins, 8 B. Mon. 198.

[5] Dawson v. McGill, 4 Whart. 230; Whissenhunt v. Jones, 78 N. C. 361; Pendergast v. McCosten, 2 Ind. 87; McCrubb v. Bray, 36 Wis. 341; Field v. Columbet, 4 Sawyer, 523; Jackson v. Wood, 24 Wend. 443; Budd v. Walker, 9 Barb. 493; Morgan v. Varick, 8 Wend. 587; Avent v. Hard, 3 Head, 458; Love v. Shartra, 31 Cal. 487.

[6] Aslin v. Parkin, 2 Burr. 668; Pearse v. Coaker, L. R. 4 Exch. 92; 38 L. J. Exch. 32; Vance v. Inhabitants, etc. 7 Blackf. 241; Ryers v. Wheeler, Hill & D. Supp. 389; Ainslie v. Mayor, etc. of N. Y. 1 Barb. 168; Mitchell v. Freedley, 10 Pa. St. 198; Miller v. Henry, 84 Pa. St. 33.

[7] Newell v. Roake, 7 B. & C. 404; Symonds v. Page, 1 Cromp. & J. 29; Doe v. Davis, 1 Esp. 358; Doe v. Filliter, 13 M. & W. 47; 11 id. 80; Doe v.

the jury might reasonably consider the costs between attorney and client as the measure.[1] Costs of the ejectment suit have been held recoverable in this country;[2] nor is the recovery limited, at least not uniformly, to costs taxable between party and party. In a Kentucky case, Marshall, C. J., said: "The principle from which the rule on this subject is to be extracted is in our opinion this: that the plaintiff in this action is entitled to be reimbursed in such amount as he has in good faith been compelled to pay in obtaining by legal means the restoration of the property which the defendant has wrongfully taken or withheld from him." "The amount recoverable under this head cannot exceed what he has actually paid, or is in good faith actually bound to pay for obtaining restitution. But as he cannot be compelled to pay more than the reasonable fees and charges for the services of others necessary for obtaining legal redress, he may not be entitled to recover the full amount which he has bound himself to pay for such services. And on the other hand, as he may have obtained the services for less than their actual or reasonable value, he may not always be entitled to recover to the full amount of that value. The recovery under this head may thus be limited below the amount which the plaintiff has actually paid, or bound himself to pay, on the ground that that amount is more than the reasonable value of the services necessary in his suit for restitution of his right. But it cannot be carried beyond that amount, on the ground that the necessary services were reasonably worth more. Then the criterion in this case is not what would have been reasonable if the plaintiff had paid, or undertaken to pay so much, but what the plaintiff had paid, or had undertaken and was bound to pay, if that sum was not unreasonable."[3]

The plaintiff is entitled to recover, as a general rule, the annual value of the land, for the time he shows a right to recover, to which may be added other damages under particular circumstances. Compensation is the proper measure of damages.[4]

Hare, 2 Dowl. P. C. 245; 2 Cromp. & M. 145; Doe v. Huddart, 2 Cromp. M. & R. 316.

[1] Newell v. Roake, supra.

[2] Barron v. Abeel, 3 John. 481; Doe v. Perkins, 8 B. Mon. 198; Denn v. Chubb, Coxe, 466. See Tate v. Doe, 24 Miss. 465.

[3] Doe v. Perkins, supra.

[4] Adams on Eject. 337, 391; Kille

In an English case, in which it appeared that there had been an actual ouster, and the defendant had kept the plaintiff out until the judgment in the ejectment, it was held that recovery was not to be confined to mesne profits only, but, as was remarked by Gould, J., the plaintiff might recover for "his trouble, etc.," that he had known four times the value of the mesne profits to be given.[1] Referring to this language, Gibson, C. J., said: "If trouble and expense are subjects of compensation, why are they not also included in the original judgment? But it would have been received as a startling novelty. A separate suit could not lie for the trouble and expense of a previous one; and there is no reason why they should be component parts of a cause of action in common with something else. There is no case in which compensation has been specifically recovered for them. There are *dicta* that a jury may give whatever they may think reasonable; but surely no court will subject a party to a blind and an unbridled discretion. A verdict will not be set aside for excess of damages, except in an extreme case; and the defendant would often suffer all but extreme injustice."[2] Consequential damages, however, besides costs of the ejectment, may be recovered — as for shutting up an inn and destroying the custom, when specially declared for.[3] The plaintiff may recover the actual damage and injury to the premises, as well as the yearly value of the land.[4] Defendants, in an action for mesne profits, had demised premises for a term of fifteen

v. Ege, 82 Pa. St. 102–112; Goodtitle v. Tombs, 3 Wils. 118; Dewey v. Osborn, 4 Cow. 329; Drexel v. Man, 2 Pa. St. 271; Brown's Lessee v. Galloway, Pet. C. C. 291; Lippett v. Kelley, 46 Vt. 516; Congregational Society v. Walker, 18 Vt. 600; Averett v. Brady, 20 Ga. 523; Masterson v. Hagan, 17 B. Mon. 325; New Orleans v. Gaines, 15 Wall. 624; Woodhull v. Rosenthal, 61 N. Y. 394.

[1] Goodtitle v. Tombs, supra.

[2] Alexander v. Herr, 11 Pa. St. 539. See Good v. Mylin, 8 Pa. St. 51.

[3] Dunn v. Large, 3 Doug. 335.

[4] Cooch v. Gerry, 3 Harr. 280; Huston v. Wickersham, 2 Watts & S. 308; Masterson v. Hagan, 17 B. Mon. 325; Lippett v. Kelley, 46 Vt. 516. In Averett v. Brady, 20 Ga. 523, which was an action for mesne profits for a ferry, it was held sufficiently liberal to defendant to instruct the jury to consider the proceeds of the ferry, deducting the expense of fitting it up, and carrying it on, and making due allowance for all risk and expense.

Under a statute in Massachusetts, providing that "the rents and profits for which the tenant is liable shall be the clear annual value of the premises for the time during which he was in possession thereof" (Gen. St. ch. 134, § 15), it was held that in estimating the damages for with-

years, at an annual rent of $2,000, besides the payment of royalty on each ton of iron ore mined; and they had received the rent for one year; but the premises were in no way injured, and no ore was taken therefrom. The defendants having been evicted by the plaintiffs, became unable to fulfil their covenants in the lease, and the lessees thereby acquired a right of action against them for damages. It was held that the $2,000 received by defendants did not establish a correct basis for fixing the rental value of the premises.[1] A defendant being bona fide purchaser for value, and having taken possession under color of title of mines which were unimproved, and having expended large sums in their development, as well as in permanent improvements thereon of great value, it was held he was chargeable for ores removed only their value in place, that is, by deducting from their market value the cost of mining, cleansing and delivering in market.[2] And he may defend against the claim of mesne profits by showing that the improvements he has made and left upon the lands are of value sufficient to be a full compensation for the use and occupation.[3] Interest has been held recoverable on mesne profits.[4] Where the property was situate in New York city, where rent was payable quarterly, it was held proper to add interest quarterly.[5] Under the statute of New York, and similar statutes adopted in other states, for recovery of damages upon a suggestion after determination of the ejectment suit, the measure of damages is that applicable in assumpsit for use and occupation. The compensation is adjusted as upon contract and not upon the footing of a tort.[6] The statutes indicate the measure of damages, and the defenses which may be made.

holding a strip of land, the premises in question, the jury might not take into consideration its special value to the demandant as a passage-way to adjacent premises; that the statute excludes the idea that he can recover consequential damages for alleged injury to his other land adjoining the premises. McMahan v. Bowe, 114 Mass. 140.

[1] Kille v. Ege, 82 Pa. St. 102.

[2] Ege v. Kille, 84 Pa. St. 333; Maye v. Tappan, 23 Cal. 306; Galler v. Felt, 30 id. 481; Stockbridge Iron Co. v. Cone Iron Works, 102 Mass. 80; Vol. I, p. 169, note 4.

[3] Id.

[4] Jackson v. Wood, 24 Wend. 443; Low v. Purdy, 2 Lans. 422; Allen v. Smith, 63 Mo. 103.

[5] Jackson v. Wood, supra.

[6] Holmes v. Davis, 19 N. Y. 488; reversing S. C. 21 Barb. 265; Woodhull v. Rosenthal, 61 N. Y. 394.

The common law action of trespass for mesne profits is a liberal and equitable one, and equitable defenses may be made.[1] Taxes paid by the defendant may be deducted from the damages.[2] Where the defendant had paid ground rent during his occupancy, which otherwise the plaintiff must have paid, it was deducted from the damages in an action for mesne profits.[3] At common law, whoever takes and holds possession of land to which another has a better title, whether he be a *bona fide* or *mala fide* possessor, is liable to the true owner for all the rents and profits which he has received; but the disseizor, if he be a *bona fide* occupant, may recoup the value of the meliorations made by him against the claim of damages.[4] The owner is not compelled to pay for improvements as a condition on which he may regain possession of his property. The improvements when annexed to the land become part of the freehold.[5] But a *bona fide* occupant is entitled to have them taken into account in ascertaining whether the owner of the land has sustained damages or not, both in the case where such improvements were made by the occupant, and where they were made by one whose title he has purchased.[6] In such case, the defendant should be allowed the value of his improvements, made in good faith, that is, in belief of his title, and without notice of the real owner's claim, to the extent of the rents and profits due to such owner.[7] The improvements should be estimated in favor

[1] Murray v. Governeur, 2 John. Cas. 441; Jackson v. Loomis, 4 Cow. 172.

[2] Ringhouse v. Keener, 63 Ill. 230; Stark v. Starr, 1 Sawyer, 15.

[3] Doe v. Hare, 2 Cromp. & M. 145.

[4] Green v. Biddle, 8 Wheat. 1.

[5] Anderson v. Fisk, 36 Cal. 629; Russell v. Blake, 2 Pick. 505.

[6] Morrison v. Robinson, 31 Pa. St. 456.

[7] Jackson v. Loomis, 4 Cow. 172; Hatcher v. Briggs, 6 Oregon, 31; Tongue v. Natwell, 31 Md. 302; Week v. Fulton, 3 Gratt. 193; Dowd v. Fawcett, 4 Dev. 92; Ewing v. Hanley, 4 Litt. 346; Porter v. Henley, 10 Ark. 187; Doe v. Roe, 2 Houst. 321; Dothage v. Stuart, 35 Mo. 231; Russell v. Blake, 2 Pick. 505; Campbell v. Brown, 2 Wood, 349; Utterback v. Binns, 1 McLean, 242; Averett v. Brady, 20 Ga. 523; White v. Moses, 21 Cal. 34; McGarrity v. Byington, 12 Cal. 426; Worthington v. Young, 8 Ohio, 401; Bedell v. Shaw, 59 N. Y. 46; Bright v. Boyd, 1 Story, 478; 2 id. 607; Union Hall Asso. v. Morrison, 39 Md. 281; Morrison v. Robinson, 31 Pa. St. 456.

A defendant in ejectment is not liable for mesne profits taken prior to his own entry, by those under whom he claims; but if, in accounting for the profits chargeable to himself, he claims credit for im-

of the defendant, at such amount as they add to the market value of the premises.[1] The compensation allowed at common law for improvements was a mere equitable defense in mitigation of damages. Now very generally this defense, or the right of a *bona fide* occupant to compensation for improvements, is defined and regulated by statute, and where it is so defined and regulated, the party claiming such compensation must bring himself within the statute.[2]

REMEDY FOR, UNDER THE CODE.— The claim for damages for withholding the possession is a distinct and separate cause of action from the claim of possession. It was necessarily the subject of a subsequent action at common law. Under the code, however, it is at the option of the plaintiff to join it with the claim of possession in one action, or bring a separate action. By the New York statute, prior to the code, the action for mesne profits was required, in substance, to be an action for use and occupation.[3] The change in the statutes by the introduction of the code did not disturb or affect this right of action for use and occupation, but the action or procedure for its recovery was changed. When the code came to unite the various

provements made by his predecessors, such improvements must first answer for the profits taken by those who erected them. Gardner v. Grannis, 57 Ga. 539.

A defendant in ejectment, who claims under a tax title, also under conveyance from a third party, and who made improvements before the tax title accrued, cannot recover the value of his improvements from the plaintiff. Jacks v. Dyer, 31 Ark. 334.

[1] Thomas v. Thomas, Ex'r, 16 B. Mon. 420; Bell's Heirs v. Barnett, 2 J. J. Marsh. 516; Allison v. Taylor's Heirs, 3 B. Mon. 363; Stark v. Starr, 1 Sawyer, 15; Woodhull v. Rosenthal, 61 N. Y. 396-7; Wythe v. Myers, 3 Sawyer, 598.

[2] Lanquest v. Ten Eyck, 40 Iowa, 213; Love v. Shartra, 31 Cal. 487; Huggins v. Clark, 51 Cal. 112; McCrubb v. Bray, 36 Wis. 342. See ante, p. 329, note 1. Where the improvements made on the land by the defendant, in an action of ejectment, have been destroyed by casualty before the trial, and he is thereby deprived of his right to compensation for them in case the plaintiff recovers the land, the plaintiff will not be entitled to recover as mesne profits or rents during any portion of the time of the defendant's possession, anything more than the reasonable value of the rent of the premises, without the improvements made by the defendant and destroyed. Nixon v. Porter, 38 Miss. 401.

[3] Holmes v. Davis, 19 N. Y. 488; Woodhull v. Rosenthal, 61 N. Y. 394.

classes of actions into one, under which all rights of action were to be enforced, and to abolish all peculiarities in the forms of pleading, the remedy for mesne profits naturally fell into the arrangement, and became the subject of a civil action under the new system; and the peculiar method of commencing it by suggestion became inapplicable.[1] Hence a claim for recovery of real property, and damages for withholding the possession, was held not to embrace the claim for the rents and profits, because the latter is a separate and distinct cause of action.[2]

Under the Kentucky statute the plaintiff may unite in the same petition "claims for the recovery of specific real property, and the rents, profits and damages for withholding the same." It was held that if the plaintiff shall elect to sue for the recovery of the land merely, or for that and damages for being kept out of possession in the same action, and seek by another suit to recover damages for trespasses and injuries committed by the destruction of timber or other property upon or appurtenant to the land, a judgment in one case would not bar a recovery in the other.[3]

The right to damages for withholding the possession of real property given by the Oregon code,[4] is equivalent to the action of trespass for mesne profits given by the common law, and includes all damages to which the owner is entitled on account of the wrongful occupation of the premises, as well for waste committed or suffered by the occupant as the value of the use and occupation. Such right is a distinct cause of action, and it joined with a claim of possession should be separately stated.[5]

[1] Holmes v. Davis, supra.

[2] Larned v. Hudson, 57 N. Y. 151; Livingston v. Tanner, 12 Barb. 481. See Cagger v. Lansing, 64 N. Y. 417.

[3] Burr v. Woodrow, 1 Bush. 692. See also Bottorff v. Wise, 53 Ind. 32.

[4] §§ 313, 318. See ante, p. 340.

[5] Wythe v. Myers, 3 Sawyer, 595; Neff v. Pennoyer, id. 495.

Section 2.

DOWER.

The right of — It is assignable on valuation — Damages for detention — Extinguishment by widow's death — Reprisals — Dower limited to husband's equitable interest — Dower right in land subject to paramount incumbrance.

The right of dower.— Dower, at common law, exists where a man is seized of an estate of inheritance and dies in the lifetime of his wife. She is entitled to be endowed, for her natural life, of the third part of all the lands whereof her husband was seized, either in deed or in law, at any time during the coverture, and which any issue which she might have had could by possibility have inherited.[1] Marriage, seizin of the husband, and his death, are essential; and where they concur, on the happening of the latter, the right of dower becomes perfect, not as an estate or interest in the land, but as a chose in action.[2]

It is assignable on a valuation.— Whatever the proceeding by which dower is recoverable, the value of the lands must be ascertained, for it is on that standard that the dower right is measured. If the lands were aliened by the husband, and have afterwards increased in value, it has been a question whether such increase should be excluded from the valuation. Where such increase of value is the result of improvements on the land made by the alienee, it does not enter into the estimation for the purpose of dower; in other words, the admeasurement is then to be made according to the value at the date of alienation; the dowress recovers the equivalent of one-third of the value of the land as such value was at that time.[3] But if the value is en-

[1] 4 Kent's Com. 35.

[2] Id.; Sheafe v. O'Neil, 9 Mass. 13; Hildreth v. Thompson, 16 Mass. 191; Croade v. Ingraham, 13 Pick. 33; Shields v. Batts, 5 J. J. Marsh. 13; Stedman v. Fortune, 5 Conn. 462; Jackson v. Aspell, 20 John. 412; Cox v. Jagger, 2 Cow. 638; Yates v. Paddock, 10 Wend. 528; Johnson v. Shields, 32 Me. 424; Summers v. Babb, 13 Ill. 483; Moore v. New York, 4 Sandf. 456; Torrey v. Minor, Sm. & M. Ch. 489; Harrison v. Wood, 1 Dev. & Bat. Eq. 437; Potter v. Everitt, 7 Ired. Eq. 152; Webb v. Boyle, 63 N. C. 271; Van Name v. Van Name, 23 How. Pr. 247.

[3] Humphrey v. Phinney, 2 John. 484; Hale v. James, 6 John. Ch. 258; Tod v. Baylor, 4 Leigh, 498; Wilson

hanced by extrinsic or general causes, the weight of authority seems to be in favor of including it. Tilghman, C. J., said: "I have found no adjudged case in the Year Books confining the widow to the time of the alienation by her husband where the question did not arise on improvements made after the alienation; and having considered all the authorities which bear upon the question, I find myself at liberty to decide according to what appears to me to be the reason and justice of the case, which is, that the widow shall take no advantage of the improvements of any kind made by the purchaser, but throwing these out of the estimate, she shall be endowed according to the value at the time her dower shall be assigned to her."[1] This view is supported by those great jurists, Story and Kent, and by many adjudications.[2] The rule has frequently been stated, however, to be, that when lands are alienated during coverture, by the husband, his widow is to be endowed of such lands at their value at the time of alienation, thereby excluding her from the benefit of any subsequent increase in the value from any cause.[3] As to lands of which the husband died seized, the widow is entitled to dower according to their value at the time of the assignment.[4] She is entitled to have such part of the land set out to,

v. Oatman, 2 Blackf. 223; Thrasher v. Pinckard, 23 Ala. 616; Danseth v. Bank of the U. S. 6 Ohio, 77.

[1] Thompson v. Morrow, 5 S. & R. 289.

[2] Powell v. M. & B. M. Co. 3 Mason, 347, 374; 4 Kent's Com. 68; Smith v. Addleman, 5 Blackf. 406; Danseth v. Bank of U. S. 6 Ohio, 77; Allen v. McCoy, 8 Ohio, 418; Gore v. Brazier, 3 Mass. 544; Scammon v. Campbell, 75 Ill. 223; Barney v. Frowner, 9 Ala. 901; Summers v. Babb, 13 Ill. 483; Manning v. Laboree, 33 Me. 343, 347; Hobbs v. Harvey, 16 Me. 80; Mosher v. Mosher, 15 Me. 371; Bowie v. Berry, 3 Md. Ch. 359; Fritz v. Tudor, 1 Barb. 28; Westcott v. Campbell, 11 R. I. 378; Carter v. Parker, 28 Me. 509; Wall v. Hill, 7 Dana, 175; Taylor v. Brodrick, 1 Dana, 348; Lawson v. Morton, 6 Dana, 471. See Doe v. Gwinnell, 1 Q. B. 682.

[3] Humphrey v. Phinney, 2 John. 484; Shaw v. White, 13 John. 179; Dorchester v. Coventry, 11 John. 509; Walker v. Schuyler, 10 Wend. 481; Marble v. Lewis, 53 Barb. 432; Brown v. Brown, 31 How. Pr. 481; Green v. Tennant, 2 Harr. (Del.) 336; Ayer v. Spring, 9 Mass. 8; Catlin v. Ware, 9 Mass. 217; Wooldridge v. Wilkins, 3 How. (Miss.) 360; Markham v. Merrett, 7 How. (Miss.) 437; Thomas v. Gammel, 6 Leigh, 9; Pollard v. Underwood, 4 Hen. & M. 459; Leggett v. Steel, 4 Wash. 305.

[4] Catlin v. Ware, supra; Wright v. Jennings, 1 Bailey, 277; McCreary v. Cloud, 2 Bailey, 343; Lorrowe v. Beam, 10 Ohio, 498.

her as dower, as will produce an income equal to one-third part of the income, which the whole estate would then produce.[1]

Damages for detention of dower.— Originally, damages were not recoverable in an action for dower at law.[2] They were first given by the statute of Merton; but as that statute only applied to actions for dower in lands of which the husband died seized, damages continued to be denied in actions brought against the husband's alienee.[3] At common law, the right to damages was limited by the remedy. In this country damages are generally, by statute or otherwise, recoverable against the alienee from the time of demand and refusal, or of the institution of the suit.[4] The heir or devisee in possession is answerable for damages from the death of the husband, and in New York, Maryland, New Jersey, and perhaps other states, even without a demand, unless he plead *tout temps prist;* and even on sustaining that plea he is liable from the commencement of the suit.[5] If that issue be found for the demandant, she is entitled to damages from the death of the husband, and not from the date of the demand only.[6] The statute of Merton seems not to have been adopted in South Carolina, and, therefore, damages are not recoverable in actions for dower;[7] and in that state interest cannot be recovered in a court of law on a sum of money assessed in lieu of dower,

[1] Carter v. Parker, 28 Me. 509.

[2] 2 Saund. 45, note 4; Fisher v. Morgan, Coxe, 125; Wright v. Jennings, 1 Bailey, 277; Layton v. Butler, 4 Harr. (Del.) 507.

[3] Kendall v. Honey, 5 T. B. Mon. 282; Marshall v. Anderson, 1 B. Mon. 198; Waters v. Gooch, 6 J. J. Marsh. 589; Embree v. Ellis, 2 John. 119; Fisher v. Morgan, Coxe, 125; Hopper v. Hopper, 22 N. J. L. 715; Gaston v. Bates, 4 B. Mon. 366.

[4] O'Ferrall v. Simplot, 4 Iowa, 381; Beavers v. Smith, 11 Ala. 20; Slatter v. Meek, 35 Ala. 528; Atkin v. Merrell, 39 Ill. 62; Galbreath v. Gray, 20 Ind. 290; Price v. Hobbs, 47 Md. 359; Sleigle v. Hiller, 5 Gill & J. 121; McClannahan v. Porter, 10 Mo. 746. But see Benner v. Evans, 3 Pen. & Watts, 454; Barnet v. Barnet, 15 S. & R. 72; McElroy v. Wathen, 3 B. Mon. 135.

[5] Darnall v. Hill, 12 Gill & J. 388; Thrasher v. Tyack, 15 Wis. 256; Hitchcock v. Harrington, 6 John. 290; Hopper v. Hopper, 22 N. J. L. 715; Rankin v. Oliphant, 9 Mo. 239; Layton v. Butler, 4 Harr. (Del.) 507; Slatter v. Meek, supra; Turner v. Morris, 27 Miss. 733; Thomas v. Gammel, 6 Leigh, 9.

[6] Watson v. Watson, 20 L. J. C. P. N. S. 25.

[7] Heyward v. Cuthbert, 1 McCord, 386.

where the husband died seized; but, by statute, interest may be allowed on assessments against the husband's alienee.[1] It has been usual there to assess one-sixth of the value of the entire fee as equivalent to the widow's estate for life in one-third of the land; and as a general rule, it is said that that proportion should be adhered to, except in extreme cases of youth on the one hand, or of age and infirmity on the other.[2] In Maryland damages against the husband's alienee can be recovered only in equity.[3] The admeasurement and assignment of dower defines it with a view to future enjoyment. If withheld, afterwards, the loss is of that specific parcel. For withholding dower before assignment, damages, when recoverable, include, but do not consist exclusively of, the net annual value of the third part of the lands in which the right of dower exists. In a Canadian case,[4] after a judgment of seizin in dower, on a writ of inquiry, it was held that the mesne value of the premises, between the death of the husband and the obtaining the judgment, should be assessed; also the demandant's taxable costs in obtaining judgment of seizin; her costs of executing the writ of *habere facias*, and her necessary traveling expenses incurred in prosecuting her suit. It was also held that her residence on the premises, in the family, and at the expense of the heir at law, for part of the time between the death of the husband and her obtaining judgment, was not admissible as a set-off to her damages for the detention, though proper to go to the jury in mitigation.[5]

[1] Wright v. Jennings, 1 Bailey, 277; McCreary v. Cloud, 2 Bailey, 343.

[2] Wright v. Jennings, supra.

[3] Sellman v. Bowen, 8 Gill & J. 55; Kiddall v. Trimble, 1 Md. Ch. 143.

[4] Robinett v. Lewis, Draper, 272.

[5] See Bogardus v. Parker, 7 How. Pr. 303. In Fisher v. Morgan, Coxe, 125 (1792), Kinsey, C. J., said: "One question which has been debated is, whether the word *damages* includes the value or *mesne* profits; or whether there is to be a recovery of the value or third part of the profits, and also damages for the detention, with costs. Upon this subject the books seem irreconcilable. It would appear from Co. Litt. 32*b*; the Statute of Merton, 20 H. III, cap. 1; 1 Ruffhead, 16; 2 Inst. 80; Rastal's Entries, *b*; Spiller v. Adams, 8 Mod. 25; Hetley, 141, as if the value and damages for detention were not distinguishable from each other, but assessed and recovered together under the name of *damages*. But although the word *damna*, properly taken, does include both the *mesne*

Dower was originally granted for the sustenance of widows, and for this purpose she was relieved of feudal exactions. It was provided by Magna Charta that she should give nothing for her dower, and tarry in the chief house of her husband for forty days after his death, within which time it was required that dower be assigned her.[1] Hence she has a right to damages if dower is not so assigned; but they cannot properly be given

profits and the extra sum for the illegal detention, yet there are not wanting respectable authorities who appear to regard them as distinct objects of the suit and judgment. In Trials *per pais*, 333, where the duty of the jury is laid down, it is said, if they find the husband died seized, then they are to inquire: 1st. Of the value beyond reprises. 2d. What time has elapsed since the death of the husband. 3d. What damages the demandant has sustained by the detention of the dower. In Dennis v. Dennis, 2 Saund. 328, the jury find, first, that the husband died seized; secondly, the value; thirdly, the damages for the detention beyond the value and costs, by the name of damages; fourth, the costs and charges. The judgment follows, first, to recover seizin of the third part; second, the value of the third part; third, for damages found by the jury, extra, and the costs of increase; and the record concludes, *value* and *damages*, and not, as in *Rastal*, which *damages* amount to, etc. Clifton, 301-2-3; Hoxley, 99; Ashton, 262, 265, seem to confirm this form of entry.

"As to the question before the court, it is this: Whether, as the jury have not found that the husband died seized, the court are empowered to give judgment either for the value — the damages for detention — or costs. In Dyer, 28*a*, it is laid down that 'the common practice is, and the precedents of the common pleas are, that a woman demandant in dower shall not recover any damages, unless the husband died seized; and this by the statute of Merton, c. 1.' The same law is laid down in Doct. and Stud. cap. 13, p. 140; Co. Litt. 32*b*; Yelv. 112. The form of the writ of inquiry strengthens the authority of these books; it always directs the jury to inquire if the husband *died seized*, and *if he did*, then to inquire of the value and damages. A note in Jenk. 45, seems contrary to this, and to give countenance to the idea that, if the husband did not die seized, she shall recover her damages from the time of the *demand* from the tenant. Buller adopts the same doctrine, but in neither of these books is there any other authority cited than 1 Inst. 32*b*, which, as we have seen, establishes the contrary law. The *dicta* of these writers are respectable authorities, but the court are compelled to reject them on the present occasion as not warranted by any judicial opinion, and as insufficient to weigh against the law as it has long been established." See Sheppard v. Wardell, Coxe, 452; Martin v. Martin, 14 N. J. L. 125 (1833). See O'Flaherty v. Sutton, 49 Mo. 583; Thomas v. Mallinckrodt, 43 Mo. 58.

[1] Co. Litt. 32*b*, sec. 36.

for withholding dower, except for such withholding after the duty attaches to assign it to her. The alienee of the husband wrongfully withholds it after demand, and the heir and his alienee from the death of the husband. In her action against the heir, however, he may plead *tout temps prist*, and if he succeeds, she will not recover damages, because it is said the heir holds by title and does no wrong till a demand is made.[1] If the tenant comes the first day and acknowledges the action, and avers that he was at all times ready to render dower, the demandant could take judgment; then she would recover only seizin *et nihil de misâ quia venit primo die.* But if the demandant would have damages, she may reply that she requested her dower, and the tenant did not endow her, and then the judgment for damages and value will wait till the issue is tried, and depend on the result.[2] She is not called on to prove such demand except upon that issue.[3]

If the heir sells, he by that act denies dower, and his grantee cannot plead *tout temps prist* because he had not the land all the time since the death of the husband.[4] That plea is available only to the heir. When he sells, and thus repudiates the dower and in effect refuses it, such plea cannot be made. And the widow is entitled to recover, against the feoffee of the heir, damages for the whole period from the death of the husband — although such defendant has occupied and claimed the land for only a portion of that time.[5]

Extinguishment by widow's death.— At law, where no statutes protect her, the widow's right to damages is extinguished by her death.[6] But it is otherwise in equity.[7] A widow has a right to ask, in equity, part of a fund in lieu of dower, where

[1] Co. Litt. 33*a*, sec. 36.

[2] Id., note.

[3] Hitchcock v. Harrington, 6 John. 290; Woodruff v. Brown, 17 N. J. L. 246.

[4] Co. Litt. 33; Park on Dower, 303.

[5] Woodruff v. Brown, supra; Seaton v. Jamison, 7 Watts, 533; Hopper v. Hopper, 22 N. J. L. 715.

[6] Rowe v. Johnson, 19 Me. 146; Atkins v. Yeomans, 6 Met. 438; Sandback v. Quigley, 8 Watts, 460; Turney v. Smith, 14 Ill. 242. See Karns v. Tanner, 74 Pa. St. 339.

[7] 1 Story's Eq. § 625; Mulford v. Hirds, 13 N. J. Eq. 13; Curtis v. Curtis, 2 Bro. Ch. 632; Dormer v. Fortesque, 3 Atk. 130; Park on Dower, ch. 15, p. 330. See McLaughlin v. McLaughlin, 22 N. J. Eq. 505.

that fund has been produced by a sale of her husband's lands which were subject to her dower, and increased by being sold clear of that incumbrance with her consent.[1]

In determining the value of dower, when to be paid out of the proceeds of the land sold so as to extinguish the right of dower, its present worth is estimated upon the basis of an annuity of such amount as equals the legal interest on one-third of those proceeds for a period which constitutes the widow's expectancy of life according to the rules generally adopted in calculating the probable time a person will live.[2] And this sum is recoverable though the widow die before its recovery and short of the time included in her expectancy. In such case the thing to be appraised, and with which the widow parts, is not the value of her real interest in the land, but the value of her expectancy.[3]

Reprisals.— At common law, there were certain reprisals which were made from the damages of the widow, and among these sometimes were included a deduction on account of her occupation of some part of the property. The legitimate extent of such deductions appears to have been this: Whatever part of the property the widow has been in the actual enjoyment of, was thrown out of the estimation of damages, and on the simple ground, that, from such property, she had not been deforced of her dower. But this rule merely excluded the claim of the widow to recover the value of her thirds in the land during the time she had so occupied it; but it did not authorize the heir to set up a counterclaim, in the suit for dower, for the other two-thirds of the value of the premises so having been occupied. If the widow had occupied the land without the assent of the heir, she was a mere trespasser, and it would not be competent for him, in the action of dower, to set off the damages thus sustained; and if, on the other hand, he had consented to such occupation, he had his action to call the widow to

[1] Maccubbin v. Cromwell, 2 Harr. & G. 443; Bonner v. Peterson, 44 Ill. 253.

[2] O'Donnell v. O'Donnell, 3 Bush, 216; Alexander v. Bradley, 3 Bush, 667. See Shippen & Robbins' App. 80 Pa. St. 391; How v. How, 48 Me. 428.

[3] McLaughlin v. McLaughlin, 22 N. J. Eq. 505.

account. But in the action of dower, the effect of the enjoyment by the widow was to estop her from saying that in such land she had been deforced of her dower, and on that account to claim damages.[1]

DOWER LIMITED TO THE HUSBAND'S EQUITABLE INTEREST IN THE LAND.— Dower is generally confined to the beneficial interest which the husband acquired during coverture in the land.[2] If the land is subject to a paramount charge or incumbrance, as where the dowress had joined with her husband in making a mortgage; or he, on instantaneous seizin, alone mortgages it for purchase money; or it was subject to a judgment or mortgage at the time of the marriage, or when the husband acquired it, her dower is confined to the right of redemption; it is subject to the incumbrance and liable to be foreclosed, or to contribute to the payment of the debt.[3]

DOWER RIGHT IN LAND SUBJECT TO PARAMOUNT INCUMBRANCE.— It has always been the policy of the law to preserve with care the right of dower, when it has once attached to the property of the husband; but the right must always attach subject to all the equities that may exist against the title of the husband

[1] McLaughlin v. McLaughlin, supra; Perrine v. Perrine, 35 Ala. 644; Driskell v. Hanks, 18 B. Mon. 855; Craige v. Morris, 25 N. J. Eq. 467; Strawn v. Strawn, 50 Ill. 256.

[2] Welch v. Buckins, 9 Ohio St. 331; Fontaine v. Boatman's Sav. Inst. 57 Mo. 552; Bullard v. Bowers, 10 N. H. 500; Griggs v. Smith, 12 N. J. L. 22; Edmundson v. Welsh, 27 Ala. 578; Leavitt v. Lamprey, 13 Pick. 382; Holbrook v. Finney, 4 Mass. 566; Nicoll v. Ogden, 29 Ill. 323; Nicoll v. Miller, 37 Ill. 387; Nicoll v. Todd, 70 Ill. 295; Stow v. Steel, 45 Ill. 328; Stow v. Tifft, 15 John. 458; Coates v. Cheever, 1 Cow. 460; Gammon v. Freeman, 31 Me. 243; Gilliam v. Moore, 4 Leigh, 30; Winn v. Elliott, Hardin (Ky.), 482; Hale v. Munn, 4 Gray, 132. See Barnes v. Gay, 7 Iowa, 26; Yeo v. Mercereau, 18 N. J. L. 387.

[3] Carll v. Batman, 7 Greenl. 102; Richardson v. Skolfield, 45 Me. 386; Simonton v. Gray, 34 Me. 50; Stribling v. Ross, 16 Ill. 122; Manning v. Laboree, 33 Me. 343; Rawlings v. Lowndes, 34 Md. 639; Stewart v. Beard, 4 Md. Ch. 319; Birnie v. Main, 29 Ark. 591; Opdike v. Bartles, 11 N. J. Eq. 133; Hinchman v. Stiles, 9 N. J. Eq. 361; Walton v. Hargroves, 42 Miss. 18; Culver v. Ex'r of Harper, 27 Ohio St. 464; McMahon v. Kimball, 3 Blackf. 1; Coles v. Coles, 15 John. 319; Young v. Tarbell, 37 Me. 509; Mills v. Van Voorhees, 20 N. Y. 412; Leavenworth v. Croney, 48 Barb. 570; Clark v. Munroe, 14 Mass. 351; Lewis v. James, 8 Humph. 537; Mantz v. Buchanan, 1 Md. Ch. 202. See King v. Stetson, 11 Allen, 407; Smith v. McCarty, 119 Mass. 519. See also Greenbaum v. Austrian, 70 Ill. 591.

at the time it attaches.[1] Payment of the incumbrance, by the husband or his personal representative, will inure to the relief of her dower; but when she claims her dower from an heir or purchaser who has discharged the lien, she will be required to contribute, and must pay proportionately to the value of her dower, which will be the interest on one-third of the debt that was a lien, for her life, or a gross sum equivalent thereto.[2] If there is a surplus on the foreclosure of a mortgage or other incumbrance to which dower in the land is subject, it will at-

[1] Firestone v. Firestone, 2 Ohio St. 415. See Crane v. Palme, 8 Blackf. 120.

[2] Swaine v. Perine, 5 John. Ch. 482; Evartson v. Tappen, 5 John. Ch. 497; Atkinson v. Stewart, 46 Mo. 510; Rossiter v. Cassitt, 15 N. H. 38; Woods v. Wallace, 30 N. H. 384; Bolton v. Ballard, 13 Mass. 227; McArthur v. Franklin, 16 Ohio St. 193; Bullard v. Bowers, 10 N. H. 500; Peckham v. Hadwen, 8 R. I. 160; Coates v. Cheever, 1 Cow. 460; Creecy v. Pearce, 69 N. C. 67; Hildreth v. Jones, 13 Mass. 525; Jennison v. Hapgood, 14 Pick. 345; Snyder v. Snyder, 6 Mich. 470; Cockrill v. Armstrong, 31 Ark. 580; Danforth v. Smith, 23 Vt. 247; Van Vronker v. Eastman, 7 Met. 157; Bell v. Mayor of N. Y. 10 Paige, 49. See Newton v. Sly, 15 Mich. 391; Wilson v. Davisson, 2 Rob. (Va.) 384. In Campbell v. Campbell, 13 N. J. Eq. 415, a bill was filed by the widow of an intestate for dower in lands of three kinds: 1, that which was subject to a mortgage, put thereon by the intestate; 2, that which was purchased by him, subject to a mortgage, the amount of which was allowed to him as so much of the purchase money, and the payment thereof assumed by him; and, 3, that which belonged to him as a member of a partnership; and the chancellor said: "It is, of course, unnecessary to speak of the real estate owned by him individually, which was not subject to any incumbrance. It is almost equally so with regard to that part of such real estate which is subject to mortgage put thereon by him. His personal estate is bound to exonerate that land from the burden of the mortgage. Keene v. Munn, 1 C. E. Green, 398; McLenahan v. McLenahan, 3 C. E. Green, 101. As to that which was purchased by him subject to mortgage, the amount of which was allowed to him as so much of the purchase money, and the payment whereof he assumed, his personal estate is not bound to exoneration. In such case, to make his estate primarily liable, there must be clear evidence of an intention to make the mortgage debt his own. The weight of authority, both in this country and England, is that the personal estate is not primarily liable, unless the grantee has not merely made himself answerable for the payment of the mortgage, but has made the debt directly and absolutely his own, or has in some other way manifested an intention to throw the burden on the personalty. But the point under consideration was directly passed upon and decided in McLenahan v. McLenahan, *ubi supra*. There the amount of the mortgage had been allowed to the intestate as so much of the purchase money. See, also,

tach to such surplus.[1] The widow may redeem from a paramount mortgage; but in that case she must pay the whole debt.[2] But if the mortgage is held by the purchaser of the equity of redemption, or in other words, by the party bound to contribute the residue of the mortgage debt, she may redeem by paying her fair proportion according to her estate.[3] If the defendant in such case has been in possession under the mortgage, she is entitled to an account of rents and profits. And in computing the sum due on the mortgage, it has been held that annual rests should be made; that the sums paid by the defendant, the first year, for repairs, taxes, etc., should be deducted from the gross rents received by him, and the balance be taken as the net rents; that the interest on the mortgage debt, for the first year, should be added to the principal, the net rent be deducted from the aggregate, and the balance become a new principal; and so on from year to year to the time of judgment.[4]

Where a mortgage, in which the wife joined, was foreclosed in the life-time of the husband against him alone, and the purchaser went into possession, it was held that as to the widow

Crowell v. Hospital of St. Barnabas, 12 C. E. Gr. 650, and King v. Whiteley, 1 Hoffm. Ch. 477.

"The real estate of a partnership, purchased with partnership funds, or for the use of the firm, is subjected to the doctrine of equitable conversion, so far as necessary for the purposes of the partnership, but otherwise it retains its legal character and incidents. It is, in equity, chargeable with the debts of the copartnership, and any balance which may be due from one copartner to another. On the winding up of the affairs of the firm, as between the heirs at law and the personal representatives of a deceased partner, his share of the surplus of that real estate remaining after paying the debts and adjusting all the equitable claims of the different members of the firm, as between themselves, is to be considered and treated as real estate. The widow of such deceased partner will be entitled to dower in his share of any real estate of the firm not required for the payment of such debts and the adjusting of such equitable claims. Uhler v. Semple, 5 C. E. Gr. 288; Buchan v. Sumner, 2 Barb. Ch. 165; Shearer v. Shearer, 98 Mass. 107; 1 Wash. on R. P. (4th ed.) 669; 1 Scribner on Dower, 536; Foster's App. 74 Pa. St. 391." Bopp v. Fox, 63 Ill. 540.

[1] Matthews v. Durgee, 45 Barb. 69; Titus v. Neilson, 5 John. Ch. 452; Smith v. Jackson, 2 Edw. Ch. 28; Hawley v. Bradford, 9 Paige, 200; Keith v. Trapier, 1 Bailey Eq. 63; Boyer v. Boyer, 1 Cold. 12; Bank of Commerce v. Owens, 31 Md. 320.

[2] Norris v. Morrison, 45 N. H. 490.

[3] Woods v. Wallace, 30 N. H. 384; Van Vronker v. Eastman, 7 Met. 157; McArthur v. Franklin, 16 Ohio St. 193.

[4] Van Vronker v. Eastman, supra.

applying to redeem her dower interest, he was to be regarded as the mortgagor and mortgagee occupying in common according to their respective interests; that regarding the price paid at the judicial sale as representing both interests, the purchaser should account for such a proportion of the net annual rents as the amount due on the mortgage at the time of the sale bore to the price at which the land was sold; that in ascertaining the annual rents, the enhanced value of the land from improvements other than ordinary repairs should be excluded. Taxes and ordinary repairs should be deducted to get the net rents. The plaintiff not having been a party to the foreclosure suit, is entitled to have the amount taken in the same manner as though no decree had been rendered; therefore, in the computation, there should be no rest made at the time of the rendition of the decree. In determining the amount to be paid by the widow, she should be charged with such part of one-third of the debt remaining unpaid as bore the same proportion to the one-third of such debt as the value of her life estate in one-third of the land bore to the value of an unincumbered fee in one-third of the entirety; in other words, the widow should pay the present worth of an annuity for her life equal to one-third of the interest of the debt found due at the taking of the account.[1]

Where land is sold to satisfy a paramount lien, and there is a surplus, a wife's contingent dower interest in it will be recognized. It has been held, in New York, that she is entitled, as against judgment creditors, to have one-third of the amount invested for her benefit, and kept invested during the joint lives of herself and her husband, and during her own life in case of her surviving him, as and for her dower in such surplus moneys.[2] In a late case in Ohio,[3] the same interest was recognized; but the court disapproved of such an investment as a mode of protecting or preserving it; and it was held that its value, ascertained by reference to the tables of recognized authority on that subject, in connection with the state of health and constitutional vigor of the wife and her husband, be paid to her.[4]

[1] McArthur v. Franklin, supra.
[2] Denton v. Nanny, 8 Barb. 618.
[3] Unger v. Lister, 32 Ohio St. 210.
[4] See Bonner v. Peterson, 44 Ill. 253.

CHAPTER XV.

INJURIES TO REAL PROPERTY.

The damages for withholding possession, recoverable after judgment for the plaintiff in ejectment, or in the action for recovery of possession of real property, have been discussed in the foregoing chapter. These damages result from, or are connected with, the loss or suspension of the plaintiff's possession, and cannot be recovered until possession is regained. When there has been a re-entry, whether pursuant to a judgment of restitution or otherwise, all the damages from the ouster to the re-entry may be recovered.[1] But all injuries to real estate do not involve a loss of possession; so injuries to the inheritance may be redressed by action, though the owner is not in possession. These will constitute the subject of the present chapter.

SECTION 1

TRESPASS TO REAL PROPERTY.

The gist of the action — Trespass defined, and the scope of the remedy stated — Measure of damages — Aggravations and special damages.

THE GIST OF THE ACTION.— The gist of this action is the injury to the plaintiff's possession;[2] and only the party actually or constructively in possession can sue.[3] Where the land on which

[1] Cutting v. Cox, 19 Vt. 517; Smith v. Wunderlich, 70 Ill. 426; Stevens v. Hollister, 18 Vt. 294; Holmes v. Seely, 19 Wend. 507; Smith v. Ingram, 8 Ired. 175; Allen v. Thayer, 17 Mass. 299; Illinois, etc. Coal Co. v. Cobb, 82 Ill. 183; Wohler v. Buffalo, etc. Co. 46 N. Y. 686. See Tracy v. Batters, 40 Mich. 406.

[2] Booth v. Sherwood, 12 Minn. 426; Smith v. Wunderlich, 70 Ill. 426; Reed v. Price, 30 Mo. 442.

[3] Smith v. Ingram, 8 Ired. 175; Abbott v. Abbott, 51 Me. 575; Little v. Palister, 3 Greenl. 6; Lyford v. Toothaker, 39 Me. 28; Holmes v. Seely, 19 Wend. 507; West v. Lamer, 9 Humph. 762; Smith v. Wunderlich, 70 Ill. 426; Campbell v. Arnold, 1 John. 511; Wickham v. Freeman, 12 John. 183; Van Rensselaer v. Radcliff, 10 Wend. 639; Lienow v. Ritchie, 8 Pick. 235; French v. Fuller, 23 Pick. 104; Owings v. Gibson, 2 A. K. Marsh. 515; Foster v. Fletcher, 7 T. B. Mon. 534; Miller v. Fulton, 4 Ohio, 433.

the trespass is committed is not in the actual occupation of any person, the plaintiff may prove constructive possession by showing his title.[1] One person may have possession of the surface and another of the subsoil, or mines and minerals.[2] The possession is presumed to be in the owner of the legal title in the absence of all other evidence; or in other words, no one being shown to be in adverse possession, he will be presumed to be in possession;[3] and it will also be presumed that his possession is coextensive with his grant.[4] Though the possession is by wrong, it will sustain the action against a stranger.[5]

TRESPASS DEFINED, AND GENERAL SCOPE OF THE REMEDY STATED. Every unauthorized intrusion into the land of another is sufficient trespass to support an action for breaking the close.[6] It is immaterial to the cause of action that no actual injury is done, or that the tortious act of the defendant is even beneficial to the plaintiff.[7] His legal right being invaded by the intrusion upon his premises, he is entitled at least to nominal damages, in order to vindicate that right, and recover his costs.[8] When the plaintiff's land is illegally entered, a cause of action at once arises; whatever is done after the breaking and entry is but aggravation of damages.[9]

The action of trespass *quare clausum fregit*, therefore, may embrace, for the purpose of compensation to the owner, as well as punitory damages, all the things done and said by the defendant in the course and forming part of the *res gestæ* of such breaking and entry, and all the natural and proximate effects which ensue.[10]

[1] Booth v. Sherwood, supra; Yorgensen v. Yorgensen, 6 Neb. 383.

[2] Cox v. Glue, 5 C. B. 533.

[3] Griffin v. Creppin, 60 Me. 270; Smith v. Wunderlich, supra.

[4] Melcher v. Merryman, 41 Me. 601.

[5] Rollins v. Clay, 33 Me. 132; Wilder v. House, 48 Ill. 279; Reeder v. Purdy, 41 Ill. 279; Meader v. Stone, 7 Met. 147; Yeates v. Allin, 2 Dana, 134; Ives v. Ives, 13 John. 235; Reed v. Price, 30 Mo. 442; Jenkins v. McCoy, 50 Mo. 348; Doty v. Burdick, 83 Ill. 473.

[6] Dougherty v. Stepp, 1 Dev. & Batt. 371.

[7] Murphy v. Fond du Lac, 23 Wis. 365; Parker v. Griswold, 17 Conn. 288.

[8] Vol. I, p. 9.

[9] Adams v. Blodgett, 47 N. H. 219; Brown v. Manter, 22 N. H. 468; Ferrin v. Symonds, 11 N. H. 365; Kolb v. Bankhead, 18 Tex. 229.

[10] Damron v. Roach, 4 Humph. 134.

MEASURE OF DAMAGES.— Damages in this action may be such as are appropriate to the tenure by which the plaintiff holds, and such as result from the injury he has suffered. Possession alone will entitle the plaintiff to recover damages for any injury affecting solely his possession. If he seeks to recover damages for the future, he must show that his title gives him an interest in such damages, and he can recover none except such as affect his own right,[1] unless he holds in such relation to the other parties interested that his recovery will bar their claim.[2] The same act may be injurious to several persons having different interests: to a tenant, or one having a limited estate in possession, in the interruption of his enjoyment and the diminution of his profits; to a landlord, or one having an expectant estate in reversion or remainder, in the more permanent injury to his property. Both may have separate actions for their several damages.[3] Where a stranger cuts down trees, a tenant can recover only in respect of shade, shelter and fruit; for he is entitled to no more.[4]

A tenant may recover for an injury which impairs the value of his possession; also for an injury which imposes an additional burden in the performance of his covenant to repair.[5] If an injury is done to a building which the tenant must keep in repair, that liability entitles him to recover damages for the injury.[6] A tenant for years has a right to be compensated for all injury done to his possession and to his rights as lessee; and in ascertaining this, the expense necessary to restore the building to such a state as would make the possession as beneficial for the purposes of the tenant as it was before the trespass was committed, should be allowed. The allowance of damages

[1] Gilbert v. Kennedy, 22 Mich. 117.

[2] Woods v. Banks, 14 N. H. 101; Hibbard v. Foster, 24 Vt. 542; Bigelow v. Rising, 42 Vt. 678; Nims v. City of Troy, 59 N. Y. 500; Jackson v. Todd, 25 N. J. L. 121; Harker v. Dement, 9 Gill, 7.

[3] George v. Fisk, 22 N. H. 32-45; Lane v. Thompson, 43 N. H. 320; Rolle's Abr. tit. Trespass, notes 3, 4, 5; Jesser v. Gifford, 4 Burr. 2141; The Town of Hamden v. Rice, 24 Conn. 350; Reeder v. Purdy, 41 Ill. 279; Starr v. Jackson, 11 Mass. 519; Jackson v. Todd, 25 N. J. L. 121; Bennett v. Thompson, 13 Ired. 146.

[4] Bedingfield v. Onslow, 3 Lev. 209.

[5] Hardrop v. Gallagher, 2 E. D. Smith, 523.

[6] Gourdier v. Cormack, 2 E. D. Smith, 200.

in favor of a tenant, however, should not exceed the value of his term, including the rent he is bound to pay.[1] Where J T demised land to the plaintiff at an annual rent for twenty-one years, with liberty to dig half an acre of brick earth annually, the lessee covenanting that he would not dig more, or, if he did, he would pay an increased rent of 375*l.* per half acre, being after the same rate that the whole brick earth was sold for, and a stranger dug and took away brick earth, it was held the lessee was entitled to recover against him, and retain the full value of it.[2] Where it appears that the plaintiff entered as tenant, he must prove his lease in order to recover more than nominal damages for other than past injury to his possession.[3] Where it appeared that the defendant, sued for pulling down a wall on the premises, received a lease five days after the trespass complained of, the plaintiff was only allowed nominal damages, it appearing that he entered under the same lessor, and did not think proper to show his lease.[4] A plaintiff in possession under color of title to the fee can recover against a stranger as owner. If the defendant be a mere intruder, he cannot set up title in a third person either to affect the cause of action, or in mitigation.[5] One in possession under a contract of purchase, and entitled to a conveyance, is virtually the owner.[6]

The damages will be such as result from the injury the plaintiff has suffered. If the defendant derives a benefit from the tortious use of the plaintiff's premises, the plaintiff will be entitled to damages measured by the benefit to the defendant. Where the defendant tortiously used the plaintiff's canal, the court say trespass could be brought for entering and breaking the plaintiff's close, and he could allege and prove the use of the canal as special damages.[7] He will be entitled to recover the value of the use.[8]

[1] Walter v. Post, 4 Abb. Pr. 382–390.

[2] Attersoll v. Stevens, 1 Taunt. 183.

[3] Gilbert v. Kennedy, 22 Mich. 117.

[4] Twyman v. Knowles, 13 C. B. 222.

[5] Reed v. Price, 30 Mo. 442–447; Illinois, etc. R. R. Co. v. Cobb, 94 Ill. 55; First Parish of Shrewsberry v. Smith, 14 Pick. 297; Ganter v. Atkinson, 35 Wis. 48; Todd v. Jackson, 26 N. J. L. 525; Hebert v. Lege, 29 La. Ann. 511.

[6] Honsee v. Hammond, 39 Barb. 89.

[7] Ward v. Warner, 8 Mich. 508–525.

[8] McWilliams v. Morgan, 75 Ill. 473.

Where land was let to the tenant, but the right to the minerals remained in the landlord, who, however, could not get them without the tenant's consent, and who had, nevertheless, got them without such consent, it was held that as the tenant had an absolute veto, it was equal in value to that of the minerals, less so much money as would induce a third person to get them; in other words, the measure of damages against the landlord would be the net returns from the sales, less such a sum of money by way of profit as would induce a third person to undertake the enterprise.[1]

All the facts and circumstances constituting or proximately connected with the trespass, tending to show its character and immediate consequences, may be proved, both to show the amount necessary to a just compensation for the injury, and the motive of the defendant, to enable the jury to determine whether the wrong is such that punitory damages should be given, and, if so, how much. In the absence of facts warranting exemplary damages, the principle of compensation governs the admeasurement of damages; and to ascertain the amount, the mode of proof must be adapted to the facts of each case. If the wrong consists in destroying some improvement on the property not essential to its enjoyment, and not appreciably affecting the value of the property as a whole, or any special interest of the plaintiff therein, the damages may be estimated on the value of the thing destroyed or removed. Thus the removal by the village authorities of a sidewalk which had been laid by the village, at its own expense, in front of the plaintiff's lot, and used there for two years, and kept in repair by the plaintiff, is a trespass, for which the plaintiff was allowed to recover the value of the walk, down, at the time it was removed.[2] But where the trespass suspends or impairs the enjoyment of the premises, compensation may be given on the basis of the rental value in the absence of any ground for special damages, or in addition to such special damages; and if the premises are put out of repair, the cost of repair will be an additional item, including interest on the amount paid. Where the trespass was the removal of a

[1] Attorney General v. Tomline, 5 Ch. D. 750; Mayne on Dam. 387.

[2] Rogers v. Randall, 29 Mich. 41. See Clark v. St. Clair, etc. Co. 24 Mich. 508.

fence, it was held that the plaintiff was entitled to recover such damages as would, properly expended, restore the premises to the condition they were in before the interference of the defendant.[1] Where the unfinished house of the plaintiff, being built under contract, was injured and its completion delayed by the defendant's tortious act, the plaintiff was not only entitled to recover for the injury to the building but also the rental value during the delay thus occasioned. The court say: "There was no valid objection to a recovery by the plaintiff for the injuries to the dwelling house. It was part of the realty and the property of the plaintiff. The fact that it was built by contract, and was not completed, did not detract from his right to the house as it was, or to recover for its destruction. A recovery by him would bar an action by the contractors, even if it be conceded they would have a remedy against the defendant. Whether an action would lie at their suit may be very doubtful. It would depend upon their liability to the plaintiff, and their obligation to deliver to him a completed house, notwithstanding the destruction of the partially completed building, by the falling in of the sewer on the plaintiff's own premises, and without fault on their part. This liability would not probably be readily acquiesced in by the contractors, and it might be difficult to establish it by action. But no legal objection exists to a recovery by the plaintiff for that which was clearly his, although he might have an action against a third person, who in turn would have a remedy over against the city."[2] If the thing destroyed, although it is part of the realty, has a value which can be accurately measured and ascertained, without reference to the soil on which it stands, or out of which it grows, the recovery may be of the value of the thing thus destroyed, and not for the difference in the value of the land before and after such destruction.[3] The defendant who destroyed the sluiceway to a mill was held liable for the sluiceway and the consequential damages of the plaintiff for having his mill stopped.[4] If for the purpose of staying a conflagration, a building has been blown up with-

[1] Marvin v. Pardee, 64 Barb. 353.

[2] Nims v. City of Troy, 59 N. Y. 508.

[3] Whitbeck v. N. Y. Cent. R. R. Co. 36 Barb. 647; Clark v. St. Clair, etc. Co. 24 Mich. 508.

[4] Hammat v. Russ, 16 Me. 171.

out right, the jury in estimating the damages should consider the circumstances under which the building and its contents were situated, and their chance of being saved, even though the same were not actually on fire; and should determine their value with reference to the peril to which they were exposed.[1]

A railroad company which lays its track upon land without the consent of the owner, and without acquiring the right to the land, is liable in damages for the difference between the annual rental value of the premises with the railroad track down, and the road operated as it is, and what the rental value of the premises would have been if the road had not been there.[2] A wrong of this nature is held to be a continuing one; there is, therefore, a right to bring successive actions, and prospective damages cannot be recovered.[3]

[1] Parsons v. Pettingill, 11 Allen, 507.

[2] Blesch v. Chicago, etc. R. R. Co. 43 Wis. 183.

[3] Carl v. Sheboygan, etc. R. R. Co. 46 Wis. 625. In this case Taylor, J., says: "One reason why a railroad company can be charged with the permanent damages for taking land for its own use in a proceeding under the statute for asserting the right of eminent domain, is, that, when such damages are paid, the company is entitled to have a clear title to the property so taken, and such title cannot be acquired in an action for a trespass or nuisance. Another reason is, that, in the action to recover damages for the nuisance, the plaintiff may have judgment to abate the nuisance, and it would be clearly unjust that the plaintiff should recover damages for a continuance of the nuisance and at the same time have judgment to abate and remove the same.

"The exact question presented by the case at bar was decided in the case of Battishill v. Reed, 18 C. B. 696, in the court of common pleas in England, in 1856. This was an action to recover damages for a continuing nuisance to the plaintiff's building, maintained by the defendant. On the trial the plaintiff offered evidence of permanent damages to his premises in the diminution of their salable value, by the act complained of. The evidence was excluded, and the question was argued before the full bench, whether the evidence should have been admitted; all the judges concurred in holding that it was properly excluded. The grounds of the decision were: first, that as the defendant could be sued again for the continuance of the nuisance, the plaintiff could only recover such damages as he could prove he had sustained in the use of his premises previous to the commencement of the action; and second, that neither the plaintiff or the court has the right to assume that the defendant would continue the nuisance after a verdict against him in the first action."

In Adams v. Hastings, etc. R. R. Co. 18 Minn. 260, trespass was brought for constructing and operating a railroad over the plaintiff's premises. It was held that damages

could not be assessed for the permanent depreciation of the value of the plaintiff's land from the building of the road and its supposed continuance in the future. The court say: "As there is no presumption of law that such illegal running of trains and other trespasses will be continued in the future — that the unlawful act of to-day will be repeated on the morrow — it is, of course, obvious, that while the jury in the present case could assess past damages, they could not assess the permanent damages, to accrue from an assumed continued use thereafter of the land by the defendant in the same way. Ford v. Chicago, etc. Railroad, 14 Wis. 609.

"The defendant may now, if it sees fit, proceed under its charter to acquire in plaintiff's land, by paying full and proper compensation therefor, the rights above stated. Such compensation, too, must include not only the value of the land taken, but also such incidental loss and damage as may be reasonably expected to result from the construction and use of the road in a legal and proper manner, necessarily including, therefore, permanent damages to accrue from a continued use of the road. Till it see fit to do so, if it continue meanwhile without his consent to run its trains over plaintiff's land, it is a trespasser, liable to him for such damages as he may sustain by such repeated illegal acts done on his land. 1 Redf. on Railways, ch. 11, sec. 12: Harrington v. St. P. & S. C. R. R. 17 Minn. 215.

"The plaintiff contends that the injury to him by reason of said illegal acts is in its nature permanent, and that he is entitled to the consequent damages.

"If the construction of said road-bed and track upon plaintiff's land necessarily lessened the value of plaintiff's property, that is to say, if it would be worth less because of the mere existence thereon of said road-bed and track, without reference to any wrongful use which defendant might or might not make of them, such depreciation accrued immediately upon the construction thereof, and was in its nature permanent, and being a direct and immediate result of the trespass, could be recovered for in this action; and if such erection necessarily caused the surface water to stand on plaintiff's land, or run into his cellar and well, he could recover therefor in this action, though such injury might not accrue for some time after the completion of such illegal act, viz.: the making of the road-bed and track. Sedg. on Dam. ch. 5; Troy v. Cheshire R. R. Co. 23 N. H. 83; Chase v. N. Y. Cent. R. R. 24 Barb. 273; McGuire v. Grant, 25 N. J. L. 356; Dickinson v. Boyle, 17 Pick. 78." Ford v. Chicago, etc. R. R. Co. 14 Wis. 609; Plate v. N. Y. Cent. R. R. Co. 37 N. Y. 472: Anderson, etc. R. R. Co. v. Kernodle, 54 Ind. 314.

A different view is advanced in The Town of Troy v. Cheshire R. R. Co. 23 N. H. 83, 101. In that case Bell, J., said: "It is evident that a recovery in this action is a bar to any future action for this cause. In cases of nuisance the injury may be of two kinds: first, the direct injury caused by the act complained of; and second, the injury which may be afterwards occasioned by the unauthorized continuance of that cause. The declaration, in this case, alleges injury from the first construction of the railroad, and from its continuance to the date of the writ. The plaintiff can, in no event, recover for any cause of action not included

in his writ; and, on this ground, he can recover for no damage not sustained when his action is commenced. For any future damage he may recover in an action based upon the continuance of the injurious cause; and, in such action, it would be no answer to say that the damage now claimed has been recovered in a former suit, because the writ in that case warrants a recovery only for damages sustained previous to its date. The principle for which the defendants contend is sound, and the only question which can arise here is as to the application of that principle. The damage done at the date of the writ is to be compensated, and that only. If that damage consists in the exposing of the party to expenditures of money, the test is not the time when those expenditures are made, for they may be paid at once, or their payment delayed, without, in any way, affecting the rights of the parties. The question is not when was the money paid, whether before or after suit, but was the liability to those expenditures occasioned by the acts complained of in the writ, or was it by the continuance of the same acts, or the state of things produced by those acts, after the action was brought? If they are the result and consequence of the wrongful acts complained of, they are to be recovered in that action. If they result, not from the wrongful acts, but from the wrongful continuance of the state of facts produced by those acts, they form the basis of a new action.

"There may, of course, be cases where it may be difficult to draw the line, but it is apprehended they will not be numerous. Wherever the nuisance is of such a character that its continuance is necessarily an injury, and where it is of a permanent character, that will continue without change from any cause but human labor, there the damage is an original damage, and may be at once fully compensated, since the injured person has no means to compel the individual doing the wrong to apply the labor necessary to remove the cause of injury, and can only cause it to be done, if at all, by the expenditure of his own means.

"But where the continuance of such act is not necessarily injurious, and where it is necessarily of a permanent character, but may or may not be injurious, or may or may not be continued, there the injury to be compensated in a suit is only the damage that has happened. This the individual who so manages the water he uses for his mills, as to wash away the soil of his neighbor, is liable at once for all the injury occasioned by its removal, because it is, in its nature, a permanent injury; but if his works are so constructed, that, upon the recurrence of a similar freshet, the water will probably wash away more of the land, for this there can be no recovery until the damage has actually arisen, because it is yet contingent whether any such damage will ever arise. A person erects a dam upon his own land, which throws back the water upon his neighbor's land; he will be answerable for all damage which he has caused before the date of the writ, and ordinarily for no more, because it is, as yet, contingent and uncertain, whether any further damage will be occasioned or not; because such a dam is not, of its own nature, and necessarily, injurious to the lands above, since that depends more upon the manner in which the dam is used than upon its form. But if such a dam is in its nature of

Wherever by one act a permanent injury is done, the damages are assessed once for all;[1] and any depreciation in the value of the property will be an element of damages according to the extent and duration of the plaintiff's estate. An estimate of damages on this basis presupposes that the premises are subject to the same lasting detriment; and that it is not to be averted or removed by any expenditure; for otherwise, the injury would be measured upon different elements. Thus, where by the wrongful act of the defendant a bar of gravel was deposited upon the plaintiff's land by a flood, and so extensive that the cost of its removal would equal or exceed the value thereby restored to the premises, that expense was held not the measure of damages; but rather the depreciation in the value of the land in consequence of the deposit remaining.[2]

a permanent character, and from its nature must continue permanently to affect the value of the land flowed, then the entire injury is at once occasioned by the wrongful act, and may be at once recovered in damages. In one of the cases, which arose from the building of the great canals of New York, the case was that a high dam was erected upon the falls of the Hudson, for the purpose of diverting the waters of the river into a feeder for the canal; the lands of an owner above were buried twenty feet under water, and their value to him, of course, entirely destroyed; the work was in its nature and design permanent. There, it would be clear, that the party injured would be entitled to recover the entire damages he had sustained, and must sustain in a single action, in truth, substantially the entire value of his property. And the decision of the court, in the case cited by the plaintiff's counsel, Woods v. Nashau Manuf'g Co. 5 N. H. 467, is in entire accordance with this view. In such a case, it might be suggested that the actual loss he had sustained was only of the use of the property to the date of the writ, and that he, and those who came after him, might bring their actions, from year to year, for any injuries they might afterwards sustain; but in such a case we entertain no doubt, that, consistently with the rules of law, the plaintiff might recover for the entire property lost." Chicago, etc. R. R. Co. v. Baker, 73 Ill. 316; St. Louis, etc. R. R. Co. v. Haller, 82 Ill. 208. Title to land does not pass by reason of a verdict and satisfaction in an action of trespass; it remains in the plaintiff; and therefore a verdict for damages for the value of the land, or any interest or easement therein, is manifestly wrong. Atlantic, etc. R. R. Co. v. Robbins, 35 Ohio St. 531; Thompson v. Morris, etc. Co. 17 N. J. L. 480; Anderson, etc. R. R. Co. v. Kernodle, 54 Ind. 314.

[1] Lamb v. Walker, 3 Q. B. D. 389.

[2] Easterbrook v. Erie R'y Co. 51 Barb. 94; Chase v. N. Y. Cent. R. R. Co. 24 Barb. 273; Hanover Water Co. v. Ashland Iron Co. 84 Pa. St. 279; Jones v. Gooday, 8 M. & W.

So where the plaintiff's land is caused to fall away in consequence of the defendant's removing the lateral support, he is entitled to damages to the extent of the injury sustained; this is not, however, the cost of restoring the lot to its former condition, or of building a wall to support it, but it is the diminution of the value of the land in consequence of the defendant's act.[1] It is a damage from loss of soil; and where by any tortious act of the defendant such a loss occurs, the owner is entitled to be compensated according to the value of the land or soil to him.[2] If its removal reduces the value of the lot, the owner is entitled to recover for such depreciation.[3]

If the wrong consists in the destruction or removal of some addition, fixture, or part of the premises, the loss may be estimated upon the diminution of the value of the premises, if any results; or upon the value of the part severed, considered either as a part of the premises, or detached; and that valuation should be adopted which will be most beneficial to the injured party; for he was entitled to the benefit of the premises intact, and to the value of any part separated.

For cutting and carrying away trees or timber by a continuous act, the action must be trespass *quare clausum fregit*.[4] Under that form of action the severance of the property from the freehold is the essential fact; and, so far as it diminishes the value of the land, the owner is entitled to compensation. The value of the timber need not be averred in such an action, and may be proved to show the amount of damages.[5] The plaintiff may adopt the value of the timber as the measure of his damages, but is not obliged to do so;[6] if the injury to the land ex-

146; Honsee v. Hammond, 39 Barb. 89; De Coster v. Mass. Min. Co. 17 Cal. 613.

[1] McGuire v. Grant, 25 N. J. L. 356; Gilmore v. Driscoll, 122 Mass. 199; Nicklin v. Williams, 10 Exch. 259. In Greer v. Mayor, etc. of New York, 1 Abb. N. S. 206, an action was brought for any injury to the plaintiff's life estate as tenant by the courtesy initiate by the destruction of the building which made the property productive. It was held error to estimate the value of his estate by the present value of the rents and profits multiplied by the number of years' probable duration of his life, without any deduction for annual charges, or rebate of interest for the time allowed.

[2] Jones v. Gooday, 8 M. & W. 146; Mueller v. St. Louis, etc. R. R. Co. 31 Mo. 262.

[3] Karst v. St. Paul, etc. R. R. Co. 22 Minn. 118.

[4] Sturgis v. Warren, 11 Vt. 433.

[5] Kolb v. Bankhead, 18 Tex. 229.

[6] Id.

ceeds the value of the timber, or in other words, if the trees were worth more standing,[1] Hogeboom, J., forcibly said: "Surely the damage would not be in all cases accurately measured by the market value of the wood or timber when cut. The trees might be a highly valuable appendage to the farm, for purposes of shade or ornament; there might be a very scanty supply for a farm of that size; or for other reasons they might have a special value as connected with the farm, altogether independent of, and superior to, their intrinsic value for purposes of building or fuel. As well might you remove the columns which supported the roof or some part of the superstructure of a splendid mansion, and limit the owner in damages to the value of these columns as timber or cord wood, as to adopt the parallel rule in this case."[2] A plaintiff in an action for trespass on land in cutting and carrying away timber is entitled, first, to recover damages for the injury to the land in severing the growing timber, considering merely the act of severing it; and, secondly, for the taking and carrying away the timber so severed.[3] Though the whole is but one continuous act, it includes this two-fold injury.[4] In some instances, however, the cutting of the trees would be the whole injury; as where ornamental trees or fruit trees are cut.[5] The tortious act is then one of destruction merely. On the other hand, if timber trees are cut after they have reached maturity, and the plaintiff, by getting their present market value, will realize all that he could ever obtain from them, the conversion of the timber is the principal injury. If ores are mined and removed, a like injury is done; and the same considerations apply in the

[1] Foote v. Merrill, 54 N. H. 490; Wallace v. Goodall, 18 N. H. 439; Ensley v. Nashville, 2 Baxt. (Tenn.), 144; Harder v. Harder, 26 Barb. 409; Van Deusen v. Young, 29 Barb. 9; Templemore v. Moore, 15 Irish C. L. N. S. 14.

[2] Van Deusen v. Young, supra.

[3] Id.; Longfellow v. Quimby, 33 Mo. 457.

[4] In Smith v. Smith, 50 N. H. 218, the court say: The common mode of declaring in actions for breaking the plaintiff's close and taking and carrying away property, "virtually includes two causes of action in one count — an action for the disturbance of plaintiff's possession of his real estate, and an action to recover the value of his chattels unlawfully taken and converted." Woolley v. Carter, 7 N. J. L. 85; Thayer v. Sherlock, 4 Mich. 173.

[5] Whitbeck v. N. Y. Cent. R. R. Co. 36 Barb. 644.

determination of damages. On the strict theory of trespass *quare clausum*, the breaking of the close is the cause of action, and the removal of timber or other property merely enhances the damages. This is especially so, if the severance from the land and the carrying away are by a continuous act. In any case, where the severance is not the principal injury, where the conversion into a chattel and the carrying away are together complained of as the cause or causes of action, and the damages ascertained on the value of the timber or ore, the actual injury is, that the defendant has taken the plaintiff's property in the condition in which it existed prior to the trespass. How should compensation be computed for this injury? The law is not settled on this point; a great diversity of decision exists. We exclude now the consideration of any special acts detrimental to the land not necessarily involved in taking the timber or ore.

In this particular action this conflict is confined to narrower limits than in trover and trespass *de bonis;* the conflict, when the wrong is not wilful, is between charging the defendant with the value of the trees standing, or stumpage, and ore in place, on one hand, and on the other its value immediately after severance from the land. The tendency of decision is toward the former rule; but, as the trespasser cannot divest the owner of his title to the property, when it becomes a chattel it is recognized as belonging to the owner of the land, so that he may retake it, replevy it, or recover for it in actions for taking or conversion of personal property. It has been deemed the right of the owner to recover the value at the time it becomes a chattel; otherwise it is said the trespasser receives compensation for services not requested by the owner, and for which he is not bound to make compensation. It is supposed that the right to retake the property, and to recover its value, are correlative rights. Ruggles, J., said: "It would be absurd to say that the original owner may retake the thing by an action of replevin in its improved state, and yet that he may not, if put to his action of trespass or trover, recover its improved value in damages."[1] The right of an owner to retake his property

[1] Silsbury v. McCoon, 3 N. Y. 384.

is maintainable on the principle that he cannot be divested of his property without his consent by the tortious act of a wrongdoer; but his rate of damages or the measure of his compensation are governed by another principle, which is that he is entitled to compensation commensurate, and only commensurate, with the injury he has suffered. When he sues to recover damages for the taking or conversion, he sues for a wrong which precedes and does not include the defendant's acts which enhance the value. The cases which support the rule of damages confined to the value of the property before the trespass was committed are given in a note,[1] with some of the reasons

[1] Foote v. Merrill, 54 N. H. 490, was trespass *quare clausum frejit* for cutting down and carrying away trees. It was held that the measure of damages is the amount of injury which the plaintiff suffered from the whole trespass, taken as a continuous act; the increased value of the trees occasioned by the labor of the defendant in converting them into timber is not to be included. Hibbard, J., says: "The defendant having wrongfully cut and trimmed the plaintiff's trees, and it being impossible to separate the original property in them from the value subsequently added, it is unnecessary to cite authorities to show that the plaintiff, after they were cut and trimmed, remained the owner of the timber made from them, free from any lien or claim of the defendant for his labor, and that he might, therefore, have lawfully taken it peaceably into his possession. It is only where the identity of the original material has been destroyed, or where its value is insignificant compared with the value of the article manufactured from it or to which it has been annexed, that the law is otherwise. Weatherbee v. Green, 22 Mich. 311. The plaintiff might also have maintained replevin for the timber. Davis v. Easley, 13 Ill. 192; Wingate v. Smith, 20 Me. 287. Or he might, according to numerous authorities, have recovered its full value at the time it was carried away by bringing trover. Brown v. Sax, 7 Cow. 95; Baker v. Wheeler, 8 Wend. 505; Rice v. Hollenbeck, 19 Barb. 664; Grant v. Smith, 26 Mich. 201; Ellis v. Wire, 33 Ind. 127. According to the doctrine of Adams v. Blodgett, 47 N. H. 219, he might have elected any day prior to the date of his writ as the time of the conversion; perhaps the same result might as well have been reached in trespass *de bonis asportatis*, but the difficulty of allowing the original taking to be abandoned, and a later one adopted, has probably been thought greater in that form of action than in trover, although judges have sometimes taken a different view. . . . If the owner of timber cut upon his land by a trespasser gets possession of it increased in value, he has the benefit of the increased value; the law neither divests him of his property, nor requires him to pay for improvements made without his authority; perhaps in trover, and possibly in trespass *de bonis asportatis*, he may be entitled to the same benefit, but we see no occasion for giving it to him where he brings his suit for the whole trespass of break-

ing and entering his close and cutting down and carrying away his trees as a continuous act. The plaintiff is entitled to be compensated according to the magnitude of his loss, and the defendant ought only be liable to compensate him according to the magnitude of his loss. The inquiry should be, how much was the plaintiff injured by the breaking and entering of his close and the cutting down and carrying away of his trees. The true measure of damages is the amount of injury which the plaintiff has actually suffered from the whole trespass. If the trees were worth no more to the plaintiff to stand than to the defendant to be cut into timber at that time, their value as timber, with the reasonable expense of cutting deducted, was the measure of the injury which was done to the plaintiff by cutting them. . . . His trees may have been prematurely cut; they may have been ornamental trees or fruit trees; the value after they were separated from the soil may have been but a small part of the real injury from cutting and removing them. 'The trees considered as timber may, from their youth, be valueless, and so the injury done to the plaintiff by the trespass would be but imperfectly compensated unless he could receive a sum that would be equal to their value to him while standing upon the soil.' Gilchrist, J., in Wallace v. Goodall, 18 N. H. 456. A rule of damages, which is manifestly unsound when applied to the cutting of trees which are more valuable while standing than after they are cut, cannot be usefully employed in other cases."

In Longfellow v. Quimby, 33 Me. 457, which was a like action, Shepley, C. J., said: "The plaintiff will be entitled to recover compensation for the injuries occasioned by the acts of the defendants upon his lands, to be ascertained by an estimate of the value of the trees cut and carried away, and of the injury, if any, occasioned by cutting them prematurely, and of the injury, if any, done to the land; and on the amount thus ascertained for being deprived of the use of his property, may be added an amount equal to six per cent. per annum, from the time of taking the property to the time of judgment." Stanton v. Prichard, 4 Hun, 266.

Whitbeck v. N. Y. Cent. R. R. Co. 36 Barb. 644, was a similar action for damages done by burning the plaintiff's clover field and destroying his apple trees. The court held that the plaintiff should recover the value of the trees standing, and the court approved the refusal of the trial court to charge the jury that the plaintiff could only recover the diminished value of the orchard lot by reason of the destruction of the trees. Johnson, J., said: "It is true that the trees in question were real estate, and in one sense part and parcel of the land itself. But so are buildings and fences, and grass, and trees of all kinds while growing upon the land. The true rule I conceive to be this: that if the thing destroyed, although it is part of the realty, has a value which can be accurately measured and ascertained, without reference to the value of the soil on which it stands, or out of which it grows, the recovery must be for the value of the thing thus destroyed, and not for the difference in the value of the land before and after such destruction. And it can make no difference, in this respect, whether the action is brought to recover for the destruction of a single tree, or all the trees

in the orchard. There is no intrinsic difficulty, as I conceive, in estimating the value of a fruit tree growing upon land, although it has strictly no market or commercial value, as a tree, independent of the land which sustains it. In this respect, however, it does not differ materially from buildings and other fixtures. But it does differ from trees which are usually converted into timber, or firewood, and which are frequently sold as they stand, for that purpose, or nursery trees which are grown for market. The difference is this: in the one case the value consists chiefly in the thing itself, as a convertible and marketable commodity, while in the other, the value consists chiefly in the quality and quantity of its average annual products; and it is capable of being leased as much as a field or a dwelling. The calculation by which the value would be determined in the two cases would be somewhat different, but, for aught I can see, it could be determined by the opinion of competent witnesses in the one case as well as the other."

Stockbridge Iron Co. v. Cone Iron Works, 102 Mass. 80, was an action of tort for mining and carrying away coal, iron and other ores from the plaintiff's land. The court held that the plaintiff was entitled to recover on the ground that the taking of the ore and the injury done to the property were tortious; that the value of the ore was to be estimated as it lay in the bed, not as it was after the defendants had increased its value by removing it, and that to this was to be added the damage done to the real estate.

In re United Merthyr Collieries Company, L. R. 15 Eq. 46, was a case like the preceding. Sir James Bacon, V. C., said: "I have not the slightest intention of interfering with or departing from the decisions which have been mentioned to me (Powell v. Aiken, 4 K. & J. 343; Wood v. Morewood, 3 Q. B. 440, note; Morgan v. Powell, 3 Q. B. 178; Jegon v. Vivian, L. R. 6 Ch. 742; Phillips v. Homfray, id. 770; Llynvi Co. v. Brogden, L. R. 11 Eq. 188; Martin v. Porter, 5 M. & W. 351), especially the more recent cases, because, as I recollect, there was a want of exact agreement between some of the common law cases and some of those which had formerly been decided in this court. I take the difference now to be entirely removed, and the rule to be clearly and plainly established, and so understanding, I made the order in this case. The words which are supposed to have been used are 'actual cost and expenses,'—the word that has been read from the short-hand notes is 'disbursements.' In my opinion there is not the slightest doubt about the meaning of either of those expressions. It is said that the trespasser must be treated as if he had been the purchaser. Now, that must be taken with a certain qualification. It is a useful illustration of what the court meant to decide in the particular case where that expression is to be found; but the principle of the decision is, that the plaintiff, although he has suffered a wrong, shall not have any more than he would have had if that wrong had not been committed. That I take to be the clear and plain principle. If he had himself severed the coal, he could only have done so by means of disbursements. If he had brought it to the pit's mouth when severed, he could only have done so by means of disbursements. If he himself had severed and brought the coal to the pit's mouth, whatever the value

of it might then be would have to be deducted, because he would have borne the expenses on both these heads, which would have been actual disbursements, not profit; nor do 'just allowances' mean profit; but if I were to change the words of the order, I might leave it doubtful, or might open up some ground for argument, as to what was meant by just allowances. . . . The trespasser is not to charge as if somebody else had employed him to sever. If he had paid a certain sum to his workmen, and by the custom of the trade was entitled to charge a certain other sum, he is not to have the larger sum. The plaintiff is to be put in the same situation as he would have been in, neither better nor worse, if he himself had severed the coal and brought it to the pit's mouth. That must have been done, and could only have been done by means of disbursements, not by any profit, not by any allowance in the trade, not by any artificial mode of guessing at it; but the books he must have kept would show how much money he spent in severing the coal, and how much money he spent in bringing it to the pit's mouth."

In Forsyth v. Wells, 41 Pa. St. 291, the parties were owners of adjoining tracts of coal land, and the defendant had opened a mine upon his own land and worked it for years. The dividing line was not exactly known, and the plaintiff claimed the defendant had dug coal over the line and out of her land; which was denied. Lowrie, C. J., in delivering the opinion of the court, said: "The plaintiff insists that because the action is allowed for the coal as personal property, that is, after it had been mined or severed from the realty, therefore, by necessary logical sequence, she is entitled to the value of the coal as it lay in the pit after it had been mined; and so it was decided below. It is apparent that this view would transfer to the plaintiff all the defendant's labor in mining the coal, and thus give her more than compensation for the injury done.

"Yet we admit the accuracy of this conclusion, if we may properly base our reasoning on the form, rather than on the principle or purpose of the remedy. But this we may not do; and especially we may not sacrifice the principle to the very form by which we are endeavoring to enforce it. Principles can never be realized without forms, and they are often inevitably embarrassed by unfitting ones; but still the fact that the form is for the sake of the principle, and not the principle for the form, requires that the form shall serve, not rule, the principle, and must be adapted to its office.

"Just compensation in a special class of cases is the principle of the action of trover, and a little study will show us that it is no unyielding form, but adapts itself to a great variety of circumstances. In its original purpose, and in strict form, it is an action for the value of personal property lost by one and found by another, and converted to his own use. But it is not thus restricted in practice; for it is continually applied to every form of wrongful conversion, and of wrongful taking and conversion, and it affords compensation, not only for the value of the goods, but also for outrage and malice in the taking and detention of them. . . .

"Where the defendant's conduct, measured by the standard of ordinary morality and care, which is the standard of the law, is not charge-

advanced in support of it; and also cases supporting the other view.[1]

able with fraud, violence, or wilful negligence or wrong, the value of the property taken and converted is the measure of just compensation. If raw material has, after appropriation and without such wrong, been changed by manufacture into a new species of property, as grain into whisky, grapes into wine, furs into hats, hides into leather, or trees into lumber, the law either refuses the action of trover for the new article, or limits the recovery to the value of the original article. 6 Hill, 425; 21 Barb. 92; 23 Conn. 523; 38 Me. 174.

"Where there is no wrongful purpose or wrongful negligence in the defendant, compensation for the real injury done is the purpose of all remedies; and so long as we bear this in mind, we shall have but little difficulty in managing the forms of actions so as to secure a fair result. If the defendant in this case was guilty of no intentional wrong, he ought not to have been charged with the value of the coal after he had been at the expense of mining it; but only with its value in place, and with such other damage to the land as his mining may have caused. Such would manifestly be the measure in trespass for mesne profits." Herdic v. Young, 55 Pa. St. 176; Coleman's Appeal, 62 Pa. St. 252, 278; Yahoola, etc. Co. v. Irby, 40 Ga. 479; Coxe v. England, 65 Pa. St. 212; Schlater v. Gay, 28 La. Ann. 340; Ensley v. Nashville, 2 Baxter (Tenn.), 144. See reasoning in opinion in Single v. Schneider, 24 Wis. 300-303; S. C. 30 Wis. 570; Webster v. Moe, 35 Wis. 75; Hungerford v. Redford, 29 Wis. 345; Railway Co. v. Hutchins, 32 Ohio St. 571; Winchester v. Craig, 33 Mich. 205; Chamberlain v. Collinson, 45 Iowa, 429.

[1] Maye v. Tappen, 23 Cal. 306. The trespass in this case was committed by entering upon and taking away the gold-bearing earth from the mining claim of the plaintiff. The court held the true measure of damages to be the value of the gold-bearing earth at the time it is separated from the surrounding soil and becomes a chattel. The court, Crocker, Justice, delivering the opinion of the court, after a review of the cases, said: "It will be noticed that the rule of damages in such cases depends, to some extent, upon the form of the action; whether the action is for an injury to the land itself, or for the conversion of a chattel which had been severed from the land. The complaint in this case alleges that the defendants, at divers times, wrongfully entered upon a portion of plaintiff's mining claim, and extracted the gold and gold-bearing earth from a portion thereof; which gold and gold-bearing earth they wrongfully carried away and converted to their own use; and the value of the gold thus carried away is alleged to have been $2,000. No demand of the possession of the gold after it was separated from the earth appears to have been made upon the defendants, and the gravamen of the action appears to be the injury done to the land itself by the acts of the defendants. The proper rule for damages in a case like the present is the value of the gold-bearing earth at the time it was separated from the surrounding soil and became a chattel. This seems to be a just and proper rule,

A party may recover the value of timber cut upon his land, although by mistake he led the defendant to believe he was cutting the timber on his own land.[1]

Accompanying trespasses of this nature there is frequently injury done to the land, beyond taking away timber or minerals. Where such is the case, additional damages are recoverable; and these will be assessed upon the particular facts. In an action for breaking and entering plaintiff's coal lands, it was made to appear that the defendant mined out coal and made excavations for that purpose, and thereby injured the coal left remaining as pillars; that by bad mining or otherwise he rendered it difficult or impossible for the plaintiff to get out or remove such pillars or remaining coal, and thus rendered it of less value; and the court held the plaintiff entitled, in addition to damages for the coal actually removed, to recover for such coal as could not be removed, what it was worth per ton in its native bed, and such damages, for so much coal as could be removed, but with increased expense, as the evidence might show such coal to be diminished in value; that if the defendant, in mining and excavating under the lands, thereby rendered it more difficult or expensive for the plaintiff to obtain access to the coal unmined and thereby depreciated its value, the plaintiff was entitled to recover such damages as he sustained from such depreciation and the increased difficulty and expense of mining and removing the coal.[2]

For destroying or carrying away growing crops, the measure of compensation is the value of the crops in the condition in which the same are at the time of the trespass.[3] The plaintiff

and one established by the decisions upon this question. In estimating these damages the expense of extracting the gold and separating it from the earth, after it is first moved from its original location, is to be deducted from the value of the gold taken out of the mining ground of the plaintiffs." Goller v. Fett, 30 Cal. 481; Moody v. Whitney, 38 Me. 174; Firmin v. Firmin, 9 Hun, 571; Robertson v. Jones, 71 Ill. 405; McLean Coal Co. v. Long, 81 Ill. 359; Illinois, etc. R. R. & Coal Co. v. Ogle, 82 Ill. 627; Martin v. Porter, 5 M. & W. 351; Wood v. Morewood, 3 Q. B. 440; Morgan v. Powell, 3 Q. B. 278; Wild v. Holt, 9 M. & W. 672; Barton Coal Co. v. Cox, 39 Md. 1; Bennett v. Thompson, 13 Ired. 146. See Bull v. Griswold, 19 Ill. 631.

[1] Pearson v. Inlow, 20 Mo. 322.

[2] Barton Coal Co. v. Cox, 39 Md. 1; Wallace v. Goodall, 18 N. H. 439.

[3] Richardson v. Northrup, 66 Barb. 85; Seamans v. Smith, 46 Barb. 320;

will be entitled to compensation, according to the particular facts of the case; he is entitled to be compensated in respect to property taken or destroyed, and for any other injury. The fact that all the labor necessary to a crop has been performed, and the state of the growth of the crop at the time of the defendant's interference, will necessarily enter into the calculation.[1]

In Iowa it has been held that the value of the crop when matured, less the cost of tillage, etc., from the time of the injury, may be recovered. The court also held that the plaintiff might recover as damages reasonable compensation for the labor necessarily expended in trying to save his crop from destruction. If he, in the exercise of ordinary care to prevent the destruction of his crops, because of defendant's fault, expended money or labor, he should be compensated therefor.[2] In Illinois it has been held that if a trespasser cuts wheat, the owner is entitled to recover in this action as if he had himself performed the whole labor of harvesting.[3] But in an action against trespassers on land, the trouble of looking after the trespassers is not to be taken into consideration as an item of damage.[4]

The fact that a trespass in removing a fence was committed, in pursuance of the vote of the town, has been allowed to be proved in mitigation of exemplary damages.[5]

In an action for destroying a fence inclosing a ranch used for dairy purposes, thereby letting in the cattle of other people which destroyed the grass, it was held erroneous, as tending to the allowance of remote and speculative damages, to admit evidence of profits that the plaintiff might have made from hogs and cows he did not have, and had made no arrangements to procure.[6] The value of crops destroyed by cattle may be recovered as a consequential damage from tortiously letting down or

Gresham v. Taylor, 51 Ala. 505. See Folsom v. Apple River, etc. Co. 41 Wis. 608-9.

[1] Williams v. Currie, 1 Man. Gr. & Scott, 841; Van Wyck v. Allen, 69 N. Y. 61; Jenkins v. McCoy, 50 Mo. 348; Benjamin v. Benjamin, 15 Conn. 347. See Chicago v. Huenerbein, 85 Ill. 594.

[2] Smith v. Chicago, etc. R. R. Co. 38 Iowa, 518.

[3] Bull v. Griswold, 19 Ill. 631; Benjamin v. Benjamin, 15 Conn. 347.

[4] Longfellow v. Quimby, 29 Me. 196.

[5] Gray v. Waterman, 40 Ill. 522.

[6] Giaccomini v. Bulkeley, 51 Cal. 260.

removing the fence around the same.[1] Interest may be allowed in the discretion of the jury on the damages,[2] but it is error to instruct the jury to allow interest as matter of legal right.[3]

AGGRAVATIONS AND SPECIAL DAMAGES.— Where the act complained of was done with force so as to constitute a proper ground for an action of trespass *vi et armis*, all the damages of the plaintiff of which such injurious act is the efficient cause, and for which the plaintiff is entitled to recover in any form, may be recovered in that action, whether such damage ensues immediately or does not occur until some time after the act is done. If special or peculiar damages are claimed, such as are not the usual consequence of the act done, it is proper and necessary to set them forth specifically in the declaration by way of aggravation, that the defendant may have due notice of the claim.[4] Thus where the defendant broke and entered the plaintiff's close, lying adjacent to a river, and dug into a bank near a dam across the river and carried away some gravel, in consequence of which a flood in the river, which took place three weeks afterwards, carried away a portion of the close and the cider mill, etc., belonging to the plaintiff, it was held that the plaintiff might recover damages for the whole of such injury in an action of trespass *quare clausum fregit*.[5] A defendant who had pulled down plaintiff's fence, so that his cattle thereupon escaped and were lost, was held liable for the cattle in an action for pulling down the fence.[6]

The defendant's sheep, while trespassing upon the plaintiff's land, mingled with the plaintiff's sheep, and communicated to them a dangerous disease, of which many of them died. In an action of trespass *quare clausum fregit*, it was held that the evidence of such communication of disease was admissible to affect the damages, and that the plaintiff was entitled to recover for the loss of his sheep, as well as for the breach of his close;

[1] Hardin v. Kennedy, 2 McCord, 277. See Crawford v. Maxwell, 3 Humph. 476; Richardson v. Milburn, 11 Md. 340.

[2] Lawrence, etc. R. R. Co. v. Cobb, 35 Ohio St. 94; Walrath v. Redfield, 18 N. Y. 457.

[3] Chicago v. Allcock, 86 Ill. 384.

[4] Dickinson v. Boyle, 17 Pick. 78; McTavish v. Carroll, 13 Md. 429; Sherman v. Dutch, 16 Ill. 283.

[5] Dickinson v. Boyle, supra.

[6] Damron v. Roach, 4 Humph. 134.

that in order to recover such damages it was not necessary for the plaintiff to prove that the defendant had knowledge of the diseased state of his sheep at the time the disease was imparted; but that it was competent for the plaintiff to prove such knowledge to enhance his damages, without any allegation to that effect in the declaration.[1] Where the defendant destroyed part of a mill, the plaintiff was allowed to recover for the interruption in the use of the mill, and a consequent loss of profits.[2] And so where the plaintiff was deprived of the profitable use of his pasture for his own stock, by the tortious conduct of the defendant in turning in his cattle with the plaintiff's; and, in consequence of the over-feeding of the pasture, the plaintiff's cattle suffered, the damages to which the plaintiff was entitled were held not to be merely the value of the pasturage in the vicinity, but the value of the growth and increase in weight which his cattle might reasonably have been expected to attain but for the over-feeding, caused by the trespass; and to show this the testimony of farmers, graziers, and drovers, having experience with cattle and that mode of feeding, was competent; it was also held to be competent to show what would be the market value of the stock in the vicinity but for the over-feeding; and what was the reduced value in the same market in consequence of the over-feeding; and the difference in price, per head and per pound, in cattle of different weights and conditions. The value in a distant market could only be shown so far as it tended to control the home market; the measure of damages being what the cattle would have been but for the injury to the pasture by the trespass, and the reduced amount caused by the injury, to be estimated up to and at the time of the bringing of the action — unless the cattle have been sold prior to that day — then at the date of the sale. It was also ruled that damage to the plaintiff's cattle resulting from loss of feed, occasioned by the tortious occupation of plaintiff's pasture, by defendant's cattle, is not included in the damage to the pasture, caused by such occupation; and the condition of the pasture, its value as such for future use at the time of the

[1] Barnum v. Van Dusen, 16 Conn. 201; Anderson v. Buckton, 1 Str. 192.

[2] White v. Moseley, 8 Pick. 356; Hammatt v. Russ, 16 Me. 171; McTavish v. Carroll, 13 Md. 429.

commencement of the action, are proper subjects of inquiry in estimating damages which had then been sustained.[1] In actions of torts, damages, which are the natural and proximate consequences of the defendant's wrongful act, may be recovered, though not contemplated by the wrongdoer. The injured party enters into no relation with the defendant, and assumes no voluntary risk in the matter of the wrong. Nor is any want of certainty in respect to his loss, resulting from the manner in which it is produced by the defendant, attributable to the plaintiff; therefore, in the determination of damages for compensation, so far as it is measurable upon any legal standard, the same rules will apply as in the assessment of damages for breach of contract; but such damages will not be assumed to be a full reparation, unless they appear to include compensation for the entire injury. The injured party is entitled to complete indemnity, even though the amount is not ascertainable with certainty and precision. All the facts will be submitted to the jury, with proper instructions by the court, that the jury may award such damages as in their discretion and judgment is due for the injury as thus shown.[2]

[1] Gilbert v. Kennedy, 21 Mich. 117.

[2] Id. "In this case Christiancy, J., said: "The damages to be awarded should be such as adequately to compensate the actual loss or injury sustained. This is an obvious principle of justice from which we see no reason to depart. But in the application of the principle, difficulties often arise in ascertaining, with anything like accuracy, the actual damages which the plaintiff has suffered from the injury; or what sum will produce adequate compensation.

"Some cases are such in their nature and circumstances, as to furnish an obvious rule by which a just and adequate compensation can be readily and accurately measured; and whenever, and so far as this is the case, such rule should be applied in actions of tort, as well as in those upon contracts, as we held in Allison v. Chandler, 11 Mich. 542, and in Warren v. Cole, 15 Mich. 265.

"But such is the almost infinite variety of circumstances under which torts may be committed, that cases will often occur, in which, 1st, no reliable data, no element of certainty can be found by which to measure with accuracy the actual amount of the damages, though it is evident to the court and jury that large damages have resulted from the injury; and 2d, cases in which there will be elements of certainty as to a part only of such damages, leaving it certain that the actual damages must be largely beyond what can be thus accurately measured. Now, in the first class of cases, are the jury to give merely nominal, or, what is the same thing, no damages, and is the injured party

If a person commits a wilful and malicious trespass upon the property of another, of such sort, or under such circumstances, as is likely to produce injury to persons or property, he is liable

to obtain no redress, because the case happens to be one which does not furnish a rule for their accurate measurement? And in the second class of cases, is he only to recover so much as can be measured with certainty, though it may be equally certain that this does not cover the tithe of the damages really sustained? This might be well enough if the want of certainty inherent in the nature of the case were properly attributable to the fault of the plaintiff. But he did not make the case; this was made against his will by the defendant, who chose his own time, place and manner of committing the wrong, and the plaintiff is compelled to grapple with the case thus made for him; and therefore such a rule, as one of universal application, can only become just when trespassers become so considerate of the rights of others as to commit their trespasses only in cases and under circumstances where the damages can be calculated by a fixed and certain rule. To deny the injured party the right to recover any actual damages in such cases, because they are of a nature which cannot be thus certainly measured, would be to enable parties to profit by, and speculate upon, their own wrongs, encourage violence and invite depredation. Such is not, and cannot be, the law, though cases may be found where courts have laid down artificial and arbitrary rules which have produced such a result.

"There can be no rule of law founded upon any just or intelligible principle, which, in actions of trespass at least, requires any higher degree of certainty in evidence upon which the damages are to be estimated, than in reference to any other branch of the cause. Juries in such cases have as much right, and it is as clearly their duty, to draw reasonable and probable inferences from the facts and circumstances in evidence, in reference to the amount of damages, as in reference to any other subject of inquiry in the case. And in those cases of trespass, or those features of a particular case, where, from the nature of the case, adequate damages cannot be measured with certainty by a fixed rule, all the facts and circumstances tending to show such damages as are claimed in the declaration, or their probable amount, should be submitted to the jury, to enable them to form, under proper instructions from the court, such reasonable and probable estimate, as in the exercise of good sense and sound judgment they shall think will produce adequate compensation. There is no sound reason in such a case, as there may be, to some extent, in actions upon contract, for throwing any part of the loss upon the injured party, which the jury believe from the evidence he has sustained; though the precise amount cannot be ascertained by a fixed rule, but must be matter of opinion and probable estimate. And the adoption of an arbitrary rule in such a case, which will relieve the wrongdoer from any part of the damages, and throw the loss upon the injured party, would be little less than legalized robbery.

"Whatever of uncertainty may

to any person injured. It is not necessary that he should intend to do the particular injury which ensues.[1] Maliciously and wantonly pulling out and throwing away the pins used in coupling together the cars of a train, whereby the cars were uncoupled, and the plaintiff, an employé of the company, whose duty it was to hitch and couple cars as required, sustained an injury to one of his hands while in the ordinary discharge of his duties, in consequence of such uncoupling, was held entitled to recover for such injury.[2]

Where in consequence of a trespass the plaintiff's business upon the premises is impaired or destroyed, damages for that injury may be recovered. Where the plaintiff was engaged in the business of repairing watches, making gold pens and selling jewelry on premises which were rendered untenantable by a trespass, it was held that past profits in that business, though they could not be taken as the exact measure of future profits, were proper to be proved, and taken into consideration by the jury, and allowed such weight, as they, in the exercise of good sense and sound judgment, should think them entitled to. If in consequence of a trespass rendering the premises untenantable, the plaintiff was obliged to remove to another place of business, he is entitled to show in an action for the trespass, that his business fell off in consequence, and how much. The court, in deciding a case involving the foregoing facts, announced this general rule: "When, from the nature of the case, the amount of damages cannot be estimated with certainty, or only a part of them can be so estimated, there is no objection to placing before the jury all the facts and circumstances of the case, having any tendency to show damages, or their probable

be in this mode of estimating damages, is an uncertainty caused by the defendant's own wrongful act; and justice and sound public policy alike require that he should bear the risk of the uncertainty thus produced; and this is not only when the trespass is wilful and wanton, without a claim of right, but whenever the property, though claimed by him, is in the possession of another, and he, taking the law into his own hands, makes himself judge in his own cause, and, knowing his right to be disputed, seizes upon the property without a judicial trial of his rights."

[1] Munger v. Baker, 65 Barb. 539; Vandenburgh v. Truax, 4 Denio, 464; Scott v. Shepherd, 2 W. Black, 892.

[2] Munger v. Baker, supra.

amount; so as to enable them to make the most intelligible and probable estimate which the nature of the case will permit. This should, of course, be done with such instructions, and advice from the court, as the circumstances of the case may require, or as may tend to prevent the allowance of such as may be merely possible, or too remote and fanciful in their character, to be safely considered as the result of the injury."[1] Properly speaking, special damages are those which are stated under a *per quod* as the consequence of the breaking and entry; and, where the defendant is guilty of some outrage connected with a particular trespass, and such outrage is a part of the trespass by being done at the same time, it is matter of aggravation, or a substantive ground of action and damage.

The taking and carrying away of personal property at the time of breaking and entering the close, or a personal injury, may be alleged as matter of aggravation. It may be alleged in the count for breaking the close, or in a distinct count as a substantive cause of action, and the latter is the more orderly method of pleading.[2] If alleged either as aggravation or as a distinct ground of damages in the count for breaking the close, it is a dependent claim, and will not, if proved, support the action, if the case for breaking the close be not established.[3] But when established, the specific claim for taking and conversion of property, or for the personal injury, is a part of the gravamen of the action, and the plaintiff will be entitled to recover the value of the property taken and converted, or for the personal injury, as well as for breaking and entering the close.[4] But for the purpose of such recovery, the trespass to personal property or to person should be stated with the same particularity as when it is the sole ground of action; otherwise such wrongs will be mere matter of aggravation, not traversable,

[1] Allison v. Chandler, 11 Mich. 542; St. John v. Mayor, etc. of New York, 13 How. Pr. 527; Sherman v. Dutch, 16 Ill. 283; Clark v. St. Clair, etc. Co. 24 Mich. 508; Fradenheit v. Edmundson, 36 Mo. 226; Kemper v. City of Louisville, 14 Bush, 87.

[2] Bishop v. Baker, 19 Pick. 517; Wright v. Chandler, 4 Bibb, 422.

[3] Eames v. Prentice, 8 Cush. 337; Warner v. Abbey, 112 Mass. 355; Brown v. Lake, 29 Ohio St. 64.

[4] Curlewis v. Laurie, 12 Q. B. 640; Woolley v. Carter, 7 N. J. L. 85; Sampson v. Henry, 13 Pick. 36; Warner v. Abbey, supra.

not a distinct ground of damage; but only a circumstance tending to give character to the principal charge and to enhance the damages assessable thereon.[1] Where a daughter, either of age or under age, is seduced in the father's house, he may allege it, and the consequential loss of services, as matter of aggravation, in an action of trespass *quare clausum*.[2]

Exemplary damages may be given in this action, and these are in the discretion of the jury, where the facts are such as legally to warrant them. If the trespass is wilfully or maliciously done, or if there is connected with the breaking and entry, otherwise not the subject of punitive damages, circumstances of outrage, insult, or wanton destruction of personal property, the proof of these facts may be submitted to the jury as grounds for damages by way of punishment; and the amount to be allowed is left to the sound discretion of the jury. Such damages are given as punishment, and their allowance and amount are submitted to the jury, only where there is evidence tending to show conduct culpable in point of intention. The act in question, or some act accompanying or connected with it, must be recklessly violent, oppressive, wanton or malicious.[3] The defendant is presumed to know the law, and to have acted with general malice when he violates it.[4]

[1] Thayer v. Shirlock, 4 Mich. 173; Chamberlain v. Greenfield, 3 Wils. 292; Rucker v. McNeely, 4 Blackf. 179; Keenan v. Cavanaugh, 44 Vt. 268; Allred v. Bray, 41 Mo. 484; Ream v. Rank, 3 S. & R. 215; Bracegirdle v. Orford, 2 M. & S. 77; Bateman v. Goodyear, 12 Conn. 575; Johnson v. Hannahan, 3 Strobh. 425; Brown v. Lake, 29 Ohio St. 64; Plumb v. Ives, 39 Conn. 120.

[2] Mercer v. Walmsley, 5 Har. & J. 27; Woodward v. Walton, 2 B. & P. N. R. 476.

[3] Merist v. Harvey, 5 Taunt. 442; Sears v. Lyons, 2 Stark. 317; Tullidge v. Wade, 3 Wils. 18; Doe v. Felleter, 13 M. & W. 47; Moore v. Crose, 43 Ind. 30; Ames v. Hilton, 70 Me. 36; Cutler v. Smith, 57 Ill. 252; Smalley v. Smalley, 81 Ill. 70; Brown v. Allen, 35 Iowa, 306; Kolb v. Bankhead, 18 Tex. 228; Gordon v. Jones, 27 Tex. 620; Jasper v. Purnell, 67 Ill. 358; Huftalin v. Misner, 70 Ill. 55; Owings v. Ulrey, 3 A. K. Marsh. 454; Bateman v. Goodyear, 12 Conn. 580; Major v. Pulliam, 3 Dana, 582; Perkins v. Towle, 43 N. H. 220; Bradshaw v. Buchannan, 50 Tex. 492; Stillwell v. Barnett, 60 Ill. 210; Hamilton v. Third Av. R. R. Co. 53 N. Y. 25; Boardman v. Goldsmith, 48 Vt. 403; Parker v. Shackelford, 61 Mo. 68; Dearlove v. Herrington, 70 Ill. 251; Devaughn v. Heath, 37 Ala. 595; Ellsworth v. Potter, 41 Vt. 685.

[4] Farwell v. Warren, 51 Ill. 467; Raynor v. Nims, 37 Mich. 34.

Though a party make an entry upon real estate under the belief that he has a right so to do, and therefore will not be liable for more than compensatory damages for such injury, he having no right, still if in doing so he does wilful injury to the plaintiff's goods, he will be liable to exemplary damages.[1] So if, in making such entry, where he is entitled to possession, he uses force to overcome opposition, commits an assault and battery upon the occupant, injures his personal property in removing it from the premises to obtain possession, he may, by reason of such force in the assertion of his rights, and for such injury to the person and personal property of the person in possession, subject himself to exemplary damages.[2] The circumstance, however, that the defendant was entitled to possession of the real estate should be taken into consideration in determining the amount of exemplary damages, for it is less culpable for a person to attempt to recover his own property by force than to attempt to rob another of property to which the assailant has no claim.[3] Where an assault in such case was committed upon the occupant's wife, and the injury to personal property done to furniture belonging to the husband, and two suits were brought against the trespasser — one by the husband and wife for the personal injury to her, and the other by the husband alone for the assault on his wife, injury to his furniture, and for breaking his close, the former of which was first tried and exemplary damages given therein,— it was held that on the trial of the second, instructions in favor of exemplary damages, correct in themselves, would be misleading and erroneous, if the jury were not reminded that the same transaction had been the subject of such damages on a preceding trial; though the jury had a right to give punitory damages in both suits, yet, on the question of amount, the former verdict should be considered.[4]

[1] Best v. Allen, 30 Ill. 30.

[2] Reeder v. Purdy, 41 Ill. 279; Bonsall v. McKay, 1 Houst. 520; Hedgepeth v. Robertson, 18 Tex. 858; Champion v. Vincent, 20 Tex. 811; Greenville, etc. Railroad Co. v. Partlow, 14 Rich. L. 237.

[3] Id.

[4] Id. Lawrence, J., thus commented on this point: "The suit brought by Purdy and wife had been already tried. In that suit the jury had been instructed they might give exemplary damages, and they had undoubtedly given them. The record of that suit was in evidence on the trial of the second suit. The court refused the instructions asked

The principle of permitting damages in certain cases to go beyond naked compensation is for example, and the punishment of the guilty party for the wicked, corrupt and malignant motive and design which prompted him to the wrongful act. A trespass may be committed from a mistaken notion of power, and from an honest motive to accomplish some good end. But the law tolerates no such abuse of power, nor excuses such act; yet, in morals, and the eye of the law, there is a vast difference between the criminality of a person acting mistakenly, from a worthy motive, and one committing the same act in a wanton and malignant spirit, and with a corrupt and wicked design. Hence, where the jury are called upon to give smart money, or damages beyond compensation, to punish the party guilty of the wrongful act, any evidence which would show this difference, or, rather, all the facts and circumstances which tend to explain or disclose the motives and design of the party committing the wrongful act, are evidence which should go to the jury for their due consideration.[1] Where the tort

by the defendant, and properly, in the form they were drawn, except as to the one already considered. Neither is there anything in itself wrong in the foregoing instruction, and yet it is of such a character that the court, in order to secure a fair consideration of the case by the jury, and having refused all the instructions drawn by the defendant, should, of its own motion, have modified the somewhat argumentative effect of this one by telling the jury that they were also, in estimating the exemplary damages, to consider the fact that the jury in the other suit had been authorized to give exemplary damages, and to take into consideration on that question the amount of the verdict in the other case. We must hold that, in strict law, exemplary damages are recoverable in both cases, because the suits are brought in different rights. In the suit by Purdy and wife, if Purdy fails to collect the judgment in his life-time, on his death it would go to the wife surviving him, and not to his personal representatives. But, apart from that contingency, the fruits of both judgments go into his pocket. It would, therefore, be highly proper that the jury, in considering the question of punitive damages, should have taken into consideration not only the circumstances of aggravation enumerated in the instruction, but also the fact that these same circumstances and the same transaction had been submitted to another jury, in a suit prosecuted in reality for the benefit of the same plaintiff, and, so far as related to the single question of the amount of vindictive damages, the amount of the former verdict would have been a proper subject of regard."

[1] Simpson v. McCaffrey, 13 Ohio, 508.

survives, and the action is brought against the representative of the deceased tortfeasor, vindictive damages should never be allowed, no matter how aggravated the trespass.[1]

Section 2.

Injury to Inheritance.

Injury to the rights of parties not in possession.

Injury to the rights of parties not in possession.— As has been stated, the same act may be injurious to several persons having different interests; to the person having a limited estate in possession, and the person or persons having the fee subject to that possessory title. The owner of the reversionary or expectant estate has no claim for damages where the wrong affects only the present enjoyment; and when it affects the value of the whole estate in possession and in expectancy, he has no claim for damages except for the injury to the inheritance. This injury may arise from the wrongful acts of the owner of the intermediate estate, or a stranger; when done by the former it is waste. Trespass will not lie against either, because the wrong is not to the possession of the injured party. In the appropriate action, however, compensation is meted out to him on the same principles, and in proportion to the injury he sustains.[2]

If a house demised to a tenant has been set on fire or thrown down from the negligence of a neighbor, the damages are apportionable between the landlord and tenant. The tenant is entitled to recover in respect to the value of his possessory interest and unexpired term in the premises, and the landlord in respect to the injury to his reversion.[3] But if the tenant is bound by covenant to keep the house in repair, a substantial injury would accrue to the tenant, and the tenant would be entitled to recover the cost of rebuilding the house, deducting the difference in value between old materials and new.[4]

[1] Ripey v. Miller, 11 Ired. L. 247.

[2] Van Deusen v. Young, 29 N. Y. 9; Randall v. Cleaveland, 6 Conn. 328; Shadwell v. Hutchinson, 2 B. & Ad. 97; Dutro v. Wilson, 4 Ohio St. 101.

[3] Panton v. Isham, 3 Lev. 359; 1 Salk. 19.

[4] Lukin v. Goodsall, 2 Peake, 15; 1 Add. on Tort, 315.

The declaration in an action brought by a reversioner must either expressly allege the act to have been done to the injury of the plaintiff's reversion, or must state an injury of such a permanent nature as to be necessarily prejudicial to the reversion, and this allegation must be proved.[1] Waste is the abuse or destructive use of property by him who has not the absolute, unqualified title, and differs from trespass in this: that the latter is an injury by the unauthorized use of another's property by one who has no right whatever.[2] Blackstone says it is a spoil or destruction of houses, gardens, trees or other corporeal hereditaments, and the disherison of him that hath the remainder or reversion.[3] It is voluntary when the tenant does some act injurious to the inheritance, and permissive when he omits some duty, and thereby an injury results to the inheritance; to tear a house down is voluntary waste; to suffer it to go to decay for want of necessary repairs is permissive.[4] To be waste it must either diminish the value of the estate, or increase the burdens upon it, or impair the evidence of title of him who has the inheritance.[5] The damages for this injury and the remedy for them are generally regulated by statute. In some of the states only single damages are given, in others double and treble damages.[6]

The damage for waste, being by definition, for injury to the inheritance, the plaintiff can recover only such damages as affect his expectant estate. If waste is committed by cutting down timber, removing buildings, carrying away gravel or other substance of the estate, the owner of the inheritance will have a right to the same damages as he would have against a stranger who tortiously impaired the value of his estate by similar tortious acts. In general, this damage is the amount the estate is diminished thereby in value.[7] In determining the

[1] Baxter v. Taylor, 4 B. & Ad. 72; Jackson v. Pesked, 1 M. & S. 234; Tucker v. Newman, 11 Ad. & El. 40.

[2] Duvall v. Waters, 1 Bland's Ch. 569.

[3] 2 Bl. Com. ch. 18. See Proffitt v. Henderson, 29 Mo. 325.

[4] Id.; 3 Dane Abr. 214; 1 Wash. R. P. 126.

[5] Id.; Huntley v. Russell, 13 Q. B. 588; Young v. Spencer, 10 B. & C. 145.

[6] See 1 Wash. R. P. 142.

[7] Harder v. Harder, 26 Barb. 409; Jesser v. Gifford, 4 Burr. 2141; Agate v. Lowenbein, 6 Daly, 291; Dickinson v. Baltimore, 48 Md. 583; Ayer v. Bartlett, 9 Pick. 156. See Worrall v. Munn, 53 N. Y. 185; S. C. 38 N. Y. 137.

amount of damage for cutting and removing wood, the jury are not limited to the value of the wood and timber actually cut and removed; they may, and should also consider the effect which the cutting off of the wood and timber has had upon the place wasted. The damages are the solid and permanent injury to the inheritance.[1] If one in possession, possessing the right of a tenant for life of agricultural land, commits waste by cutting timber necessary to retain for the use of the farm, the reversioner may recover for this damage as well as the value of the timber.[2]

Section 3.

NUISANCE.

What is a nuisance — At least nominal damages recoverable therefor — Usually a continuous wrong requiring a succession of actions — What recoverable in the first action — Continuing liability of the erector — Damages may include expenditures not yet made — When nuisance not a continuing wrong — Measure of damages — For removal of lateral support to land — Where nuisance interrupts or destroys an established business — Private remedy for public nuisance — As to joint and several liability — Pleading.

What is a nuisance.— A private nuisance has been defined to be anything done to the hurt or annoyance of the lands, tenements or hereditaments of another.[3] It may be anything which is calculated to interfere with the comfortable enjoyment of a man's house; as smoke, noise, or bad odors, even when not injurious to health.[4] It may be any wrongful act which destroys

[1] Harder v. Harder, 26 Barb. 409.

[2] Van Deusen v. Young, 29 N. Y. 9.

[3] 3 Black. Com. 215; Cooper v. Hall, 5 Ohio, 320.

[4] Rex v. White, 1 Burr. 333; Tenant v. Goldwin, 1 Salk. 360; Rex v. Neil, 2 C. & P. 485; Cleveland v. Citizens' G. L. Co. 20 N. J. Eq. 201; Fish v. Dodge, 4 Denio, 311; First Baptist Ch. v. Schenectady, etc. R. R. Co. 5 Barb. 79; Ross v. Butler, 19 N. J. Eq. 294; Whitney v. Bartholomew, 21 Conn. 213; Att'y Gen. v. Steward, 19 N. J. Eq. 417; Ball v. Nye, 99 Mass. 582; Duncan v. Hayes, 22 N. J. Eq. 27; Marshall v. Cohen, 44 Ga. 489; Meigs v. Lister, 23 N. J. Eq. 199; Pottstown Gas Co. v. Murphy, 39 Pa. St. 257; Bliss v. Hall, 4 Bing. N. C. 183; Greene v. Nunnemacher, 36 Wis. 50; McKeen v. See, 4 Robt. 449; Cropsey v. Murphy, 1 Hilt. 126; Brady v. Weeks, 3 Barb. 157; Whalen v. Keith, 35 Mo. 87; Tate v. Parish, 7 T. B. Mon. 335; Mulligan v. Elias, 12 Abb. N. S. 259; Smiths v. McConathy, 11 Mo. 518; Sparhawk v. Union, etc. R. R. Co. 54 Pa. St. 401; State v. Haines, 30

or deteriorates the property of another, or interferes with his lawful use and enjoyment thereof; or any act which unlawfully hinders him in the enjoyment of a common or public right, and thereby causes him a special injury.[1] An actionable nuisance may be anything wrongfully done or permitted which injures or annoys another in the enjoyment of his legal rights.[2] It may be created by affirmative act causing annoyance and damage, or by neglect of some duty of prevention.[3] Where it is sought to make one accountable for the consequences of acts done by him upon his own land, the question, in general, is not whether he exercised due care, but whether his acts caused the damage. If they necessarily tend to injure his neighbor in his pre-existing rights of property, he is liable in damages for the natural and necessary consequences thereof, irrespective of any considerations as to the care and skill with which such operations may have been conducted.[4] The erector of a nuisance is liable not only for its creation, but also for its continuance.[5] When he who erects a nuisance conveys the land, he does not transfer the liability for the erection to the grantee; the grantee is not generally liable until, upon request, he refuses to remove the nuisance; if a tenant or grantee, however, continues a nuisance after request to abate it, he is liable.[6]

For the purpose of discussing the subject of damages, it is not necessary to state the technical differences between nuisance and the wrong called trespass; for the same rules of damage

Me. 65; Walter v. Selfe, 4 De G. & S. 315; Soltau v. De Held, 2 Sim. N. S. 133, 159; Elliotson v. Feethan, 2 Bing. N. C. 134; Scott v. Bay, 3 Md. 431.

[1] Fay v. Prentice, 1 C. B. 828; Aiken v. Benedict, 39 Barb. 400; Norton v. Scholefield, 9 M. & W. 665; State v. Taylor, 29 Ind. 517; Brown v. Illius, 27 Conn. 84; Woodward v. Aborn, 35 Me. 271.

[2] Cooley on Torts, 565.

[3] Hankesworth v. Thompson, 98 Mass. 77; Cawkwell v. Russell, 26 L. J. Exch. 35.

[4] Cahill v. Eastman, 18 Minn. 324; Heeg v. Licht, 80 N. Y. 579.

[5] Conhochton, etc. Co. v. Buffalo, etc. R. R. Co. 52 Barb. 390; Waggoner v. Jermaine, 3 Denio, 306; Fish v. Dodge, 4 Denio, 311; Smith v. Elliott, 9 Pa. St. 345; Pickard v. Collins, 3 Barb. 444.

[6] Woodman v. Tufts, 9 N. H. 88; Johnson v. Lewis, 12 Conn. 307; Angell on Watercourses, 403; Pillsbury v. Moore, 44 Me. 154; Morris Canal, etc. Co. v. Ryerson, 27 N. J. L. 457; Beavers v. Trimmer, 25 N. J. L. 97; McDonough v. Gilman, 3 Allen, 264; Thorntou v. Smith, 11 Minn. 15; Waggoner v. Jermaine, 3 Denio, 306; Hubbard v. Russell, 24 Barb. 404.

apply in both cases. Trespass is susceptible of very precise definition, but such a variety of wrongs come under the denomination of nuisance, that all definitions of it must, in the nature of things, be very general. The remedy against a nuisance by action for damages merely would be, in many instances, imperfect and inadequate, because full redress cannot be obtained in a single action. For this reason resort may be had to equity for prevention by injunction. And provision is very generally made by statute for judicial abatement at law, in addition to the award of damages.[1]

Nuisances are generally of a continuing nature, and are continuous by the continuous fault of the person creating it; and often by that of some other person who has become so connected with it as to be also answerable for its continuance. This continuous fault may consist in a repetition of affirmative acts, keeping alive and perpetuating the nuisance, or it may consist in a neglect to remove a nuisance which otherwise would, of itself, continue. The wrong in the latter case is in omitting to perform the necessary act to cause the nuisance to cease, when the doing of such act is a legal duty.[2]

Every man has a right to use his own property as to him seems proper, subject to this important qualification: that he so use it as not to injure another. Nuisances may be, and generally are, created and continued on the pretext of the wrongdoer using his own property to make the same conducive to his own profit and enjoyment; but by neglecting the legal restriction of that use to avoid injury to others. If he carry on a lawful trade or business in such manner that it becomes a nuisance to his neighbor, he must answer in damages.[3]

At least nominal damages recoverable therefor.— The creating or continuing a nuisance in any form which involves

[1] Remington v. Foster, 42 Wis. 608; Davis v. Lambertson, 56 Barb. 480.

[2] Fish v. Dodge, 4 Denio, 317; Smith v. Elliott, 9 Pa. St. 345; Holmes v. Wilson, 10 A. & El. 503; Bowyer v. Cook, 4 M. G. & S. 236; Loweth v. Smith, 12 M. & W. 582; Thompson v. Gibson, 7 M. & W. 456; Staple v. Spring, 10 Mass. 74; Cumberland, etc. Corp. v. Hitchings, 65 Me. 140; Esty v. Baker, 48 Me. 495; Russell v. Brown, 63 Me. 203.

[3] Pickard v. Collins, 23 Barb. 444; Campbell v. Seaman, 63 N. Y. 568; Columbus Gas, etc. Co. v. Freeland, 12 Ohio St. 392.

the physical invasion of or interference with the plaintiff's property is a wrong for which an action will lie, and at least nominal damages may be recovered.[1] But when the act complained of is lawful in itself, a different rule prevails. It is then only when some actual injury is done that a right of action ensues. Every man has a right to use his own as to himself seems proper; but he must be careful to so use it that no injury is done to another. If the thing complained of as a nuisance causes neither hurt, inconvenience, annoyance or damage, it is not a nuisance; but if it causes either in the least degree, the person creating it must be liable for the consequences, no matter how small the damage. The person sustaining it will have a right of action, but there must have been some damage in fact, not merely in imagination.[2]

In Columbus Gas, etc. Co. v. Freeland,[3] Gholson, J., said: "It is evident that what amount of annoyance or inconvenience will constitute a legal injury, resulting in actual damage, dependent on varying circumstances, cannot be precisely defined, and must be left to the good sense and sound discretion of the tribunal called upon to act. Any rule on the subject can only serve as a guard against an unreasonable exercise of that discretion. Thus, in the one above cited,[4] we are cautioned to regard the proper mean, the ordinary standard of comfort and convenience, and not particular or exceptional cases above, nor, it may be added, below. Regard should be had to the notions of comfort and convenience entertained by persons generally of ordinary tastes and susceptibilities. What such persons would not regard as an inconvenience materially interfering with the physical comfort, may be properly attributed, when alleged to be a nuisance, to the fancy or fastidious taste of the party. On the other hand, the charge of a nuisance, if it be of a thing offensive to persons generally, cannot be escaped by showing that to some persons it is not at

[1] Alexander v. Kerr, 2 Rawle, 83; Foote v. Clifton, 22 Ohio St. 247; Jones v. Hannovan, 55 Mo. 462; Phillips v. Phillips, 34 N. J. L. 208; Butman v. Hussey, 12 Me. 407; Frendenstein v. Hiene, 6 Mo. App. 267; Chatfield v. Wilson, 27 Vt. 670; Hill on Torts, 608; Casabeer v. Mowry, 55 Pa. St. 419.

[2] Cooper v. Hall, 5 Ohio, 322; McElroy v. Goble, 6 Ohio St. 187; Elliot v. Fitchburg R. R. Co. 10 Cush. 191; Monk v. Packard, 71 Me. 309.

[3] 12 Ohio St. 392.

[4] Soltau v. De Held, 2 Sim. N. S. 133.

all unpleasant or disagreeable."[1] In Thompson v. Crocker,[2] the action being brought for inconvenience to the plaintiff in working his mill, caused by increasing the water below his mill by the defendant's dam, the judge instructed the jury that if the plaintiff had sustained any actual perceptible damage in consequence of the erection of the defendant's dam, he was entitled to recover, but that for a theoretic injury, or damage to be inferred from the obstruction of the water by the defendant's dam, and from the principle that any obstruction of the water below would prevent it from passing from the plaintiff's mill so rapidly as it would without such obstruction, the defendant was not answerable.[3] In such cases the cause of action depends on actual damage, and the statute of limitations begins to run from the time when such damage occurs.[4]

USUALLY A CONTINUOUS WRONG REQUIRING SUCCESSIVE ACTIONS.—Successive actions may be brought if the nuisance continues by the continuous fault of the defendant. In the first, the question whether the acts complained of constitute a nuisance or not is to be determined; and where there is no ground for imputing any wanton or intentional wrong, the damages are confined to the actual injury from the nuisance and its continuance to the date of the writ. If it continues afterwards, the damages resulting therefrom can only be recovered by a new suit, and they may be so recovered; for every continuance of the nuisance is a new nuisance.[5] In such subsequent action all damages for continuance of the nuisance since the commencement of the

[1] Cooley on Torts, 600; First Baptist Ch. v. Schenectady, etc. R. R. Co. 5 Barb. 79; St. Helen's Smelting Co. v. Tipping, 11 Ho. L. Cas. 642.

[2] 9 Pick. 59.

[3] See Oakley Mills, etc. Co. v. Neese, 54 Ga. 459.

[4] Delaware, etc. Canal Co. v. Wright, 21 N. J. L. 469; Powers v. Council Bluffs, 45 Iowa, 652.

[5] Cole v. Sprowl, 35 Me. 161; Vedder v. Vedder, 1 Denio, 257; Blunt v. McCormick, 3 Denio, 283; Savannah, etc. Co. v. Bourquin, 51 Ga. 378; Bare v. Hoffman, 79 Pa. St. 71; Seely v. Alden, 61 Pa. St. 302; Anderson, etc. R. R. Co. v. Kernodle, 54 Md. 314; Frendenstein v. Heine, 6 Mo. App. 287; Whitmore v. Bischoff, 5 Hun, 176; Hopkins v. Western Pac. R. R. Co. 50 Cal. 190; Hartz v. St. Paul, etc. R. R. Co. 21 Minn. 358; Sackrider v. Beers, 10 John. 241; Duncan v. Markley, Harp. 179; Cumberland, etc. Co. v. Hitchings, 65 Me. 140; Allen v. Worthy, L. R. 5 Q. B. 193; Queen v. Waterhouse, L. R. 7 Q. B. 545; Beckwith v. Griswold, 29 Barb. 291; Mahon v. N. Y. Cent. R. R. Co. 24 N. Y. 658; Thayer v. Brooks, 17 Ohio, 489; Slight v. Gutzlaff, 35 Wis. 675.

prior action are recoverable; and the defendant will be regarded, for such continued wrong, as wilful and contumacious, and subject to exemplary damages, such as may insure the abatement of the nuisance.[1]

WHAT RECOVERABLE IN THE FIRST ACTION.—In the first action all damages may be recovered which have resulted from it and which will ensue without any further fault of neglect or positive wrongful act of the defendant. If the defendant is subject to successive actions until he remove the nuisance, then, of course, in the first action nothing can be included in the recovery which will enter into the estimate of damages in any subsequent suit. For illustration, suppose a business is conducted which causes discomfort and annoyance to others. That injury will continue so long as the offensive business is conducted; each day's business produces a day's discomfort; the business and annoyance are continuing cause and effect. In the first suit for such a nuisance it cannot be proved, nor will the law assume, that the wrong and injury will continue. If in fact it is continued during the pendency of the action, it is a wrong not in issue; it is a new wrong, and the resulting damage is a fresh cause of action. So if a person has erected a dam or embankment on his own land or elsewhere, and thereby water to which another is entitled is diverted from his property; or by such means his property is flooded or otherwise injured, the injury will continue so long as the dam or embankment is maintained. If it is permanent, the injury will also be permanent, unless the cause is removed, and if the law requires the defendant to remove the dam or embankment, every day that he neglects that duty he is guilty of continuing the nuisance, and successive actions may be brought. According to the general current of decision, and on principle, this is a continuous wrong; for if, on such or a similar case, the plaintiff is compelled to assess his damages once for all, he is precluded from bringing a second suit, though the damage may turn out to be greater than the recovery.[2] In effect, the defendant would thus, by his

[1] Bradley v. Amis, 2 Hayw. 399; Cumberland, etc. Co. v. Hitchings, 65 Me. 140.

[2] Fowle v. New Haven, etc. Co. 112 Mass. 334; Ill. Cent. R. R. Co. v. Grabill, 50 Ill. 241; Jeffersonville, etc. R. R. Co. v. Esterle, 13 Bush, 667.

wrongful act, acquire a right to continue the wrong; a right equivalent to an easement. A right to land cannot thus be acquired.[1] On the other hand, such a principle would involve the injustice of compelling the defendant to pay for a perpetual wrong, which he would, perhaps, put an end to, at once, on the adjudication that the erection is a nuisance.[2] In a late case in Pennsylvania,[3] the plaintiff and defendant were owners of tanneries on opposite sides of the same stream, the defendant's being the lower one. The plaintiff was the owner of land on both sides of the stream below both tanneries. The plaintiff had a dam from which he conducted water to his tannery; the defendant made a dam below into which the surplus water from plaintiff's dam flowed; from this dam the defendant by a pipe conducted the water to his tannery, by which the plaintiff lost the use of the water required to carry offal from his tannery. The court say: "A severance of the connection of the pipe with the stream would cause the water to run in its accustomed channel and remove the whole cause of complaint. It is not a case of an entry on another's land and a severance of a part of the freehold, nor the depositing a permanent nuisance thereon." The act committed was not of such a permanent character that it could be assumed to continue through all coming time and to justify the assessment of damages accordingly. It was therefore deemed error to permit evidence to be given of a permanent injury to the market value of the tannery, and to instruct the jury that the plaintiff was entitled to recover the permanent damage done to the freehold. He was deemed entitled to the damages he had sustained prior to the commencement of the suit, and to be entitled to them as of that date; and the jury were permitted to compute interest thereon down to the time of the verdict.[4]

Where the defendant filled up about two hundred yards of the

[1] Atlantic, etc. R. R. Co. v. Robbins, 35 Ohio St. 531; Thompson v. Morris Canal, etc. Co. 17 N. J. L. 480; Anderson, etc. R. R. Co. v. Kernodle, 54 Ind. 314.

[2] See post, pp.

[3] Bare v. Hoffman, 79 Pa. St. 71.

[4] The reason for the allowance of interest was deemed the same as in two prior cases of Railroad Co. v. Gesner, 8 Harris, 240; Pennsylvania R. R. Co. v. Cooper, 8 P. F. Smith, 408; D. L. & W. R. R. Co. v. Burson, 11 P. F. Smith, 369.

plaintiff's canal bed without authority, but under color of official power to make a street, it was held to be a nuisance erected on the plaintiff's land which it was the duty of the defendant to remove; that successive actions could be brought until such removal. That in one action it was erroneous to give as damages the diminution of the value of the property, as that would lead to an erroneous result.[1]

Continuing liability of the erector.— The continuing liability of the erector of a nuisance which consists of a permanent structure is very strongly illustrated by an English case, which was an action on the case for continuing a nuisance to the plaintiff's market, by a building which excluded the public from a part of the space on which the market was lawfully held. It appeared that the building was erected under the superintendence and direction of the defendants, though not on their own land, but of the corporation of K. The plaintiff became a lessee of the market after the erection of the encroaching building. It was contended on behalf of the defendants, that they were not responsible for the continuing of the nuisance; that they were distinct persons from the corporation; and that though they were guilty of erecting, they could not be considered as having continued the nuisance, because they were not in possession, or interested in the soil on which the building was erected. Parke, B., said: "That the defendants were responsible for some consequences of the original erection of the building to the then owner of the market, though the defendants were not acting for their own benefit, but for that of the corporation, is not disputed; nor could it be. If they are considered merely as servants of the corporation, they would be liable just as the servant of an individual is, if he is actually concerned in erecting the nuisance; and as they would clearly have been responsible to the then owner of the market for the immediate consequences of their wrongful act, how can their liability be confined to the injury by the interruption of the first market, or what limit can be assigned to their responsibility other than the continuance of the injury itself? Is he who originally erects a wall by which ancient lights are ob-

[1] Cumberland, etc. Canal Co. v. Hitchings, 65 Me. 140.

structed, to pay damages for the loss of the light for the first day only? Or does he not continue liable so long as the consequences of his own wrongful act continue, and bound to pay damages for the whole time? And if the then owner of the market might have maintained the action against the defendants for the injury to his franchise, for the whole period during which the defendants' act continued to be injurious to him, his lessee must be in the same condition as to subsequent injuries; for it is clearly established that he has a right of action for every continuing nuisance. . . . It was also said that the defendants could not now remove the nuisance themselves without being guilty of a trespass to the corporation, and that it would be hard to make them liable. But that is a consequence of their own original wrong, and they cannot be permitted to excuse themselves from paying damages for the injury it causes, by showing their inability to remove it, without exposing themselves to another action."[1] Erecting the nuisance was not deemed the entire wrong; that was done to the owner; the continuance of the building was a distinct and additional wrong, and gave an action to the succeeding tenant.[2] The continuance of a dam flooding the plaintiff's property is ground for successive actions as for a continuous wrong.[3] So is the occupation of the plaintiff's land or of a street adjacent thereto for a railroad.[4]

DAMAGES MAY INCLUDE EXPENDITURES NOT YET MADE.— The authorities agree that damage done at the date of the writ is to be compensated, and that only. If that damage consists in the exposing of the party to the expenditure of money, the test is not the time when the expenditures are made, for they may be paid at once, or their payment delayed, without in any way affecting the rights of the parties. The question is not when the money was paid, whether before or after suit; but, was the lia-

[1] Thompson v. Gibson, 7 M. & W. 456. See Blunt v. Aikin, 15 Wend. 522.

[2] See Russell v. Brown, 63 Me. 203; Esty v. Baker, 48 Me. 495; Bowyer v. Cook, 4 M. G. & S. 236; Holmes v. Wilson, 10 Ad. & El. 503.

[3] Pillsbury v. Moore, 44 Me. 154; Staple v. Spring, 10 Mass. 72.

[4] Mahon v. N. Y. Cent. R. R. Co. 24 N. Y. 658; Sherman v. Milwaukee, etc. R. R. Co. 40 Wis. 645.

bility to those expenditures occasioned by the acts complained of? Or was it by the continuance of the same acts, or of the state of things produced by those acts, after the action was brought? If they are the result and consequence of the wrongful act complained of, they are to be recovered in that action; if they result from the wrongful continuance of the state of facts produced by those acts, they form the basis of a new action.[1]

When nuisance not a continuous wrong.— When a wrongful act is done which produces an injury which is not only immediate, but from its nature must necessarily continue to produce loss independent of any subsequent wrongful act, then all the damages resulting, both before and after the commencement of the suit, may be estimated and recovered in one action.[2] Thus in a Minnesota case, in which it was held that occupying land for a railroad was a continuing wrong, the court say: "If the construction of the road and track on the plaintiff's land necessarily lessened the value of the property; that is to say, if it would be worth less because of the mere existence thereon of said road-bed and track, without reference to any wrongful use which the defendant might or might not make of them, such depreciation accrued immediately upon the construction thereof, and was, in its nature, permanent; and being a direct and immediate result of the trespass, might be recovered at once. And if such erection necessarily caused the surface water to stand upon plaintiff's land and run into his cellar and well, he could recover therefor in the same action; though such injury might not accrue for some time after the completion of the road-bed and track." [3]

If the injury to real estate is in the nature of waste, as where a building is demolished or trees destroyed or fences broken down, there is no legal obligation or duty resting upon the wrongdoer to abate the wrong or repair the mischief. He is liable only for the damages. Only one action then can be

[1] Troy v. Cheshire R. R. Co. 23 N. H. 83–101; Holmes v. Wilson, 10 Ad. & El. 503; Staple v. Spring, 10 Mass. 72.

[2] Cooper v. Randall, 59 Ill. 321; Hayden v. Albee, 20 Minn. 159.

[3] Adams v. Hastings, etc. R. R. Co. 18 Minn. 265.

maintained; and he is liable in that action for the whole damage, prospective as well as retrospective.[1]

Damages have not been invariably assessed as for a continuing wrong, where deposits of soil or other substances have been made on another's land, or other encroachment made thereon of a nature to continue unless active measures are taken for their removal. If the process of deposit goes on, and there is a continued accretion of foreign matter on the land by defendant's fault, successive actions may, of course, be brought, but it is not the uniform American rule to regard the wrong of making the deposit and that of its continuance on the land distinct or divisible wrongs. Thus, in an action by the owners of a water power against the owner of a tannery higher up the stream for permitting tan bark to be conveyed into the plaintiff's pool to the detriment of his mill, the court recognizing that the rule for measuring damages is that which aims at actual compensation for the injury, and that whatever ascertains this is proper evidence to be submitted to the jury, held that the plaintiff was entitled to permanent damages; in other words, to recover all his damages in one action, measured either by the depreciation of the value of his property or by the cost of removing the deposit.[2] Agnew, Justice, said: "The owner of the freehold may undoubtedly recover for an injury which permanently affects or depreciates his property. . . . Being the owner of the property, and in its actual possession and use, . . (the plaintiff) . . had a right to all the damages flowing directly from the tort of the defendant. If, therefore, a permanent injury was created by the lodgment of the tan bark in the pool of their dam, which actually depreciates the property in value as a water power, it must affect the value of the land to which it belongs; and why should not this be compensated in damages? . . . Compensation for the diminished enjoyment or use of the property for a certain number of years is not compensation for the diminished value of the estate itself. The profit of the land must not be confounded with the land itself. If the land were under lease, an injury which diminished its annual profit to the tenant and also depreciated

[1] Cumberland, etc. Co. v. Hitchings, 65 Me. 140.

[2] Seely v. Alden, 61 Pa. St. 302.

and diminished the value of the property itself, would be the subject of a double action, in which the tenant and the landlord would each recover the amount of his own loss. Of course, when the owner claims in both cases he cannot be allowed double compensation for the same loss. So that the damages for use must not represent in any part the damages for the permanent injury. It is the duty of the court to see that one does not overlap the other. We think the court erred in refusing to admit both methods of computing the permanent damages, to wit: that which measures the damages by the different values of the land with and without the deposit, and that which measures them by the cost of removing the deposit. It is often difficult for the court to determine the true measure until the evidence is in; it may turn out that the cost of removing the deposit in a certain case would be less than the difference in the value of the land, and then the cost of removal would be the proper measure of damages; or it may be that the cost of removal would be much greater than the injury by the deposit, when the true measure would be the difference in value merely." A similar ruling has been made in New York. The owner of a flax mill upon a natural stream permitted flax shives to float down the current and collect in a mass or deposit in a mill-pond below, thereby impairing the use of the mill. The cost of removing the deposit was held to be a direct consequence of the injury, and was recoverable although the deposit had not been removed. The removal being necessary to restore the property to its former condition, the expense of it would measure the diminution of value by the wrong done. But this was not deemed to be exclusive of other elements of damage, as, for example, the effect of the shives upon cattle in drinking, and the filling in at high water of the trunks leading from the pond to the mill.[1]

In New Hampshire it has been laid down that wherever the nuisance is of such a character that its continuance is necessarily an injury, and where it is of a permanent character that will continue without change from any cause but human labor, the measure of damages is an equivalent for the original and

[1] O'Riley v. McChesney, 3 Lans. 278; affirmed, 49 N. Y. 672.

entire injury, and it may at once be fully compensated; since the injured person has no means of compelling the individual doing the wrong to apply the labor necessary to remove the cause of injury, and can only cause it to be done, if at all, by the expenditure of his own means.[1] The case and the application of the principle thereto were thus stated by the court: "The town is made, by law, chargeable with the duty and expense of maintaining the road, which this railroad company have in part destroyed and in part obstructed, according to the declaration; they have a qualified interest in the roadway and bridge which they have constructed and have the right to maintain, and in the materials of which they are composed, and are entitled to recover the value of that roadway and material. The railroad is, in its nature and design and use, a permanent structure, which cannot be assumed to be liable to change; the appropriation of the roadway and materials to the use of the railroad is, therefore, a permanent appropriation; the use of the land set apart to be used as a highway by the railroad company, for the use of their track, is a permanent diversion of that property to that new use, and a permanent dispossession of the town of it, as the place on which to maintain the highway. The injury done to the town is then a permanent injury, at once done by the construction of the railroad, which is dependent upon no contingency of which the law can take notice, and for the injury thus done to them they are entitled to recover at once their reasonable damages. Those damages are, first, the value to them of the property and rights of which they have been deprived, for the use and purpose to which they are, by law, bound to apply them. Assuming, then, that they were sufficient to meet the requirements of the law and the public wants for a highway, their value is to be measured by the cost of the new ground they are bound to furnish to the community for a way, if it will be less costly and more reasonable, having reference to the accommodation of the public by the highway and the railway to procure new ground, rather than to build a highway over or under the railway; by the costs of the materials which will be requisite to make a road, which will as

[1] Troy v. Cheshire R. R. Co. 23 N. H. 102.

well meet the requirements of the legal duty of the town to the public in relation to the road as the old, and the expense of applying those materials to that use in the new road, and the fund that will be permanently required in all future time to defray the increased expense of supporting and maintaining the new road in suitable repair, beyond what would have been necessary for the old road. These ingredients go to make up the present value of the old road, of which the town has been deprived, and they are to be recovered, not as prospective damages, but as a compensation for the injury the town has now sustained. When these expenses shall be paid by the town, or whether they shall ever be paid, is a question with which these defendants have nothing to do. If, from change of circumstances, the town should be relieved from the burden of maintaining the road, the amount paid by the railroad will be applied, as in equity it should, to replace to the town the costs of the land for the road, and the expenses of making it, long since paid by them."

This comprehensive remedy for the damages from a permanent nuisance is adopted in Iowa. "In the light of it," said the court, "we can see that in a case of overflow from a mill-dam, the injured party should be allowed to maintain successive suits. Somewhat depends on the way the dam is used. The injury, therefore, is not uniform. But what is of controlling importance, the dam if not maintained will go down, as surely as the sun will go down, and the nuisance of itself will come to an end. Its duration will be determined by freshets and other forces which are contingent, and, therefore, incalculable. It may, indeed, be so built that it should be regarded as permanent. In such case it is said that the damage should be considered and treated as original.[1]

"While no infallible test can be applied to enable us to determine whether a structure is permanent or not, inasmuch as nothing is absolutely permanent, yet when a structure is practically determined to be a permanent one, its permanency, if it is a nuisance, and will necessarily result in damages, will make the damages original."[2] The case was this: The defendant had

[1] Citing preceding case.

[2] Powers v. Council Bluffs, 45 Iowa, 655.

constructed a ditch along a street by the plaintiff's property, in such a negligent and unskilful manner that his property was injured thereby; one ditch was made to empty into another by a fall, making a cavity below the fall, and wearing away the land at the brink of the fall. The court held that the damage resulting from the construction of the ditch was original damage. The court say: "After the ditch was constructed and the water of the creek first began to work upon plaintiff's land, its continuance was just as certain as that water would flow in the creek, unless changes were made therein by human hands. Its continuance would just as certainly be an injury as that the floods of the creek would wash the soil and earth through which the ditch was dug. It follows then that the plaintiff's cause of action accrued for all injury sustained or that in the future would be suffered;" also, "we have seen no case where successive actions have been allowed for damages resulting from negligence combining with a natural cause, however gradual the operation of that cause. Successive actions are allowed only when the defendant is in continuous fault. It may be a fault of commission or omission, but if the latter, it must be something else than an omission to repair or arrest an injury resulting from negligence or unskilfulness, unless the remedy is to be applied upon the wrongdoer's premises."[1] This rule, as applied to such a case, affords the defendant no option or opportunity to put an end to the injury by amending his work; but the permanent or "original damages" are reducible to the amount it would cost the plaintiff himself to amend the work if the injurious feature of it may be corrected at a moderate expense.[2] A subsequent case occurred which was unaffected by this mitigation. A railroad company and a city were defendants. The latter had, in the exercise of its powers, granted the company the right to locate its road along a certain street, adjacent to which the plaintiff owned and occupied property. The complaint was that there was negligence in selecting a line for the road on that street, and it was fixed unnecessarily near to the plaintiff's premises, thereby causing him great inconven-

[1] See Finley v. Hershey, 41 Iowa, 389.

[2] Simpson v. Keokuk, 34 Iowa, 568; Van Pelt v. Davenport, 42 Iowa, 314.

ience and damage. The true measure of damages was held to be the difference in value of the plaintiff's property with the road constructed upon its present line in the street, and what that value would have been, if the road had been constructed upon a line in the street selected with reasonable care and a proper regard for the rights of all interested.[1]

In another case the plaintiff was the owner of a lot abutting on a slough or arm of the Mississippi river, and occupied it with a slaughter or pork house; the defendant owned a saw mill on the same slough, and partially filled up this slough in front of his premises, and thereby impeded and cut off the flow of water from the river. The wrong was treated as an entirety, and the damages to be measured and ascertained by comparison of the value of the property affected by the filling up of the slough prior thereto, and its value as depreciated by such filling. It was insisted that the true measure of the plaintiff's damage was the difference between the value of the use of the property before and after the filling. On this point the court said: "The injury sustained by plaintiffs affected the property itself and incidentally the value of its use was depreciated. It is evident that the rule contended for by defendant's counsel would, if applied to the case, fail to make full compensation to plaintiffs. The property depreciated in value because the value of its use was affected, and because the property itself was injured by the acts complained of. In order to compensate the plaintiffs for the injury to their property, they should recover to the extent its value was depreciated. If plaintiffs could only recover for the depreciated value of the use of the property whenever the property was used, as defendant claims, there would be a continually recurring cause of action in favor of plaintiffs, and the rights of the parties would not be settled in the present suit, a thing which the law will avoid."

In a late Massachusetts case,[2] a railroad company, for the construction of its road-bed in such a manner as unnecessarily to turn the current of a stream against plaintiff's land and wash away his soil, was held liable for prospective as well as

[1] Cadle v. Muscatine, etc. R. R. Co. 44 Iowa, 11.

[2] Fowle v. New Haven, etc. Co. 112 Mass. 334.

past injury. A recovery of prospective damages in a prior suit was held to bar an action for subsequent damage, though caused by an unusual freshet. The declaration in the former suit was for soil washed away and for diminution in the value of the residue. The court say: "The permanent character of the structure, and the fact that the plaintiff accepted damages which were assessed for the permanent injury, and necessarily involved a consideration of the probable future effect upon the plaintiff's land of the changed current of such a stream in its different stages of water, remain unaffected by the evidence. The jury may have intended to compensate the plaintiff for the injury now complained of, or to give him the means to protect himself against it. As a general rule, a new action cannot be brought unless there be a new unlawful act and fresh damage. There is no exception to this rule in the cases of nuisance, where damages after action brought are held not to be recoverable, because every continuance of a nuisance is a new injury, and not merely a new damage. The case at bar is not to be treated strictly in this respect as an action for an abatable nuisance. More accurately it is an action against the defendant for the construction of a public work under its charter in such a manner as to cause unnecessary damage by want of reasonable care and skill in its construction. For such an injury the remedy is at common law. And if it results from a cause which is either permanent in its character, or which is treated as permanent by the parties, it is proper that entire damages should be assessed with reference to the past and probable future injury. This is the course which appears to have been taken in this case, and to allow a recovery here might subject the defendant to double damages."

The courts of Kentucky also allow recovery for past and prospective injury from a permanent nuisance; as for a railroad laid and operated in the street of a city, impairing the value of the easement therein of adjacent lot-owners, and subjecting such owners occupying their lots to daily annoyance, from smoke, soot, noise, and hazard of fire.[1] The injury and damage are thus stated by the court in a late case: "We adjudge that

[1] Elizabethtown, etc. R. R. Co. v. Combs, 10 Bush, 382.

if appellant's road has been so located as to deprive appellee of the means of ingress and egress to and from his lot on W street with ordinary vehicles, on either side of its road, when its trains are passing or standing on the street in front of his lot, he is entitled to recover such damages as he has thereby sustained; and if his houses are damaged by having smoke, soot or fire from passing engines thrown or blown into or against them, he is entitled to recover for this also. The diminution of the value of the adjacent property, occasioned by these circumstances, will be the measure of his right to recover. We have heretofore held, in actions for injury to real estate by trespassers, that the plaintiff can only recover compensation for the injury done up to the commencement of the action; but that was in cases of injury not continuing or permanent in their character. The injury in this case, if any, is permanent and enduring, and no reason is perceived why a single recovery may not be had for the whole injury to result from the acts complained of." [1]

In a subsequent case, it was held that if the railway tracks have been so located as to unreasonably obstruct the abutting lot-owner's means of ingress and egress over the street to and from his lot; or, if his houses have been injured by having smoke, sparks or cinders thrown or blown into or upon them; or, if their walls have been cracked by the rapid movement of heavy trains of cars, he is entitled to recover for the damages directly resulting from all or any one or more of these causes; that the measure of damages which the lot owner may recover, if entitled to recover at all, is the diminution in value of his houses and lot by the location of the railway tracks, and the uses to which they are authorized to be put by the grant under which they are built. If the location and operation of the roads in front of the houses diminish their value say twenty per centum, then the diminution should be proportioned to their value just preceding the time at which it became generally known that the street had been selected as the line of the road. The jury should ascertain what the value of the property was just before it became generally known that the roads were to

[1] Elizabethtown, etc. R. R. Co. v. Combs, 10 Bush, 382.

be located in front of it, and then determine what proportion of that value was taken from the houses and lot by the obstruction of the street, and the annoyance incident to the movement of engines and trains of cars along and over the roads. Benefits arising out of or from an unauthorized act may sometimes be considered in the determination of the sum to be recovered by the injured party; but in all cases these benefits must be direct and immediate. They must be confined to the approximate consequences of the act complained of, and be of like kind with the opposite injuries for which the recovery is sought. If the railways afford the complaining lot-owner increased or additional facilities for ingress and egress to and from his houses and lot, or for the movement of articles in which he may deal, or supplies which it is necessary that he shall procure, this benefit may be taken into consideration in estimating the damages he has sustained. The same case announced the following principle: that by instituting an action for permanent damages, the lot-owner in effect consents that the railroad company may continue for all future time to use the street as it is now using it, and, as consideration therefor, to accept such judgment as may be therein rendered.[1]

In Illinois the doctrine has been carried still further. In an action by the owner and occupant of a lot situated near the right of way of a railroad on which the company erected cattle pens so conducted as to become a nuisance, the court held that in estimating the damages it was proper to consider the depreciation in the value of the plaintiff's property occasioned by such nuisance; and in addition the injury and annoyance to the plaintiff while occupying the premises; that one recovery for such depreciation would bar any future action for the same cause; but if the former recovery was for annoyance merely,

[1] Jeffersonville, etc. R. R. Co. v. Esterle, 13 Bush, 667. In Kemper v. Louisville, 14 Bush, 87, the defendant was a municipal corporation; by a street improvement it dammed a natural drain, and thus flooded the plaintiff's lot where he lived. It was held that the plaintiffs were entitled to recover for the injury to their house and lot, and that while no recovery could be had for physician's bills, or loss of time to the occupants, on account of sickness caused by the stagnant water, still these facts might be proved with a view to show the extent to which the value of the property had been lessened by reason of the act complained of.

and for rendering the atmosphere unwholesome, then a similar recovery might be had at every term of court so long as the nuisance continues.[1]

The apparent discrepancy in the American cases on this subject may, perhaps, be reduced by supposing that where the nuisance consists of a structure of a permanent nature, and intended by the defendant to be permanent, or of a use or invasion of the plaintiff's property, or a deprivation of some benefit appurtenant to it, for an indefinitely long period in the future, the injured party has an option to complain of it as a permanent injury and recover damages once for all for the whole time; estimating its duration according to the defendant's purpose in creating or continuing it; or to treat it as a temporary wrong to be compensated for while it continues; that is, until the act complained of becomes rightful by grant, or condemnation of property, or ceases by abatement. The recovery of damages on a declaration alleging the permanency of the nuisance, on principle, would estop the plaintiff not only from recovering future damages, but also from taking any steps to abate the nuisance, during the period for which damages had been recovered. This is apparently the law in Kentucky. By such an action, the plaintiff consents to the continuance, according to his allegations of the duration of the injury for which he recovered judgment; and accepts the recovery as a compensation therefor.[2] In the Massachusetts case which has been referred to, the plaintiff's second action was deemed barred on account of the scope of his first declaration, and the acceptance of damages assessed for the permanent injury.[3] Thus considered, such a recovery will have the effect to give the defendant a permanent right to

[1] Ill. Cent. R. R. Co. v. Grabill, 50 Ill. 241; Chicago, etc. R. R. Co. v. Baker, 73 Ill. 316.

[2] Jeffersonville, etc. R. R. Co. v. Esterle, 13 Bush, 667.

[3] Fowle v. N. H. etc. Co. 112 Mass. 338. In Johnson v. Porter, 42 Conn. 234, the plaintiff alleged in his declaration that the plaintiff had annoyed him by offensive odors from a barn-yard, placed by the defendant near the plaintiff's dwelling house and that thereby he was prevented from the comfortable use of his house; and his family was made sick, and he was subjected to medical expense; it was held that he could not, under this declaration, for the purpose of enhancing damages, show the diminished value of his dwelling house and lot by reason of the offensive odors. See Ill. Cent. R. R. Co. v. Grabill, 50 Ill. 241.

do the acts which constitute the nuisance, as fully as though there had been a condemnation of the property by the exercise of the power of eminent domain. But the option to recover permanent damages in a common law action, with this effect, is not generally admitted in this country, and is wholly unknown in England.[1]

Measure of damages.— If permanent damages are allowed, they are measured by the depreciation of value caused by the nuisance, or by adding to the damages allowed for past injury the amount necessary to restore the premises to their former condition, or to protect the plaintiff against future injury.[2] Where, however, the damages are assessed for the continuance of the nuisance to the commencement of the suit only, it may affect and injure the inheritance as well as the value of the possession; they may therefore be assessed for any permanent injury so caused; and for the depreciation of rental value, by the difference, in other words, between the rental value free from the effects of the nuisance and subject to it; but to the occupant the latter damages may be computed on the diminution of the value of the use to him.[3] These damages compensate the ordi-

[1] Adams v. Hastings, etc. R. R. Co. 18 Minn. 260; Hartz v. St. Paul, etc. R. R. Co. 21 Minn. 358; Brewster v. The Sussex R. R. Co. 40 N. J. L. 57; Ford v. Chicago, etc. R. R. Co. 14 Wis. 609; Harrington v. St. Paul, etc. R. R. Co. 17 Minn. 215; Blesch v. Chicago, etc. R. R. Co. 43 Wis. 183; Ellsworth v. Cent. R. R. Co. 34 N. J. L. 93; Carl v. Sheboygan, etc. R. R. Co. 46 Wis. 625; Atlantic, etc. R. R. Co. v. Robbins, 35 Ohio St. 531; Battishill v. Reed, 18 C. B. 696; Devery v. Grand Canal Co. 9 Irish C. L. 194; Mellor v. Pilgrim, 3 Bradw. 476.

[2] Finley v. Hershey, 41 Iowa, 389; Ill. Cent. R. R. Co. v. Grabill, 50 Ill. 241; Chicago, etc. R. R. Co. v. Baker, 73 Ill. 316; Powers v. Council Bluffs, 45 Iowa, 655; Elizabethtown, etc. R. R. Co. v. Combs, 10 Bush, 382; Fowle v. N. H. etc. Co. 112 Mass. 333; O'Riley v. McChesney, 3 Lans. 278; Bare v. Hoffman, 79 Pa. St. 71; Givens v. Van Studdiford, 4 Mo. App. 498.

[3] Francis v. Schoellkopf, 53 N. Y. 152; Wiel v. Stewart, 19 Hun, 272; Whitmore v. Bischoff, 5 Hun, 176; Emery v. Lowell, 109 Mass. 197; Walrath v. Redfield, 11 Barb. 368; Hatfield v. Cent. R. R. Co. 33 N. J. L. 251; Carl v. Sheboygan, etc. R. R. Co. 46 Wis. 625; Bare v. Hoffman, 79 Pa. St. 71; Chicago v. Huenerbein, 85 Ill. 594; Schuylkill Nav. Co. v. Farr, 4 W. & S. 362; Gile v. Stevens, 13 Gray, 146; Jutte v. Hughes, 67 N. Y. 267; Pinney v. Berry, 61 Mo. 359. In Hatch v. Dwight, 17 Mass. 289, a mortgagee who had taken possession was held entitled to recover interest on the

nary or general loss from the nuisance. If there are special elements of damage, as there may be, and in most cases are, recovery may be increased accordingly. Where the defendant caused the nuisance by digging a ditch, and by means thereof conducting water from his brewery into a clay pit on the plaintiff's premises; and such water becoming stagnant and offensive, the plaintiff incurred expense in filling it up by direction of the board of health, the expense so incurred was allowed as an item of damage.[1]

The owner and occupier may recover for expenses incurred to protect the premises affected by the nuisance against a continuance of the injury, as well as to repair those already done.[2] The owner of logs scattered and delayed by reason of a boom by which the defendant obstructed a floatable stream, has been allowed the depreciation in the market value during the detention, and for loss of logs carried away, and the expense of searching for others.[3]

For injury done to the plaintiff's crops by the flowing of his land, he is entitled to recover for their value standing upon the land, so far as destroyed, and the depreciation in value of such as are only injured or partially destroyed.[4] But for depriving a party of the use of land by a nuisance, recovery can be had only of the rental value; not the supposed value of what might have been raised by cultivation, less the cost of cultivation and marketing.[5] For injuries done to the plaintiff's house, grounds, fruit trees and garden by water turned on his land by the defendant, in constructing a railway, damages may be ascertained in favor of the owner, by the difference between the value of the plaintiff's premises before the injury happened, and the value immediately after the injury, taking into account only the damages which have resulted from the defendant's acts.[6] Under such circumstances, the owner is bound to use

value of a mill privilege rendered useless for the erection of a mill by a dam built below.

[1] Shaw v. Cummiskey, 7 Pick. 76.

[2] Jutte v. Hughes, 67 N. Y. 267.

[3] Plummer v. Penobscot L. Ass. 67 Me. 363.

[4] Folsom v. Apple R. L. D. Co. 41 Wis. 602.

[5] Chicago v. Huenerbein, 85 Ill. 594.

[6] Chase v. N. Y. Cent. R. R. Co. 24 Barb. 273.

reasonable care, skill and diligence, adapted to the occasion, to save his property from being injured by the water, notwithstanding it came on his premises by the fault and negligence of the defendant.[1]

Where the plaintiff is the owner and occupier of the land affected by the nuisance, the particular circumstances of the injury may be taken into account, and damages given, not only for the diminished value of his use and for any peculiar annoyance suffered or expense rendered necessary or incurred in respect thereto, but also for any act which permanently injures the inheritance. For the unauthorized maintenance of a dam so as to overflow another's land, he may recover damages for loss of the use of a ford which he had habitually used in hauling crops and wood from one part of his farm to another, and for the loss of growing timber killed by such overflow prior to the suit, though the timber did not, in fact, die until afterwards.[2] A city authorized a canal corporation to change the course of a sewer into which a street was drained, and into which a house was also drained, the owner of which consented to the corporation's making the change on its promise to hold him harmless from the consequences. The drain became obstructed and the water flowed back into the house. In an action against the city for the obstruction, under a declaration alleging that the defendants obstructed the drain so that water and filth flowed into the plaintiff's cellar and destroyed his property therein, and put him to trouble and expense to get the water out, the plaintiff was held entitled to damages for any injury which affected his estate, or diminished its value for use and occupation by reason of the inconvenience and annoyance of flooding the cellar, and of unwholesome and disagreeable smells, or of insects thereby generated or attracted to the house; and also his reasonable expense in preventing or removing the nuisance, and of changes and repairs thereby rendered necessary, and which he could not, by reasonable care and diligence, have avoided.[3]

A railroad company, by permitting a horse killed by its locomotive to remain on the side of the railroad track so near the

[1] Chase v. N. Y. Cent. R. R. Co. 24 Barb. 273.

[2] Hayden v. Albee, 20 Minn. 159.

[3] Emery v. Lowell, 109 Mass. 197.

house of an adjacent owner as to render its occupancy unwholesome, is subject to an action by him, and he may show, not only the sickness of himself, but also the sickness of his wife, his family and the different members, to affect the damages.[1] A plaintiff, suffering from a nuisance of water flooding his ground about his house, destroying his shrubbery and garden, and injuring the health of his family, may not only recover for the injury to the house and lot, but he may prove physicians' bills paid, loss of time of his family on account of sickness caused by stagnant water, not as constituents of the measure of damages, but for the purpose of showing the extent to which the value of the property has been lessened by reason of the acts complained of.[2] The working of quarries and blasting of rocks, whereby large quantities of rocks and stones are thrown upon the dwelling house and premises of plaintiff, breaking the doors, windows and roof, is, as to such injuries, a trespass; and if by such operations all persons on and about the plaintiff's premises are kept in continual fear and jeopardy of their lives, rendering a proper attention to business full of fear and danger, they would constitute a nuisance, and in case therefor, the damages for diminution of the value of the property for the purpose of renting, and the prevention of the plaintiff's servants from performing their labor, and for injury from leakage in the roof through holes so caused, may be recovered.[3] The owner of a ferry established by law may have an action against an owner who sets up a ferry in opposition to him, without authority, and uses unwarrantable means to divert custom from the plaintiff's ferry; and may recover, as his measure of damages, the defendant's clear gains from the rival ferry.[4]

For removal of lateral support to land.—Removal of lateral support of land by which such land drops away is a legal injury to the owner, for which he is entitled to damages. There is incident to the land, in its natural condition, a right of

[1] Ellis v. Kansas City, etc. R. R. Co. 63 Mo. 131.

[2] Kemper v. Louisville, 14 Bush, 87; Francis v. Schoellkopf, 53 N. Y. 152; Wiel v. Stewart, 19 Hun, 272.

[3] Scott v. Bay, 3 Md. 431.

[4] Stark v. McGowen, 1 N. & McC. 387; Chenango Bridge Co. v. Lewis, 63 Barb. 111.

support from the adjoining land; and if land not subject to artificial pressure sinks and falls away in consequence of the removal of such support, the owner is entitled to damages to the extent of the injury sustained.[1] The measure of damages is not the cost of restoring the lot to its former situation, or building a wall to support it, but it is the diminution of value of the plaintiff's lot by reason of the defendant's act.[2]

It is well settled that where the owner of a lot builds upon his boundary line, and the building is thrown down by reason of excavations made upon the adjoining lot, in the absence of improper motive and carelessness in the execution of the work, no recovery can be had for the injury done to the building.[3] But though the adjacent owner is not obliged to refrain from excavations near his land, except to preserve the lateral support of the land in its natural condition, still, if there are buildings upon it, he is under obligation to proceed with care for their protection; he must give reasonable notice of his intended excavation to the owner of such buildings, and also make his excavations with care.[4] Owners of the surface are entitled to absolute subjacent support; they have a right to support of the land with any erections thereon.[5]

WHERE A NUISANCE INTERRUPTS OR IMPAIRS AN ESTABLISHED BUSINESS.— This is an element of damage which may be proved as a distinct injury, or as bearing upon the inquiry how much

[1] McGuire v. Grant, 25 N. J. L. 356; Thurston v. Hancock, 12 Mass. 220; Foley v. Wyeth, 2 Allen, 131; Beard v. Murphy, 37 Vt. 99; Farrand v. Marshall, 19 Barb. 380; Guest v. Reynolds, 68 Ill. 478; Baltimore, etc. R. R. Co. v. Reaney, 42 Md. 117; Charless v. Rankin, 22 Mo. 566; Hay v. The Cohoes Co. 2 Comst. 162.

[2] McGuire v. Grant, supra.

[3] McGuire v. Grant, supra; Gayford v. Nicholls, 9 Exch. 702; Humphries v. Brogden, 12 Q. B. 739; Partridge v. Scott, 3 M. & W. 220; Panton v. Holland, 17 John. 92; Wyatt v. Harrison, 3 B. & Ad. 871; Brown v. Windsor, 1 Cromp. & J. 29. In Boothby v. Androscoggin, etc. R. R. Co. 51 Me. 319, it was held that the railroad company was not liable for removing the lateral support of adjacent land in excavations made for their road in pursuance of their charter. But see Richardson v. Vt. Cent. R. R. Co. 25 Vt. 465.

[4] Cooley on Torts, 595; Wyrley Canal Co. v. Bradley, 7 East, 368; Shrieve v. Stokes, 8 B. Mon. 453.

[5] Hext v. Gill, L. R. 7 Ch. Ap. 699; Bononi v. Backhouse, El. B. & El. 622; S. C. 9 Ho. L. Cas. 503; Smith v. Thackerah, L. R. 1 C. P. 554; Cooley on Torts, 595.

the value of the plaintiff's use of the premises affected has been lessened by the defendant's wrong-doing. The nature and extent of the business may be proved, and its past productiveness, not with a view to measure the damages by expected profits prevented by the nuisance, but to assist the jury in the exercise of their judgment, with a view to awarding adequate compensation.[1] For obstructing the water below a mill by means of a dam so as to prevent its running, it has been held in New York, the owner and occupier of the mill is only entitled to recover the value of the use of the mill during the time he is necessarily deprived of the use of it, and the amount of the permanent diminution of value by the erection of the dam. It was intimated that damage from the deterioration or fall in the market price of saw-logs on hand to be sawed, suffered without negligence of the plaintiff in omitting to make other disposition of them, should be disallowed as being analogous to unearned and contingent profits.[2] It is believed that this intimation is not supported by the supposed analogy, because the loss in question is not a loss of profits; and upon the cases truly analogous, such loss should be compensated.[3] A party was held entitled to recover for a loss of rent by the defendant's failure to keep his privies and drains in repair.[4] And as for a permanent injury for establishing a brothel on adjoining property to plaintiff's tenements held for renting.[5] In such a case, a fair means of arriving at the actual damage would be to ascertain the loss of rent and depreciation of the value of the property caused by the nuisance; that is, how much less the property would sell for on account of the existence of the nuisance, and what loss of rent has resulted from the same cause. But, in

[1] Simmons v. Brown, 5 R. I. 229; Pollitt v. Long, 58 Barb. 20; White v. Moseley, 8 Pick. 356; Bucknam v. Nash, 12 Me. 474; St. John v. The Mayor, etc. 6 Duer, 315; 13 How. Pr. 527; Park v. C. & S. W. R. Co. 43 Iowa, 636; Shafer v. Wilson, 44 Md. 268; Stetson v. Faxon, 19 Pick. 147; Bonner v. Welborn, 7 Ga. 296; St. Louis, etc. R. R. Co. v. Capps, 67 Ill. 607.

[2] Walrath v. Redfield, 11 Barb. 368; 18 N. Y. 457.

[3] Plummer v. Penobscot L. Asso. 67 Me. 363; Ward v. N. Y. Cent. R. R. Co. 47 N. Y. 29; Manville v. Western U. Tel. Co. 37 Iowa, 214; Shepherd v. Milwaukee Gas Co. 15 Wis. 318.

[4] Jutte v. Hughes, 67 N. Y. 268.

[5] Givens v. Van Studdiford, 4 Mo. App. 498.

ascertaining these facts, all circumstances that would show a depreciation in value should be considered.[1] And the damage recovered must be the actual depreciation shown to be caused by the existence of the nuisance. Where property is changing its character, and what has been formerly a good residence neighborhood is invaded by business establishments which destroy its quiet, it is matter of common observation that it passes through a period in which it is neither good for business of the better class nor for residences; and drinking saloons, and other establishments more or less objectionable or disreputable, settle down for a time in what were once the residences of wealthy citizens. When a bawdy house is opened in such a neighborhood, it may be very difficult to say how much any depreciation of value is attributable to that fact alone. But if it be shown that after the defendant's house was occupied as a bawdy house, other disreputable houses sprang up in the neighborhood, the mere fact that it may be impossible to say how much of the damage was occasioned by the nuisance on the defendant's premises, and how much by the other brothels, will be no bar to recovery.[2]

The abatement of a nuisance does not preclude the recovery of damages which have been suffered prior to such abatement.[3]

Mitigations.— The fact that the plaintiff might have abated the nuisance caused by obstructing a ditch, but did not, it being necessary to go upon the defendant's land for that purpose, will not affect his right of action or the damages.[4] Where, however, the plaintiff has access to the nuisance, or the means or opportunity of avoiding or mitigating the injury it causes, it is his duty to abate the nuisance, or to take the proper measures for preventing or lessening the damages therefrom.[5] Where this duty arises, damages will be limited to such as are

[1] Id.; Ill. Cent. R. R. Co. v. Grabill, 50 Ill. 241.

[2] Givens v. Van Studdiford, supra. See post, p. 425.

[3] Gleason v. Gary, 4 Conn. 418; Pierce v. Dart, 7 Cow. 609; Renwick v. Morris, 3 Hill, 621; The People v. Corp. of Albany, 11 Wend. 539.

[4] White v. Chapin, 102 Mass. 138; Walrath v. Redfield, 11 Barb. 368; Heaney v. Heeney, 2 Denio, 625. See Gilbert v. Kennedy, 22 Mich. 133.

[5] Chase v. N. Y. Cent. R. R. Co. 24 Barb. 273.

or would be suffered if the duty had been performed, added to the expense incident to the performance of that duty.[1] If a plaintiff, having the opportunity, without incurring a liability for trespass, neglects to exercise ordinary care and diligence to prevent injury, he may be denied any recovery, on the ground of contributory negligence.[2] The plaintiff is not obliged, however, to take notice of defendant's threat to commit a wrong, and thereupon to take measures to prevent damages; it is sufficient for him if he exercises ordinary care in the preservation of his property, after he has knowledge that wrong has been done.[3]

It is no defense that the plaintiff is a lessee, and rented the premises injured after the business causing the nuisance had been established, and with knowledge of its existence, and for small rent on that account.[4] Nor is it a defense that the business is necessary to be carried on, and is useful to the public.[5]

If some incidental advantage accrues to the plaintiff from the wrongful act of the defendant which causes the nuisance, that circumstance may be considered in mitigation. In an action in Massachusetts, for damages occasioned by the filling up by the defendant of his land, adjacent to that of the plaintiff, whereby the free flow of water off the plaintiff's land had been obstructed, the jury were held properly instructed that they should take into consideration the evidence on both sides bearing on this point, and if they were satisfied that the filling up had actually benefited the plaintiff's estate in any particular, they would, in assessing the damages, make an allowance for such benefit, and give the plaintiff such sum in damages as they found, upon the evidence, would fully indemnify and compensate him for all the damages he had actually sustained.[6] The authorities of the city in which the plaintiff's premises were situated gave a railroad company the right to locate and

[1] Emery v. Lowell, 109 Mass. 197; Fowle v. N. H. etc. Co. 112 Mass. 334; O'Riley v. McChesney, 3 Lans. 278; Terry v. Mayor, etc. 8 Bosw. 504.

[2] Simpson v. Keokuk, 34 Iowa, 568; Van Pelt v. Davenport, 42 Iowa, 308; Irwin v. Sprigg, 6 Gill, 200.

[3] Plummer v. Penobscot L. Ass. 67 Me. 363.

[4] Smith v. Phillips, 8 Phila. 10.

[5] Id.; Marcy v. Fries, 18 Kans. 353.

[6] Luther v. Winnisimmet Co. 9 Cush. 171; Brower v. Merrill, 3 Chand. (Wis.) 46; 3 Pin. 46.

operate their road on the street in front of those premises, on condition that they should macadamize certain neighboring streets and construct a sewer; these improvements were made. In an action for damages to the plaintiff for occupying the street in front of his premises without extinguishing his right therein as a highway, it was held that the company were entitled to show, in diminution of damages, that the work so done in the improvement of the streets, and building a sewer, enhanced the value of the plaintiff's property.[1] The benefit occasioned to a meadow below a mill-dam by a ditch dug at the time of the erection of the dam by the owner of the dam, through his own land below the meadow, cannot be set off against the damage done to the meadow by subsequent flowing occasioned by the dam; and the cost of the ditch is immaterial in assessing such damages.[2] In New Hampshire it has been held that the damage caused in washing away the bank of a stream, flowing land, and depreciating the grass thereon, by a mill owner accumulating water in the wet season and letting it off in the summer, cannot be mitigated by any benefit that such flowing makes on any other part of the same proprietor's land.[3] A party liable for conducting a tannery and other offensive business, where they constitute a nuisance to the owner of houses for rent, is not entitled to show in mitigation of damages, that, since his tannery has been operated, it has enhanced the value of plaintiff's premises, and the rental value thereof, in consequence of the number of persons employed therein creating a demand for dwellings in the vicinity.[4]

To entitle the defendant to show any incidental benefit to the plaintiff in case of suit for nuisance, the benefit must accrue directly from the act or business which causes or constitutes the nuisance and confer the benefit in the same manner as it

[1] Porter v. North Mo. R. R. Co. 33 Mo. 128. In The Palmer Co. v. Ferrill, 17 Pick. 58, it was held that, in assessing damages under the statute for flowing lands, the proper rule was to estimate the loss arising to the proprietor from the direct injury done to the land, taken as a whole, by the flowing, deducting therefrom any benefit which may be done to the same land by the same cause, namely, by the flowing.

[2] Gile v. Stevens, 13 Gray, 146.

[3] Gerrish v. New Market M. Co. 30 N. H. 478; Talbot v. Whipple, 7 Gray, 122.

[4] Francis v. Schoellkopf, 53 N. Y. 153.

operates to produce the injury; the allowance for benefits must be confined to the proximate consequences of the act complained of, and be effects of like kind with the opposite injuries for which the recovery is sought.[1]

The damages for nuisance will be limited to the title or right of the plaintiff as in trespass.[2] Where a husband and wife joined in an action on the case for permanently obstructing a right of way appurtenant to her inheritance, and she died pending the action, the court held that the suit did not abate, but that the surviving husband could go on and recover judgment; that he was entitled to recover the whole amount of damages sustained until the death of the wife, and afterwards a proportion equal to the husband's interest in her estate as her heir.[3]

Private remedy for public nuisances.— A nuisance may be both public and private in its character, and in so far as it is private, the person who suffers a special damage therefrom has a right of action.[4]

One who has sustained damage peculiar to himself from a common nuisance has a cause of action against the person erecting or maintaining the nuisance, although a like injury has been sustained by numerous other persons.[5] Grover, J., thus forcibly states this doctrine: "The idea that if, by a wrongful act, a serious injury is inflicted upon a single individual recovery may be had therefor against the wrongdoer, and that if, by the same act, numbers are so injured no recovery can be had by any one, is absurd. . . . It is said that holding the defendant liable to respond in an action to each one injured will lead to a multiplicity of actions. This is true,

[1] Jeffersonville, etc. R. R. Co. v. Esterle, 13 Bush, 667.

[2] Francis v. Schoellkopf, supra; Seely v. Alden, 61 Pa. St. 305; Staple v. Spring, 10 Mass. 72. See ante, p. 365.

[3] Jeffcoat v. Knotts, 11 Rich. 649.

[4] Park v. C. & S. W. R. R. Co. 43 Iowa, 636; Crommelin v. Coxe, 30 Ala. 318; Abbott v. Mills, 3 Vt. 521; Mills v. Hall, 9 Wend. 315; Myers v. Malcolm, 6 Hill, 292; Hay v. Cohoes Co. 3 Barb. 48; Fort Plain Bridge Co. v. Smith, 30 N. Y. 62; Welton v. Martin, 7 Mo. 307; Grigsby v. Clear Lake Water Co. 40 Cal. 396; Venard v. Cross, 8 Kans. 248; Clark v. Peckham, 10 R. I. 35; Greene v. Nunnemacher, 36 Wis. 50.

[5] Francis v. Schoellkopf, 53 N. Y. 153.

but it is no defense to the wrongdoer, when called upon to compensate for the damages sustained from his wrongful act, to show that he, by the same act, inflicted a like injury upon numerous other persons. The position is unsustained by any authority. While in the application to particular cases there is some conflict, yet there is none whatever in the rule itself. That rule is, that one erecting or maintaining a common nuisance is not liable to an action at the suit of one who has sustained no damage therefrom except such as is common to the entire community; yet he is liable at the suit of one who has sustained damage peculiar to himself. No matter how numerous the persons may be who have sustained this peculiar damage, each is entitled to compensation for his injury. When the injury is common to the public, and special to none, redress must be sought by a criminal prosecution in behalf of all."[1] The plaintiff must suffer some special damage beyond that which is suffered in common with the public.[2] This may be direct or consequential;[3] and it must be specially alleged in the declaration.[4]

As to joint and several liability.— All persons who jointly participate in the creation of a nuisance, or in its maintenance during the same period, may be held liable jointly or severally as in other cases of tort.[5] But parties liable only as tenants or grantees of the premises on which the nuisance is situated, cannot be held jointly liable with the party creating it; for, while the creator of a nuisance continues to be liable in the tenant's or grantee's time, the latter are not liable before their connection with the property. And in case of a succession of

[1] Id.; Lansing v. Smith, 4 Wend. 9; Mills v. Hall, 9 Wend. 315; First Bap. Ch. v. Schenectady, etc. R. R. Co. 5 Barb. 83. See Shawbut v. St. Paul, etc. R. R. Co. 21 Minn. 502.

[2] Dudley v. Kennedy, 63 Me. 465; Yolo County v. Sacramento, 36 Cal. 193; Coburn v. Ames, 52 Cal. 385; Cole v. Sprowl, 35 Me. 161; Harrison v. Sterett, 4 Har. & McH. 540; Bunyon v. Bordine, 14 N. J. L. 472; Baxter v. Wynoski Turnpike Co. 22 Vt. 114; Hatch v. Vt. etc. R. R. Co. 28 Vt. 142; Brown v. Watson, 47 Me. 161.

[3] Rose v. Miles, 4 M. & S. 101; De Laney v. Blizzard, 7 Hun, 7.

[4] Baker v. Boston, 12 Pick. 184; S. C. 22 Am. Dec. 241; Memphis, etc. R. R. Co. v. Hicks, 5 Sneed, 427.

[5] Cooley on Torts, 133–4.

tenants, each is severally liable during his term only; and successive grantees in the same manner.[1]

If several, independently, and without concert, create a nuisance, they are not jointly liable; but each is liable in respect to his own wrongful act, and for the damages which resulted therefrom. A dam was filled by deposits of coal dirt from different mines on the stream above the dam; some worked by defendants and their tenants, and others by persons entirely unconnected with the defendants. The court held that the defendants were not liable for the combined results of all the deposits; that the ground of the action was not the deposit of the dirt in the dam by the stream, but by the negligent act above; throwing the dirt into the stream was the tort; the deposit only the consequence. The liability of the defendants began with their acts on their own land, and was wholly separate and independent of concert with others. Their tort was several when committed, and it did not become general because its consequences united with other consequences; and the defendants were not liable for the acts of their tenants not done by their authority or command.[2] The court say: "It may be difficult to determine how much dirt came from each colliery, but the relative proportion thrown in by each may form some guide, and a jury in a case of such difficulty, caused by the party himself, would measure the injury with a liberal hand. But the difficulty of separating the injury of each from the others would be no reason that one man should be held liable for the torts of others without concert. It would be simply to say, because the plaintiff fails to prove the injury one man does him, he may therefore recover from that one all the injury that the others do." [3]

The defendant constructed a covered channel for a small brook that ran through his premises. This channel proved in-

[1] Greene v. Nunnemacher, 36 Wis. 50; Lull v. Fox & W. Improvement Co. 19 Wis. 101; Hess v. Buffalo, etc. R. R. Co. 29 Barb. 391.

[2] Little Schuylkill, etc. Co. v. Richards, Adm'r, 57 Pa. St. 142.

[3] Chipman v. Palmer, 9 Hun, 517; Wallace v. Drew, 59 Barb. 413; Van Steenburgh v. Tobias, 17 Wend. 562; Russell v. Tomlinson, 2 Conn. 206; Adams v. Hall, 2 Vt. 9; Buddington v. Shearer, 20 Pick. 477; Auchmuty v. Ham, 1 Denio, 495; Partenheimer v. Van Order, 20 Barb. 479. But see Boyd v. Watt, 27 Ohio St. 259; Givens v. Van Studdiford, 4 Mo. App. 498.

sufficient for all the waters that came down the brook in times of heavy rain, and by its obstruction caused water to overflow upon and injure the adjoining premises of the plaintiff. The local authorities after the making of such channel constructed several sewers and drains which emptied into the brook above these premises, by which a considerable quantity of sewage and of surface water, that would have gone in other directions, were let into the brook. It was held that the defendant was not liable for any damage beyond that caused by the natural flow of the water, including its increased flow from heavy rains and other natural causes. That the defendant and the city which constructed such sewers were not joint tortfeasors.[1] There may be a like limitation where the defendant's wrongful acts have produced consequences multiplied by unforeseen and extraordinary natural causes. A railway company threw its waste water from a tank upon the premises of another, where it spread and froze, doing damage to the property of the owner; it was held that the company could not claim exemption from liability on the ground that the freezing of the water was the act of nature; for such result from the wrongful act might have been foreseen. To excuse from liability for an act of nature in combination with the defendant's act, it must have been such as could not have been foreseen and prevented by the exercise of ordinary care and prudence.[2] Where all the water which so freezes on another's lot is not the water turned thereon by the defendant, but a part is flowing surface water in its natural course, the defendant is liable only for the damages resulting from the water caused to flow upon the land by himself. The jury should not return nominal damages in such a case, merely because they cannot determine how much of the actual damage was so caused. They must estimate in the best way they can how much of the whole damage was occasioned by the water turned on the land by the defendant.[3]

Pleading.— The general allegation of damages will suffice to let in proof and to warrant recovery of all such damages as naturally and necessarily result from the wrongful act com-

[1] Sellick v. Hall, 47 Conn. 260.

[2] Chicago, etc. R. R. Co. v. Hoag, 90 Ill. 339; Cobb v. Smith, 38 Wis. 21.

[3] The Chicago, etc. R. R. Co. v. Hoag, supra.

plained of; the law implies such damages; that is, damages of that sort, and proof only is necessary to show the extent and amount.[1] But where damages actually sustained do not necessarily result from the act complained of, and consequently are not implied by law, the plaintiff must state in his declaration the particular damage which he has sustained, for notice thereof to the defendant; otherwise the plaintiff will not be permitted to give evidence of it on the trial.[2]

The damages which enter into or constitute the general measute of recovery for the wrong complained of, are those provable under the general allegation of damages; but in many cases of tort there is no such state of facts that the whole injury would be covered by any general rule more precise than the elementary principle which entitles the injured party to just compensation. The question, therefore, whether any particular injurious result of the tortious act committed by the defendant, not stated in the pleadings, can still be proved to enhance the damages, must depend on whether it is the necessary consequence of that act. If not the direct consequence, it must be alleged, and alleged so specifically as that the defendant may be apprised of the claim. Where the use of a mill was impaired by the obstruction of the water by a dam below on the stream, and the declaration alleged that the obstruction subjected the plaintiff to great loss and expense by the interruption of the business of the mill, and in depriving the plaintiff of the profits thereof, it was held he was not entitled to recover for the loss or diminution of rent. "Profits," say the court, "are clearly distinguishable from rents. Both terms are technical in their nature, and neither necessarily includes the other; there may be profits without rent, and *vice versa*."[3]

In an action for obstructing a right of way leading to an estate held by the plaintiff's wife in mortgage, the declaration con-

[1] 1 Chitty Pl. 395; Solms v. Lias, 16 Abb. Pr. 311; Taylor v. Dustin, 43 N. H. 493; De Forest v. Leete, 16 John. 122; Bristol, etc. Co. v. Gridley, 28 Conn. 201; Burrell v. N. Y. etc. Co. 14 Mich. 39; Teagarden v. Hetfield, 11 Ind. 522; Ellicott v. Lamborne, 2 Md. 131.

[2] Squier v. Gould, 14 Wend. 159; Plimpton v. Gardiner, 64 Me. 360; Taylor v. Dustin, supra; Spencer v. St. Paul, etc. R. R. Co. 21 Minn. 362; Wampach v. St. Paul, etc. R. R. Co. 21 Minn. 364; Ellicott v. Lamborne, 2 Md. 131; vol. I, p. 63.

[3] Plimpton v. Gardiner, supra.

tained only the general allegation of damages; and it was held that those for the consequent diminution of rents could not be recovered because not specially alleged.[1] So in an action for obstructing a natural watercourse, and thereby injuring the plaintiff's buildings, loss of rents was treated as special damages.[2] In an action for the pollution of the water of a stream which ran through the plaintiff's land, he was not permitted to prove the cost of boiling and skimming the water to fit it for household purposes, in the absence of an allegation that the water was, and had to be, so treated.[3] It was also held that proof was inadmissible that the rental value of the farm was diminished by the wrong done in polluting the waters of such stream, because the complaint failed to allege that the plaintiff rented the farm or was prevented from renting it for that reason.[4]

A plaintiff, the owner of a paper mill, set forth in his declaration as the gravamen of his complaint, that earth, sand and substances were washed into his mill-dam, and so filled and choked the dam as to make it in a great degree useless to him in the working of his mill. The court held that he could not offer evidence to prove that he could not wash his rags, because the stream was rendered impure and muddy by the earth and clay deposit in and upon the margin, and that by reason of such impurity of the water he was prevented from making white paper. That the manufacture of paper is one thing, and the preparation of the materials is another distinct process; and evidence showing damage as resulting from the interruption of the latter process is not proper and legal, unless the fact is expressly averred in the declaration. That the fact that the plaintiff owned a paper mill, operated by water from the dam in question, did not necessarily suggest the additional fact that he made white paper in his mill, and that the rags for the same were washed from the water in the dam. The inability of the plaintiff to wash his rags and make white paper could not, therefore, be regarded as the necessary and inseparable consequence of the washing of the earth into and filling up of the dam.

[1] Adams v. Barry, 10 Gray, 361.
[2] Parker v. Lowell, 11 Gray, 353.
[3] Porter v. Froment, 47 Cal. 165.
[4] Id.

And he could not recover for those particular injuries without specially alleging them in his declaration. But where the allegation was that the defendant failed to keep the privies, drains and drain pipes connected with his building in proper repair, but suffered the same to become and remain out of order, so that water and filth escaped therefrom and percolated through the wall of the plaintiff's house, on adjoining premises, and into the cellar in such quantities as to soak and cover the floor of such cellar, and to make the same permanently unfit for use; and, also, to greatly injure the walls and other portions of the building; and to create such an offensive stench and smell as to interfere with the plaintiff's use of said premises and with the letting thereof, it was held that the allegations were sufficient to authorize evidence of the loss of the use of the cellars and of the rental thereof.[1]

[1] Jutte v. Hughes, 67 N. Y. 267.

CHAPTER XVI.

TAKING PROPERTY FOR PUBLIC USE.

The power of eminent domain — What is just compensation — The measure of it — What facts may be taken into consideration — The recovery will be limited by the owner's title and the nature of the interest condemned — With reference to what time are the value and damages to be assessed — Deduction for benefits — Proof of value and damages — The effect of judgment for just compensation — Interest.

THE POWER OF EMINENT DOMAIN.— By the exercise of the right or power of eminent domain, an individual owner may be compelled to sell and surrender his property when the public necessities require it.[1] Not only land, but incorporeal rights connected therewith may be taken for public use.[2] The taking is deemed to be for such use as well, when the state or some municipal division thereof exercises the power, as also when it is invoked by certain private corporations, in aid of their undertakings to subserve the public interest, as by railroads, canals, and other improved means of travel or transportation.[3] This right of eminent domain can be exercised to take private property, only on the inseparable condition of making just compensation therefor.[4] This compensation must be of a pecuniary nature;[5] and this is secured by constitutional inhibition of the exercise of the right except upon the payment of the compensation.

[1] Fletcher v. Peck, 6 Cranch, 145; Trombley v. Humphrey, 23 Mich. 474; San Francisco, etc. R. R. Co. v. Caldwell, 31 Cal. 367; Redf. on Rail. ch. 11, sec. 1.

[2] People ex rel. Fountain v. Supervisors of Westchester Co. 4 Barb. 64; Furniss v. Hudson River R. R. Co. 5 Sandf. 551.

[3] Buffalo, etc. R. R. Co. v. Brainard, 9 N. Y. 100; Weir v. St. Paul, etc. R. R. Co. 18 Minn. 155; Boston Water Power Co. v. Boston, etc. R. R. Co. 23 Pick. 360; Giesy v. Cincinnati, etc. R. R. Co. 4 Ohio St. 308.

[4] Bonaparte v. Camden, etc. R. R. Co. 1 Bald. 226; Bloodgood v. Mohawk, etc. R. R. Co. 18 Wend. 9; 2 Kent's Com. 339; Cooley's Const. Lim. ch. 15; Bradshaw v. Rogers, 20 John. 103; Carson v. Coleman, 11 N. J. Eq. 106; Symonds v. Cincinnati, 14 Ohio, 148.

[5] Id.; Chicago, etc. R. R. Co. v. Melville, 66 Ill. 329; Weckler v. Chicago, 61 Ill. 142; Sutton v. Louisville, 5 Dana, 28; Ferris v. Bramble, 5 Ohio St. 109; Symonds v. Cincinnati, 14 Ohio, 175.

Statutes which provide for the exercise of the right universally direct how the amount shall be ascertained and paid. Many such statutes give a right to compensation for consequential injuries that are not within the requirement to make just compensation, for the legislature may authorize the exercise of the right of eminent domain without providing for all consequential damage.

Where the charter of a company, or other statute providing for taking private property for public use, and for payment of compensation for damages not only to land owners whose property is taken, but also to owners whose lands are injuriously affected, no new right is created, but the common law right is preserved to recover in respect of any injury resulting from the enterprise, although that enterprise which is the cause of the injury has the sanction of law.[1]

The land owner cannot be deprived of this compensation secured by the constitution, or by more liberal statutes, except by his own act of waiver or discharge, or by his dereliction.[2] The right to it exists not only when land is taken, but when land is in any manner injuriously invaded though not taken.[3] Where a railroad corporation, claiming to act under legislative authority, removed a natural barrier situated between the land, the injury to which was in question, and the railroad, such barrier having theretofore completely protected the meadow on such lands from the effect of freshets and floods in a neighboring river, it was held that, although it was wholly beyond the boundaries of the land in question, yet, as its removal caused the water to overflow such land, the owner had the same right to compensation as though a portion of the land had been taken by the railroad company.[4] If, however, no land is taken, nor touched, in the construction and operation or use

[1] Columbia, etc. Bridge Co. v. Geisse, 35 N. J. L. 563.

[2] Western, etc. R. R. Co. v. Johnston, 59 Pa. St. 290.

[3] Pumpelly v. Green Bay Co. 13 Wall. 166; Eaton v. B. C. & M. R. R. Co. 51 N. H. 504; Grand Rapids B. Co. v. Jarvis, 30 Mich. 308; Stetson v. Chicago, etc. R. R. Co. 75 Ill. 74.

[4] Eaton v. B. C. & M. R. R. Co. supra; Nevins v. Peoria, 41 Ill. 502; Aurora v. Reed, 57 Ill. 29; Toledo, etc. R. R. Co. v. Morrison, 71 Ill. 616; St. Louis, etc. R. R. Co. v. Capps, 72 Ill. 191; Gillham v. Madison Co. R. R. Co. 49 Ill. 488.

of a public work, there can be no claim for damages for any consequential injury. Under the sanction of the legislature, a railroad bridge was built over a stream within the limits of a city; and on the destruction of the bridge by fire, the city proceeded to erect another bridge, on substantially the same site, but built it so that it might be used not only for a railroad bridge, but also for the accommodation of foot passengers and teams. The plaintiff, who owned a foundry on the stream, and relied mainly on the stream for power to propel his machinery, sought to enjoin the construction of the bridge until compensation was awarded him for the loss produced by building the piers for the bridge in the channel of the stream. *Held*, that no cause of action existed, as the plaintiff's land was not touched, and the damage to them, if there was any at all, was too indirect or consequential.[1]

WHAT IS JUST COMPENSATION.— There is some conflict of decision in respect to what constitutes just compensation. According to the best authorities, however, it is believed it is compensation for the net injury which is suffered from the exercise of this sovereign right. The word "compensation" imports that a wrong or injury has been inflicted, and must be redressed in money. Money must be paid to the extent of the injury. This may be less or more than the value of the property taken; but when compensation has been made to the extent of the injury, the language and just purpose of the constitution are satisfied.[2] A loss of the property taken will often be but a part of the injury to the owner; and, on the other hand, the value of the part taken may be wholly or partially compensated, in fact, by benefits resulting from the taking to the owner's adjacent property. Where the value of the property taken is not arbitrarily required to be paid for, and the constitution or statute requires only full indemnity, the value of the property taken, and the damages or benefits to the

[1] Swett v. Troy, 12 Abb. N. S. 100; Cleveland, etc. R. R. Co. v. Speer, 56 Pa. St. 325; Davidson v. B. & M. R. R. Co. 3 Cush. 91. See Fitchburg R. R. Co. v. B. & M. R. R. Co. 3 Cush. 58; In the Matter of the Union Village, etc. R. R. Co. 53 Barb. 457.

[2] Symonds v. Cincinnati, 14 Ohio, 175.

residue, if any, are taken into account, and such sum allowed as will make the owner whole.[1] Where, by reason of the location of a railroad over a part of a lot of land, and the filling up of a canal in which the owner of the lot had a privilege, the value of the land was so enhanced that afterwards it was worth more than the entire lot was before, the owner was held to have no claim for damages.[2]

It is said to be long settled law in Connecticut, that where a land owner has a claim for damages for land taken, and has received local and special benefits equal to the damage, the value of the benefits shall be set off against the damage, and he shall be allowed nothing. It is true that his entire benefit may be exhausted in this application, while the benefits received by his neighbors are assessed only a small percentage, and thus there may be a seeming and perhaps a real inequality, but, so long as his benefit equals his damage, he cannot be said to suffer by the taking of his property for public use, and there would be an injustice in compelling others to pay him for damage that really has no existence.[3]

THE MEASURE OF IT.— The general measure of just compensation is the value of the land taken where all the owner's land is taken;[4] and where a part only is taken, the difference in

[1] San Francisco, etc. R. R. Co. v. Caldwell, 31 Cal. 374; Betts v. Williamsburgh, 15 Barb. 255; Commonwealth v. Session of Norfolk, 5 Mass. 435; Macham v. Fitchburg R. R. Co. 4 Cush. 291; Bangor, etc. R. R. Co. v. McComb, 60 Me. 290; Kilbourne v. Suffolk, 120 Mass. 393; Jones v. The Chicago, etc. R. R. Co. 68 Ill. 380; Commonwealth v. Coombs, 2 Mass. 492; Commonwealth v. Sessions of Middlesex, 9 Mass. 388; Matter of Furman Street, 17 Wend. 658; People v. Mayor of Brooklyn, 4 Comst. 419; Indiana Cent. R. R. Co. v. Hunter, 8 Ind. 74; McIntire v. State, 5 Blackf. 384; Greenville, etc. R. R. Co. v. Partlow, 5 Rich. 421; White v. C. & Charlotte, etc. R. R. Co. 6 Rich. 47; Upton v. South, etc. R. R. Co. 8 Cush. 600; McMasters v. Commonwealth, 3 Watts, 292; Alexander v. Baltimore, 5 Gill, 383; Livermore v. Jamaica, 23 Vt. 361; White v. County Commissioners, 2 Cush. 361; Shaw v. Charlestown, 2 Gray, 107; Dickenson v. Fitchburgh, 13 Gray, 546; Young v. Harrison, 17 Ga. 30; Alton, etc. R. R. Co. v. Carpenter, 14 Ill. 190; Root's Case, 77 Pa. St. 276.

[2] Whitman v. Boston, etc. R. R. Co. 3 Allen, 133.

[3] Trinity College v. Hartford, 32 Conn. 478; Nichols v. Bridgeport, 23 Conn. 189; Nicholson v. N. Y. etc. R. R. Co. 22 Conn. 74.

[4] San Francisco, etc. R. R. Co. v. Caldwell, supra.

value of the whole before the taking and its value affected by it.[1]

If property is materially or permanently diminished in value in consequence of a railroad running over it, or the taking of part for any public use, the owner is entitled to full satisfaction in damages. Equity and justice require that he be compensated, not only for the land actually appropriated, but also for the incidental injury to the value of the residue. By so much as the real value of the property, as a whole, is diminished in consequence of the taking and public use of a part, by so much is the owner of the property injured. If the value of a farm is thus in fact depreciated, damages therefor are recoverable without regard to the cause of such depreciation.[2] In one case in Wisconsin it was said to be inconvenient and troublesome to cross the track of a railroad from one part of a farm to another with cattle and agricultural implements; that there was more or less danger to person and property in doing so; that grain and property near the track were exposed to fire from locomotives; that horses were liable to be frightened by passing trains of cars, and to run away and destroy property; and that on account of these things the farm was less valuable. The evidence relating to these subjects was not interposed for the purpose of laying the basis for the recovery of damages for such remote and speculative injuries, but the object was to

[1] Id.; Bigelow v. West Wis. R. R. Co. 27 Wis. 478; Parks v. The Wisconsin Cent. R. R. Co. 33 Wis. 413; Howe v. Ray, 113 Mass. 88; Tucker v. Mass. Cent. R. R. Co. 118 Mass. 546; Dickenson v. Fitchburgh, 13 Gray, 546; Page v. Chicago, etc. R. R. Co. 70 Ill. 324; Harrison v. Iowa, etc. R. R. Co. 36 Iowa, 323; Curtis v. St. Paul, etc. R. R. Co. 20 Minn. 28; Colvill v. St. Paul, etc. R. R. Co. 19 Minn. 283; Chicago, etc. R. R. Co. v. Francis, 70 Ill. 238; Wilson v. Rockford, etc. R. R. Co. 59 Ill. 273; Mix v. La Fayette, etc. R. R. Co. 67 Ill. 319; Peoria, etc. R. R. Co. v. Sawyer, 71 Ill. 361; Bloomington v. Miller, 84 Ill. 621; Bangor, etc. R. R. Co. v. McComb, 60 Me. 290; Wilmington, etc. R. R. Co. v. Stauffer, 60 Pa. St. 374; Cummings v. Williamsport, 84 Pa. St. 472; Pennsylvania, etc. R. R. Co. v. Bunnell, 81 Pa. St. 414; Shenango, etc. R. R. Co. v. Braham, 79 Pa. St. 447; East Brandywine, etc. R. R. Co. v. Ranck, 78 Pa. St. 454; St. Louis, etc. R. R. Co. v. Teters, 68 Ill. 144; Jones v. Chicago, etc. R. R. Co. 70 Ill. 380; Haslam v. Galena, etc. R. R. Co. 64 Ill. 353; Dearborn v. Boston, etc. R. R. Co. 24 N. H. 179; Atchison, etc. R. R. Co. v. Blackshire, 10 Kans. 477.

[2] Patterson v. Boom Co. 3 Dill. 465.

account for the decrease in the value of the property. On this subject Cole, J., said: "If, in consequence of its exposure to these remote injuries, the property is diminished one-half in value, then this decrease in value measures the actual loss to the owner, and, when compensated for this depreciation in the value of his property, he is not receiving compensation for some imaginary injury, some fanciful loss which may or may not occur, but he is paid for the real loss which he sustains by the building of the railroad across his property. If the construction of the road across his land depreciates the property one-half its value in the market, then he is damnified to this extent; it matters not what causes the depreciation in value, whether exposure to fire, annoyance from trains, or danger to person and property; the real question is, whether, in consequence of the railroad, the property is diminished in value, and if so, how much; for this will measure the direct and necessary loss which the owner has sustained by the construction of the road over his land." [1]

If the land is rendered less valuable because it is exposed to fire, or if access to it is rendered more difficult, or if the use of the remainder is more inconvenient by reason of the railroad; or if its value is depreciated by the noise, smoke, or increased dangers caused by the use of the railroad, all these are to be included in the estimate of damages; not that witnesses are to be called upon to estimate the damages for each or any of them; for though they enter into the estimates, the question is, what is the market value of the land without the railroad, and what is the market value of the remainder of the piece with the railroad; in other words, what is the value of the piece which is taken, and how much is the residue depreciated in its market value by the separation and by the construction of the railroad. These two sums added together is the amount of compensation to which the injured party is entitled.[2]

WHAT FACTS MAY BE TAKEN INTO CONSIDERATION.—To ascertain the fact of depreciation as a consequence of the taking and use of part of a parcel of land, before the improvement is

[1] Snyder v. Western Union R. R. Co. 25 Wis. 60.

[2] Matter of the Utica, etc. R. R. Co. 56 Barb. 464.

actually completed and before its ultimate effect on the value is practically realized, the consequences of particular facts have to be in some measure anticipated. There is not entire agreement as to the particular facts or kind of facts which may be proved and considered in order to determine such depreciation. In Pennsylvania, only such can be proved as are fair to be considered as a ground of damages on general principles; such as show injury as the certain and immediate consequence of the construction and proposed use of the part taken.[1]

In other states, the facts relied on or available to prove such depreciation are not uniformly subjected to that precise test, but their admissibility and force are decided by their supposed tendency to affect in fact the price and value of the property. Hence circumstances are often taken into account which in no other view could be a ground of damage.[2] The increased exposure to fire by laying and operating railroads near buildings and through fields, is very generally allowed to be proved to show damage by depreciation.[3] So the danger to which

[1] N. Y. etc. R. R. Co. v. Young, 33 Pa. St. 175; Patten v. Northern Cent. R. R. Co. 33 Pa. St. 426; Searle v. Lackawanna, etc. R. R. Co. 33 Pa. St. 57; Watson v. Pittsburg, etc. R. R. Co. 37 Pa. St. 469; Lehigh, etc. R. R. Co. v. Lazarus, 28 Pa. St. 203.

[2] Bigelow v. West W. R. R. Co. 27 Wis. 478; Western Penn. R. R. Co. v. Hill, 56 Pa. St. 460; Patterson v. Boom Co. 3 Dill. 465; St. Louis, etc. R. R. Co. v. Teters, 68 Ill. 144; Jones v. Chicago, etc. R. R. Co. 68 Ill. 380; Keithsbury, etc. R. R. Co. v. Henry, 79 Ill. 290; Summerville, etc. R. R. Co. v. Doughty, 22 N. J. L. 495.

[3] Hatch v. The Cincinnati, etc. R. R. Co. 18 Ohio St. 92; Jones v. Chicago, etc. R. R. Co. 68 Ill. 380; Colvill v. St. Paul, etc. R. R. Co. 19 Minn. 283; Curtis v. St. Paul, etc. R. R. Co. 20 Minn. 28; Bangor, etc. R. R. Co. v. McComb, 60 Me. 290; Somerville, etc. R. R. Co. v. Doughty, 22 N. J. L. 495; Pierce v. Worcester, etc. R. R. Co. 105 Mass. 199; Adden v. White Mts. N. H. R. R. 55 N. H. 413. In Lehigh Valley R. R. Co. v. Lazarus, 28 Pa. St. 203, it was held a risk to fire being communicated from locomotives to buildings, cannot be taken into consideration in estimating the damages sustained by the owner of land arising from the construction of a railroad over such land, because of the uncertain and contingent nature of such damages. Summerville, etc. R. R. Co. v. Hummell, 27 Pa. St. 99. In the late case of Wilmington, etc. R. R. Co. v. Stauffer, 60 Pa. St. 374, it was held in that state that if the railroad were laid so near to a barn, and the danger of fire was necessarily so imminent, that no man of common prudence would use it as such, then the premises would be depreciated by the barn being rendered useless. But in Patten v. Northern C. R. R. Co.

the owner and his family and stock are exposed in crossing the track from one part of a farm to another is provable for the same purpose.[1] If the remainder of a lot is rendered less valuable by reason of being severed or disfigured by the taking and proposed use of a part, such sum may be allowed as shall be found according to the injury. In determining the consequent depreciation of the lot, the jury may consider the use to which the part taken is appropriated; the character, situation, present and probable use of the remainder of the lot; the distance of the owner's buildings from the public use, and any facts which the jury, from a view of the testimony, shall find injure the value of the premises by the proper and legal use of the appropriated part.[2] Where a part has been taken for a railroad, they may consider all inconveniences from the sounding of whistles, ringing of bells, rattling of trains, jarring of the ground, or from smoke, so far as they severally arise from the use of the strip taken and upon it, excluding all common and indirect damages, that is, such damages as affect the owner in common with all other members of the community. So, also, if they find that the real value of the remainder of the lot, or any erections thereon, was actually diminished by exposure to fire from the company's locomotives, they may assess such sum as will be a just compensation for such diminution, taking into consideration at the same time, that, by the statute, if property is injured by fire communicated by a locomotive engine, where such a statute is in force, the company using it is absolutely responsible for such injury.[3] Evidence that the location of a railroad across a farm made it more difficult to rent it, has been received on the question of damages.[4]

Where a part of the owner's land was liable to be washed and to cave off where there was a bank, and the sand drifted

33 Pa. St. 426, it was held that increased cost of insurance could not be considered.

[1] Jones v. Chicago, etc. R. R. Co. 68 Ill. 380.

[2] Peoria, etc. R. R. Co. v. Sawyer, 71 Ill. 361; Hannibal B. Co. v. Schoubacher, 57 Mo. 582; Bangor, etc. R. R. Co. v. McComb, supra; Tucker v. Mass. C. R. R. Co. 118 Mass. 546; Watson v. Pittsburgh, etc. R. R. Co. 37 Pa. St. 469; Cleveland, etc. R. R. Co. v. Ball, 5 Ohio St. 569; Wilson v. Rockford, etc. R. R. Co. 59 Ill. 273.

[3] Id.

[4] Pittsburgh, etc. R. R. Co. v. Rose, 74 Pa. St. 363.

from the road to the injury of the adjoining land, and these facts resulted unavoidably from the building of a railroad in a suitable and proper manner, this loss was considered in estimating the depreciation from building the road.[1] So where the right of way for a railroad ran through a man's farm so as to sever a strip of about two acres from the body of the farm, and thus rendering it useless to him for farming purposes, it was held that while compensation could not be demanded for such strip, it not being taken by the road, yet it would form an element in estimating the damages the owner would sustain, if any, by the construction and operation of the road.[2] The owner of land over which a railroad sought to condemn a right of way may recover for loss of the beneficial use of a spring of water from which he is thus cut off.[3] So a party who had procured certain fixtures for a water cure establishment, and they were useless to him in consequence of taking a part of his premises for a public improvement, he was held entitled, in addition to other damages, to recover his loss on such fixtures.[4] If taking part of a tract of land destroys a water power on the residue, damages therefor may be assessed.[5]

The commissioners or jury, in determining just compensation for taking land for a railroad, may always take into consideration all incidental loss, inconvenience and damage, present and prospective, which may be known or be reasonably expected to result from the construction and operation of the road in a legal manner. Accordingly they may always take into consideration the exact condition in which the road may be when they make the assessment.[6] The owner of flats crossed by a railroad bridge having raised the flats around and under the bridge within the location of the road, but without the consent of the proprietor thereof, was held entitled to recover by way of dam-

[1] Dearborn v. Boston, etc. R. R. Co. supra; Colvill v. St. Paul, etc. R. R. Co. 19 Minn. 283.

[2] Wilson v. Rockford, etc. R. R. Co. 59 Ill. 273.

[3] Peoria, etc. R. R. Co. v. Bryant, 57 Ill. 473.

[4] Price v. Milwaukee, etc. R. R. Co. 27 Wis. 98.

[5] Lake Superior, etc. R. R. Co. v. Greve, 17 Minn. 323; Barclay R. R. etc. Co. v. Ingham, 36 Pa. St. 194.

[6] Missouri, etc. R. R. Co. v. Haines, 10 Kans. 439; Hayes v. Ottawa, etc. R. R. Co. 54 Ill. 373.

ages, against such proprietor, for so much of the expense of such raising and filling up as was necessary to enable him to enjoy his other lands, provided such necessity was caused by the location and construction of the railway.[1] Land was taken by a city to widen a highway after such land had been previously filled in by the owner, in pursuance of an order of the municipal authorities to abate a public nuisance; the measure of damages was held to be the value of the land as it stood at the time of the taking; that the expense incurred in filling it no farther entered into the measure of damages than so far as it had effect in increasing the value of the land.[2] If the property has been put to a particular use or business, and its productive value is chiefly therefor, and the taking of part impairs that use, it is sometimes an important fact, and may be proved to enhance damages according to the depreciation caused by destroying or impairing such business or use. Thus where the construction and use of a railroad over a plaintiff's land had the effect of destroying the business of a mill thereon by driving away custom, it was held a ground of damage. It appeared that after the railroad was built and began to be operated, the customers ceased to carry their grain there to be ground, and that at least one-half of the custom had fallen off. The reason given was simply the danger in going to the mill with horses and teams, owing to the location of the road with reference to the mill.[3]

Where a strip of land appropriated by defendant for the purpose of its railway was part of a larger tract used and occupied as an entirety, as a site for a brick yard, it was ruled that evidence was admissible to show that by defendant's appropriation the plaintiffs were prevented from enlarging their works, and that, in consequence, the value of the brick yard as it was was depreciated; that it was proper to consider, as an element of damage, the effect upon the value of the plaintiff's premises, and upon the convenience of conducting the plaintiff's business thereon, the circumstance that, in consequence of the defendant's railway, the plaintiffs were put to the necessity of frequently, for instance, one hundred times a day, crossing the

[1] Commonwealth v. Boston, etc. R. R. Co. 3 Cush. 25.

[2] Squire v. Somerville, 120 Mass. 579.

[3] Western Penn. R. R. Co. v. Hill, 56 Pa. St. 460.

track in hauling clay to their pits.[1] So it has been held in Wisconsin, that evidence of the business to which the plaintiff's adjoining property was devoted, and of the effect upon such business of the taking of the property in question, was properly admitted, as bearing upon the question of damages; the court having duly instructed the jury that the proper measure of such damages was the value of the land condemned, and the diminution in market value of the other property.[2] A railroad company built its road along the street of a town under an ordinance granting the right of way upon condition that the company should pay all damages that might accrue to property owners on such street by reason of the construction of the road. And it was held that the company was liable to a property owner for whatever deterioration in value his real estate may have undergone in consequence of laying the railroad track, and for damages for interruption of his business during such time as it would necessarily require to provide another equally eligible place to remove to, and that the damage to his business during such time should be ascertained by proof of the probable reasonable profits which might have been made had there been no interruption of the business. In that case, if he chose to remain and submit to the interruption and loss of profits, he would, nevertheless, be entitled to recover from the company as damages the necessary cost to avoid such loss by a removal.[3]

If a building stands in the way of a road, and it is necessary to destroy it, its value must be paid, estimating it as a building, and not the materials composing it; but should the owner appropriate any of the *debris* remaining on its removal, his claim of damages will be lessened *pro tanto*.[4] Among the inconveniences resulting to a farmer from a railroad crossing his farm may be considered the fact that he is deprived of access to a river, and excluded from the river bank for the purpose of fishing, and from a fishing ground.[5] Under a statute providing that, in estimating damages sustained, "regard should be had

[1] Sherwood v. St. Paul, etc. R. R. Co. 21 Minn. 127.

[2] Driver v. Western Union R. R. Co. 32 Wis. 569.

[3] St. Louis, etc. R. R. Co. v. Capps, 72 Ill. 188; S. C. 67 Ill. 607. See Virginia, etc. R. R. Co. v. Henry, 8 Nev. 165.

[4] Lafayette, etc. R. R. Co. v. Winslow, 66 Ill. 219.

[5] Boston & Maine R. R. v. Montgomery, 119 Mass. 114.

to all the damages done to the party, whether in taking his property or in injuring it in any manner," the owner of part of a building was held entitled to recover for the loss of support and of shelter caused by removing from his part the part he did not own.[1]

Where the erection of a railroad bridge across a river in a city causes permanent injury or depreciation in the value of a lot in the immediate vicinity which is used for dock purposes, such injury is a proper element of damages in a suit by the owner against the company, and it is proper to allow the lot-owner to show such damages by proving the value of his property before the erection of the bridge, and its value afterwards; or, in other words, to prove how much less the property would sell for in consequence of building the bridge.[2] Where the taking is for a canal, its leakage may be considered on the question of damages.[3]

In estimating the damages to land for taking a part thereof for a railroad or other public improvement, its value should not be limited by estimates exclusively for any particular use. The jury are to consider the market value of the land before and after the alleged injury, and in estimating this value, everything which gives it intrinsic value is to be taken into consideration, and its capabilities for any use to which it may be put.[4] If land taken for a right of way has a mine under its surface, that fact may be considered, if it add to the market value of the land, even though the mine has never been worked; so of a water power which has never been utilized.[5] The owner may have damages for being prevented from removing minerals

[1] Marsden v. Cambridge, 114 Mass. 490.

[2] Chicago, etc. R. R. Co. v. Stein, 75 Ill. 41.

[3] James River Co. v. Turner, 9 Leigh, 313.

[4] Young v. Harrison, 17 Ga. 30; Shenango, etc. R. R. Co. v. Braham, 79 Pa. St. 447; Dwight v. Hampden, 11 Cush. 201; Dickenson v. Fitchburg, 13 Gray, 546; Colvill v. St. Paul, etc. R. R. Co. 19 Minn. 283; Carter v. St. Paul, etc. R. R. Co. 22 Minn. 342; White v. Charlotte, etc. R. R. Co. 6 Rich. 47; Mississippi B. Co. v. Ring, 58 Mo. 491; Matter of Furman St. 17 Wend. 649; Burt v. Wigglesworth, 117 Mass. 302; Somerville, etc. R. R. Co. v. Doughty, 22 N. J. L. 495; Regina v. Brown, 36 L. J. Q. B. 322.

[5] Haslam v. Galena R. R. Co. 64 Ill. 353.

under the right of way.[1] The jury, however, is not at liberty to make a special allowance for the value of unopened mines beneath the surface. Their existence is only material so far as they effect market price.[2]

Aggravations connected with an entry to take and use land for public purposes are not to be considered with a view to damages beyond just compensation.[3]

The law does not afford indemnity for all losses occasioned by the laying and use of a railroad, or the making of any public improvement, especially for such damages as are remote and consequential, or such as are imaginary or fanciful.[4] They are damages not caused by the taking of land, but by the change which the public improvement introduces into the course of business. It affords no protection against, or compensation for, new competitions.[5] Nor against changes introduced by time and the progress of the age.[6] Nor does it afford relief against such inconveniences as the whole community suffer alike, in a greater or less degree, and which are to be borne by the public in consideration of the greater public good to be acquired.[7] A party, a part of whose lands has been taken for public use, cannot have his damages increased on account of the loss of a gratuitous privilege which he has been enjoying by the sufferance of another.[8] Where part of a tract of land is taken for public use, and the severance of that part, and the public use of it, necessitates any new expenditure to protect or maintain the ordinary use of the residue, such expenditures, or the necessity thereof, is an element of damage. The owner has a right to recover the amount so expended or required to be expended,

[1] Barnsley Canal Co. v. Turbill, 13 L. J. Ch. 406; Proud v. Bates, 34 L. J. Ch. 406; Fletcher v. Great West. R. R. Co. 29 L. J. Ex. 253.

[2] Searle v. Lackawanna, etc. R. R. Co. 33 Pa. St. 57.

[3] Lafayette, etc. R. R. Co. v. Winslow, 66 Ill. 219.

[4] Minnesota, etc. R. R. Co. v. Doran, 17 Minn. 188; First Parish v. Middlesex, 7 Gray, 106; Troy, etc. R. R. Co. v. Northern T. Co. 16 Barb. 100.

[5] Fuller v. Edings, 11 Rich. 239; Cincinnati, etc. R. R. Co. v. Zinn, 18 Ohio St. 417; Adden v. White Mts. R. R. 55 N. H. 415; Petition of Mount W. Road Co. 35 N. H. 146; Edmands v. Boston, 108 Mass. 535; Schuylkill Co. v. Freedley, 6 Whart. 109. See Patterson v. Boston, 23 Pick. 425.

[6] Id.

[7] Id.

[8] Hatch v. Cincinnati & I. R. R. Co. 18 Ohio St. 93.

on the ground that the value of his premises is diminished accordingly. Thus, the necessity of maintaining fences by the owner along the line of a railroad is a recognized item of damage.[1] The recovery, however, will be limited to such fences, and such amount therefor, as are reasonably necessary. The amount expended to erect fences is not the measure of damages.[2]

[1] Baltimore, etc. R. R. Co. v. Lansing, 52 Ind. 229; Montmorency Road v. Rock, 41 Ind. 264; White Valley, etc. R. R. Co. v. McClure, 29 Ind. 536; Toniac, etc. R. R. Co. v. Unsicker, 22 Ill. 221; Rock I. etc. R. R. Co. v. Lynch, 23 Ill. 645; Bland v. Hixenbaugh, 39 Iowa, 532; Jones v. Chicago, etc. R. R. Co. 68 Ill. 380; Winona, etc. R. R. Co. v. Waldron, 11 Minn. 515; Penn. etc. R. R. Co. v. Bannell, 81 Pa. St. 427; Louisville, etc. R. R. Co. v. Glazebrook, 1 Bush, 325.

[2] Bland v. Hixenbaugh, 39 Iowa, 532; Milwaukee, etc. R. R. Co. v. Eble, 4 Chand. 72; 3 Pin. 334; Louisville, etc. R. R. Co. v. Glazebrook, 1 Bush, 325. But see North E. R. R. Co. v. Smeath, 8 Rich. 185, in which it appeared that a railroad had been laid through a large tract of land, to run partly through cultivated and partly through wood land; that on the latter cattle were kept. No allowance for fencing was made, though it was held that the railroad company was not bound to fence its road; and though it was shown that its trains had been very destructive of cattle, and the company had latterly refused to pay for them. The court say: "In Greenville & C. R. R. Co. v. Partlow, 5 Rich. 428, Judge Frost said: . . . 'the expense of fencing along the road where it passes through fields, is probably an item of damages.' It might be enough to say that this *dictum* decides nothing against the appellants. On the contrary, its implication seems to favor the conclusion that it is only where the road runs through fields that fencing would be a proper item. But it really has not, and ought not to have, any controlling effect on the very matter of which it speaks, further than the respect and weight which is rightfully due to an able judge, our late esteemed associate. For it was a mere *obiter*, notwithstanding it was in answer to a ground of appeal. The case turned upon and was decided on the ground that the increased salable value of this land 'was a part of the benefit and advantage to the owner from the location of the road, and must be set off against the damages.' In deciding 'what loss or damage may occur to the owner,' the jury are not to resort to mere possibilities. The natural or necessary consequences from the location are to be looked at, as cutting off the owner from a part of his lands; the necessity to remove a fence and replace it, so as to secure a field where the road runs upon and opens one side of it; the draining of a well or spring by the excavation; as well as the actual taking and occupation of his soil. But fencing along the whole line, on both sides of it, in cultivated and uncultivated, enclosed and unenclosed lands, is neither a natural nor a necessary consequence of the location of the railroad. When it is located through a field, cattle

But where a railroad company taking lands for its road is required by law to fence it, or has already done so, nothing will be allowed as damages against such company for building a fence;[1] for, in the assessment of damages for property taken for public use, it is always assumed that the appropriation will be made according to law; that the property so appropriated will be used in a legal manner, and that all obligations connected with such use, imposed by law, will be fulfilled; and if the fact is or turns out otherwise, another remedy is available and must be resorted to.[2] If farm crossings will be necessary on a railroad, and the law does not impose upon the railroad company the duty of their construction and maintenance, the want thereof, or any expense necessary to be incurred by the owner to secure

guards, where it enters and leaves, are all which are necessary or usual. Fences on both sides would subject the owner to more inconvenience by far than the railroad. For then he he would have his fences to climb, or pull down, whenever he wished to pass from one part of his plantation to another.

"Such a system of fencing might operate as a pound to gather his cattle for slaughter, by an engine, and to break up and destroy it, and the trains, to the endangering of life and limb of all passing.

"But in fact, fences along railways in this state are not made, in even enclosed lands. Persons passing over the G. & C. Railroad, through the very land for which fencing was allowed in Partlow's case, will find that not a solitary rail has been laid alongside the road. It is argued, however, that to prevent the killing of stock, it is necessary that there should be fences. I have already suggested that instead of protection it might be the means of destruction. If the question were new, I should be very much inclined to hold that a company were not liable for such injury, unless upon clear proof of negligence in running of the train. For the charter of a railroad makes the use of it by a locomotive just as lawful as the use of a highway by a wagon or coach. Who would suppose that the owner of a wagon or coach was liable for a hog killed by being driven over by the wagoner or coachman unless negligence was shown? The runner of a locomotive knows very well that he perils his own life, and all who are dependent upon his care, when he runs over a cow or other animal. It is so rare that men are reckless enough to incur such peril designedly, that I think the presumption should be in his favor and not against him."

[1] Id.; March v. Portsmouth, etc. R. R. Co. 19 N. H. 372.

[2] Bangor, etc. R. R. Co. v. McComb, 60 Me. 290; Fleming v. Chicago, etc. R. R. Co. 24 Iowa, 353; Troy, etc. R. R. Co. v. Northern Turnpike Co. 16 Barb. 100; Chicago, etc. R. R. Co. v. Springfield, etc. R. R. Co. 67 Ill. 142; Colcough v. Nashville, etc. R. R. Co. 2 Head, 171; Lyon v. Green Bay, etc. R. R. Co. 42 Wis. 543; Southside R. R. Co. v. Daniel, 20 Gratt. 344.

such a convenience, or to lessen the injury from the absence and want of such crossing, may be considered on the question of damages.[1] The expense of erecting and maintaining a retaining wall, for the protection of property adjacent to railroad excavations, may be allowed in addition to other damages. And this allowance will not be prevented by tender of a stipulation of the condemning party to erect and keep up such a wall.[2]

Where one railroad company acquired, by legal condemnation, the right to run its road through a high embankment of another, and on a grade twenty feet below the track of the other, it was held under no legal obligation to erect or maintain a bridge to support the track of such other company; and, therefore, proof of what it would cost to build such bridge and keep the same in repair was deemed proper in the assessment of damages. The company whose property was thus invaded was entitled to have such sum for damages as would enable it to construct and keep in repair all such works as should be necessary to keep its track in a safe and secure condition, and also for all resulting incidental loss and inconvenience.[3] If a building must be removed in consequence of the taking of the land on which it stands, the expense of the removal will be included in the damages, and also the value of the right, if any exists, to have the house remain on the land until it would otherwise expire.[4] And expenditures necessary to restore structures upon adjacent premises in their former condition relatively, may also be considered,[5] as well as loss of time in such removal.[6]

In the assessment of damages allowed by law for laying out a highway a grade below an adjoining house and land, the cost of cutting down the land and of building a basement under the house, with a door, and interior ascent in the house, is an admissible element, if such alterations are found to be the most reasonable and economical means of restoring the estate to its former value. The damages in such a case are not confined to

[1] Peoria, etc. R. R. Co. v. Sawyer, 71 Ill. 361.

[2] Thompson v. Milwaukee, etc. R. R. Co. 27 Wis. 93; Commonwealth v. Boston, etc. R. R. Co. 3 Cush. 25.

[3] Chicago, etc. R. R. Co. v. Springfield, etc. R. R. Co. 67 Ill. 142.

[4] Tafts v. Charlestown, 4 Gray, 537.

[5] Chase v. Worcester, 108 Mass. 60; Hyde v. Middlesex, 2 Gray, 267.

[6] Hannibal Br. Co. v. Schaubacher, 57 Mo. 582.

the injury caused to the right of lateral support of the soil exclusive of the building, but includes all the damages to the property.[1]

THE RECOVERY WILL BE LIMITED BY THE OWNER'S TITLE AND BY THE NATURE OF THE PROPERTY OR INTEREST CONDEMNED.— A railroad company is not obliged to take the entire width called for by its petition, and may ask for an adjustment of damages on a narrower strip than that described in its petition, if the whole width is not needed for its purposes.[2]

Property already taken for public use is subject to be again condemned for a different one. A railroad may be crossed by a highway, and the easement for such crossing may be condemned by proceedings against the railway company, and the latter will be entitled to recover damages for taking their land for the purposes of a highway, subject, however, to its use for a railroad; for the expense of erecting and maintaining signs required by law at the crossing; for making and maintaining cattle guards at the crossing, if necessary, and for the expense of flooring the crossing and keeping the planks in repair.[3] So where a common highway is laid over a turnpike road, the owner of the latter will be entitled to recover damages. In apportioning the damages to be paid to the turnpike corporation among several towns, the appraisers may take into consideration, along with the distance in each town, the value of the existing road, with reference to the cost of construction and state of repair; but they cannot consider the greater ability of one town to pay, or the greater advantage which its inhabitants would receive from the free highway, and make those matters in part the basis of their apportionment.[4]

The condemnation will include everything on the land adapted to the proposed public use; thus, if land is taken for a way, and has already been used as such, the condemnation includes all things placed, fixed or existing upon it, adapted to its use

[1] Hartshorn v. Worcester, 113 Mass. 111.

[2] Peoria, etc. R. R. Co. v. Bryant, 57 Ill. 473.

[3] Old Colony, etc. R. R. Co. v. Plymouth, 14 Gray, 155.

[4] Reed's Petition, 13 N. H. 381. See Troy v. Cheshire R. R. Co. 23 N. H. 83.

as a public way, such as gravel, stone or wood paving, plank way, flag stones, bridges, culverts or lamp posts, and all works erected on or connected with it for use, or rendering its use more safe and beneficial as a way.[1] Even in the ordinary cases of taking land for the first time as a public way, the proprietors of the land have only the right to remove buildings, trees and fences, and generally things not adapted to its use as a way, or not required for the supply of materials necessary or useful in making or repairing the way.[2] If erections upon the land taken are of such a character as to become so incorporated with the land taken as to be regarded as the land taken, they should be included in the appraisal.[3] Steps projecting from the door of a house over land taken for a highway are obstructions to the highway, and must be removed by the owner of the land, and the expenses are to be included in the assessment of damages occasioned by such taking of his land; so with the eave spouts and bay windows, if they interfere with the public use of the entire limits of the highway.[4]

Just compensation is not limited to and assessable only in favor of the owner in fee. A life interest, or a term of years, may be carved out of the fee. In such case, the tenant for life or lessee, as well as the remainderman or lessor, is equally entitled to compensation for injury to his interest.[5] Every person having any interest, partial or temporary, or permanent and absolute, is entitled to damages proportioned to the injury to that interest.[6] The division of ownership, however, cannot operate to subject the condemning party to payment of greater damages than if one person had a complete and perfect title.[7]

[1] Central Bridge Corporation v. Lowell, 15 Gray, 111.

[2] Id.; Brown v. Worcester, 13 Gray, 31.

[3] Id.

[4] Id.

[5] Colcough v. Nashville, etc. R. R. Co. 2 Head, 171.

[6] Parks v. Boston, 15 Pick. 198; Lawrence v. Boston, 119 Mass. 126; Biddle v. Huseman, 23 Mo. 597; Breed v. Eastern R. R. Co. 5 Gray, 470; Platt v. Bright, 29 N. J. Eq. 128; Dows v. Congdon, 16 How. Pr. 571; State v. Halick, 33 N. J. L. 307; First Parish v. Middlesex, 6 Gray, 106; Miller v. Mayor of Newark, 35 N. J. L. 460 (66 Pa. St.).

[7] Burt v. Wigglesworth, 117 Mass. Mass. 302; Burt v. Merchants' Ins. Co. 115 Mass. 1; Edmunds v. Boston, 108 Mass. 535; Matter of Reservoir, 1 Buff. (N. Y.) Sup. Ct. 408; Ross v. Elizabethtown R. R. Co. 20 N. J. L. 230.

Payment to any other than the true owner will be of no avail, and would constitute no defense to the claim of such owner.[1] Payment cannot be made to one tenant in common so as to affect the right of other tenants to damages.[2] One having no title can claim no damages,[3] and the title may be incidentally investigated with a view to awarding the damages to the proper persons.[4] But the condemning party may by his proceedings recognize title in a person proceeded against so as to preclude any question.[5] In one case it was held that where a railroad company applies for the appointment of a commission to ascertain the value of and condemn land needed by it for a right of way, and makes the parties in possession defendants to their application, the latter are entitled to have the land, as determined by the commission, paid for to them, although third parties have given notice of their ownership of the land.[6] Where the claimant is plaintiff he must show his title.[7] Railroad companies, by virtue of this compulsory power, acquire no absolute fee simple to land, but only the right to use it for their purposes; and compensation must be allowed for the value of the use so appropriated. What, if anything, would be left to the land owner of value, consistent with the enjoyment of the easement by the company, should also be considered.[8]

Where a claim has accrued for damages to an entire tract of

[1] Tanner v. Kellogg, 49 Mo. 118; Missouri R. R. Co. v. Owen, 8 Kan. 409; Hood v. Finch, 8 Wis. 381.

[2] Brinckerhoff v. Wemple, 1 Wend. 470.

[3] Allyn v. Providence R. R. 4 R. I. 457; Rooney v. Sac. R. R. Co. 6 Cal. 638; Robbins v. Milwaukee, etc. R. R. Co. 6 Wis. 636; Menot v. Cumberland Co. Coms. 28 Me. 125.

[4] Thurston v. Portland, 63 Me. 149; Bresbine v. St. Paul, etc. R. R. Co. 23 Minn. 114.

[5] Rippe v. Chicago, etc. R. R. Co. 23 Minn. 18; Sacramento, etc. R. R. Co. v. Moffatt, 7 Cal. 577.

[6] See St. Paul, etc. R. R. Co. v. Matthews, 16 Minn. 341; Norristown Turnp. Co. v. Burket, 26 Ind. 53; Auditor v. Crise, 20 Ark. 540; Crise v. Auditor, 17 Ark. 572; Selma R. R. v. Camp, 45 Ga. 180; Provident, etc. of Mt. Sterling v. Givens, 17 Ill. 255; Peoria, etc. R. R. Co. v. Laurie, 63 Ill. 264; Same v. Bryant, 57 Ill. 473; St. Louis, etc. R. R. Co. v. Teters, 68 Ill. 144; Wright v. Wisconsin R. R. Co. 29 Wis. 341. See Chandler v. Jamaica P. Aqueduct, 125 Mass. 544.

[7] Peoria, etc. R. R. Co. v. Bryant, 57 Ill. 473; Robbins v. Milwaukee, etc. R. R. Co. 6 Wis. 636.

[8] Alabama, etc. R. R. Co. v. Burkett, 42 Ala. 83. See Lake Superior, etc. R. R. Co. v. Greve, 17 Minn. 322.

land by reason of the actual construction of a railroad over a part of it, and, before the damages have been assessed or paid, the land is sold, without any provision in respect to them, the right to such damages remains in the vendor.[1] The damages belong to the owner at the time of the injury, and do not pass to a subsequent vendee,[2] or to such owner's heirs.[3] A lessor may show, on the assessment of damages,[4] a surrender of a lease after the land demised had been taken for a highway, with a release of the lessee's claim for damages.

If land sought to be condemned for an easement is already burdened with one public servitude, the imposition of another of the same kind gives no right to damages, but it is otherwise if there is a subsequent condemnation for a different purpose, inconsistent with or subversive of the first; and in such case damages are recoverable as though the former had not existed.[5] A plank road laid by a company over a highway is not a different public use which will give abutting owners a right to compensation as for an additional servitude; but such company will be liable if it by excavations endanger the stability of houses on the line.[6]

WITH REFERENCE TO WHAT TIME ARE THE VALUE AND DAMAGES TO BE ASSESSED.— As the value of real estate is liable to be much affected generally and specially by the improvement for which it may be taken, the inquiry is important, at what time in the proceeding practically or legally to appropriate it are the damages to be ascertained for the purpose of just compensation. Possession for public use cannot be taken, nor is the title of the owner divested until payment is made, or at least adequately provided for.[7] The time of the taking is that

[1] Pomeroy v. Chicago, etc. R. R. Co. 25 Wis. 641. See Pick v. Rubicon Hydr. Co. 27 Wis. 433.

[2] Sargent v. Machias, 65 Me. 591; Tenbrooke v. Jahke, 77 Pa. St. 392. But see Caldwell v. Bank, 20 Ind. 294.

[3] Neal v. Knox, etc. R. R. Co. 61 Me. 298.

[4] Dickenson v. Fitchburg, 13 Gray, 546.

[5] Moale v. Baltimore. 5 Md. 314. See Pinkerton v. Boston, etc. R. R. Co. 109 Mass. 527.

[6] Williams v. Natural B. Plk. Rd. 21 Mo. 580.

[7] Daniels v. Chicago, etc. R. R. Co. 35 Iowa, 129; Henry v. Dubuque, etc. R. R. Co. 10 Iowa, 540; Bensley v. Mountain L. W. Co. 13 Cal. 306; Rider v. Stryker, 63 N. Y. 136; Cook v. South Park Com. 61 Ill. 115; People v. Williams, 51 Ill. 63.

at which the value is fixed, but the cases do not agree as to what is to be deemed the taking — whether the actual appropriation or the condemnation.[1]

In Pennsylvania it has been held that the jury should consider the matter as if they were called upon to value the injury at the moment when compensation could first be demanded.[2] This is the difference in the value of the land before the improvement is made, and the value after its completion;[3] that it is a proper instruction to tell the jury that the market value of the property should be ascertained before the road or the prospect of the road had produced any effect upon it, then the value immediately after the completion should be ascertained, and the difference would settle the question of damages.[4]

In Wisconsin a statute provided that land taken by a railroad should be appraised at its value at the time the company acquired title.[5] Under this statute the owner was held to be entitled to be paid the value of the property at the time of the taking, that that is the just compensation of the constitution. A company having previously built its road, it was held that the improvements were to be excluded from the estimate. If the market value is enhanced at the time of the condemnation, however, the land is to be estimated at such enhanced value.[6]

In Minnesota the value is required by statute to be assessed at the time of the taking, and that is construed to mean at the time of making the award.[7] Compensation is awarded with

[1] Milwaukee, etc. R. R. Co. v. Eble, 4 Chand. 72; 3 Pin. 334; Montclair R. R. Co. v. Benson, 36 N. J. L. 557; Miller v. Easton, etc. R. R. Co. 37 N. J. L. 222; Stafford v. Providence, 10 R. I. 567; Patterson v. Boom Co. 3 Dill. 465; St. Joe, etc. R. R. Co. v. Orr, 8 Kan. 419; Virginia, etc. R. R. Co. v. Lovejoy, 8 Nev. 100; Daniels v. The C. Q. & N. R. Co. 41 Iowa, 52; The San Francisco, etc. R. R. Co. v. Mahoney, 29 Cal. 112; Hosher v. Kansas City, etc. R. R. Co. 60 Mo. 329; Arnold v. Covington Bridge, 1 Duv. 372.

[2] Schuylkill Nav. Co. v. Thoburn, 7 S. & R. 411; Shenango, etc. R. R. Co. v. Braham, 79 Pa. St. 447; Penn. etc. R. R. Co. v. Bunnell, 81 Pa. St. 426.

[3] Hornstein v. Atlantic, etc. R. R. Co. 51 Pa. St. 87; Delaware, etc. R. R. Co. v. Benson, 61 Pa. St. 369.

[4] Id.

[5] Laws of 1872, ch. 119, sec. 21.

[6] Aspinwall v. Chicago, etc. R. R. Co. 41 Wis. 474; Driver v. Western Union R. R. Co. 32 Wis. 569.

[7] Warren v. St. Paul, etc. R. R. Co. 21 Minn. 424; Sherwood v. St. Paul, etc. R. R. Co. 21 Minn. 122; Winona, etc. R. R. Co. v. Denman,

reference to the value and condition of the premises at the time of the award.

The same time is adopted in Kansas,[1] in California,[2] and in Wisconsin.[3]

The time of taking in Massachusetts is the time fixed by statute for estimating the value and damages; that time is when the land is actually appropriated to public use, not when the damages are assessed.[4]

The government, by its agents, entered wrongfully on a tract of land and erected a building which became part of the realty, and then took proceedings to condemn the land for public use; it was held that the owner had a right to have the value of the structure allowed him in the estimate of damages.[5]

In an Iowa case,[6] the defendant company appropriated land for right of way without proceedings to condemn and assess damages, and without any grant from the owner. By the statute of that state either party could take proceedings, and the company in fact instituted proceedings eleven years after the actual appropriation of the land. The court say: "Defendants have held the land at the sufferance of the plaintiff, enjoying its benefits to the same extent as though the plaintiff's damages had been assessed. Plaintiff has suffered no greater damage than would have occurred to him had the defendants pursued the course pointed out by the statute which they are now, by this proceeding, pursuing. By these proceedings plaintiff is not deprived of the title to the land; the defendants acquire nothing more than the right to occupy it for railroad purposes. Had they been instituted prior to or upon defendants'

10 Minn. 267; Winona, etc. R. R. Co. v. Waldron, 11 Minn. 515; St. Paul, etc. R. R. Co. v. Murphy, 19 Minn. 500; Hursh v. St. Paul, etc. R. R. Co. 17 Minn. 439; Warren v. St. Paul, etc. R. R. Co. 18 Minn. 384.

[1] St. Joe, etc. R. R. Co. v. Orr, 8 Kan. 419.

[2] The San F. etc. R. R. Co. v. Mahoney, 29 Cal. 112; Stockton, etc. R. R. Co. v. Galgiani, 49 Cal. 139.

[3] Lyon v. Green Bay, etc. Co. 42 Wis. 543.

[4] Dickenson v. Fitchburg, 13 Gray, 546; Reed v. Hanover B. R. R. Co. 105 Mass. 303.

[5] U. S. v. Land in Monterey Co. 47 Cal. 515. But see Cal. P. R. R. Co. v. Armstrong, 46 Cal. 85; Emerson v. Western Union R. R. Co. 75 Ill. 176; Graham v. Connersville, etc. R. R. Co. 36 Md. 463; Aspinwall v. Chicago, etc. R. R. Co. 41 Wis. 474; Justice v. Nesquehoning P. R. R. Co. 87 Pa. St. 28.

[6] Daniels v. C. I. & N. R. Co. 41 Iowa, 52.

taking the possession of the land, no different right would have been acquired by them than they obtain in the present action. In each case the measure of the plaintiff's damage is the same, namely, the value of the land without regard to benefits resulting from the improvement. Plaintiff, had the damage been assessed upon the occupancy of the land, would have received no compensation for its prospective uses, other than as these would enter into the estimate of its value. The same matters will now determine the value that it would have then. It will be seen, in view of these considerations, that the value of the land, at the time of the appropriation, with interest upon the sum assessed from that date until judgment in this case, is the just measure of the plaintiff's damages."

Deduction for benefits.— By measuring the damages according to the depreciation in market value, the condemning party will get the benefit of any advance in the price of the land, as a whole, produced by the improvement at the time the inquiry as to value is made. The value taken before the appropriation of the land is supposed to be uninfluenced by the projected improvement. The value after it is completed is the value as affected by it; if enhanced, the increase cancels the damage *pro tanto;* if it has the contrary effect, the consequent diminution adds to the special damage for taking a part and inconveniencing the residue. Where damages are assessed, however, for depreciation anticipated, by proof of particular facts, no account is taken of the general benefit of the improvement; on the contrary, they are purposely excluded.[1] And so of any common injury which affects the community or public at large.[2] Only those benefits are considered which are special, and affect particularly the land in question.[3] These benefits are estimated like the damages.[4]

[1] Meacham v. Fitchburg R. R. Co. 4 Cush. 291.

[2] Petition of Mount W. Road Co. 35 N. H. 146; Adden v. R. R. Co. 55 N. H. 415.

[3] Weit v. St. Paul, etc. R. R. Co. 51 Pa. St. 87; Wood v. Hudson, 114 Mass. 513; Symonds v. Cincinnati, 14 Ohio, 148; Paine v. Woods, 108 Mass. 168; The Palmer Co. v. Ferrill, 17 Pick. 58; Green v. Fall River, 113 Mass. 262; Dwight v. Hampden, 11 Cush. 201; Meacham v. Fitchburg R. R. Co. supra; Young v. Harrison, 17 Ga. 30; Trinity College v. Hartford, 32 Conn. 452; Hilbourne v. Suffolk, 120 Mass. 393.

[4] Trinity College v. Hartford, supra; Railroad Co. v. Tyree, 7 W. Va. 693; St. Louis, etc. R. R. Co. v.

It is the business of the tribunal to which the ascertainment of just compensation is confided to balance the advantages that are special against the disadvantages that are actual, and with the aid of whatever testimony is laid before them, to find out, as well as practicable, how much less the land would fetch in the market by reason of the improvement in question, and that sum will represent what has been really taken away from the owner, and should be given back in damages.[1] If this special benefit is equal to the compensation that the owner should otherwise receive, he will be entitled to nothing else.[2]

Where an assessment was made for damages for flowing lands by means of a dam, it was held that the benefit might be considered resulting to the lot flowed, and the adjoining land, from the formation of ice on it in the ordinary use of the dam, where such ice might be cut and sold as merchandise, without appreciably diminishing the water power for which the dam was erected; and also benefits resulting to the same land by reason of the greater convenience afforded the owner by means of the flowing, and through the use of his land to exercise his right in common with the public to take ice from a natural pond by which the overflowed land was bounded.[3] But where the establishment of a road rendered the building of fences necessary, the damages allowed for the appropriation of the land, it was held, should not be diminished by the value of any advantages which might accrue to the adjacent property from the erection of the fences.[4]

Benefits of two kinds may accrue to lands bounding on a way laid out, altered, or widened: First, the special and direct

Richardson, 45 Mo. 466; Winona, etc. R. R. Co. v. Waldron, 11 Minn. 515; Weir v. St. Paul, etc. R. R. Co. 18 Minn. 155; Mitchell v. Thornton, 21 Gratt. 164; Hosher v. Kansas City, etc. R. R. Co. 60 Mo. 329; Quincy R. R. Co. v. Redge, 57 Mo. 599; Lee v. Tebo R. R. Co. 53 Mo. 178; Miss. R. Bridge v. Ring, 58 Mo. 491; Pacific R. R. v. Chrystal, 25 Mo. 544; Freedel v. N. C. R. R. Co. 4 Jones L. 89; James River Co. v. Turner, 9 Leigh, 313.

[1] Hornstein v. Atlantic, etc. R. R. Co. 51 Pa. St. 87; Boston, etc. R. R. Co. v. Old Colony R. R. Corporation, 12 Cush. 605.

[2] Whitman v. Boston, etc. R. R. Co. 3 Allen, 133; Trinity College v. Hartford, 32 Conn. 452.

[3] Paine v. Woods, 108 Mass. 160.

[4] Bland v. Hixenbaugh, 39 Iowa, 532.

benefit arising from its own position upon the way itself; and second, the general benefit, not arising from its location on the way, but from the facilities and advantages caused by the way, which affect all the estates in the neighborhood equally, and which are shared in common with such estates. The direct and peculiar benefit may be set off against the damages. The general benefit cannot.[1] The advantages that an abutter may receive from his location on a highway laid out, altered or widened, are none the less peculiar and special to him, because other estates on the street receive special and peculiar benefits of the same kind.[2] If a lot is drained or fertilized by a public im-

[1] Hilbourne v. Suffolk, 120 Mass. 393; Carpenter v. Landaff, 42 N. H. 218; Shawneetown v. Mason, 82 Ill. 337; Commissioners v. Johnston, 71 N. C. 398.

[2] Hilbourne v. Suffolk, supra; Allen v. Charlestown, 109 Mass. 243. But see Whitcher v. Benton, 50 N. H. 25. In Trinity College v. Hartford, 32 Conn. 476, Park, J., said: "There are obviously three classes of benefits that may result from the opening of highways; one, the general benefit which the public, as such, receives from the opening of a new avenue of travel; another, the special benefits which those receive who reside or own land upon the new highway, in the more convenient access that is given to their lands; and another, the strictly local benefit which land, as such, may receive from the opening and construction of the road, an illustration of which would be drainage, if it should happeu to be drained by the road and its ditches; or the filling up of low ground by surplus earth that is to be disposed of in loweriug some neighboring hill. As to the character of these classes of benefits, and as to their general relatiou to the road, with reference to questions of assessment and damage, there seems to be no serious difference between the claims of parties. The mere public benefit cannot be assessed at all, and is only to be considered with reference to the question how much of the expense of the road shall be paid by general taxation. The merely local benefit is clearly to be deducted from the damage that would be allowed the owner for the part of his land taken for the road, and it goes so far to reduce the actual damage done to him in taking his land. The special benefits, within the limits fixed by the law, are clearly to be considered in assessing benefits; and if nothing was to be done except to assess benefits, there would probably be no difference of opinion as to the rule to be adopted iu determining the proportions in which the burden of the road should be laid upon the benefits. The sole question is in the case where the same person has received benefits and has also a claim for damages. We will suppose his claim for damages is $1,000, that he gets no local benefit, and that his special benefit is exactly $1,000. Now, if he had received only the benefit, and was assessed for that benefit, with all the other persons enjoying special benefits, he

provement, the benefit is direct and special;[1] so, if it discontinue a portion of an old highway, the part vacated thereby inuring to the person to be compensated.[2]

In New Hampshire it is held that in estimating damages to land owners by a new highway, nothing can be deducted on account of benefits not special to the particular owner to be compensated; and where he obtained access to his land, he not having access otherwise, except across land which he did not own, such benefit is not special. The court said this was not a benefit for which the land owner should pay, but a general improvement in which many would share.[3]

In Illinois, as a set-off against consequential damages arising from a railroad crossing a farm, it was held proper to take into consideration the facilities afforded by the road, and a convenient depot, for getting the products of the farm to market, as also the actual increase in the market value of the farm occasioned by the road.[4]

Where compensation was claimed for the location and construction of a railroad between the coal mines and a navigable river on the land owner's premises, whereby the conveniences of the river transportation for the coal to market were injured

would probably be assessed only a moderate percentage upon it. We will suppose that assessment would be ten per cent., so that he would be called upon to pay $100 on account of his having received $1,000 of benefit. Now the counsel for the petitioners contend that, where the same person has a claim for $1,000 damage, he should not have the whole benefit he has received applied to the damage, satisfying it in full and leaving him nothing, but that only the ten per cent. which he would have been assessed for his benefit, if the benefit had been independently assessed, should be so applied, and the balance, $900, should be paid him for his damage. There is much that is plausible in this claim, and it is not altogether unreasonable; but the rule has long been settled in this state, not only in practice, but by repeated decisions of this court, that where the land owner has a claim for damage for land taken, and has received local and special benefits equal to the damage, the value of the benefits shall be set off against the damage, and he shall be allowed nothing."

[1] Milwaukee R. R. Co. v. Eble, 4 Chand. 72; 3 Pin. 334.

[2] Tingley v. Providence, 8 R. I. 493.

[3] Carpenter v. Landaff, 42 N. H. 218; Whitcher v. Benton, 50 N. H. 25; Adden v. Railroad, 55 N. H. 413. See Virginia, etc. R. R. Co. v. Lynch, 13 Nev. 92.

[4] Wilson v. Rockford, etc. R. R. Co. 59 Ill. 273.

or cut off, it was held competent for the railroad company to show, for the purpose of reducing the damages,[1] that the river transportation, in connection with the coal banks, had ceased to be valuable, or become of less value by means of the facilities for coal transportation afforded by the railroad. In case of a railroad appropriation for right of way through a tract of land, causing incidental and local injury to the residue of the tract, although general resulting benefits from the railroad to the value of such residue of the land is prohibited from being taken into account in estimating the amount of compensation to be paid the owner, yet where a local incidental benefit to the residue of the land is blended or connected either in locality or subject matter with the local incidental injury to such residue of the land, the benefit may be considered in fixing the compensation to be paid the owner, not by way of deduction from the compensation, but of showing the extent of the injury done to the value of the residue of the land.[2]

In many of the states, benefits are excluded by constitution or statute, from consideration in determining what shall be paid for the *value* of property taken for public use; but the inhibition in this form has not been deemed to exclude this consideration in reduction of consequential damages resulting from the appropriation. In other states the same restricted application of benefits is made on general principles, as proper and necessary to give "just compensation."[3]

In Kentucky the right to just compensation for property taken for public use is held to exclude all benefits, in reduction

[1] Cleveland & Pittsburgh R. R. Co. v. Ball, 5 Ohio St. 569.

[2] Id.

[3] Todd v. Kankakee R. R. Co. 78 Ill. 530; Carpenter v. Jennings, 77 Ill. 250; Wilson v. Rockford, etc. R. R. Co. 59 Ill. 273; Hayes v. Ottawa, etc. R. R. Co. 54 Ill. 373; Raleigh R. R. Co. v. Wicker, 74 N. C. 220; Shipley v. Baltimore, etc. R. R. Co. 34 Md. 336; Railroad Co. v. Tyree, 7 W. Va. 693; Mitchell v. Thornton, 21 Gratt. 164; Augusta v. Marks, 50 Ga. 612; Mayor of Atlanta v. Central R. R. Co. 53 Ga. 120; Vicksburg, etc. R. R. Co. v. Calderwood, 15 La Ann. 481; Buffalo, etc. R. R. Co. v. Ferris, 26 Tex. 588; New Castle R. R. Co. v. Bramback, 5 Ind. 543; Memphis v. Bolton, 9 Heisk. 508; Giesy v. C. W. & Z. R. R. Co. 4 Ohio St. 330; Wagner v. Gage Co. 3 Neb. 237; Woodfolk v. Nashville, etc. R. R. Co. 2 Swan, 422; Chapman v. Oshkosh, etc. R. R. 33 Wis. 629; Newby v. Platte Co. 25 Mo. 258; Commissioners v. O'Sullivan, 17 Kan. 58.

of the value of the property taken, and to limit their application to the reduction of damages resulting from such taking. In an early case the court said: "When the property of one citizen is taken without his consent for the use of the whole community of which he is a member, the constitution imperiously requires, not that the public shall decide whether he is entitled to any compensation, but that the just compensation shall be paid or secured; and that compensation implies the value, at least, of the thing taken. No citizen can be compelled to give his land to the public without an equivalent; and what is that equivalent but the value, in money, of the land surrendered to public use? He may act unreasonably and unjustly in an imaginable case, by insisting on pecuniary compensation, or in refusing to make a surrender without exacting the value of the property. But he has a right to insist on being paid the value of the thing taken from him, although he may be incidentally benefited with others in the appropriation of it to public use. If, however, claiming more than the value of the property taken, he seeks indemnity for consequential inconvenience or injury, then the true question will be whether, upon a survey of all advantages as well as disadvantages which will be likely to result to him, the balance will be for or against him, and if ascertained to be in his favor, then, of course, he will be entitled to nothing for alleged damages for such inconvenience or injury, because, the whole case being properly considered in all its bearings, he will sustain no damage. Thus, and only thus, advantages and disadvantages may be compared, and set off the one against the other."[1] This view has been adhered to.[2] The compensation guaranteed by the constitution, it is there insisted, cannot consist of the mere estimate of a jury or by appraisers of the prospective and speculative advantages, which, in their opinion, will accrue to the owner from the proposed use of his land by the public, but must be a pecuniary compensation equivalent to the value of the land to be taken. These advantages may be set off against the consequential damages and inconvenience which the owner may sustain, but not against

[1] Sutton's Heirs v. Louisville, 5 Dana, 33.

[2] Rice v. Turnpike Co. 7 Dana, 87.

the value of the land itself. To that extent, at least, the owner is entitled, under all circumstances, to a specific compensation without deduction or set-off.[1] This mode of adjusting the compensation is deemed to be the true and only effectual exposition of the constitution.[2] There is this other distinguishing feature of the law as held in that state on this subject: advantages which may offset the consequential damages are not confined to those which are special to the land from which a part is taken. The advantages which the owner may derive from the construction of a railroad, for instance, are not in the least diminished by the fact that they will be enjoyed by others, nor does it furnish any reason why they should be excluded from the estimate in comparing the advantages and disadvantages that will result to him from the establishment of the road. Other persons, it is true, may enjoy the same advantages without being subjected to the same inconveniences; but this results from the nature of the improvement itself, and does not, in any degree, detract from the value of these advantages to the owner of the land through which the road passes.[3]

The value which the constitution in Kentucky guarantees is the value to the owner, where the property taken is a part of a greater tract; and it is to be estimated by considering its relative position to his other land, and the circumstances which may diminish or enhance that value; the real value of the land to the owner as it is actually situated, and not merely regarding it as a separate and independent piece of land, he has a right to demand. It is held that nothing else can secure him a just compensation for his property. The inquiry should be, What is its value, situated as it is, if he were not the owner of it, but owned adjacent property on both sides of it, under precisely the same circumstances?[4] "This question of value," the court say, in a late case in that state, "can be most readily and fairly determined by ascertaining the value of the entire tract

[1] Id.; Elizabethtown, etc. R. R. Co. v. Helm's Heirs, 8 Bush, 681.

[2] Jacob v. Louisville, 9 Dana, 114; Henderson, etc. R. R. Co. Dickerson, 17 B. Mon. 178.

[3] Henderson, etc. R. R. Co. v. Dickerson, 17 B. Mon. 180; Louisville, etc. R. R. Co. v. Thompson, 18 id. 744–5; Louisville, etc. R. R. Co. v. Glazebrook, 1 Bush, 325.

[4] Henderson, etc. R. R. Co. v. Dickerson, 17 B. Mon. 180.

of land, excluding the enhancement resulting from the contemplated improvement; then,[1] what will be its value after the appropriation of a portion of such estate therein as may be proposed to be taken. The difference in value thus found is the true compensation to which the owner is entitled."[2] The particular facts and circumstances to be considered in adjusting the difference in the value of a tract of land, before and after a portion of it has been taken or appropriated to public use, cannot, from the nature of things, be set out in detail, or defined with any degree of precision; but every circumstance injuriously affecting the citizen in the enjoyment of his land not taken, which can be satisfactorily demonstrated to grow out of his being deprived of the use theretofore enjoyed by him of the portion taken, should receive due consideration, and be allowed its proper weight. The appraisers or jury should disregard reasons which are purely personal to the owner, not affecting the market value of his remaining lands, and also such prospective damages as may follow the construction and operation of the proposed railway or other public work. These prospective damages are to be considered in the determination of the consequential damages, and the rule laid down in the case of Sutton's heirs controls the settlement of that question. A survey is taken of all the advantages and disadvantages which may be reasonably anticipated to result from the prudent construction and operation of the proposed railway, and if the balance be against the owner of the land, then to the extent that such balance diminishes its market value, he should have a judgment on account of incidental damages; otherwise, of course, he is entitled to nothing.[3]

[1] Still excluding this enhancement.

[2] Elizabethtown, etc. R. R. Co. v. Helm's Heirs, 8 Bush, 681.

[3] Id. In Greenville & Columbia R. R. Co. v. Partlow, 5 Rich. 436, the court, by Frost, J., said: "In the argument of the case, the effect of the terms of the charter has not been sufficiently weighed. The law must control the judgment of the court. II Stat. 327, directs that the commissioners or jury, 'in making the valuation, shall take into consideration the loss or damage which may occur to the owner, in consequence of the land or right of way being taken; and also the benefit or advantage he may receive from the establishment or erection of the railroad or works, and shall take particularly the nature and amount

The owner's lands taken into consideration in the estimate of damages and benefits are those adjoining and connected with

of each; and the excess of loss or damage, over and above the benefit and advantage, shall form the measure of valuation of said land or right of way.'

"What is a benefit or advantage to the owner of land, which he may acquire by the construction of the road? The only direct and immediate benefit of a railroad to an owner, through whose land it may pass, is the facility it affords in carrying the produce of the land to market, and the cheapness and expedition of traveling. The most important advantages are incidental. Of these, incomparably the greatest, in a pecuniary view, is the enhanced value imparted to real estate along the line of the road. It forms the chief inducement for subscription to the undertaking. It was prominently in the view of the legislature in granting the charter, as an expected benefit to the owner, whose land might be taken for the construction of the road, and could not have been overlooked. Yet, it is not expected that any and every benefit and advantage, by the terms of the act, is the subject of assessment. It is plain by the assessment which is directed to be made, that it was intended to provide compensation to the owner of the land, and no more. He was to make no gain or profit from the company. Compensation is an equivalent for property taken, or for an injury. It must be ascertained by estimating the actual damage the party has sustained. That damage is the sum of the actual value of the property taken and of the injury done to the residue of the property, by the use of that part which is taken, less the benefit which accrues to the residue of the said property by the use of that which is taken. The benefit is in part an equivalent to the loss and damage. The loss and damage to the defendant is the value of the land the company has taken, and the injury which the location and use of the road through his tract may cause to the remainder. The amount which may be assessed for these particulars, the company admits it is bound to pay; but as a set-off, it claims credit for the benefit the defendant has received from the construction of the road. That benefit may consist in the enhanced value of the residue of his tract. When the company has paid the defendant the excess of his loss or damage over and above the benefit and advantage he has derived from the road, he will have received a just compensation.

"It is objected that the enhanced value of the land should not be assessed as a benefit to the defendant, because it is precarious and uncertain. The argument admits that the enhanced value, if permanent, should be assessed, but whether the appreciation is permanent and substantial, or transient and illusory, is a subject about which the court is not competent to determine; it must be submitted to a jury, who will give credit to the company, according to the circumstances. The argument is not tenable that an increased salable value is no benefit to the owner of land unless he sells it. This is true if it be assumed the price will decline. The chance of this is estimated by the jury, in the amount which they may assess for that benefit. The sum assessed, is,

the land taken and forming a part of the same parcel.[1] The fact that the property consists of several lots or blocks, or several legal subdivisions of sections, as sold by the government, will not prevent its being considered as one tract or parcel, if it is occupied and used as such.[2] Nor will land so occupied be deemed separated by a highway or street running through it.[3] But unless the property claimed to be one tract is so used and occupied, it may be separated by streets, and will have to be treated as consisting of separate parcels as so divided.[4] So agricultural land may be separated so as not to be treated as an

therefore (so far as human foresight can anticipate the future), the exponent of the substantial increase of the value of the land. This is a benefit to the owner, by enlarging his credit and his ability to pay his debts or provide for his family, in the same manner, and to the same extent, as if his fortune was increased by an acquisition of property.

"But the argument most strenuously urged is, that the public benefit, expected from the construction of the road, formed the consideration for the grant of the charter; and of these expected benefits, the most important was the enhanced value of the land along the line of the road, and as a public benefit is the aggregate of the benefit of individuals, the company is precluded, by its contract, from claiming against the defendant any assessment for the increased value of the land. No such stipulation is found in the charter. On the contrary, it appears that the owner of the land taken by the company is to be assessed for any benefit, without exception of what he may receive from the construction of the road.

"The only other argument which will be noticed is, that it is unjust and oppressive to the defendant to set off his damage and loss against the increased value of the land, because thereby his benefit is extinguished, while contiguous owners enjoy that benefit. The state has invested the railroad company with its eminent power to take private property for a great public work. The company is bound to make compensation. This is all the defendant can, in reason, demand. He cannot require a premium; if his neighbors are more benefited by the construction of the road than he may be, that is no loss to him."

[1] Hilbourne v. Suffolk, 120 Mass. 393; Mix v. La Fayette, etc. R. R. Co. 67 Ill. 319; St. Louis, etc. R. R. Co. v. Brown, 58 Ill. 61; Todd v. Kankakee, etc. R. R. Co. 78 Ill. 530; Meacham v. Fitchburg R. R. Co. 4 Cush. 291.

[2] Driver v. Western Union R. R. Co. 32 Wis. 569; Welch v. Milwaukee, etc. R. R. Co. 27 Wis. 108.

[3] Id.; Hannibal Bridge Co. v. Schaubacher, 57 Mo. 582; Page v. Chicago, etc. R. R. Co. 70 Ill. 324; Chapman v. Oshkosh R. R. Co. 33 Wis. 629; Sherwood v. St. Paul, etc. R. R. Co. 21 Minn. 127; St. Paul, etc. R. R. Co. v. Murphy, 19 Minn. 500.

[4] Matter of N. Y. Cent. R. R. Co. 6 Hun, 149.

entirety by an intervening bluff.[1] Damages to separate tracts are to be separately assessed.[2]

Proof of value and damages.— These are not susceptible of precise proof, and can only be approximately shown by the opinions of witnesses having the requisite information.

If the true value of an estate immediately before and immediately after the location of a road over it could be accurately ascertained, such a discovery would afford the most exact means of determining what was the real pecuniary damage sustained by the owner. The market value is a near, and perhaps the closest, approximation to it; and, therefore, any evidence which is competent in its general character to prove the value is apposite and admissible. In the very nature of things there can be no absolute standard by which the value of land or real estate can be measured; and, of course, when it cannot be tested by the fact of a recent sale, the nearest approach to it, which can be obtained, is a knowledge of the opinion and judgment of intelligent practical men, who are best acquainted with the property. Evidence of such opinion and judgment must of necessity often be all that can be resorted to, and it is always competent and admissible, leaving its weight in each particular case to be determined by the jury, in connection with the circumstances under which it is offered.[3]

Market value means the fair value of the property as between one who wants to purchase and one who wants to sell any article; not what could be obtained for it under peculiar circumstances when a greater than its fair price could be obtained, nor its speculative value; not a value obtained from the necessities of another. Nor, on the other hand, is it to be limited to that price which the property would bring when forced off at auction under the hammer. It is what it would bring at a fair public sale, when one party wanted to sell and the other to buy.[4]

The jury in making an estimate upon the testimony of the opinions of witnesses, should not adopt those of men who are

[1] Minnesota R. R. Co. v. Doran, 15 Minn. 230.

[2] St. Louis, etc. R. R. Co. v. Brown, 58 Ill. 61.

[3] Dwight v. Hampden, 11 Cush. 203; Wyman v. Lexington, etc. R. R. Co. 13 Met. 316.

[4] Lawrence v. Boston, 119 Mass. 126.

sanguine in their estimate of value, nor of men who are over cautious; but of prudent, practical men, men of experience, thought and consideration, and who have had opportunity of forming correct opinions of the value of the lands and damages sustained.[1]

The market value of land is not a question of science or skill upon which only an expert can give an opinion. Persons in the neighborhood are presumed to have sufficient knowledge of the market value of land.[2] The opinions of witnesses founded upon a knowledge of the location, productiveness or adaptation of the land to other uses, not speculative, or, of the market or selling price of the land in the vicinity, are legal evidence to prove its value.[3] But while the opinions of witnesses thus qualified by their knowledge of the subject are competent testimony, it has been held they cannot, upon direct examination, be allowed to testify as to particular transactions, such as sales of adjoining lands, how much has been offered and refused for adjoining lands of like quality and location, or for the land in question, or any part thereof; or how much the company have been compelled to pay in other and like cases — notwithstanding those transactions may constitute the source of their knowledge. If this was allowed, the other side would have the right to controvert each transaction instanced by the witnesses, and investigate its merits, which would lead to as many side issues as transactions, and render the investigation interminable. Upon cross-examination, however, the knowledge of the witnesses, and, therefore, the value of their opinions, may be tested in that mode, if desired, by the party in whose interest the examination is conducted.[4]

[1] Somerville, etc. R. R. Co. v. Doughty, 22 N. J. L. 503.

[2] Shattuck v. Stoneham, etc. R. R. Co. 6 Allen, 115; Swan v. Middlesex, 101 Mass. 173; Pennsylvania, etc. R. R. Co. v. Bunnell, 81 Pa. St. 414.

[3] Snyder v. The Western U. R. R. Co. 25 Wis. 60; Cent. P. R. R. Co. v. Pearson, 35 Cal. 261; Parks v. Wisconsin, etc. R. R. Co. 33 Wis. 413; Serle v. Lackawanna, etc. R. R. Co. 33 Pa. St. 517; Brown v. Corey, 43 Pa. St. 495; Snow v. Boston, etc. R. R. Co. 65 Me. 230; Grand Rapids, etc. R. R. Co. v. Horn, 41 Ind. 479; East Pennsylvania R. R. Co. v. Hiester, 40 Pa. St. 53; Whitman v. Boston, etc. R. R. Co. 7 Allen, 313; Penn. etc. R. R. Co. v. Bunnell, 81 Pa. St. 42; Pittsburgh, etc. R. R. Co. v. Rose, 74 Pa. St. 362.

[4] C. P. R. R. Co. v. Pearson, supra; Brunswick, etc. R. R. Co. v. McLaren, 47 Ga. 546; Dickinson v.

Opinions of witnesses are not admissible as to the amount of damages, nor as to the future effect of taking part of a tract of land for a public improvement.[1] Some Massachusetts cases sanction a more liberal rule for the admission of opinions.[2] And in Illinois it has been held that witnesses who are acquainted with a farm, and its productiveness and value, may give their opinions as to the damages which will result from the construction of a railroad over it.[3]

THE EFFECT OF A JUDGMENT FOR THE JUST COMPENSATION.— The judgment is a bar only to an action for such injuries as could properly be included in the assessment.[4] These are damages resulting from making the appropriation in conformity to the law, and proceeding with the construction of the public improvement and subsequent use of the property in a skilful and proper manner, observing all legal restrictions and fulfilling all legal obligations.[5] Just compensation does not extend to or embrace injuries to adjoining land not authorized to be taken; nor to damages resulting from carelessness or wilful trespass in the execution of the work.[6] It is conclusively presumed after judg-

Fitchburg, 13 Gray, 546; Tufts v. Charlestown, 4 Gray, 537; Pennsylvania, etc. R. R. Co. v. Bunnell, 81 Pa. St. 414; Pinkham v. Chelmsford, 109 Mass. 225; Davis v. Charles River Bridge Co. 11 Cush. 506; West Newbury v. Chase, 5 Gray, 421; Whitman v. Boston R. R. Co. 7 Allen, 313; Swan v. Middlesex, 101 Mass. 173; Shattuck v. Stoneham R. R. Co. 6 Allen, 115; Fall River Works v. Fall River, 110 Mass. 428; Cobb v. Boston, 112 Mass. 181; Lehmicke v. St. Paul, etc. R. R. Co. 19 Minn. 464; Rondout R. R. Co. v. Deyer, 5 Lans. 298.

[1] Atlantic, etc. R. R. Co. v. Campbell, 4 Ohio St. 583; Troy, etc. R. R. Co. v. Northern T. Co. 16 Barb. 100; Rockford, etc. R. R. Co. v. McKinley, 64 Ill. 338; Colvill v. St. Paul, etc. R. R. Co. 19 Minn. 283; Curtis v. St. Paul, etc. R. R. Co. 20 Minn. 28; Dalzell v. Davenport, 12 Iowa, 437; Hosher v. Kansas City, etc. R. R. Co. 60 Mo. 329; Tingley v. Providence, etc. R. R. Co. 8 R. I. 493.

[2] Swan v. Middlesex, 101 Mass. 173; Brainard v. Boston, etc. R. R. Co. 12 Gray, 407.

[3] Keithsburg, etc. R. R. Co. v. Henry, 79 Ill. 290.

[4] South Side R. R. Co. v. Daniel, 20 Gratt. 344.

[5] Ante, p. 126; Dodge v. County Commissioners, 3 Met. 380; Delaware Canal Co. v. Lee, 22 N. J. L. 243; McCormick v. Kansas City, etc. R. R. Co. 57 Mo. 433; Bailey v. Mayor of N. Y. 3 Hill, 531; Lawrence v. Great Northern R'y Co. 16 Q. B. 643; Mason v. Kennebec, etc. R. R. Co. 31 Me. 215.

[6] Colcough v. Nashville, etc. R. R. Co. 2 Head, 171.

ment that it embraced all damages of every kind naturally consequent to the taking; in judgment of law all such damages were foreseen and compensated,[1] and no others. But this does not preclude a fresh demand if the plan of the public work is changed after the assessment so as to make the appropriation more injurious.[2] The judgment is conclusive of the amount due to the person designated to receive it;[3] and the adjudication vests a right to the money.[4] After damages have been ascertained and fixed for taking private property for a highway, there can be no abatement of the amount for subsequently vacating a part of such highway,[5] or its entire discontinuance.[6]

Interest.— It being an accepted principle that land taken for public use should be valued, and damages ascertained, as of the date of the taking, payment is then legally due, unless a statute designate some other time;[7] and on general principles, interest should be given from the time when the principal should be paid;[8] or, in other words, from the time the land owner was entitled to compensation;[9] unless the obligation to pay it then is qualified by some required preliminary act to liquidate the amount, or, a demand of payment.[10] In some of

[1] Furniss v. Hudson R. R. R. Co. 5 Sandf. 551; Chicago, etc. R. R. Co. v. Springfield, etc. R. R. Co. 67 Ill. 142.

[2] Boyd v. Negley, 53 Pa. St. 387; Carpenter v. Easton R. R. Co. 26 N. J. L. 168.

[3] Sparhawk v. Walpole, 20 N. H. 317.

[4] People v. Board of Supervisors, 4 Barb. 64.

[5] Reed v. Inhabitants of Wall, 34 N. J. L. 275.

[6] Clough v. Unity, 18 N. H. 75.

[7] Hamersley v. New York, 56 N. Y. 533; Phillips v. Pease, 39 Cal. 582.

[8] Norris v. Philadelphia, 70 Pa. St. 332.

[9] Delaware, etc. R. R. Co. v. Burson, 61 Pa. St. 369.

[10] People v. Canal Commissioners, 5 Denio, 401. In Clough v. Unity, 18 N. H. 75, it was considered that by the adjudication of damages on laying out a highway, a right to the money is vested, and is not affected by a subsequent discontinuance of the highway. But after such adjudication, no duty is imposed on the town except to pay before making the road. If the owner sues for the money before the town proceeds to open the highway, he does so before there is any active duty to pay on the part of the town. The court say that the decree is "not like a judgment, the liquidation of a demand; it is of itself the inception of a demand; it rests on no promise; it is not in the nature of damages for a tort, nor money of . . (the owner) . . received by the town and misapplied.

"The award and consequent de-

the states, the taking is by the legal proceedings to condemn; and there, as a general rule, interest is charged only from the date of the award.[1] It is given not strictly as damages, but as an equitable mode of compensating the owner for the unnecessary delay in ultimately ascertaining the amount he is entitled to be paid, where the final judgment is postponed for any re-examination by appeal or otherwise. The general rule, therefore, is liable to be controlled by the circumstances of the particular case. If the owner has had the profitable use of the premises, or has received rents during such intermediate period, these circumstances are taken into account, and the interest abated accordingly. Advantage should be taken of such circumstances on the trial finally had.[2]

cree bear certain strong analogies to a judgment which carries interest. But a judgment is rather an act of the party himself, who procures it for the express purpose of enforcing an antecedent claim; while the award of land damages is a matter into which both parties have been brought *in invitum*, and affords no evidence whatever that the money is detained contrary to the wishes of the party entitled to it. There is no necessary presumption that he wishes to receive it until the time when the town would be required to pay it for the purpose of justifying their entry upon the land, unless he makes a demand, and so manifests his wishes; and if the demand is not complied with, establishes the adverse relation between the parties that lays the foundation for demanding interest. Mohurin v. Bickford, 6 N. H. 567; Reid v. Renn Glass Factory, 3 Cow. 436." In the earlier case of Fiske v. Chesterfield, 14 N. H. 240, it was held that the acceptance by the court of common pleas of the report of a committee laying out a road, is not precisely a judgment that the town is indebted to the land owner in the sum awarded to him as damages, but it furnishes record evidence that he is entitled to recover.

"If he brings an action of debt on that judgment, without a demand, after the road is opened, he is entitled to recover interest on the sum awarded from the time of opening of the road, but not before that time, as until then the amount could not be considered as detained."

[1] Metler v. Eastern, etc. R. R. Co. 37 N. J. L. 222; Warren v. First Division, etc. R. R. Co. 21 Minn. 424.

[2] Id. But in Commonwealth v. Boston, etc. R. R. Co. 3 Cush. 57, the court by Shaw, C. J., said: "We consider it the plain dictate of justice when money is due on a judgment, or on a verdict in the nature of a judgment, and payment is prevented by the necessary time taken for re-examining the case, if it result in confirming the former judgment and showing that the party was then entitled to his money, that interest should be allowed as a just compensation for the delay." See Detmold v. Drake, 46 N. Y. 318.

If the delay after the assessment by commissioners is by the unnecessary act or litigious conduct of the owner, he will not be entitled to interest during such delay.[1] Thus, if the owner is the sole appellant, and the verdict of the jury should not be in excess of the appraisement of the commissioners, interest should be disallowed. In that event, the postponement of the receipt of compensation adjudged by the commissioners, and decided by the judge to have been adequate, would be due to his own act. To allow him indemnity for such delay, in the form of interest, would be unreasonable and unjust. But if the condemning party also appeal, interest will not be denied to the owner because he had taken an appeal.[2] In New Hampshire, where the amount of damages has been fixed by award of commissioners, and the owner appeals, interest will be allowed unless the money has been tendered or deposited.[3] Then if the owner appeals and gets a larger sum allowed, he is entitled to interest only on such additional sum, for he could receive the tendered or deposited sum without prejudice to his right to appeal.[4]

In those states where the taking is the actual appropriation, interest is allowed from that time, and included in the award;[5] and the award will itself bear interest after it is made.

Where the condemning party is required to procure condemnation of and pay for the property prior to actual appropriation or use of it, he is in fault, and a trespasser, if he take possession without first acquiring the right. By such delay in instituting proceedings, he incurs the hazard of paying an enhanced price, as of the date of the assessment, in those states

[1] Cook v. South Park Com. 61 Ill. 115.

[2] Warren v. First Division, etc. R. R. Co. supra.

[3] Concord R. R. v. Greeley, 23 N. H. 237.

[4] Shattuck v. Wilton R. R. Co. 23 N. H. 269.

[5] Gay v. Gardiner, 54 Me. 447; Bangor, etc. R. R. Co. v. McComb, 60 Me. 290; Kidder v. Oxford, 116 Mass. 165; Reed v. Hanover B. R. R. Co. 105 Mass. 303; Whitman v. Boston, etc. R. R. Co. 7 Allen, 313; Atlantic, etc. R. R. Co. v. Koblentz, 21 Ohio St. 334. Where a jury returned a verdict in which they assessed the damages at a certain sum "with interest thereon from the time when the said railroad company took possession of the land," it was held void for uncertainty. The Conecticut River, etc. R. R. Co. v. Clapp, 1 Cush. 559.

where the value and damages are fixed at that date, or the charge of interest from the time of taking possession, where that fact fixes the date of taking. In case of appropriations of private property for public use, by the state or some municipal division, compensation is not unfrequently so provided for that the owner must be the actor to obtain it. Then he must take the necessary steps to entitle himself to the money, and to impose the immediate duty to pay it, and until that is done there can be no such default in making the payment as will give him a right to interest.[1] But if the appropriating party takes unauthorized possession before payment, and the value and damages are fixed at the date of such appropriation, a right to interest arises from such actual taking.[2]

[1] People v. Canal Commissioners, 5 Denio, 401; Norris v. Philadelphia, 70 Pa. St. 334; Philadelphia v. Dyer, 41 Pa. St. 469, 470; Second Street Harrisburg, 66 Pa. St. 132.

[2] Delaware, etc. R. R. Co. v. Burson, 61 Pa. St. 369; Fiske v. Chesterfield, 14 N. H. 240.

CHAPTER XVII.

TRESPASS TO PERSONAL PROPERTY.

When damages for, may exceed compensation — What they may include — Measure of damages for taking or destroying property — Special and consequential damages — Expenses to recover or restore property — Mitigation of damages — Where the property is applied under legal process to the owner's benefit — Damages against trespasser from the beginning.

WHEN DAMAGES FOR, MAY EXCEED COMPENSATION.— The damages for this wrong are limited to compensation in the absence of aggravations for which punitory damages are allowable. Whether, by the proof adduced, there are such aggravations shown as will justify the jury in considering a claim for exemplary damages, is for the court to decide. If there is testimony tending to show, and warranting a finding, that the trespass was wanton or malicious, the court will submit the question of the allowance of such damages, and if allowed, the amount of them, to the jury.[1] When the allowance of such damages has been submitted to the jury, the amount which they may think proper to allow will be accepted by the court, unless so exorbitant as to indicate that they have been influenced by passion, prejudice or a perverted judgment.[2]

WHAT THEY MAY INCLUDE.— Trespass is a wrong committed with force, actual or constructive; it is more or less aggressive; therefore, the damages necessary to complete compensation usually include reparation for pecuniary items capable of clear proof and precise computation, and may include reparation for other injuries, equally deserving recompense, and which cannot be proved with certainty, nor estimated by any precise standard, and possibly by no money standard. The former must be

[1] Selden v. Cushman, 20 Cal. 56; Ives v. Humphreys, 1 E. D. Smith, 196; Pacific Ins. Co. v. Conard, Baldw. 138; Moore v. Schattz, 31 Md. 423; Rose v. Story, 1 Pa. St. 190; Wylie v. Smitherman, 8 Ired. 236.

[2] Rogers v. Henry, 32 Wis. 327; Belknap v. Boston, etc. R. R. Co. 49 N. H. 358; McCarthy v. Wiskern, 22 Minn. 90; McConnell v. Hampton, 12 John. 234.

proved in actions for trespass as in any other action, and if, when they are compensated, the plaintiff has adequate redress for the wrong he has suffered, they constitute the basis of his entire recovery, and are the measure of damages; in other words, where from the nature and circumstances of the case a rule can be discovered by which adequate compensation can be accurately measured, such rule should be applied in actions of tort as well as in those upon contract.[1] If such rule exist as to a part of the damages only, it is available and obligatory to that extent. And if the wrong produce other injury also, not capable of such certain proof and pecuniary estimate, it is not necessarily excluded from the consideration of the jury. If the general facts can be proved, they will be submitted to the jury for a finding of compensation according to their best judgment.[2] But they must tend to establish a damage in legal contemplation; that is to say, a recoverable damage according to the elementary requisites which have been considered at large in another place; a damage which is the natural and proximate consequence of the trespass; and of a nature susceptible of appreciation upon practicable proof,— neither remote nor speculative. In this action, as in all others, where no proof laying ground for exemplary damages is given, compensation to the plaintiff for his loss is the general rule of damages.[3]

In this action, the possessor of a chattel may recover in respect of the taking and its circumstances; not only for any actual loss or injury suffered therefrom, but also some damages, not necessarily nominal, even if no real injury ensue from the taking, and the property is not removed, nor the plaintiff's enjoyment materially interfered with. In this respect the action of trespass reaches an element of the wrong which would be waived in trover.[4] Where the taking of property was attended with injurious aggravations, it was held that a plea which alleged an assignment in bankruptcy after the commencement of the suit by which the right to recover for the property taken

[1] Allison v. Chandler, 11 Mich. 542; Warren v. Cole, 15 Mich. 265; Gilbert v. Kennedy, 22 Mich. 117.

[2] Id.; Ogden v. Lucas, 48 Ill. 492; Dennison v. Hyde, 6 Conn. 507.

[3] Hopple v. Higbee, 23 N. J. L. 342.

[4] Hite v. Long, 6 Rand. 457; Bayliss v. Fisher, 7 Bing. 153; Madan Doss v. Gokul Doss, 14 W. R. 59; Chamberlain v. Shaw, 18 Pick. 219.

passed to the assignee, was not an answer to the whole action; that the plaintiff still had a right to recover in respect of the taking.[1]

Where the taking diminishes the value by severing fixtures, their value in place, rather than as chattels severed, may be recovered.[2] Where a plank sidewalk was wrongfully removed, the owner was held entitled to recover not merely the value of the plank, but their value laid in the walk.[3] In trover the plaintiff could recover only the value of fixtures as mere chattels.[4]

In this action the plaintiff is entitled to give evidence, for the purpose of enhancing damages, of the circumstances which accompanied and give character to the wrong, and to show any inconvenience, insult or injury attending it, or resulting therefrom.[5] The defendant, by artifice, obtained entrance into the plaintiff's dwelling house, and thence removed furniture lately sold and delivered, because it had not been paid for; and the court said the pecuniary loss to the plaintiff is not necessarily the rule of damages. The jury are to determine the extent of the injury, and the equivalent damages, in view of all the circumstances of injury, insult, invasion of the privacy and interference with the comfort of the plaintiff and his family.[6] The circumstances attending the trespass are thus allowed to be proved, with a view to compensation for general as well as special damages; and also to show the evil motive, if such there be, with a view to exemplary damages. Where the trespass is committed in a wanton, rude and aggravated manner, indicating malice, or a desire to injure, "a jury," said Baldwin, J., in a charge afterwards approved by the federal court of last resort, "ought to be liberal in compensating the party injured for all he has lost in property, in expenses for the recovery of his rights, in feelings, or in reputation; and even this

[1] Brewer v. Dew, 11 M. & W. 625. See Gregory v. Cotterell, 1 E. & B. 360.

[2] Moore v. Drinkwater, 1 Fost. & Fin. 144; Thompson v. Pettitt, 10 Q. B. 101.

[3] Rogers v. Randall, 29 Mich. 41.

[4] Clarke v. Halford, 2 C. & K. 540.

[5] Bracegirdle v. Orford, 2 M. & S. 77; Sniveley v. Fahnestock, 18 Md. 391.

[6] Ives v. Humphreys, 1 E. D. Smith, 196.

may be extended by setting a public example to prevent a repetition of the act. In such cases there is no certain fixed standard, for the jury may not only take into view what is due to the party complaining, but to the public, inflicting what are called in law speculative, exemplary or vindictive damages."[1] The defendant, in the wrongful act of taking the goods, used language which wounded the owner's feelings; it was allowed to be proved, and considered as one of the circumstances accompanying and giving character to the trespass, for the purpose of increasing the damages for the malice and insult.[2] Exemplary damages are not allowable in an action based on a trespass, which, though unlawful, was not malicious; malice is not implied from the mere unlawfulness of the act.[3]

Where the plaintiff complains of no injury to his person or his feelings; where no malice is shown; where no right is involved beyond a mere question of property; where there is a clear standard for the measure of damages, and no difficulty in applying it, the measure of damages is a question of law, and is necessarily under the control of the court.[4] Such damages are the same in all actions; they do not depend on the form of the action, and are not affected by it.[5] Where the trespass is not accompanied by any circumstances tending to aggravate the wrong, and sufficient to justify exemplary damages, the law applies in all cases the same uniform measure of relief, for property taken or injured.[6]

MEASURE OF DAMAGES FOR TAKING OR DESTROYING PROPERTY.—For the asportation or destruction of his personal property so that the owner is wholly deprived of it, he is entitled to

[1] Pacific Ins. Co. v. Conard, Baldw. 138; affirmed, 6 Pet. 262. Johnson v. Camp, 51 Ill. 219, decides that where a party takes away a crop, raised and harvested by another, stacked upon premises the taker had bought at a foreclosure sale, he is a trespasser, and as he is chargeable with a knowledge in law that he did not acquire the crop by his purchase, he was liable to punitory damages.

[2] Treat v. Barber, 7 Conn. 279; Bracegirdle v. Orford, 2 M. & S. 77; Edwards v. Beach, 3 Day, 44; Nichols v. Bronson, 2 Day, 211; Linsley v. Bushnell, 15 Conn. 225.

[3] Brown v. Allen, 35 Iowa, 306.

[4] Berry v. Vreeland, 21 N. J. L. 187.

[5] McInvoy v. Dyer, 47 Pa. St. 118.

[6] Dorsey v. Manlove, 14 Cal. 553.

recover its value at the time of the trespass, and interest from that time. This is a minimum measure of damages for an entire loss of the property. For any injury to it there is a right to a proportional recovery.[1] Interest is not always mentioned in the cases as part of the rule, and is perhaps not always intended. In England, and to some extent in this country, it is left to the discretion of the jury; and they have been allowed to decide whether the value should be fixed at the date of the taking or conversion, or at some later date before or at the time of the trial.[2]

The value a party is entitled to recover depends on the quantity of the interest he possesses or represents in the property which was the subject of the trespass. The plaintiff must have the actual possession, or a present right of possession when the trespass was committed, in order to maintain this action.[3] The person in whom the general property is vested may maintain an action against a stranger, although he has never had the possession in fact, because the general property draws after it the right of possession.[4] One having the actual pos-

[1] State v. Smith, 31 Mo. 566; Walker v. Borland, 21 Mo. 289; Gray v. Stevens, 28 Vt. 1; Clapp v. Thomas, 7 Allen, 188; Coolidge v. Choate, 11 Met. 79; Garretson v. Brown, 26 N. J. L. 425; Campbell v. Woodworth, 26 Barb. 648; Dorsey v. Manlove, 14 Cal. 553; Gilson v. Wood, 20 Ill. 37; Josey v. Wilmington, etc. R. R. Co. 11 Rich. (S. C. L.) 399; Thomas v. Isett, 1 G. Greene, 470; Scott v. Bryson, 74 Ill. 420; Brannim v. Johnson, 19 Me. 361; Conard v. Pacific Ins. Co. 6 Pet. 262; Pacific Ins. Co. v. Conard, Baldw. 138; Kennedy v. Whitwell, 4 Pick. 466; Lillard v. Whittaker, 3 Bibb, 92; Watts v. Potter, 2 Mason, 77; Dillenback v. Jerome, 7 Cow. 294; Ingram v. Rankin, 47 Wis. 406; Baker v. Drake, 53 N. Y. 211; Briscoe v. McElween, 43 Miss. 556.

[2] Greening v. Wilkinson, 1 C. & P. 625. Toledo, etc. R. R. Co. v. Johnston, 74 Ill. 83, was for killing animals on a railroad. The trial court instructed the jury to add interest to the sum they should find as the value of the property from the date of the killing. This was held error, and the jury having found interest, the judgment was reversed. The court say, in such cases the damages must be compensatory only, unless circumstances of aggravation are shown.

[3] Scott v. Bryson, 74 Ill. 420; Neely v. McCormick, 25 Pa. St. 255; Wilson v. Martin, 40 N. H. 88; Hume v. Tufts, 6 Blackf. 136; Witzel v. Marr, 46 Pa. St. 463; Muggridge v. Evileth, 9 Met. 233; Codman v. Freeman, 3 Cush. 306; Brown v. Thomas, 26 Miss. 335; Howe v. Farrar, 44 Me. 233; Aikin v. Buck, 1 Wend. 466.

[4] Beaty v. Gibbons, 16 East, 116; Bro. Abr. Trespass, pl. 303, 346; 1 Add. on Torts, ¶ 524.

session, as by finding,[1] or for a temporary purpose, as bailee or mortgagee,[2] or has any other special property with possession,[3] may not only bring this action against a stranger who has taken possession without color of right, but may recover the full value of the property. And though the plaintiff's possession be tortious as to the true owner, he may recover against a stranger who divests such possession.[4] Such persons being bound to restore the property to the general owner, or to stand responsible to him for its full value, have the right to recover by that measure from the stranger who has wrongfully deprived them of it.[5]

The general owner of property, in the hands of a bailee at the time of the taking, may also maintain trespass if he has a present right to resume possession by the terms of the bailment, or in consequence of the wrongful act of the bailee or of the defendant.[6] In either case, only one recovery can be had; whether the action is brought by the special or general owner, the recovery of full value by him ousts the other of his right of action; otherwise the trespasser would be liable to make a second satisfaction for the injury.[7] One tenant in common is not under such ulterior responsibility to his co-tenant, as special owners are to the general owner, and therefore his recovery will be limited to his interest.[8]

Where the action is between the general and special owner directly, or between others claiming under or in privity with

[1] Amory v. Delamirie, 1 Str. 504.

[2] Browning v. Skellman, 24 N. J. L. 351; Swire v. Leach, 18 C. B. N. S. 479; Heydon and Smith's Case, 13 Coke, 69; Burton v. Hughes, 9 Moore, 339; Sutton v. Buck, 2 Taunt. 307; Lyle v. Barker, 5 Bin. 457; White v. Webb, 15 Conn. 302; Harker v. Dement, 9 Gill, 7; Faulkner v. Brown, 13 Wend. 63; Outcalt v. Darling, 25 N. J. L. 443; Ullman v. Barnard, 7 Gray, 554; Burke v. Savage, 13 Allen, 408; Adams v. O'Connor, 100 Mass. 515; Jones v. McNeil, 2 Bailey, 466; Alt v. Weidenburg, 6 Bosw. 176.

[3] Luse v. Jones, 39 N. J. L. 707.

[4] Scott v. Bryson, 74 Ill. 420; McClure v. Hill, 36 Ark. 268; Hoyt v. Gilsten, 13 John. 141; Hendricks v. Decker, 35 Barb. 298; Brown v. Ware, 25 Me. 411; Potter v. Washburn, 13 Vt. 558; Carson v. Prater, 6 Cold. 565; Criner v. Pike, 2 Head, 398; Fletcher v. Cole, 26 Vt. 170.

[5] Harker v. Dement, 9 Gill, 7; Story on Bailm. § 280.

[6] 1 Add. on Torts, ¶ 524; Scott v. Newington, 1 M. & Rob. 252.

[7] Luse v. Jones, 39 N. J. L. 707.

[8] Sedgworth v. Overend, 7 T. R. 279; Harker v. Dement, supra.

them; between a plaintiff having a qualified interest and a defendant who owns the residue, or has an interest in or a charge upon it, the damages will be limited by the value of the plaintiff's interest.[1]

If the property of which the owner is deprived is a marketable commodity, its market value is the value he is entitled to recover.[2] And this price will govern though the property would have been worth more to the plaintiff by reason of a particular contract he had entered into.[3] It is held that the retail price is not the measure of value. Where a quantity of merchandise is sued for, the retail price would be unjust; for the merchant, in fixing the retail price, takes into consideration not only the first cost of the goods, but store rent, clerk hire,

[1] Brierly v. Kendall, 17 Q. B. 937; Huntley v. Bacon, 15 Conn. 267; Chamberlain v. Shaw, 18 Pick. 279; Schindel v. Schindel, 12 Md. 108; Goulet v. Asseler, 22 N. Y. 225; Parish v. Wheeler, 22 N. Y. 494; Davidson v. Gunsally, 1 Mich. 388; Treadwell v. Davis, 34 Cal. 601; Spicer v. Waters, 65 Barb. 227; Ward v. Henry, 15 Wis. 239. In Noble v. Kelly, 40 N. Y. 415, a sheriff with three executions in his hands of different dates, against one K, levied on and seized at one time, and by a single act, certain gold coin of the value of $1,000, the property of N. N brought suit against him, in the nature of trespass, naming him as sheriff, and alleging the wrongful seizure to have been by him claiming to act as sheriff, "and under color of several pretended executions." The sheriff justified under the executions against K, setting them forth particularly. Before the trial, N executed to the sheriff a release, under seal, reciting a consideration of ten dollars, releasing him as sheriff from all manner of action and actions, causes of action, suits, sums of money, trespasses, damages, claims and demands, whatsoever, he ever had, then had, or might have, "by reason, on account, or in consequence of any, or all and every, of his acts and proceedings under and by virtue, or in consequence of the issuance and delivery to him of an execution," describing one of the executions in the sheriff's hands at the time of the levy. This release being pleaded by supplemental answer, as a bar to the action, and a release of the whole cause of action, the court held it was neither; but operated only as a release of the damages sustained by the plaintiff to the amount of the execution specified; and that the plaintiff was nevertheless entitled to recover as damages the value of the coin seized, after deducting the amount so covered by the release.

[2] Coolidge v. Choate, 11 Met. 79; Gardner v. Field, 1 Gray, 151; Brown v. Allen, 35 Iowa, 306; Suydam v. Jenkins, 3 Sandf. 620; State v. Smith, 31 Mo. 566.

[3] Brown v. Allen, supra; Gardner v. Field, 1 Gray, 151. But see Gaudet v. France, L. R. 6 Q. B. 199.

insurance, and probable amount of bad debts, and adds to all this a percentage of profit.[1] This must be understood of a considerable quantity, not of a single article. The owner must be entitled to recover at such rate as he would have to pay in the nearest market where a like quantity could be bought, to replace the property taken.[2] The injury done by the taking of the plaintiff's property may be enhanced by depriving him of the opportunity or ability to make profits; an established business may thus be destroyed. If he is able to show gains thus prevented with the requisite certainty, he is entitled to compensation for them.[3]

Where the property is not marketable, its value must be ascertained by such proof as the nature of the case admits of. One criterion of damage may be its actual value to him who owns it; and this is the rule where it is chiefly or exclusively valuable to him. Such articles as family pictures, plate and heirlooms, should be valued with reasonable consideration of, and sympathy with, the feelings of the owner.[4] Where the portrait of the owner's father was lost by the negligence of the carrier, this rule was applied by the court, adding that in its application the jury should take into account its cost, the practicability and expense of replacing it, and such other considerations as in the particular case affect its value to the owner.[5] The testimony of the plaintiff, that he had no other portrait

[1] State v. Smith, 31 Mo. 566; Butler v. Collins, 12 Cal. 457; Nightingale v. Scannell, 18 Cal. 315.

[2] Cassin v. Marshall, 18 Cal. 689; Waters v. Langdon, 16 Vt. 570; Starkey v. Kelley, 50 N. Y. 677.

[3] Thomas v. Isett, 1 G. Greene, 470; Freidenheit v. Edmundson, 36 Mo. 226; Allred v. Bray, 41 Mo. 484; Milburn v. Beach, 14 Mo. 104; Luse v. Jones, 39 N. J. L. 707; Strasberger v. Barber, 38 Md. 103; Davenport v. Ledger, 80 Ill. 574; Oviate v. Pond, 29 Conn. 479. In Wehle v. Butler, 61 N. Y. 245, on an irregular attachment, the party therein named as creditor caused a stock of goods to be seized; they were the stock of a retail merchant of fancy goods, and her business was thus entirely broken up. The attachment was set aside and trespass brought for the goods. It was held that the plaintiff was entitled "to recover as part of her damages the fair retail value of her goods unlawfully taken." Reynolds, C., for the court, remarked: "That was the nature of her business as a merchant, and the goods were, doubtless, purchased with reference to it." See Wehle v. Haviland, 69 N. Y. 448.

[4] Suydam v. Jenkins, 3 Sandf. 620; Spicer v. Waters, 65 Barb. 227.

[5] Green v. Boston, etc. R. R. Co. 128 Mass. 221.

of his father, was held to bear on the question of the actual value to him, and was competent. In an action for conversion of plates for printing labels and advertisements of great value to the owner, but of very trifling value to others, the measure of damages was held to be the value to him; and that in estimating this, the cost of replacing the plates might be considered.[1] Where trespass was brought for destroying a picture on exhibition, and it appeared that it was libelous to the defendant and his sister, under the general issue, the plaintiff was only allowed to recover for the canvas and paint. Lord Ellenborough held that, because it was libelous, it could not be valued as a work of art.[2] The recovery measured by the value and interest is not peculiar to trespass, and requires no further elucidation in this connection.[3]

Special and consequential damages.— The value and interest are not always a compensation for the injury; as, if one take from his neighbor the beasts of the plow in seed time, or the implements of husbandry in harvest, whereby he is prevented from sowing his seed or reaping his corn, it is obvious that the value of the thing taken may be the smallest part of the injury.[4] Where a plaintiff owned a fishery and net on a river; had men employed to assist him in fishing; and while his net was out in the river the defendant ran his vessel through and injured it so as to delay his use of it, it was held that in addition to the damage to the net, the plaintiff was entitled to show these facts, and also the facts concerning the running of shad and the number caught on the preceding day, with a view to compensation for the loss of the benefits of the use. "The whole loss sustained," say the court, "is to be taken into view; and this depends on its use, its profits, the particular season or time, or occasion of the injury done; and the benefits or advantages lost thereby. And if so, all these must necessarily be proved, and submitted to the consideration of the jury."[5] The defendant stopped the plaintiff's team and took out one horse,

[1] Stickney v. Allen, 10 Gray, 352.
[2] Du Bost v. Beresford, 2 Camp. 511.
[3] See Vol. I, pp. 173, 174.
[4] Woolley v. Carter, 7 N. J. L. 85.
[5] Post v. Munn, 4 N. J. L. 61; Sniveley v. Fahnestock, 18 Md. 391.

thereby not only depriving him of the service of that animal, but subjecting him to delay and trouble in respect to the others in the team, and his journey. The court held that in this action he could recover not only for the force and breach of the peace, but for stopping his team in order to take the horse.[1] In estimating the damages for a wrongful seizure of the furniture of a boarding house, it has been held proper to prove that there were guests in the house, and that applicants for board had to be turned away before, with reasonable diligence, the house could be refurnished, with a view to showing annoyance and injury to business to increase damages.[2]

The defendant will be liable for such consequential damages, resulting from his interference with the plaintiff's property, as might reasonably be expected by the defendant in the usual and natural course of things to ensue from his act, whether his interference be to take and carry away, or to injure or destroy it.[3] Where a horse was injured by a collision, the damage was held to include the diminution of his market value, sums paid, and the value of services performed, in a reasonable attempt to cure him; the loss of the use while the horse was under treatment, altogether not exceeding the value of the horse.[4] But the hire of another horse in the meantime cannot be included.[5] No allowance can be made for the expenses of the litigation to procure redress for the injury by trespass beyond taxable costs; they are regarded as full compensation.[6] Such expenses cannot

[1] Shafer v. Smith, 7 Har. & J. 67.

[2] Luse v. Jones, 39 N. J. L. 707; Davenport v. Ledger, 80 Ill. 574.

[3] See Vol. I, p. 71. McAfee v. Crofford, 13 How. U. S. 447; Johnson v. Courts, 3 Har. & McHen. 510; Oleson v. Brown, 41 Wis. 413; Metallic, etc. Co. v. Fitchburg R. R. Co. 109 Mass. 277; Bishop v. Williamson, 11 Me. 495; Atchison v. Steamboat, 14 Mo. 63.

[4] Gillett v. Western R. R. Co. 8 Allen, 560.

[5] Hughes v. Queuten, 8 C. & P. 703; Barrows v. Arnaud, 8 Q. B. 595; Edwards v. Beebe, 48 Barb. 106.

[6] Greenfield Bank v. Leavitt, 17 Pick. 1; Falk v. Waterman, 49 Cal. 224; St. Peter's Church v. Beach, 26 Conn. 355; Fairbanks v. Witter, 18 Wis. 287; Park v. McDaniels, 37 Vt. 594; Barnard v. Poor, 21 Pick. 378; Rutland, etc. R. R. Co. v. Bank of M. 32 Vt. 639; Kelly v. Rogers, 21 Minn. 146; Harris v. Eldred, 42 Vt. 39; Earl v. Tupper, 45 Vt. 275; Good v. Mylin, 8 Pa. St. 51; Howell v. Scoggins, 48 Cal. 355; Stopp v. Smith, 71 Pa. St. 285; Hatch v. Hart, 2 Mich. 289; Warren v. Cole, 15 Mich. 265. In Harris v. Eldred, supra, the owner of property which

be allowed even in cases where exemplary damages may be assessed;[1] but it is otherwise in some of the states.[2]

In an early Connecticut case, trespass was brought for carrying away a spar which the plaintiff had procured to be used as a mast for a vessel he was building. The fact of the taking of the spar having been established, the plaintiff offered to prove, in aggravation of damages, that he was building a cutter, and had procured the spar for her mast; that there was no other spar on Connecticut river suitable for such purpose, and that these facts were known to the defendant; that the taking was malicious, and with intent to obstruct the plaintiff, and he was obstructed and delayed in the building for several months. The evidence was rejected, and this was held error, and Smith, J., remarked, speaking for the court: "In actions founded on tort, the first object of the jury should be to remunerate the injured party for all the real damage he has sustained. In doing this the value of the article taken or destroyed forms

had been wrongfully taken from him, sought, in an action for the tort, to recover, among other damages, the expenses of a legal proceeding in New York, by which he regained possession. They were disallowed; not on the assumption that they were recovered or recoverable in the suit in New York. They were deemed not allowable equally whether the laws of New York provided for costs to the prevailing party in such proceedings or not; because the costs of another action are not allowable. It is difficult to reconcile the reasoning on which this conclusion was reached with the doctrine of Greenfield Bank v. Leavitt, supra. That case recognizes the right of the injured party to employ judicious agencies to recover his property, and to recover the expenses in an action for the wrongful taking. The law is settled in favor of their allowance. Why discriminate against the expenses of a judicious and appropriate proceeding in court to obtain possession, if they are not measurable by taxation and to be collected as costs in that proceeding?

[1] Falk v. Waterman, 49 Cal. 224; Earl v. Tupper, 45 Vt. 275; Howell v. Scoggins, 48 Cal. 355.

[2] Dibble v. Morris, 26 Conn. 416; Seeman v. Feeney, 19 Minn. 79; Titus v. Corkins, 21 Kans. 722; Roberts v. Mason, 10 Ohio St. 277; Marshall v. Bitner, 17 Ala. 832; Bracken v. Neill, 15 Tex. 109; New Orleans, etc. R. R. Co. v. Allbritton, 38 Miss. 242; Thompson v. Powning, 15 Nev. 210. The code of Georgia, § 2942, provides that the expenses of litigation are not generally allowed as part of the damages; but if the defendant has acted in bad faith or has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow them. Guernsey v. Shellman, 59 Ga. 797.

one item; there may be others; and in this case I think there were others. The interruption and delay which occurred in the building of a cutter might be, and probably was, a serious injury; and to show that this interruption and delay was a necessary consequence of the trespass, it was proper to prove that no other mast could be procured on the river; for if it had been an article easily to be obtained, and like many others could be procured at any time in the market, no such interruption or delay could be attributed to the taking of it. . . . I have no doubt that the damages claimed in this case were sufficiently immediate. If a man should with force take the horse of another, while from home on a journey, the interruption of the journey, and the delay occasioned by it, would not be too remote to be assessed by way of damages. I can see no difference between that case and many others of the same sort which might be put, if further illustrations were necessary, and the present. The damage is the natural and necessary consequence of the trespass and cannot be attributed essentially to any other cause." [1]

Expenses to recover or restore the property.— If the owner regains possession, or the property is restored to and accepted by him, it will go in mitigation; then his claim for damages will be for the taking and detention.[2] The owner may reasonably exert himself to recapture his property.[3] He is entitled to compensation for such exertions, and also for moneys expended for the same purpose in a judicious and reasonable manner — in necessary purchases of the property,[4] in satisfying charges thereon,[5] or in offering and paying a reasonable reward for its return.[6]

[1] Churchill v. Watson, 5 Day, 140; McAfee v. Crofford, 13 How. U. S. 447.

[2] Reynolds v. Shaler, 5 Cow. 326; Murray v. Burling, 10 John. 172; Walker v. Fuller, 29 Ark. 448; Jones v. McNeil, 2 Bailey, 466; Barrelett v. Bengard, 71 Ill. 280; Hanmer v. Wilsey, 17 Wend. 91; Coffin v. Field, 7 Cush. 355; Kaley v. Shed, 10 Met. 317; Clapp v. Thomas, 7 Allen, 188.

[3] Bennett v. Lockwood, 20 Wend. 223.

[4] Keene v. Dilke, 4 Exch. 388.

[5] Woodham v. Gelston, 1 John. 134; Beadle v. Whitlock, 64 Barb. 287.

[6] Greenfield Bank v. Leavitt, 17 Pick. 1. In this case it was held that if return of the property is obtained by the offer and payment of a reasonable reward, this amount,

MITIGATION OF DAMAGES.— Any appropriation of the property or its proceeds by the owner, after the tortious taking, is equivalent to a return to the extent that the owner thus gets the benefit of it. Whatever such benefit, it goes in mitigation. If returned at a different place, the loss in value on that account must be compensated.[1] So if in consequence of the defendant's wrong a sale must be made, the net proceeds are deducted by way of mitigation.[2] And if the owner purchase the property at a sale made by the defendant, or from his vendee, at less than its value, the amount paid on such purchase, instead of the value, will be considered in the estimate of damages,[3] and the application of the amount paid by him on a judgment against him will make no difference with the measure of damages, for the seizure and sale being wrongful, his purchase is not a consent to such application.[4] One whose property was wrongfully taken from him replevied it; but being nonsuited in the replevin suit, the statutory judgment which the defendant in that action was entitled to claim was rendered against him for the value of the property. He thereupon sued in trespass for the taking of the property; and it was held that he was entitled to recover in this suit not only for the detention of the property while the defendant had it, but also its value as assessed in favor of the defendant in the replevin suit.[5]

with interest from the time of payment, is to be deducted from the mitigating value of the property restored. And the court say: "It is well settled, that if property for which an action is brought should be returned to, and received by, the plaintiff, it shall go in mitigation of damages. But if it become subjected to a charge after the conversion, and before it was returned; if, for example, the conversion were of a watch, which the defendant threw into a well, and the plaintiff hired a man to descend into the well and get it, the expense of reclaiming it should be deducted from the value when returned. It is the charge which regulates the damage. Murray v. Burling, 10 John. 176. As where one takes another's horse and leaves him at an inn, and the owner reclaims him, subject to the charge for his keeping. The damages are for the injury suffered, notwithstanding the owner has regained his property."

[1] Bates v. Clark, 95 U. S. 204; Dennison v. Hyde, 6 Conn. 507.

[2] Pacific Ins. Co. v. Conard, Bald. 137; affirmed, 6 Pet. 262.

[3] Sprague v. Brown, 40 Wis. 612; Parham v. McMurray, 32 Ark. 261; Baker v. Freeman, 9 Wend. 236; Hurlburt v. Green, 41 Vt. 490.

[4] Parham v. McMurray, supra.

[5] Haviland v. Parker, 11 Mich. 103.

Where the property is valuable for use while in the defendant's possession, interest is not necessarily the compensation for the detention; the owner may recover what the use was worth. The owner is entitled to compensation for the value of such use.[1] If the defendant has made a profitable use of it, he should not have any benefit from his own wrong, but that profit should inure to the owner.[2] The return of the property, in whatever way it occurs, only goes in mitigation. This goes no further than such return operates to place the injured party in as good condition as before the trespass was committed. If the property has been injured in the taking, or while in the defendant's possession, or its market value has declined, the loss falls on the trespasser.[3]

WHERE THE PROPERTY TAKEN IS APPLIED UNDER LEGAL PROCESS TO OWNER'S BENEFIT.— The wrongdoer is entitled to no deduction from the damages for applying the property or its proceeds to the owner's benefit without his consent, unless by execution of valid legal process or authority. In that case it is said his consent is implied. It would probably be quite as correct to say that in that instance his consent is unnecessary. The law has intervened and disposed of the property; and having rightfully appropriated it to pay a debt of the owner, he has recovered satisfaction for its value, and ought not again to recover the same value.[4] If after the wrongful taking the property be seized to pay the owner's tax or debt, and is so applied, that application of it will inure to the benefit of the tortious taker in mitigation of damages.[5] This is the general doctrine, and

[1] Ewing v. Blount, 20 Ala. 694; Post v. Munn, 4 N. J. L. 61; Farrell v. Colwell, 30 N. J. L. 123.

[2] Suydam v. Jenkins, 3 Sandf. 620; Beadle v. Whitlock, 64 Barb. 287.

[3] Lucas v. Trumbull, 15 Gray, 306; Ewing v. Blount, 20 Ala. 694; Perham v. Coney, 117 Mass. 102; Barrelett v. Bengard, 71 Ill. 280; McInvoy v. Dye, 47 Pa. St. 118.

[4] Bates v. Courtwright, 36 Ill. 518.

[5] Dailey v. Crowley, 5 Lans. 301; Pierce v. Benjamin, 14 Pick. 356; Lucas v. Trumbull, 15 Gray, 306; Delano v. Curtis, 7 Allen, 470; Perham v. Coney, 117 Mass. 102; Perkins v. Freeman, 26 Ill. 477; Hallett v. Novion, 14 John. 273; Cook v. Hartle, 8 C. & P. 568; Curtis v. Ward, 20 Conn. 204; Burn v. Morris, 2 Cr. & M. 579; Hepburn v. Sewell, 5 Har. & J. 211; Doolittle v. McCullough, 7 Ohio St. 299; Cook v. Loomis, 26 Conn. 483; Sprague v. Brown, 40 Wis. 612; Johannesson v. Borschsenius, 35 Wis. 131; Cooper v. New-

applies whether the process on which the property is disposed of is for the satisfaction of a debt due the wrongdoer himself or a third person. But an important exception is made in New York, Michigan, and perhaps Maryland. The wrongdoer cannot there, as the law is also in England, avail himself, by way of mitigation of damages, of any appropriation to the owner's benefit, by seizure under legal process or otherwise, without his consent, where the process or appropriation is procured for the wrongdoer's benefit or for his debt, or by his agency or procurement for the debt of any other person.[1]

DAMAGES AGAINST TRESPASSER FROM THE BEGINNING.— Void process, or any legal authority abused in the taking or subsequent treatment of the property, will not only afford no justification to the party acting under it, but he will be precluded by his wrongful action from setting up any application of the property or money, so obtained, to the owner's benefit, without his consent, by way of mitigation of damages. Thus, in trespass for taking goods under process upon a regular judgment, but in a place to which the process did not run, the owner was permitted to recover the whole value, and not merely the damage sustained by the taking in a wrong place.[2] In another case, the defendant, who was landlord to the plaintiff, had, in order to make a distress, forcibly and illegally entered the demised premises, and there seized the latter's goods. It was held that the plaintiff was entitled to recover the full value, and not that value minus the rent.[3] Cockburn, C. J., said: "It must be taken that if a man under color of legal authority, as in the case of distress for rent, does that which makes him a trespasser *ab initio*, he is in the same position as a stranger, who, without

man, 45 N. H. 339; Stewart v. Martin, 16 Vt. 397; Montgomery v. Wilson, 48 Vt. 616. See ante, p. 581.

[1] Wehle v. Butler, 61 N. Y. 245; Ball v. Liney, 48 N. Y. 6; Otis v. Jones, 21 Wend. 394; Lyon v. Yates, 52 Barb. 237; Perk v. Lemon, 1 Lans. 295; Sherry v. Schuyler, 2 Hill, 204; Higgins v. Whitney, 24 Wend. 379; Ward v. Benson, 31 How. Pr. 411; Wehle v. Haviland, 42 How. Pr. 399; Wanamaker v. Bower, 36 Md. 42. See Edmundson v. Nuttall, 7 C. B. N. S. 280; Swire v. Leach, 18 C. B. N. S. 479. See post, pp. 531–537.

[2] Sewell v. Champion, 6 A. & El. 407.

[3] Attack v. Bramwell, 3 B. & S. 520.

any legal authority whatever, breaks into a house and seizes the goods of another. . . . The defendant has taken the plaintiff's goods, it may be under color of legal authority, but in point of law he has taken them, not under a distress, but under a trespass, and it does not lie in his mouth to say that, by taking them, and appropriating a part of them in satisfaction of his rent, he has *pro tanto* done good to the plaintiff. The man whose premises are broken into, and whose goods have been seized, has a right to say, 'Let me be put into the position in which I stood before your illegal act. I will not accept at your hands the benefit you say you have done me by it.'" Crompton, J., was of the same opinion, and thus declared his view of the law: "A landlord has by law the special privilege of paying himself his rent by seizing his tenant's goods; and where he takes that proceeding in a way not authorized, he becomes a trespasser from the beginning; all the acts he does are trespasses; he is a trespasser, not only in entering, but in seizing and disposing of the goods taken, and the ordinary rule is, that the injured party shall recover the full value. . . . This case is a bare tort, under color of which the defendant has helped himself to the plaintiff's goods, and he has no more right to put against their value the rent due to him, than he would to put any other debt. The interest of the tenant was the real value of the goods; the plaintiff had no real charge or lien upon them; and, therefore, that value was the measure of damages."[1]

If a defendant is a trespasser from the beginning, his defense wholly fails, and he is liable to pay the same sum in damages which he would be compelled to pay if he had gone on without any precept or pretense of authority, and done all the acts proved upon him.[2] But an abuse of process only subjects to a loss of the protection of that particular process, and of the rights depending on it. If property is lawfully attached, no

[1] White v. Binstead, 76 E. C. L. 303; Gillard v. Brittan, 8 M. & W. 575. Compare Chinnery v. Viall, 5 H. & N. 288; Mickles v. Miles, 1 Grant (Pa.), 320. As to what is such an abuse of process as will make one a trespasser from the beginning, see note to Barrett v. White, 11 Am. Dec. 365.

[2] Per Green, J., Barrett v. White, 3 N. H. 210.

abuse of execution will make the officer chargeable as a trespasser in making the attachment; and hence the damages would be assessed on the basis of the attached property being subject to the lien.[1] So when a landlord, who had a right to distrain growing crops, made such a distraint, but subsequently illegally sold them, and they were harvested and taken away by the purchaser, his illegal act of sale did not affect his lien, and as no actual damage resulted from the sale and harvesting, he was only entitled to nominal damages.[2] If the abuse of authority or process is only an excess as to a separable part of his action under it, he will be a trespasser from the beginning only as to that part. Where the defendant drew beer out of one of several barrels that he had taken, he was a trespasser only as to that barrel.[3] And where six looms were inventoried with other property in a distress for rent, and the defendant had no authority to take the looms, it was held that taking them did not affect his authority in respect to the other property.[4]

The trespasser may also show in mitigation of damages that the plaintiff was not the owner of the property taken, and that after the taking it was reclaimed by the true owner or has been taken on legal process against him;[5] also that since the defendant's taking the right of the plaintiff in the property has ceased.[6]

The facts and circumstances attending the trespass, as has already been stated, may always be proved, that the jury may understand its intrinsic character; to enable the plaintiff to show aggravations, and bad motive; and to enable the defendant to controvert these; but the defendant, if guilty of the trespass, is bound to make reparation for the actual injury. Absence of bad motive and absence of all aggravations cannot relieve him from making full compensation for property taken, destroyed or injured.[7]

[1] Heald v. Sargeant, 15 Vt. 506. See Van Brunt v. Schenck, 11 John. 377; Osgood v. Carver, 43 Conn. 24.

[2] Proudlove v. Twemlow, 1 Cr. & M. 326.

[3] Dod v. Monger, 6 Mod. 215.

[4] Harvey v. Pocock, 11 M. & W. 740; Keen v. Priest, 4 H. & N. 236; Rowley v. Rice, 11 Met. 337.

[5] Squire v. Hollenbeck, 9 Pick. 551; Hanson v. Herrick, 100 Mass. 323.

[6] Id.; Perry v. Chandler, 2 Cush. 237; Borlander v. Geatry, 36 Cal. 110; Wannamaker v. Bower, 36 Md. 42; Bower v. Dew, 11 M. & W. 625; Criner v. Pike, 2 Head, 398.

[7] Harker v. Dement, 9 Gill, 7

An admission of counsel on the trial of an action of trespass, that the defendant acted without malice, will preclude the plaintiff from claiming vindictive damages; and, therefore, evidence on the part of the defendant in the nature of justification of his tortious act is inadmissible by way of mitigation.[1] Evidence in respect to the motive by which the defendant was influenced is only material on the part of the defendant when it is introduced to repel an attempt by the plaintiff to recover exemplary damages.[2]

[1] Hoyt v. Gelston, 13 John. 141, 561.

[2] McCanbie v. Davies, 6 East, 538.

CHAPTER XVIII.

CONVERSION.

The action of trover — The general rule of damages — Proof of value — Interest — When the property converted had to be sold — Where the property has no market value — Property of fluctuating value — Where the value of the converted property has been increased by the defendant — Special and consequential damages — Exemplary damages may be recovered — For conversion of money securities, stocks, deeds and other documents — How damages affected by the nature of the plaintiff's interest — Mitigation of damages.

The action of trover.— The common law action of trover may be brought against any person who has had in his possession, by any means whatever, the personal property of another, and sold or used the same without the consent of the owner; or refused to deliver the same when demanded. The injury is done by the conversion and deprivation of the plaintiff's property, and is the gist of the action; and the statement of the finding or trover is now immaterial, and not traversable; and the fact of conversion does not necessarily import an acquisition of property by the defendant.[1] Lord Mansfield thus defines the action: "in *form* it (i. e. the trover) is a fiction; in *substance* it is a remedy to recover the value of personal chattels wrongfully converted by another to his own use; the form supposes that the defendant might have come lawfully by it; and if he did not, yet by bringing this action the plaintiff waives the trespass; no damages are recoverable for the act of taking; all must be for the act of converting. This is the tort or *malificium*, and to entitle the plaintiff to recover two things are necessary; first, property in the plaintiff; secondly, a wrongful conversion by the defendant." [2] It lies only for property of a personal nature; not tangible property only, but all property of a personal nature which may be converted; it lies for paper representatives of value, choses in action and corporate stock.[3]

[1] 1 Chitty Pl. 146.

[2] Id.; Cooper v. Chitty, 1 Burr. 31.

[3] Ayres v. French, 41 Conn. 151; Payne v. Elliot, 54 Cal. 341; McAllister v. Kuhn, 96 U. S. 87. But see Sewall v. Lancaster Bank, 17 S. & R. 285; Neiler v. Kelley, 69 Pa. St. 403.

The action is based upon title; the plaintiff must be the general owner, or have some special property in the subject of the action; he must have also the actual possession or a right to the present possession at the time of the conversion.[1] By recovery of the value, and satisfaction of the judgment, the title is transferred to the defendant; it is then vested in him as of the date of the conversion.[2]

THE GENERAL RULE OF DAMAGES.— The general rule of damages in England and in this country is the value at the time and place of conversion; and, in this country, at least, interest is added as matter of law.[3] This rule is based on the assumption that the value of the property is beneficially equal to the property itself; and that interest compensates for the delay in

[1] Smith v. Plomer, 15 East, 607; Fairbank v. Phelps, 22 Pick. 535; Burton v. Tannehill, 6 Blackf. 470; Caldwell v. Cowan, 9 Yerg. 262; Lewis v. Mobley, 4 Dev. & Batt. 323; Grant v. King, 14 Vt. 367; Ames v. Palmer, 42 Me. 197; Curd v. Wunder, 5 Ohio St. 92; Thayer v. Hutchinson, 13 Vt. 507; 2 Greenlf. Ev. § 640.

[2] Morris v. Robinson, 3 B. & C. 196; Hepburn v. Sewell, 5 Har. & J. 211; Arnold v. Kelly, 4 W. Va. 642; Osterhout v. Roberts, 8 Cow. 43; Stirling v. Garritee, 18 Md. 468; Wright v. Walker, Mart. & Hayw. 167; Brinsmead v. Harrison, L. R. 6 C. P. 584. Settling a trespass, however, consisting of cutting down trees, does not have this effect of transferring the title to the trees cut. Betts v. Church, 5 John. 348.

[3] Robinson v. Hartridge, 13 Fla. 501; Spencer v. Vance, 57 Mo. 427; Cole v. Ross, 9 B. Mon. 393; Spicer v. Waters, 65 Barb. 227; Briscoe v. McElween, 43 Miss. 556; Dixon v. Caldwell, 15 Ohio St. 412; New York Guaranty, etc. Co. v. Flynn, 65 Barb. 365; Fowler v. Merrill, 11 How. U. S. 375; Watt v. Potter, 2 Mason, 77; Polk v. Allen, 19 Mo. 467; Bourne v. Ashley, 1 Low. 27; Jones v. Allen, 1 Head, 626; Allen v. Dykers, 3 Hill, 593; Lee v. Mathews, 10 Ala. 682; Moore v. Aldrich, 25 Tex. Sup. 276; Ripley v. Davis, 15 Mich. 75; Final v. Backus, 18 id. 218; Barry v. Bennett, 7 Met. 354; Johnson v. Sumner, 1 Met. 172; Falk v. Fletcher, 18 C. B. N. S. 403; Taylor v. Ketchum, 5 Robt. 507; Selkirk v. Cobb, 13 Gray, 313; Agnew v. Johnson, 22 Pa. St. 471; Phillips v. Speyers, 49 N. Y. 653; Tyng v. Commercial Warehouse Co. 58 id. 308; Andrews v. Durant, 18 id. 496; Ormsby v. Vermont C. M. Co. 56 id. 623; Douglass v. Kraft, 9 Cal. 562; Yater v. Mullen, 24 Ind. 277; Dillenback v. Jerome, 7 Cow. 298; Rensselaer Glass Factory Co. v. Reid, 5 Cow. 587; Dennis v. Barber, 6 S. & R. 420; Jacoby v. Laussatt, id. 300; Hurd v. Hubbell, 26 Conn. 389; Cook v. Loomis, id. 483; Lyon v. Gormly, 53 Pa. St. 261; Stirling v. Garritee, 18 Md. 468; O'Meara v. North Am. M. Co. 2 Nev. 112; Carlyon v. Lannan, 4 Nev. 156; Boylan v. Huguet, 8 Nev. 345; Homer v. Hathaway, 33 Cal. 117; Page v. Fowler, 39 id. 412; Riley v. Martin,

payment of that value.[1] This assumption is more particularly true where the property converted is marketable goods and commodities which can be bought and sold at pleasure, at prices that are easily ascertained, and subject to but slight fluctuations.[2] If there were no fluctuations it would be immaterial to the equivalence of compensation when the value is taken except as to interest. But there is a logical as well as a legal relation between the conversion and the assessment of value to require them to be coincident; a natural connection between the wrong done and the retributive or compensatory assessment of damages; therefore the value should be ascertained at the time of the conversion.

The conversion may occur, first, by a wrongful taking; second, by a wrongful use or appropriation after obtaining a lawful possession; and, thirdly, by a wrongful detention. To be a certain legal measure of damages, it should be applied inflexibly to the first act of conversion; especially if there be no subsequent pursuit of the property or assertion of right to it in specie. No change of the property by the wrongdoer should suffice to give the owner a new cause of action, or a new date for the valuation of the property.[3] After a conversion, a sale by the

35 Ga. 136; Grant v. King, 14 Vt. 367; Crumb v. Oaks, 38 id. 566; Kennedy v. Strong, 14 John. 128; Ryburn v. Pryor, 14 Ark. 505; Hatcher v. Pilham, 31 Tex. 201; Jenkins v. McConico, 26 Ala. 213; Robinson v. Barrows, 48 Me. 186; Sanders v. Vance, 7 T. B. Mon. 209; Clark v. Whitaker, 19 Conn. 319; Linville v. Black, 5 Dana, 177; Commercial Bank v. Jones, 18 Tex. 811; Davis v. Fairclough, 63 Mo. 61; Daniel v. Holland, 4 J. J. Marsh. 26; King v. Ham, 6 Allen, 298; Lillard v. Whittaker, 3 Bibb, 92; Scull v. Briddle, 2 Wash. C. C. 150; Williams v. Crum, 27 Ala. 468; Kennedy v. Whitwell, 4 Pick. 466.

[1] Ewing v. Blount, 20 Ala. 694.

[2] Bank of Montgomery v. Reese, 26 Pa. St. 143.

[3] See Baltimore Marine Ins. Co. v. Dalrymple, 25 Md. 269; Dows v. National Bank, 91 U. S. 618; Tome v. Dubois, 6 Wall. 548; Newman v. Kane, 9 Nev. 234; Foote v. Merrill, 54 N. H. 490; O'Meara v. North Am. M. Co. 2 Nev. 112. Robinson v. Barrows, 48 Me. 186. A departure from this rule has been coincident with or the occasion of the conflict of decision relative to the measure of damages. See Ellis v. Wire, 33 Ind. 127; Final v. Backus, 18 Mich. 218. In this latter case, trover was brought for saw logs cut from timber on the plaintiff's land, and transported to another county where they were sawed into lumber. Cooley, C. J., said: "The actual change in the character of the property appears to have taken place when they were manufactured into lumber there; and although the

defendant at a price greater than the value at the time of the conversion should not change the rule; and it has been held that it does not.[1] And it is equally the rule to take the price at the time of the conversion when there is a subsequent decline in the value.[2]

Proof of value.— The value is to be proved as in other cases where it is in question.[3] The finder of a jewel took it to a goldsmith to learn what it was; the goldsmith returned the socket, but retained and refused to deliver the jewel. In trover by the finder, after evidence of the value of the finest jewel which would fit the socket, the court directed the jury, that unless the defendant, the goldsmith, produced the jewel, and showed that it was not of the finest water, they should presume the strongest against him, and make the value of the best jewel that would fit the socket the measure of damages.[4] This was by application of the maxim, *omnia præsumuntur contra spoliatorem*.[5] Where foreign goods which have passed through the custom house are in question, it has been held in New York that the custom house valuation may be introduced as evidence of value.[6] If there is only a distant market, to which

owner of the land from which they were taken might have treated their removal from the land as a conversion, he was not compellable to do so; but might have followed the logs and reclaimed them at Saginaw. This being so, the plaintiff had a right to treat the time of the manufacture of the logs into lumber as the period of conversion, and to recover their value accordingly." This reasoning favors the recovery of an intermediate value, and without restriction of time, if the wrongdoer changes the property, or from time to time exercises some new dominion over the property which alone would suffice to constitute a conversion.

[1] Kennedy v. Whitwell, 4 Pick. 466; Baker v. Wheeler, 8 Wend. 508; Whitehouse v. Atkinson, 3 C. & P. 344.

[2] Devlin v. Pike, 5 Daly, 85.

[3] Vol. I, p. 798.

[4] Armory v. Delamirie, 1 Str. 505.

[5] Hargreaves v. Hutchinson, 2 A. & E. 12; Curry v. Wilson, 48 Ala. 638.

[6] Caffe v. Bertrand, How. App. Cas. 224. If a creditor having an absolute deed of land from his debtor as security, convey the land to a bona fide purchaser, he is liable to the debtor for the proceeds of the sale, or the value of the land, at the latter's election, less the amount of the debt. Meehan v. Forrester, 52 N. Y. 277. Land sold under a judgment in fraud of the bankrupt law, the assignee may recover for at its value, and he is not limited in his recovery to what it sold for. Clarion Bank v. Jones, 21 Wall. 325. See Norman v. Cunningham, 5 Gratt. 63.

the goods are destined, the value there may be taken with proper deductions of expenses which must be incurred and are usually incident to make that market available. Thus in a proceeding in the nature of trover for the conversion of a whale in Okholsk sea, the value was determined by the market at New Bedford, which was the home port of both vessels involved, by deducting the expense of cutting in, boiling, freight and insurance.[1] So in trover for the capture on the high seas of a cargo bound for New York, the value at the time and place of the capture was arrived at by adopting New York prices, with deduction of a reasonable premium of insurance, and also adding damages equal to interest.[2] An intermediate consignee who converts the property consigned, is liable to the value at the place of destination.[3]

The market value will govern rather than any special value to the owner, arising from his having contracted it or otherwise, the defendant not being apprised of such special value.[4] If there is a market value at the place of conversion, it will be adopted, though the property is intended to be shipped for sale to another place.[5] The master of a ship which became disabled on the voyage made an unauthorized sale of his cargo at an intermediate port, and it sold low; in trover the jury were directed to give as damages the invoice price and the amount paid for freight.[6] The market price for like property, bought and sold in like quantity, should be given. Stocks of goods cannot be recovered for at retail prices.[7] In trover for a quantity of tallow, in Vermont, there being evidence that it was merchantable, it was held admissible to show the retail price of such tallow at the time and place of the conversion.[8]

[1] Bourne v. Ashley, 1 Low. 27; Saunders v. Clark, 106 Mass. 331. See Cockburn v. Ashland Lumber Co. 54 Wis. 619.

[2] Hallett v. Novion, 14 John. 273.

[3] Farwell v. Price, 30 Mo. 587.

[4] Brown v. Allen, 35 Iowa, 306; Gardner v. Field, 1 Gray, 151; Watt v. Potter, 2 Mason, 177. But see France v. Gaudet, L. R. 6 Q. B. 199.

[5] Spicer v. Waters, 65 Barb. 227.

[6] Ewbank v. Nutting, 7 C. B. 797.

[7] Wehle v. Haviland, 69 N. Y. 448, overruling on this point Wehle v. Butler, 61 N. Y. 245; State v. Smith, 31 Mo. 566; Butler v. Collins, 12 Cal. 457; Nightingale v. Scannell, 18 Cal. 315. See Haskell v. Hunter, 23 Mich. 305.

[8] Waters v. Langdon, 16 Vt. 570.

If fixtures are severed from the freehold, and trover is brought for them, their value as chattels only, and not as fixtures, can be recovered.[1] In the comprehensive code action, the technical impediments sometimes encountered in the prosecution of common law actions, in the way of embracing in one suit all the injurious elements of a wrong, do not exist.[2] Accordingly, facts connected with a wrongful taking which would be admissible and relevant in an action of trespass, and tend to increase damages, may be alleged and proved in an action for the taking and conversion of property. Thus in an action for the unlawful taking and conversion of a quantity of household goods, including carpets, upon the question of damages as to the carpets, the charge to the jury was approved which directed them to inquire what would be the value to a party who wanted to get the same articles again; that it was proper to include not only their worth in the market, but also the value of the labor in cutting, making and putting them down.[3] But when the property so in place can no longer be there used by the owner, and he is subject to summary removal, its value will be estimated, in case of conversion, with reference to these facts; they will be estimated in the condition in which they will be when removed, or as subject to the obligation or necessity of removal.[4]

Interest.— In England the allowance of interest, under the operation of the statute of 3 and 4 Wm. IV,[5] is a matter of discretion with the jury. With us it is generally held to be matter of right from the time of the valuation; it is considered a constituent part of the indemnity which a party entitled to recover the value may claim; and that it is the duty of the court to direct the jury to allow it from the date of conversion.[6]

[1] Clark v. Halford, 2 C. & K. 540. See Ayer v. Bartlett, 9 Pick. 156.

[2] Clark v. Bates, 1 Dak. 42; Rhoda v. Alameda Co. 58 Cal. 357.

[3] Starkey v. Kelly, 50 N. Y. 677.

[4] Moore v. Wood, 12 Abb. 393.

[5] Ch. 42, § 29.

[6] Suydam v. Jenkins, 3 Sandf. 620 et seq.; Wilson v. Conine, 2 John. 280; Bissell v. Hopkins, 4 Cow. 53; Hyde v. Stone, 7 Wend. 354; Baker v. Wheeler, 8 Wend. 505; Dillenback v. Jerome, 7 Cow. 294; Stevens v. Low, 2 Hill, 132; Chauncey v. Yeaton, 1 N. H. 151; McCormick v. Penn. C. R. R. Co. 49 N. Y. 303; Hamer v. Hathaway, 33 Cal. 117; Northern Transp. Co. v. Sellick, 52 Ill. 249; Tarpley v. Wilson, 33 Miss. 467.

The plaintiff should not be permitted to recover, besides the value of animals or slaves and interest, their hire, or the value of their services or use, nor in lieu of interest.[1] In some cases this has been allowed.[2]

WHEN THE PROPERTY CONVERTED HAD TO BE SOLD.— Where the plaintiff held the property as sheriff or assignee, and would have been obliged to sell at auction if the defendant had not taken it, and the conversion has been followed by a sale, there does not appear to be any reason or precedent for adopting any different measure of damages or proof of value on that account, if the plaintiff is not restricted to some special value or mode of proof. It was remarked in one such case,[3] that it often happens that a jury considers the sum at which the goods were actually sold at auction as a fair measure of damages. The owner was entitled to remove buildings standing upon ground condemned for a street; he neglected to remove them, and the public authorities, desiring to use the ground, disposed of the buildings by a public sale. It was held that the plaintiff, by his neglect to remove the buildings, consented to the mode adopted to dispose of them; therefore, in an action for the conversion, his recovery was limited to the net proceeds of that sale.[4] In an English *nisi prius* case a distinction appears to have been recognized in case of property which had to be sold. Goods were sold, after bankruptcy, by a sheriff, but in good faith. The assignees were held to be entitled only to an amount equal to the proceeds, less the expenses of selling. As the assignees would be bound to sell, the jury were allowed a discretion to deduct the expenses.[5] But in a later case, the court considered that if the trustee in bankruptcy elected to treat the sale as a tort, he was entitled to the full value of the goods, and any damages resulting to the estate from the sale; that he was not confined to the proceeds, except upon a ratification of the sale.[6]

[1] Polk v. Allen, 19 Mo. 467; Fail v. Presley, 50 Ala. 342; Frey v. Drahos, 7 Neb. 194.

[2] Dealy v. Lance, 2 Spears, 487; Schley v. Lyon, 6 Ga. 530; Banks v. Hatton, 1 Nott & McC. 221. See Hair v. Little, 28 Ala. 236.

[3] Whitehouse v. Atkinson, 3 C. & P. 344.

[4] Peters v. Mayor, etc. 8 Hun, 405.

[5] Clark v. Nicholson, 6 C. & P. 712.

[6] Smith v. Baker, L. R. 8 C. P. 350; Clarion Bank v. Jones, 21 Wall. 328.

WHERE THE PROPERTY HAS NO MARKET VALUE.— This subject has been considered in other parts of this work, and it is not necessary now to enter upon it at large.[1] If the property has no market value at the time and place of conversion, either because of its limited production, or because it is of such a nature that there can be no general demand for it, and it is more particularly valuable to the owner than any other, it may be estimated with reference to its value to the owner.[2] A wine merchant having obtained from a wine broker samples of wine then lying at a wharf, and which the broker had agreed to sell at 14*s.* per dozen, sold it to the captain of a ship about to sail, at 24*s.* per dozen, to be delivered on board the next day. The merchant obtained the delivery warrants from the broker and claimed the wine from the wharfinger, but he refused to deliver it. No other wine of the same brand and quality was to be had in the market, and the merchant was held entitled to recover in trover the actual value of the wine to him, which at the time of the conversion was 24*s.* per dozen, he having made a *bona fide* sale of it at that price.[3] Mellor, J., said: "'Under ordinary circumstances, the direction to the jury would simply be to ascertain the value of the goods at the time of the conversion; and in case the plaintiff could by going into the market have purchased other goods of like quality and description, the price at which that could have been done would be the measure of damages. It was, however, admitted on the trial, in the present case, that course could not have been pursued, inasmuch as champagne of the like quality and description could not have been purchased in the market so as to enable the plaintiff to fulfil his contract with Captain H. We are of opinion that the true rule is to ascertain the actual value of the goods at the time of the conversion; and that a *bona fide* sale having been made to a solvent customer at 24*s.* per dozen, which would have been realized had the plaintiff been able to obtain delivery from the defendants, the champagne had, owing to these circumstances, acquired the actual value of 24*s.* per dozen;

[1] Ante, p. 476; Vol. II, pp. 368, 378.

[2] Suydam v. Jenkins, 3 Sandf. 620; Spicer v. Waters, 65 Barb. 227; Green v. Boston, etc. R. R. Co. 128 Mass. 221; Stickney v. Allen, 10 Gray, 352; Sturges v. Keith, 57 Ill. 463.

[3] France v. Gaudet, L. R. 6 Q. B. 199.

and we think that, in the present case, that ought to be the measure applied; and that a jury would not only have been justified in ascertaining that to be the value, but ought, where the transaction was *bona fide*, to have taken that as a measure of damages, and . . . we think we ought to say that such is the proper measure of damages. . . .

"We are not prepared to say that there is any analogy between the case of contract . . in which two parties making a contract for the sale and delivery of a specific chattel, the vendee gives notice to the vendor of the precise object of the purchase, and a case like the present. In the case of contract, special damages, reasonably resulting from the breach of it, may be considered within the contemplation of the parties. In case of trover, it is not in general special damages which can be recovered, but a special value attached by special circumstances to the article converted; the conversion consists in withholding from another property to the possession of which he is *immediately* entitled, and the circumstances which affix the value are then determined; no notice to the wrongdoer could then *affect the value*, although it might affect his conduct; but upon what principle is notice necessary to a man who *ex hypothesei* is a wrongdoer? In such a case as the present, the actual value is fixed by circumstances at the time of the demand, and no notice of the special circumstances could then affect the actual value of the goods withheld from the rightful owner, who thereby sustains 'an actual present loss,' which appears to us to be a convertible term with actual value."[1]

[1] The learned judge further distinguished the value from special damage by observing: "It is not necessary to determine whether notice is or is not necessary in trover, in order to enable the plaintiff to recover special damage, which cannot form part of the actual present value of the thing converted, as in the case of withholding the tools of a man's trade, in which the damage arising from the deprivation of his property is not, and apparently cannot be fixed at the time of the conversion of the tools. In that case, however, we are inclined to think that either express notice must be given, or arise out of the circumstances of the case. This point was not determined in Bodley v. Reynolds, 8 Q. B. 779, approved in Wood v. Bell, 5 E. & B. 772, but we think there must have been evidence of knowledge on the part of the defendant, that, in the nature of things, inconvenience beyond the loss of the tools must have been occasioned to the plaintiff." See Seymour v. Ives, 46 Conn. 109.

PROPERTY OF FLUCTUATING VALUE.— As to the measure of damages for the conversion of such property there has been much conflict of opinion. The cases are numerous, and a review of them in detail would be prolix and unprofitable. The principal difference is that the courts in some of the states adhere to the general rule of damages where such property is in question, allowing the value at the time of the conversion and interest, and whether property is converted or stocks.[1] And in others, the courts allow the highest market value between the time of the conversion and the commencement of suit or the trial; but some of the latter annex the limitation that the suit be commenced within a reasonable time and be prosecuted to trial with proper diligence.[2]

[1] Sturges v. Keith, 57 Ill. 451; McKenney v. Haines, 63 Me. 74; Fisher v. Brown, 104 Mass. 259; Pinkerton v. Railroad Co. 42 N. H. 463; Third Nat. Bank v. Boyd, 44 Md. 47; Boylan v. Huguet, 8 Nev. 345; Bates v. Stansell, 19 Mich. 91.

[2] Clark v. Pinney, 7 Cow. 681; Stapleton v. King, 40 Iowa, 278; Tatum v. Manning, 9 Ala. 144; Guerry v. Kerton, 2 Rich. 507; Ewing v. Blount, 20 Ala. 694; Jenkins v. McConico, 26 id. 213; Kid v. Mitchell, 1 Nott & McC. 334; Kent v. Ginter, 23 Ind. 1; Stephenson v. Price, 30 Tex. 715; Hatcher v. Pelham, 31 id. 201; Johnson v. Marshall, 34 Ala. 521; Freer v. Cowles, 44 id. 314. In Boylan v. Huguet, supra, Whitman, C. J., said: "That this is the rule in New York, subject to some meaningless exceptions, such as bringing suit within reasonable time, etc., there is no doubt. That some other states, notably Iowa, Pennsylvania and California, have substantially adopted this rule, is true. Connecticut is sometimes ranked in the same line, but that is a mistake. St. Peter's Church v. Beach, 26 Conn. 355. California has endeavored to modify in some degree (Page v. Fowler, 39 Cal. 412), and New York shows its determination to recede, upon occasion made, in the following language of the entire court of appeals, by Church, C. J., pronouncing a recent opinion: 'An unqualified rule, giving a plaintiff in all cases of conversion the benefit of the highest price to the time of trial, I am persuaded cannot be upheld by any sound principle of reason or justice. Nor does the qualification suggested in some of the opinions, that the action must be commenced within a reasonable time, and prosecuted with reasonable diligence, relieve it of its objectionable character. Without intending to discuss this question at this time, we deem it proper to say that while the decisions and opinions of our predecessors will receive the utmost respect and consideration, we do not regard the rule referred to so firmly settled by authority as to be beyond the reach of review, whenever an occasion shall render it necessary.' Matthews v. Coe, 49 N. Y. 57. This is only dictum; but such dictum is very ominous of the fate of the New York rule.

"It is not surprising that there is a desire to escape effects which are

The cases which originated and have maintained this exception to the general rule, have proceeded upon the plausible principle that the owner who has been tortiously deprived of his property should have the benefit of any subsequent increase in value, and not the wrongdoer; that where the advance is owing to general causes, it would be unjust to allow the latter to determine the date of fixing the value that he should pay by a tort, as he might select a time of great depression to convert the

sometimes so absurd. As in this case, the first suit and recovery were for some $8,000; had that judgment stood, as it probably would have done but for the motion of appellants, the law would have declared that respondent was fully compensated for his loss consequent upon the wrong-doing of appellants; but that judgment having been set aside, it took over three times that amount to afford compensation only a few months after. In other words, damages were given which were purely speculative, which were not only not proven, but which were against all probable presumption, as human experience teaches that the man who sells his stock at the highest price is the rare exception to the generality of dealers. Yet the measure was correct if the rule be so; the suit had been brought seasonably, and prosecuted with diligence.

"Looking at the assumed basis of this rule, it is impossible to add anything to the exhaustive *resumé* of the decisions said to constitute its foundation, as given in Suydam v. Jenkins, 3 Sandf. 614; but it is curious, and perhaps not uninstructive, to re-glance at them for a moment. And first, the stock cases, so-called, which were writs of inquiry to assess damages on bonds given to replace stock; and they hold that if the stock has risen in value since the day when it should have been delivered, the price at the time of trial is to be the measure of damages. Shepherd v. Johnson, 2 East, 211; McArthur v. Seaforth, 2 Taunt. 257; Donnes v. Back, 1 Stark. 318; Harrison v. Harrison, 1 C. & P. 413; Owen v. Routh, 14 C. B. 327. This upon the theory that the plaintiff wanted to keep his stock, and therefore could only be indemnified by a verdict for money sufficient to replace it, as the defendant was bound to do. None of these cases hold, and McArthur v. Seaforth expressly negatives the idea that the highest price at any intermediate day can be allowed.

"This rule was followed in this state in an equity case to compel the transfer of certain shares of stock (O'Meara v. North America Mining Co. 2 Nev. 112), and is undoubtedly correct under similar circumstances either at law or in equity; but how it can justify the measure of damages allowed in this case is inexplicable; for here and in like cases courts never would allow the converted property to be restored in specie, except where it might have been of such nature that its value could not have been changed; and the real question to be determined almost invariably is its worth, not that the party delinquent may replace it, as he would have been allowed to do in the cases cited, but that the injured party may be in-

property, and by having the benefit of a future appreciation derive great gains by his own wrong. To prevent this seeming injustice, the owner at the time of the trial has been allowed a retrospection of the intermediate market, and to recover the highest price reached during that period. This would not be unfair to the defendant nor more than a just indemnity to the owner, if it were shown by the evidence that that was his real loss; that had the defendant done nothing to prevent his retain-

demnified for its loss. When? Why, when he lost it, not before nor after, but at the time when the loss occurred.

"There are a few other decisions which seem to have been rendered rather upon the desire to do justice in the particular case than upon general principles, and which are hardly precedents for anything. In Greening v. Wilkinson, 1 C. & P. 625, trover for East India Company's warrants for cotton, the highest price either at time of conversion or subsequently, at jury's option, was given. Of this case Judge Duer says in Suydam v. Jenkins, supra: 'It is, however, only a *nisi prius* decision, and the report is not only brief, but we apprehend imperfect; material facts seem to be omitted, nor is it stated what was the verdict finally rendered.' That this is not the accepted rule appears from the uncontradicted remarks of counsel in Elliot v. Hughes, cited post. In Archer v. Williams, 2 C. & K. 26, action for the wrongful detention of scrip, Creswell, J., directed the jury to find the highest price between conversion and trial; this direction they disobeyed; and finally, in making up the bill of exceptions, the instruction was considered to have been that more than nominal damages were to be allowed; so that case is not authority in point. In Shaw v. Holland, 15 M. & W. 145, an action for non-delivery of railway shares, the same rule was applied as in Gainsford v. Carroll, 2 B. & C. 624, for non-delivery of goods; *i. e.*, the difference between the contract price and the market price on the day when the contract was broken; making the distinction, however, which is often found, but which upon reflection will be seen to be none, that the money not having been paid, it was in the power of the vendee to go into the market and buy, and thus save himself, as if he was called upon to do so, and might not rely upon his contract. In Mercer v. Jones, 3 Camp. 477, Lord Ellenborough lays down the rule in trover, 'that the plaintiff is entitled to damages equal to the value of the article converted at the time of the conversion,' and applying it to the case in hand (trover for bills of exchange), disallowed interest after demand and refusal to deliver. Of this case, Abbott, C. J., is reported to have said in Greening v. Wilkinson, that it was hardly law. Thus the wisest disagree.

"In a recent case at *nisi prius*, the highest price of goods between the agreed date of delivery and the time of trial was given; and the case is worthy to be quoted somewhat lengthily, as presenting a comical instance of reasoning in a circle to make a rule. Remembering that

ing the property, he would have sold it and realized that price; or that the defendant has in fact realized it. But the owner is more than compensated when he is allowed to recover on review of the market more than he would have sold for during the same period. By allowing him uniformly the highest intermediate market price, he is saved from all hazard of mistake in this regard, and the wrongdoer is made to bear it without any possibility of gain for his sagacity, if he has sold at the right

the New York rule is fathered on English decisions, hear counsel. The action was for non-delivery of hops contracted at five pounds ten shillings the hundred weight; they had risen from the time of delivery to seven pounds ten shillings, at which price they continued till the day of the trial. To the offer by plaintiff of evidence to that effect, Joseph Brown (with whom was Shee, Sergt.) objected that such evidence was not admissible, as a series of cases had decided that the measure of damages for the non-delivery of goods purchased was the market price at the time of the breach of the contract.

"McMahon (with whom was Digby Seymour) submitted that the rule applied only where the goods were not paid for at the time of the purchase, in which case it was said that the buyer, not having parted with his money, could go with it into the market and buy at the current price; but that a different rule prevailed where, as in the present case, the price was paid at the time of purchase. There was no case in which this precise point had been decided in the courts of this country, though there were several decisions upon it in the American courts. The nearest analogous cases in our courts were those relating to the loan of stock, in which it was decided that on the failure to return it, the lender was entitled to recover the highest price up to the day of trial. . . . His lordship (Byles, J.) said . . . he would rule that the plaintiff was entitled to recover the value of the hops at the price of the present day, but would give the defendant leave to move to reduce the damages if the court should think he was wrong. Elliot v. Hughes, 3 F. & F. 387. No motion was made to reduce; so the case stands decided upon American authority, there being confessedly none English; while, on the other hand, the American cases claim English parentage.

"The fact is, there is no such well established rule. There have been exceptional instances of granting this measure of damages, probably with the laudable desire of doing exact justice at the moment in an individual case. There has also been an attempt to make these exceptions the rule; but that has not prevailed, nor should it; for the purpose of the law is to make the nearest practicable approach to justice in all cases; and that can only be attained by the preservation of fundamental principles. What are they in cases like the one at bar? To that question there can be but one answer: All the authorities concur. Complete indemnity to the party injured, but no punishment to the wrongdoer.

time; and without premium or compensation to mitigate his loss in being obliged to indemnify the owner, if he makes the common mistake of selling too soon or too late. These obvious considerations have prevented the adoption, as a uniform and invariable measure of damages, of the highest intermediate value, where it has been fluctuating. In some states where the courts were once committed to this exceptional rule, cases have since arisen in which its application would be so manifestly unjust, that it has been reconsidered and substantially abandoned. This has notably occurred in New York and California. In Baker v. Drake,[1] the court review the previous decisions in that state on this general question, and subject them to the test of the fundamental principle on which damages are assessed, namely: that in civil actions the rule of damages does not depend on the form of the action; that whether it be contract or tort, the proper measure of damages, except where punitory damages are allowed, is a just indemnity to the party injured for the loss which is the natural, reasonable and proximate result of the wrongful act complained of, and which a proper degree of prudence on the part of the person complaining would not have averted. And the court reached the conclusion that a fixed, unqualified rule giving the plaintiff in all cases of conversion the highest market price from the time of the conversion to the time of the trial, cannot be applied upon any sound principle of reason or justice. The case was against a broker who had purchased stock for a customer, the plaintiff, not as an investment but upon speculation, the latter furnishing a small amount as a margin, and the former supplying the residue of the capital embarked in the speculation. The broker made an unauthorized sale of the stock; and it was held that if, upon being advised of the sale, the customer desired further to prosecute the adventure, he had a right to disaffirm the sale and to

"To accomplish this end, all damages must be given which necessarily flow from the wrongful act. Those are the value of the property at the time of conversion, for that is what one has found and the other lost, together with damages for the detention of that value, which is legal interest from conversion to judgment, and in addition any special damage which may legitimately arise out of any matters in existence at the date of the tort."

[1] 53 N. Y. 211; S. C. 66 id. 518.

require the broker to replace the stock; and upon his failure or refusal to do this, that the remedy of the principal was to replace it himself; and that the advance in the market price from the time of the sale up to a reasonable time to replace it after notice of the sale, would afford a complete indemnity, and was the proper measure of damages. The case of Markham v. Jaudon,[1] so far as it relates to the rule of damages, was overruled. Later decisions have approved and followed Baker v. Drake.[2]

In California the rule of the highest intermediate value was twice held, and in the last instance it was treated as the doctrine of the state.[3] But a later case subjected that rule to an ordeal that exploded it. This case was Page v. Fowler.[4] The property in question was hay; it had been wrongfully taken by the defendant in 1863, when it was worth from three to five dollars per ton; but at an expense of something over five dollars per ton in transporting it, it might have been sold for twelve dollars and fifty cents per ton. In the following year there was great scarcity of hay and the price rose to about forty dollars per ton. The case was tried in November, 1869; and the jury were instructed that the plaintiff was entitled to the highest market value between the taking and the trial, and interest. On appeal, the supreme court, by Temple, J., said: "When we consider that the object to be attained by this rule is indemnity for loss actually sustained, the result in this case is sufficiently startling. But the rule is claimed to be of universal application, and as to a large class of personal property, to wit, perishable articles, its operation is still more manifestly unjust. If a quantity of fruit — strawberries, for instance — in the season of their greatest abundance, were taken under circumstances which would entitle the owner to indemnity only, and a suit to recover their value were immediately commenced, the trial would not be likely to occur for many months. In the meantime, the season of plenty has passed, and the fruit bears an extra-

[1] 41 N. Y. 235.

[2] Ormsby v. Vt. Copper M. Co. 56 N. Y. 623; Tyng v. Commercial Warehouse Co. 58 id. 308; Mechanics', etc. Bank v. Farmers', etc. Bank, 60 id. 40; Thayer v. Manley, 73 id. 307; Harris v. Tumbridge, 83 id. 99, 100; Gruman v. Smith, 81 N. Y. 27.

[3] Douglass v. Kraft, 9 Cal. 562; Hamer v. Hathaway, 33 id. 117.

[4] 39 Cal. 412.

ordinary price. Nevertheless, by this rule, he is permitted to recover the enhanced value which he could never have realized, and this under pretense that it is necessary to indemnify him for his actual loss. This is, of course, an extreme case, and may be said to prove only that there should be exceptions to the rule; but I think that the rule is necessarily liable to work injustice in every case. In the cases where it has been enforced, it is said to apply only to articles which fluctuate in value. If there is anything which can be said to have a market value which does not fluctuate, of course it can make no difference when the value is ascertained. This distinction, therefore, might as well be omitted, and the rule applied indiscriminately to all descriptions of personal property. If goods belonging to a merchant, and designed for immediate sale, were taken, the trial of a suit brought to recover their value might, for reasons well understood by every member of the bar, and in the usual course of things, be postponed for years. The highest price might be ten years after the sale, and yet it would be morally certain that, had the goods not been taken, the owner would have disposed of them within the next few months. It is obvious that the damages in such a case (and the supposed case is the general rule) might be grossly unjust, and have very little reference to the loss actually sustained.

"Without the possibility of loss, the owner is allowed the range of the market for many years in which to choose his price, and perhaps realizes enormous profits in the face of proof to a moral certainty that, had he kept the goods, he would not, and perhaps could not, have received them. The best possible speculation would be to have one's property taken by a responsible person, and this under a rule which only indemnifies for actual loss, and does not permit speculative or hypothetical damages, and in which nothing is exacted as a punishment to the wrongdoer.

"The English rule, so far as I can discover, has always been to leave to the jury, as a matter of discretion, the question as to the time the property should be valued, except in the case of stocks, when the value at the time of trial was the measure of damages. In the United States, on the other hand, it has always been considered a rule of law, and the jury are allowed

no discretion in the matter. The doctrine is, therefore, as I think, of American origin, and it may be remarked that all the cases concur in admitting that the general rule is that the damages are to be measured by the value of the property at the time it was taken, the doctrine in question being an exception to the rule; and though the exception has, perhaps, become the rule, it may be well to bear in mind that it originated in an exception made on the ground that, in certain cases (where the market value is fluctuating), the prevailing rule did not do full justice. The exception ought not, therefore, to be carried beyond the purpose for which it was made. That being accomplished, the ordinary rule should prevail. The reason for it must have been that, in the usual course of trade or business, it was that the owner would have realized the enhanced value if he had not been deprived of his property. All the cases are upon the ground that otherwise he would not be completely indemnified. It could not have been intended to give him profits it is certain he would not have realized. . . .

"In many of the cases it is said that the plaintiff will be allowed the highest price intermediate the taking and the trial, if the suit has been commenced within a reasonable time, and prosecuted without unreasonable delay, and no intimation is made as to what the rule would be if the suit were not commenced within a reasonable time; but it is evident that the question of damages ought not to be the same in either case. The time of the commencement of the action or trial would not seem to have any natural or logical connection or relation to the question of damages; and the question as to whether a suit was or was not commenced within a reasonable time would rarely, if ever, depend upon any fact which would affect the indemnity to which the plaintiff is entitled. The reasonable time mentioned in the cases cannot mean a reasonable time within which to commence the action, independently of the question of damages. It must mean a time within which it would be reasonable to allow the plaintiff to take the highest market price as the measure of his damage. In other words, the rule deducible from the authorities is, that in cases affecting property of a fluctuating value, where exemplary damages are not allowed, the correct measure of damages is the highest

market value within a reasonable time after the property was taken, with interest computed from the time such value was estimated.[1] The rule thus stated may be somewhat indefinite, but it is certainly not more so than the rule in the New York cases, which have reference to the commencement of the action, or its diligent prosecution; and the rule thus stated has this advantage, that what is a reasonable time would always be determined with reference to the question of indemnity; and if the old standard of value at the time of the taking be departed from, I can think of no rule more definite which would not be arbitrary and liable to work injustice."[2]

In New York there were many decisions, prior to Baker v. Drake, which adopted or affirmed the rule of the highest intermediate value.[3] But while this course of decision was in progress, other cases were decided in that state somewhat out of harmony with it, and in accord with the later adjudications. In one case there had been a wrongful sale of stock by a pledgee.[4] Part of the stock was demanded afterwards, and the damages for the conversion of that part was held to be its value at the date of the demand, with interest. Another part was not demanded, and for its conversion its value within a reasonable time after the wrongful sale was allowed, the pledgee being allowed to deduct its cost, which he had paid for the plaintiff. In another case,[5] a factor at Buffalo had wheat on consignment from his principal, who directed him to sell it at a

[1] See Scott v. Rogers, 31 N. Y. 676.

[2] By the California code of 1872, § 3336. it is declared that the measure of detriment for conversion of personal property is presumed to be, 1, the value of the property at the time of the conversion, with interest from that time; or, where the action has been prosecuted with reasonable diligence, the highest market value between the conversion and the verdict, without interest, at the option of the injured party; and 2, a fair compensation for the time and money properly expended in pursuit of the property. See Barrante v. Garratt, 50 Cal. 112; Fairbanks v. Williams, 58 id. 241.

A similar rule has been adopted by statute in Georgia. Code 1873, § 3077.

[3] West v. Wentworth, 3 Cow. 82; Clark v. Pinney, 7 Cow. 681; Blot v. Boiceau, 3 N. Y. 85; Romaine v. Van Allen, 26 id. 309; Wilson v. Mathews, 24 Barb. 295; Burt v. Dutcher, 34 N. Y. 493; Willard v. Bridge, 4 Barb. 361; Markham v. Jaudon, 41 N. Y. 235; Lobdell v. Stowell, 51 N. Y. 70; Lawrence v. Maxwell, 6 Lans. 469.

[4] Brass v. Worth, 40 Barb. 648.

[5] Scott v. Rogers, 31 N. Y. 676.

specified price on a given day, or, if not sold at that day, to ship it to New York. The factor sold it the day after that specified. If the directions of the principal had been followed, the wheat would have reached New York between the 27th and the 31st of July, at an expense for transportation of fifteen cents per bushel. The New York market fluctuated, between July 25th and November 29th, from $1.25 to $1.65 per bushel. The unauthorized sale was treated as a conversion, and the measure of damages was held to be the difference between the price for which the wheat was sold, the proceeds of the unauthorized sale having been paid over, and what it was worth during a reasonable time afterwards, which was held to embrace the residue of the season to November 29th, when navigation of the river and canal closed. Had it appeared at what time the plaintiff intended to sell, after the arrival of the wheat in New York, the damages would have been computed with reference to the value at that time. In another case,[1] where a pledgee converted the pledge, which consisted of warehouse receipts for corn, the court, by Church, C. J., referring to the rule of the highest intermediate value, said: "Whatever may be said of the propriety of such a rule in any case not special and exceptional in its circumstances, it should not be applied in a case like this. The price was fixed a year and a half after the original action was commenced. There is not the slightest evidence that the plaintiff or his assignor contemplated or desired to keep the corn. On the contrary, it affirmatively appears that the intention was to sell it when it reached $1 a bushel, and such was the agreement, while the price allowed was $1.45. Besides, the evidence shows that it would have been difficult, if not impossible, to have preserved it until the time when the price was fixed. . . . An unqualified rule giving a plaintiff in all cases of conversion the highest price to the time of trial, I am persuaded cannot be upheld upon any sound principle of reason or justice. Nor does the qualification suggested in some of the opinions, that the action must be commenced within a reasonable time and prosecuted with reasonable diligence, relieve it of its objectionable character."

[1] Matthews v. Coe, 49 N. Y. 57.

In a case still earlier than these,[1] Mr. Justice Duer delivered a masterly opinion which contains a thorough discussion of the law of compensation for the loss of personal property by tort and breach of contract, upon principle and authority in opposition to the rule of the intermediate highest value, except upon proof of such facts as makes it manifest that it is a just indemnity for the owner's actual loss, or gives him a value which the wrongdoer actually obtained or might have realized. He says: "It seems to us exceedingly clear that the highest price for which the property could have been sold, at any time after the right of action accrued, and before the entry of judgment, cannot, except in special cases, be justly considered as the measure of damages. Whenever the evidence justifies the conclusion that a higher price would have been obtained by the owner had he kept the possession, or has been obtained by the wrongdoer, we have admitted and shown that it ought to be included in the estimate of damages; in the first case, as a portion of the indemnity to which the owner is entitled; and, in the second, as a profit which the wrongdoer cannot be permitted to retain; but we cannot admit that the same rule is to be followed where nothing more is shown than a bare possibility that the highest price would have been realized, and still less where it is proved that it would not have been obtained by the owner, and has not been obtained by the wrongdoer. Its allowance in these cases would in truth impose a penalty upon the wrongdoer, and render the damages vindictive instead of remunerative; and it must be remembered that we are treating exclusively of the cases in which vindictive damages are not claimed, or, if claimed, ought not to be given."

In Pennsylvania, the point under discussion has had pretty nearly the same history, beginning with Bank of Montgomery v. Reese.[2] In that case, the court held that where bank stock has been wrongfully withheld from a party entitled to it, the measure of damages, where the consideration for the stock has been paid, is the highest market value between the breach and the trial, together with the bonus and dividends which have

[1] Suydam v. Jenkins, 3 Sandf. 614.

[2] 26 Pa. St. 143. See Musgrave v. Beckendorff, 53 Pa. St. 310.

been received in the meantime; but where the consideration has not been paid, the plaintiff should be allowed the difference between it and the value of the stock, together with the difference between the interest on the consideration and the dividends on the stock. Strong reasons are given why the general rule should not apply where the articles could not be procured elsewhere, and from the restrictions on its production, or other causes, its price is subject to very considerable fluctuations. But the conclusion that the loss is the highest intermediate value is not so satisfactorily sustained where it rests on inference alone that the owner would have realized it. It is true, as said in Harrison v. Harrison,[1] that "justice is not done if you do not place the plaintiff in the same situation in which he would have been if the stock had been replaced at the stipulated time;" but it does not maintain this measure of redress except in a retributive rather than a compensatory sense, to say we cannot act upon the possibility of his not keeping it, or that, if it was stock bought on speculation to be sold at the best opportunity, it will be assumed that but for the defendant's wrong the plaintiff would so have disposed of it. The English decisions referred to may have proceeded, and there is reason to suppose they did, on the reasonable presumption, from prevalent habit, that the stock was intended as a permanent investment, and therefore would be kept until the trial. That presumption is quite unlike one that if stock is bought to be sold again for profit, the holder will sell when the market is the most favorable. This Pennsylvania case is subsequently referred to as laying down a principle exclusively applicable to a party who is bound by a contract or trust duty to deliver stock.[2] And finally that the rule here laid down has no application to trover, and does not apply to ordinary stock contracts. That it applies between trustee and beneficiary, or to cases where justice cannot be reached by the ordinary measure of damages.[3]

The general rule may safely and justly be departed from or supplemented, when that rule would fail to furnish adequate

[1] 1 C. & P. 412.

[2] Neiler v. Kelley, 69 Pa. St. 403; Work v. Bennett, 70 id. 484.

[3] Huntingdon, etc. Coal Co. v. English, 86 Pa. St. 247; North v. Phillips, 89 id. 250; Wagner v. Peterson, 83 id. 238.

compensation for the entire injury; as if there be a subsequent increase in price, which the plaintiff would have obtained, or which the defendant has obtained.[1] And if he still has the property in his possession at the time of the trial, there is no injustice in compelling him to pay what it is worth at that time. The subject of special and consequential damages will be considered farther on.

The measure of damages in trespass, trover or replevin for the loss of property is generally the same as that which a vendee, who has paid for the property, is entitled to recover against a vendor for its non-delivery. The rule applied in one such action is cited freely in the others. The English cases make a difference between vendor and purchaser when the vendee has paid the price in advance. Therefore the rule there is the same for a conversion of the plaintiff's stock, and where he sues for a breach of a contract to replace stock or for non-delivery of stock contracted and paid for — its value at the time of the trial,[2] if the price has advanced; otherwise, the plaintiff will be entitled to the value at the time of the conversion.[3] It has there been held that where a bond is given by the borrower of a sum of stock, to secure the replacement of the stock, and payment in the meantime of a sum equal to the interest and dividends, and a bonus is afterwards declared upon the stock, the lender has an equity to be placed in the same situation as if the stock had remained in his hands, and is consequently entitled to the replacement of the original stock increased by the amount of the bonus, and to the dividends in the meantime as well upon the bonus as upon the original stock.[4] This is a reasonable measure of damages on the footing of the English ventures in stock as an investment; but affords no support to the rule of the highest intermediate value not maintained to the time of the trial.

[1] Symes v. Oliver, 13 Mich. 9; Ewart v. Kerr, 2 McMull. 141; De Clerq v. Mungin, 46 Ill. 112.

[2] Shepherd v. Johnson, 2 East, 211; McArthur v. Seaforth, 2 Taunt. 257; Harrison v. Harrison, 1 C. & P. 412; Shaw v. Holland, 15 M. & W. 145; Owen v. Routh, 14 C. B. 327.

[3] Forrest v. Elwes, 4 Ves. Jr. 492; Sanders v. Kentish, 8 T. R. 162; Matter of Baha, etc. R. R. Co. L. R. 3 Q. B. 584.

[4] Vaughan v. Wood, 1 Mylne & K. 403.

The rule in North Carolina is peculiar. The value at the trial is the measure of damage, and though the property may have suffered injury or deterioration, the defendant has the option to surrender it, and damages may be assessed for the detention, including compensation for the diminution of value.[1]

WHERE THE VALUE OF THE CONVERTED PROPERTY HAS BEEN INCREASED BY THE DEFENDANT.— If the wrongdoer take the property in one condition, and by bestowing labor upon it puts it in another and better condition, and thus makes it more valuable, is he chargeable in an action for the conversion with the improved value? The general rule in trover — the value at the time and place of conversion, with interest — would exclude any such question by the very logic of the remedy. But under the more flexible rule of reaching the real equity of the particular case, or under the rule of giving the highest intermediate value, it has often been a grave practical question. The improved value is recoverable in some states upon general principles, and in others to some extent by statute. Thus where timber has been taken and converted into wood; wood into coal; logs into lumber; corn into whisky, or the like, the value in the latest and most improved and valuable form has been recovered.[2]

[1] Boylston's Ins. Co. v. Davis, 70 N. C. 485.

[2] Betts v. Lee, 5 John. 348; Curtis v. Groat, 6 John. 168; Brown v. Sax, 7 Cow. 95; Riddle v. Driver, 12 Ala. 590; Rice v. Hollenbeck, 19 Barb. 664; Walther v. Wetmore, 1 E. D. Smith, 7; Silsbury v. McCoon, 3 N. Y. 379; S. C. 6 Hun, 425; 4 Denio, 332; Babcock v. Gill, 10 John. 287; Nesbitt v. St. Paul Lumber Co. 21 Minn. 491; Ellis v. Wire, 33 Ind. 127; Symes v. Oliver, 13 Mich. 9; Final v. Backus, 18 id. 218; Snyder v. Vaux, 2 Rawle, 423; Millar v. Humphries, 2 A. K. Marsh. 446; Smith v. Gonder, 22 Ga. 353; Baker v. Wheeler, 8 Wend. 505; Davis v. Easley, 13 Ill. 192; Eastman v. Harris, 4 La. Ann. 103. In Bly v. United States, 4 Dill. 466, this rule was maintained in an action against wilful and negligent trespassers on the government land. The court say: "Where timber has been cut into logs upon the public lands, by a person who knows that the lands belong to the government, or who has no reasonable ground to believe that it belongs to him, or to some one under whom he claims, and such logs are hauled to the watercourse, and rafted and taken to a distant boom, by means of which labor of the wrongdoer their value is much enhanced beyond their value when first severed from the freehold, the government may replevy such logs in the boom, or may maintain an action in the nature of trover for their value; and in

In Indiana, a crop of wheat was wrongfully taken, harvested and threshed; and the wrongdoer was held liable for it at the

either case, may recover without deduction for the enhanced value which may have been given to the logs after their severance from the freehold by the labor of the wrongdoer. In such a case the government is not confined to what is called the 'stumpage' value, but may recover the value of the logs in the boom, as in such case the title of the government to the logs thus cut continues as against the wrongdoer and all persons (Tome v. Dubois, 6 Wall. 548), until at least there has been some greater transformation of the original property than exists while it remains in the shape of logs; if the wrongdoer sells the logs to a person who has no actual notice that they were cut on the public lands, still the government may maintain replevin against such vendee for the logs, if they are in existence, or if he has sawed them into lumber (which is a conversion of the logs), the government may recover from him the value of such logs when so manufactured into lumber, and is not confined to the 'stumpage' value." The authorities being conflicting, the court followed the decision of the supreme court of the state of Minnesota, where the case arose (Nesbitt v. St. Paul Lumber Co. 21 Minn. 491). They justified the rule as a proper one for the protection of timber on the public lands from wilful or negligent trespassers; and against their innocent vendee as "a logical and necessary result of the property in the logs still remaining in the government." They refer to several of the cases above cited. See U. S. v. Mills, 9 Fed. Rep. 684; Schulenberg v. Harriman, 2 Dill. 398; S. C. 21 Wall. 44. Referring to the English and American cases which confine the damages to the value of the original property taken, it was remarked that they "have generally arisen between adjoining owners, and the mitigated rule of damages which they lay down may have been adopted in consequence of the difficulty of ascertaining boundaries in subterranean mines, and it does not apply where the trespass is fraudulent or wilful or negligent. At all events the doctrine of those cases should not be extended to cases of wilful or negligent trespasses upon the public timber lands of the government."

In Walther v. Wetmore, 1 E. D. Smith, 7, it is held that because the owner does not lose title to the property by the wrongdoer improving it, and may retake or replevy it, he is entitled to recover the improved value in trover. Grant v. Smith, 26 Mich. 201, is to the same effect.

The following are sections of the Minnesota Statutes: R. S. 250, sec. 39. In all cases of wrongful or unlawful taking, detention and conversion of logs or timber, and intermingling the same with other logs and timber so that they cannot be identified and separated therefrom by the owner, the rule of the common law applicable to the case of a wrongful and fraudulent confusion of goods shall govern in determining the right of property in respect to said logs and timber.

Sec. 40. In cases where logs or timber bearing the same mark, but belonging to different owners in severalty, have, without fault of any of them, become so intermin-

highest market price between the taking and the sale made by the wrongdoer, without any abatement or allowance for har-

gled that the particular or identical logs or timber belonging to each cannot be designated, each of such owners may, upon the failure of any one of them having the possession, to make a just division thereof after demand, bring and maintain against such one in possession an action to recover his proportionate share of said logs or timber, and in such action he may claim and have the immediate delivery of such quantity of said mark of logs or timber as shall equal his said share, in like manner and with like force and effect as though such quantity embraced his identical logs and timber and no more.

Wisconsin statute — Rev. St. sec. 4269: "In all actions to recover the possession or value of logs, timber or lumber, wrongfully cut upon the land of the plaintiff, or to recover damages for such trespass, the highest market value of such logs, timber or lumber, in whatever place, shape or condition, manufactured or unmanufactured, the same shall have been, at any time before the trial, while in possession of the trespasser, or any purchaser from him, with notice, shall be found or awarded to the plaintiff, if he succeed, except as in this section provided. The defendant in any such action may, within ten days after the service of the complaint, serve on the plaintiff his affidavit that such cutting was done by mistake, and therewith an offer, in writing, to allow judgment to be taken against him for the sum therein specified, with costs. If the plaintiff accept the offer and give notice thereof, in writing, within ten days, he may file the summons, complaint and offer, with an affidavit of the service of the notice of acceptance, and the clerk must thereupon enter judgment accordingly, which shall be in full satisfaction of the matters alleged in the complaint. If notice of acceptance be not so given, the affidavit of the defendant shall be deemed traversed. Upon the trial the jury shall find specially upon such issue, and also the true value of such logs, timber or lumber when so cut, as well as their highest market value, aforesaid. If the jury find such cutting was by mistake, and the sum, exclusive of cost, for which judgment was so offered, was not less than the value of such logs, timber or lumber when cut, with interest from that time to the time of such offer, and ten per centum as damages upon the combined sum, principal and interest, the plaintiff shall have judgment for the amount of such offer only, less the costs and disbursements of the action since the date of such offer, to be taxed and deducted in favor of the defendant. If the jury find such cutting was by mistake, but the sum, exclusive of costs, for which judgment so offered, was less than such value, and interest and ten per centum damages combined, judgment shall be awarded the plaintiff on the verdict for the value found at time of cutting, with interest from the time of such cutting, and ten per centum thereon aforesaid, besides the cost of the action. If there be several defendants not alike liable, either, or any, may serve such affidavit and offer, and have a separate trial as to him or them." See Tuttle v. Wilson, 52 Wis. 643. This statute does not apply to an innocent purchaser. Wright v. Bolles W. W. Co. 50 Wis. 167.

vesting and threshing.[1] Similar rulings have been made in other states.[2] In such cases, the plaintiff, by such recovery, is placed in a better situation than he would be in if the wrong had not been committed. He is not entitled to recover this increase of value as a necessary part of a perfect compensation for the loss and injury which he suffered. It is said that a wrongdoer cannot acquire title to another's property by improving it. As a general proposition this is true; but the principle does not apply when the owner sues for a conversion, and asks damages therefor. The injury then to be compensated is not affected at all by the use which the defendant has subsequently made of the property. When found guilty of the conversion, and the defendant pays the damages assessed therefor, the law vests him with the title as of that date. By bringing such an action the owner tacitly assents to this result.[3] Instead of the value added by the defendant, the value at the time and place of the conversion, with interest, is the rule founded in sound principle and now supported by a decided preponderance of authority. Maule, J., said upon this point:[4] "It may be that the wrongdoer who acquires no property in the chattel he converts, acquires no lien for what he expends on it, and the owner may bring detinue or trover. But it does not follow that if the owner brings trover, he is to recover the full value of the thing in its improved state. The proper measure of damages, as it seems to me, is the amount of the pecuniary loss the plaintiffs have sustained by the conversion."

Where the chattel has become such by a tortious severance from the realty, as where coal or minerals are taken from a mine, or timber or fixtures are severed from the freehold, the general rule is to allow the value immediately after the severance and when the property first becomes a chattel.[5] In the two California cases just cited below, the action was for mesne

[1] Ellis v. Wire, 33 Ind. 127.

[2] Stuart v. Phelps, 39 Iowa, 14; Benjamin v. Benjamin, 15 Conn. 347.

[3] Ante, p. 488.

[4] Reid v. Fairbanks, 13 C. B. 692.

[5] Moody v. Whitney, 38 Me. 174; Martin v. Porter, 5 M. & W. 351; Morgan v. Powell, 3 Q. B. 278; Maye v. Tappan, 23 Cal. 306; Goller v. Fett, 30 id. 481; Single v. Schneider, 24 Wis. 301; 30 id. 570; Foote v. Merrill, 54 N. H. 490; Adams v. Blodgett, 47 N. H. 219; Tilden v. Johnson, 52 Vt. 628; Stockbridge Iron Co. v. Cone Iron Works, 102 Mass. 80; Winchester v. Craig, 33 Mich. 205; Firmin v. Firmin, 9 Hun, 571; McLean County C. Co. v. Long,

profits or for injury to land, and the rule of damages applied was the value of the gold dust, less the expense of its extraction. In Maye v. Tappan, the court say the rule of damages depends to some extent upon the form of the action; whether the action is for an injury to the land itself or for conversion of a chattel severed from the land. In that case the action was for injury to the land. The same rule was laid down in Clawser v. Joplin M. Co.[1] In Pennsylvania, Michigan and Wisconsin, the same rule has been applied in trover.[2] In Forsyth v. Wells, it was held that the rule of the value after severance would transfer to the plaintiff all the defendant's labor in mining the coal which was the subject of the action, and thus give the plaintiff more than compensation for the injury done; and the court thus discuss the relation of the rule of damages to the form of action: "Yet we admit the accuracy of this conclusion if we may properly base it on the form, rather than on the principle or purpose of the remedy. But this we may not do; and especially we may not sacrifice the principle to the very form by which we are endeavoring to enforce it. Principles can never be realized without forms, and they are often inevitably embarrassed by unfitting ones; but still the fact that the form is for the sake of the principle, and not the principle for the form, requires that the form shall serve, not rule, the principle, and must be adapted to its office.

"Just compensation, in a special class of cases, is the principle of the action of trover, and a little study will show us that it is no unyielding form, but adapts itself to a great variety of circumstances. In its original purpose, and in strict form, it is an action for the value of personal property lost by one

81 Ill. 359; Kier v. Peterson, 41 Pa. St. 357; Heard v. James, 49 Miss. 236; Young v. Lloyd, 65 Pa. St. 199; Lyon v. Gormley, 53 Pa. St. 261; Clarke v. Holford, 2 C. & K. 540; Bennett v. Thompson, 13 Ired. L. 146; Smith v. Gowder, 22 Ga. 353; Wood v. Morewood, 3 Q. B. 440, note; Cushing v. Longfellow, 26 Me. 306; United States v. Magoon, 3 McLean, 171; Greeley v. Stillson, 27 Mich. 154; Tome v. Dubois, 6 Wall. 548; Potter v. Mardre, 74 N. C. 36; Wetherbee v. Green, 22 Mich. 311.

[1] 4 Dill. 469, note.

[2] Forsyth v. Wells, 41 Pa. St. 291; Single v. Schneider, 30 Wis. 570; 24 id. 299; Hungerford v. Redford, 29 id. 345; Winchester v. Craig, 33 Mich. 205.

and found by another, and converted to his own use. But it is not thus restricted in practice; for it is continually applied to every form of wrongful conversion, and of wrongful taking and conversion, and it affords compensation not only for the value of the goods, but also for outrage and malice in the taking and detention of them.[1] Thus form yields to purpose for the sake of completeness of remedy. Even the action of replevin adapts itself thus.[2] And so does trespass.[3]

"In very strict form, trespass is the proper remedy for a wrongful taking of personal property, and for cutting timber, or quarrying stone, or digging coal on another man's land and carrying it away; and yet the trespass may be waived and trover maintained without giving up any claim for any outrage or violence in the act of taking.[4] It is quite apparent, therefore, that this form of action is not so uniform and rigid in its administration as to force upon us any given or arbitrary measure of compensation. It is simply a form of reaching a just compensation, according to circumstances, for goods wrongfully appropriated. When there is no fraud, or violence, or malice, the just value of the property is enough.[5]

"When the taking and conversion are one act, or one continued series of acts, trespass is the more obvious and proper remedy; but the law allows the waiver of the taking, so that the party may sue in trover; and this is often convenient. Sometimes it is even necessary; because the plaintiff, with full proof of the conversion, may fail to prove the taking by the defendant. But when the law does allow this departure from the strict form, it is not in order to enable the plaintiff, by his own choice of actions, to increase his recovery beyond just compensation, but only to give him a more convenient form for recovering that much.

"Our case raises a question of taking by mere mistake, because of the uncertainty of boundaries; and we must confine ourselves to this. The many conflicting opinions on the measure of damages in cases of wilful wrong, and especially the very learned and thoughtful opinions in the case of Silsbury

[1] 6 S. & R. 426; 12 id. 93; 3 Watts, 333.
[2] 1 Jones, 381.
[3] 7 Casey, 456.
[4] 3 Barr, 13.
[5] 11 Casey, 28

v. McCoon,[1] warn us to be careful how we express ourselves on that subject.

"We do find cases of *trespass*, where judges have adopted a mode of calculating damages for taking coal, that is substantially the same as the rule laid down by the Common Pleas in this case, even where no wilful wrong was done, unless the taking of the coal out by the plaintiff's entry was regarded as such. But even then we cannot avoid feeling that there is a taint of arbitrariness in such a mode of calculation, because it does not truly mete out just compensation.[2] We prefer the rule in Wood v. Morewood,[3] where Parke, B., decided, in a case of trover for taking coals, that if the defendant acted fairly and honestly, in the full belief of his right, then the measure of damages was the fair value of the coals, as if the coal field had been purchased from the plaintiffs.[4]

"Where the defendant's conduct, measured by the standard of ordinary morality and care, which is the standard of the law, is not chargeable with fraud, violence, or wilful negligence or wrong, the value of the property taken and converted is the measure of just compensation. If raw material has, after appropriation and without such wrong, been changed by manufacture into a new species of property, as grain into whisky, grapes into wine, furs into hats, hides into leather, or trees into lumber, the law either refuses the action of trover for the new article, or limits the recovery to the value of the original article.[5]

"Where there is no wrongful purpose or wrongful negligence in the defendant, compensation for the real injury done is the purpose of all remedies; and so long as we bear this in mind, we shall have but little difficulty in managing the forms of actions so as to secure a fair result. If the defendant in this case was guilty of no intentional wrong, he ought not to have been charged with the value of the coal after he had been at the expense of mining it; but only with its value *in place*, and with such other damage to the land as his mining may have caused.

[1] 4 Denio, 322; and 3 Comst. 379.

[2] 5 M. & W. 357; 9 id. 627; 3 Q. B. 283. And see 28 Eng. L. & E. 175.

[3] 3 Q. B. 440, note.

[4] See also Bainbridge on Mines and Minerals, 510; 17 Pick. 1.

[5] 6 Hill, 425 and note; 21 Barb. 92; 23 Conn. 523; 38 Me. 174.

Such would manifestly be the measure in trespass for mesne profits."[1]

Where the plaintiff's timber standing was worth $1.50 per thousand feet, and an expense of $9 had to be and was incurred by the defendant in wrongfully cutting it into logs and transporting them to a distant market where they were worth $12 per thousand, the plaintiff was held entitled in trover to recover the value when taken, that is, the "stumpage" value, in the ordinary market; or the value at the place where it was marketed less the sums expended in the cutting and transportation, in thus putting the property in condition for sale, with interest from the date of conversion.[2]

The value of property converted may be and often is enhanced by transportation. This increase of value is no just cause for an increase of damages to the owner; for it is no additional element in his pecuniary loss. He is, therefore, by the prevailing course of decision, allowed only the value at the place as well as time of conversion.[3]

Where a conditional sale of cloths was made, and the purchaser printed them but did not perfect his purchase, in trover brought by the seller against one to whom the conditional vendee had consigned the cloths to be sold, it was held the plaintiff could recover in damages only the value of the goods at the time they were delivered, not their value after they were printed.[4] In trover for the conversion of a vessel which was

[1] In Lyon v. Gormley, 53 Pa. St. 265, Strong, J., commenting on Forsyth v. Wells, used this language: "The decision was made by a bare majority of the court, and it is to be regarded as ruling nothing more than the law as applicable to the circumstances of that case. There the coal had been taken under a mistake of right, and the act complained of was substantially a trespass. It was a case for compensation, and though it was held trover would lie, the action was treated as an action *quare clausum fregit* for an injury, not wanton." The rule and principle of Forsyth v. Wells has been followed in Pennsylvania. Herdic v. Young, 55 Pa. St. 176; Coleman's App. 62 Pa. St. 278; Young v. Lloyd, 65 id. 199.

[2] Winchester v. Craig, 33 Mich. 205.

[3] Weymouth v. Chicago, etc. R. R. Co. 17 Wis. 550; Sanders v. Clark, 106 Mass. 331; Herdic v. Young, 55 Pa. St. 176; Tilden v. Johnson, 52 Vt. 628.

[4] Dresser Manuf. Co. v. Waterston, 3 Met. 9; Aborn v. Mason, 14 Blatchf. 405.

taken in an unfinished state and completed by the defendant, it was held, in an action by a purchaser at a sale under execution, levied while it was in the unfinished state in which the defendant took it, that the plaintiff was entitled only to the value at the time of the levy.[1] And a similar rule was applied in England. The plaintiff had a bill of sale of a ship being built to secure advances. The defendant converted her before she was finished and afterwards completed her. The plaintiff was held entitled to the value at the time of the conversion, not her value at a subsequent time; and he was held not entitled to special damages for the loss of freight she might have earned.[2]

This principle which confines the plaintiff's recovery to a compensation for his actual loss, and therefore to the value of his property at time of conversion, applies when its identity is destroyed by a wrongful intermixture with other property, producing what is commonly called a *confusion of goods*. If the owner chooses to seek his remedy by an action for the conversion of his goods, he is fully compensated when he recovers its value at the time of such a conversion, as when it occurs in any other manner. By the general current of authority he is confined to that measure of redress.[3] But where this rule of strict compensation, in this class of cases, does not prevail, and the improved value may be taken where it has been enhanced by the labor of the wrongdoer, the right of the owner to take the entire property in which his goods are a part by a wrongful admixture, is recognized and enforced.[4]

The cases which administer the mitigated rule, exempting the wrongdoer from paying the owner the enhanced value caused by his labor, or the loss of his property by its admixture with that of another, confine it to the case of conversion by mistake or in the bona fide assertion of his rights.[5] But

[1] Green v. Hall, 1 Houst. (Del.) 506.

[2] Reid v. Fairbanks, 13 C. B. 692.

[3] Hesseltine v. Stockwell, 30 Me. 237; Moody v. Whitney, 38 Me. 174; per Campbell, J., in Stephenson v. Little, 10 Mich. 433; Wetherbee v. Green, 22 Mich. 311; Potter v. Mardre, 74 N. C. 36. See Single v. Schneider, 30 Wis. 570; Ryder v. Hathaway, 21 Pick. 298.

[4] Rice v. Hollenbeck, 19 Barb. 664; Walther v. Wetmore, 1 E. D. Smith, 7; Silsbury v. McCoon, 6 Hill, 425; 4 Denio, 332.

[5] Heard v. Jones, 49 Miss. 236; Forsyth v. Wells, 41 Pa. St. 291.

there are intimations in several cases that the value of the original property should be given as the measure of compensation in all cases without regard to the wrong having been done wilfully or fraudulently.[1] Damages beyond compensation by reason of bad motive are vindictive in their nature, and it is exceptional for the court, instead of the jury, to award them as matter of law, and as a matter of right.[2]

Special or consequential damages.— In England, and generally in this country, special damages are recoverable in trover if alleged in the declaration. In trover for a horse valued at 15*l.*, special damage was claimed for the hire of another. There was some hesitation in recognizing the damage as recoverable, and a compromise result followed in a judgment for 25*l.*[3] Where a carpenter's tools were the subject of the suit, the court allowed special damages by reason of the plaintiff, a carpenter, being prevented, in consequence, from working at his trade.[4] In a subsequent case,[5] the court of Queen's Bench drew a distinction between special damage and special value, and said they were inclined to think that to enable a plaintiff to recover special damage which did not form part of the actual present value of the goods, as in withholding the tools of a man's trade, the defendant must have some notice of the inconvenience likely to be occasioned. It has been held that if the goods have been returned after conversion, and accepted by the plaintiff, he can only recover nominal damages, unless he claims special damages, and alleges them in his declaration.[6] Such return accepted is treated as if ordered by the court; and therefore, in the absence of allegations in the declaration, or conditions agreed on at the acceptance, the latter is deemed an admission that the property has been returned in the same plight as when converted, and that no special damages have been suffered; for

[1] Single v. Schneider, 30 Wis. 570; Potter v. Mardre, 74 N. C. 36; Moody v. Whitney, 38 Me. 174. See ante, vol. I, p. 168.

[2] See Heard v. Jones, 49 Miss. 236.

[3] See Hughes v. Quentin, 8 C. & P. 703; Barron v. Arnaud, 8 Q. B. 595. See Saunders v. Brosius, 52 Mo. 50; Boylan v. Huguet, 8 Nev. 343.

[4] Bodley v. Reynolds, 8 Q. B. 779.

[5] France v. Gaudet, L. R. 6 Q. B. 199.

[6] Barrelett v. Bengard, 71 Ill. 280; Moon v. Raphael, 2 Bing. N. C. 310.

only in such a case would the court stay proceedings on return of the property.[1]

In Pennsylvania such damages are not regarded as special.[2] In allowing proof that the defendant's detention prevented the sale of the property when the market was high, and that the plaintiff was injured by the subsequent decline, the court thus

[1] See post, p. 531. In Moon v. Raphael, supra, the defendant, a sheriff, who held goods taken in execution, delivered them to plaintiffs, assignees of a bankrupt, after an action of trover had been commenced by them; the plaintiff accepted the goods without condition; held, that they could not recover in the action more than nominal damages; at all events not without alleging special damages in the declaration. Tindall, C. J., said: "If the defendants had come to the court to stay proceedings on the delivery of the goods, the plaintiffs would not have been compelled to accept them, unless they were in the same plight as when they were taken, and no injury had accrued to the plaintiffs. But the plaintiffs have taken upon themselves to accept the goods, without imposing any condition on the defendants, and then proceed to trial, as they had a right to do, to recover their costs; in order to which, according to the practice of a century, the jury may, under such circumstances, give them nominal damages. But the plaintiffs seek for more; and, though no special damage has been alleged in the declaration, and the damage complained of is not necessarily incidental to the wrongful taking of the property, they claim to recover the amount of rent paid in respect of the premises on which the goods were detained for the period during which they were under detention. If an action of trespass had been brought, such an allegation of special damage might perhaps have been sustained; this, however, is an action of trover, and the declaration, which is in the common form, seeks only damages for the detention of goods which were delivered up before the trial. But it is said that if damages may be recovered in trover where the goods have been given up before the action, by the stronger reason may a plaintiff claim damages where injury has resulted to him from the conversion, and restoration of the goods has not been made till after the action commenced; and many cases have been cited to that purport, in all of which I am disposed to agree. But in all of them the damage was either an injury to the property converted, or the actual and necessary consequence of the conversion. The case of Gibson v. Humphrey does not much apply; it only decides that the court will not stay the proceedings on payment of costs, except in cases where the defendant has restored the chattel alleged to be converted, and where the plaintiff claims no special damage; or where, if the chattel was sold, there is no dispute as to price. But the injury of which the plaintiffs complain, not being a damage necessarily consequent on the wrongful conversion of the goods, if it could in any shape fall within the remedy of an action for trover, ought at least to have formed the subject of a special allegation."

[2] Rank v. Rank, 5 Pa. St. 211.

stated what is believed to be the theory of the American practice on this point: "The redelivery is the defense, and is evidence for the defendant, not in bar of the action, but in mitigation of the damages; and the plaintiff in reply may surely present to the consideration of the jury the actual injury resulting to him from the trover or conversion, in order to show to what extent the damage should in justice be mitigated." [1] Any damages claimed in addition to the value and interest are necessarily special and must be alleged.[2] But the compensation the plaintiff may be entitled to in place of the value by reason of a return of the goods is not of this nature.

EXEMPLARY DAMAGES MAY BE RECOVERED.— Where *exemplary damages* are allowed, they are generally held recoverable in all actions of tort, where the wrong which is the gist of the action is committed wilfully or maliciously — is attended with the aggravations which are treated as sufficient ground in trespass to justify such damages.[3] In trover, where property has been tortiously taken, the taking is not the gist of the action; and the manner of the taking is not usually considered for the purpose of exemplary damages. It is otherwise, however, in Pennsylvania.[4]

FOR CONVERSION OF MONEY SECURITIES, STOCKS, DEEDS AND OTHER DOCUMENTS.— For conversion of money securities, the owner is *prima facie* entitled to their face value; that is the presumptive value; and he will be entitled to recover the actual value if in any manner shown.[5]

[1] See post, p. 529.

[2] Vol. I, p. 763.

[3] Prebble v. Kent, 10 Ind. 325; Forsyth v. Wells, 41 Pa. St. 291; Neiler v. Kelley, 69 Pa. St. 403; Jacoby v. Laussatt, 6 S. & R. 300; Dennis v. Barber, 6 S. & R. 420; Berry v. Vantries, 12 S. & R. 89; Day v. Woodworth, 13 How. 363; Dibble v. Morris, 26 Conn. 416; Mowry v. Wood, 12 Wis. 413.

[4] See last note.

[5] Latham v. Brown, 16 Iowa, 118; Robinson v. Hurley, 11 id. 410; Bredow v. Mutual Sav. Inst. 28 Mo. 181; Craig v. McHenry, 35 Pa. St. 120; Roberts v. Berdell, 61 Barb. 37; Turner v. Retter, 58 Ill. 264; Dennis v. Barber, 6 S. & R. 420; Menkens v. Menkens, 23 Mo. 252; McPeters v. Phillips, 46 Ala. 496; St. John v. O'Connel, 7 Port. 476; Mercer v. Jones, 3 Camp. 476; Wilson v. Conine, 2 John. 280; Shotwell v. Wendover, 1 id. 65; Cortelyou v. Lansing, 2 Cai. Cas. 200; Ingalls v. Lord, 1 Cow. 240; King v. Ham, 6 Allen, 298; Tying v. Commercial Warehouse Co. 58

Stated accounts,[1] and even accounts not stated, are held to be within this rule; but the presumption of the face value of an account, not stated, is not strong, and may be easily overthrown.[2]

Interest should be computed to the date of the conversion, where the face value is recovered, and the converted security bore interest; and from the date of the conversion, interest as damages on both should be computed to the date of the trial.[3] The face value of a check which has been paid on a forged indorsement is the measure of damages, after a refusal to surrender it on demand.[4]

The maker of a promissory note can maintain an action for its conversion against one who, before it has any legal inception, wrongfully negotiates it to a *bona fide* holder for value. He is entitled to recover the full amount of the note, as damages, without averring or proving that he has paid it to the holder. It is sufficient that he is legally liable to pay it.[5] But where a note having the plaintiff's name on it only as indorser, has been as to him fraudulently transferred to a *bona fide* holder, and has not yet matured, such indorser is not entitled to maintain an action before he has been called on for payment, or his liability made absolute. He is not deemed yet to have suffered any damage.[6] Trover may be brought by the acceptor for the conversion of a paid bill of exchange; nor is he confined to nominal damages; he is entitled to recover in respect of the risk of liability, although the bill is utterly valueless.[7] The obligee in a bond may recover in this action against the obligor who tore

N. Y. 308; Fisher v. Brown, 104 Mass. 259; Potter v. Merchants' Bank, 28 N. Y. 641; Seals v. Cummings, 8 Humph. 442; Canton v. Smith, 65 Me. 203; Holt v. Van Eps, 1 Dak. 206; Decker v. Matthews, 12 N. Y. 313; Evans v. Kymer, 1 B. & Ad. 528; American Exp. Co. v. Parsons, 44 Ill. 312. In Brightman v. Reeves, 21 Tex. 70, this presumption of face value was denied, and proof required of the actual value.

[1] O'Donoghue v. Corby, 22 Mo. 393.

[2] Sadler v. Bean, 37 Iowa, 439. See Doyle v. Eccles, 17 U. C. C. P. 644; Woodbarne v. Scarborough, 20 Ohio St. 57.

[3] Roberts v. Berdell, 61 Barb. 37; Clark v. Bates, 1 Dak. 42.

[4] Survey v. Wells, Fargo & Co. 5 Col. 124.

[5] Decker v. Mathews, 12 N. Y. 313.

[6] Freeman v. Venner, 120 Mass. 424.

[7] Dunne v. Thorpe, B. D. & O. 128. See Hausard v. Robinson, 7 B. & C. 90; Evans v. Kymer, 1 B. & Ad. 528; Stone v. Clough, 41 N. H. 290.

off his seal; and the whole amount of the penalty, it appearing that the condition had been broken to the damage of the plaintiff to a still greater amount.[1] In such a case no alternative can be given the defendant to deliver up the obligation in discharge of damages.[2] It has been held that the owner may recover for the conversion of a bond the sum he would be entitled to recover on it from the obligee.[3]

If the party liable on an instrument converts it, he is liable to that measure of recovery, and the defense of insolvency has no application.[4] So where a plaintiff sues for conversion of notes made by himself, the measure of damages is the amount due on them at the time of the trial, without reference to his ability to pay.[5] If a judgment has been recovered against him on such notes, and he has paid it, the amount paid will be the measure of damages.[6] In other cases the insolvency of the parties liable on the paper may be shown in mitigation of damages.[7] If, on account of peculiar circumstances, the note of a person having no property liable to execution would be available to the owner for its full amount, he is entitled to recover it.[8]

The defendant has a right to show in reduction of damages payment in whole or in part; the inability of the maker to pay; a release of the maker from his undertaking; the invalidity of the instrument, or any other matter which will legitimately affect or diminish its value.[9] But if the maker becomes insolvent after the conversion, it will be no ground for mitigation of damages.[10]

[1] Bank of Upper Canada v. Widmer, 2 Up. Can. Jur. O. S. 222.

[2] Id.

[3] Romig v. Romig, 2 Rawle, 241; Delany v. Hill, 1 Pittsb. 28.

[4] Stephenson v. Thayer, 63 Me. 143.

[5] Robbins v. Packard, 31 Vt. 570; Thayer v. Manley, 73 N. Y. 305.

[6] Comstock v. Hier, 73 N. Y. 269.

[7] McPeters v. Phillips, 46 Ala. 496; Potter v. Merchants' Bank, 28 N. Y. 641; Latham v. Brown, 16 Iowa, 118; Zeigler v. Wells, Fargo & Co. 23 Cal. 179; Cothran v. Hanover Nat. Bank, 40 N. Y. Super. Ct. 401.

[8] Rose v. Lewis, 10 Mich. 483; Delegal v. Naylor, 7 Bing. 460.

[9] Booth v. Powers, 56 N. Y. 22; Terry v. Allis, 20 Wis. 32; Ingalls v. Lord, 1 Cow. 240; Brown v. Montgomery, 20 N. Y. 287; Fell v. McHenry, 42 Pa. St. 41; King v. Ham, 6 Allen, 298; Mathew v. Sherwell, 2 Taunt. 439; Robinson v. Hurley, 11 Iowa, 410.

[10] Knapp v. U. S. otc. Express Co. 55 N. H. 348; King v. Ham, 6 Allen, 298.

In trover for conversion of an insurance policy, the rule of damages is probably the same as if the action were by the insured upon the policy; subject to mitigation by evidence of the insolvency of the insurer.[1] In trover for a policy of insurance, it appeared that it was void; the plaintiff had assigned it as security for a debt, and the pledgee, on receipt of a certain amount from the insurer as a gratuity, had delivered it up to be canceled. It was held that the plaintiff was entitled to only nominal damages for the value of the parchment; he was not entitled to the full amount of the policy, for it was confessedly bad, nor to the sum paid the defendant, for it was merely a gratuity.[2] In one case trover was sustained for a policy which was never effected. An agent had been employed to procure insurance, and he reported that he had done so, when in fact he had not. He was not permitted to gainsay his representation, and was held to the same liability as an insurer, for the same indemnity the plaintiff would have had if the representation had been true.[3]

Damages for conversion of deeds and other instruments will be allowed according to the loss in the particular case. If the party deprived of a deed is in possession of all the deed is intended to convey, the damages are less than when he is out of possession.[4] In the latter case the jury may give the full value of the estate as damages, but these are generally reduced to a small sum on the deeds being given up.[5] Where the obligor in a bond to convey land has converted the bond, the measure of damages has been held to be the value of the land. This may justly be awarded, for recovery and satisfaction would extinguish the equitable interest, and thus have the same effect to transfer title as in other cases.[6] But where the conversion of a deed will not affect the owner's title, and the wrong is not one for which punitive damages can be given, the proper measure of damages is such a sum as will recompense the plaintiff for any

[1] Kohne v. Insurance Co. 1 Wash. C. C. 93. See Chicago Building So. v. Crowell, 65 Ill. 453.

[2] Wills v. Wells, 8 Taunt. 264.

[3] Harding v. Carter, Park on Insurance, 5.

[4] Lloyd v. Sadlier, 7 Ir. Jur. N. S. 15.

[5] Loosemore v. Radford, 9 M. & W. 657; Coombe v. Sansom, 1 D. & R. 201.

[6] Clowes v. Hawley, 12 John. 483.

actual loss he may have sustained, and for his trouble and expense of going into a court of equity or elsewhere to establish and perpetuate the evidence of his title.[1] A having agreed to purchase of B the remainder of a term, the latter delivered to him the lease in order that he might get an assignment made out. A then obtained an enlargement of the term from the original landlord, and refused to accept an assignment or pay the full price agreed on, because B's under-tenant had removed some fixtures. It was held that B might insist on A accepting the assignment, and after demand and refusal of the lease might maintain trover for it and recover the agreed price as damages.[2]

How damages affected by the nature of the plaintiff's interest.— To entitle a plaintiff in trover to recover the full value of the property from one who converts it, he must be the owner of the property, or, if not the owner, have a right of possession with responsibility over to the general owner. The goods must be stated in the declaration to be the goods of the plaintiff. He must have the title or right of possession at the time of the conversion.[3] Property in a third person, with whom the wrongdoer is in no privity, will be wholly unavailing to one who tortiously invades actual possession, or to rebut a right inferable from actual possession. Actual possession not wrongful as to the defendant will be sufficient to maintain the action, unless the plaintiff has possession as a mere servant to somebody else.[4] But under a plea which puts the plaintiff's possession and property in issue at the time of the conversion, the defendant may show title in a third person. Such proof tends to controvert the plaintiff's title; and where the defendant has a right of possession derived from the general owner,

[1] Mowry v. Wood, 12 Wis. 413.

[2] Parry v. Frame, 2 Bos. & P. 451.

[3] Thayer v. Hutchinson, 13 Vt. 507; Kemp v. Thompson, 17 Ala. 9; Pattison v. Adams, 7 Hill, 126; Bond v. Mitchell, 3 Barb. 304; Curd v. Wunder, 5 Ohio St. 92; Fairbank v. Phelps, 22 Pick. 538; Ames v. Palmer, 42 Me. 197.

[4] Freshwater v. Nichols, 7 Jones' L. 251; Bartlett v. Hoyt, 29 N. H. 317; Harris v. Smith, 3 S. & R. 20; Hampton v. Brown, 13 Ired. L. 13; Gruman v. Smith, 81 N. Y. 27.

or has acted by his authority, or has responded to him, he is entitled to set up his title.[1]

If the plaintiff is not possessed of the full title, but he has actual possession with responsibility over to the true owner for the property, or has any special possessory title, however temporary, if it existed at the time of the conversion, he may recover the full value as against a mere stranger or wrongdoer.[2] But if the plaintiff, having but a limited title, brings his action against one having the remaining interest, or against one claiming under such residuary owner, the plaintiff can then recover only according to his interest.[3] The defendant hired to the plaintiff a negro for two years, and put him in possession; soon afterwards the defendant got possession of the negro and sold him. In trover it was held the hirer was entitled to recover the difference between the amount fixed as hire, and the profits of the negro's labor for the stipulated term.[4] The holder of a lien, seeking to enforce it against the owner, or who sues the owner or one claiming under him, for injury to or conversion of the property, can only recover the value of his lien.[5]

A party who has a lien on or other special interest in property, and converts it, is liable to the owner for its value, but is entitled to recoup the value of his special property.[6] This right of recoupment may be extended under the American authorities to cases or to counterclaims where there is no lien or special

[1] Bates v. Stanton, 1 Duer, 79; Beach v. Berdell, 2 Duer, 327; Edson v. Weston, 7 Cow. 278; King v. Richards, 6 Whart. 418; Ogle v. Atkinson, 5 Taunt. 759; Sheridan v. New Quay Co. 4 C. B. N. S. 618; Floyd v. Bovard, 16 W. & S. 76; White v. Teal, 12 A. & E. 114; Sylvester v. Girard, 4 Rawle, 185.

[2] Mechanics' & Tr. Bank v. Farmers' & M. Bank, 60 N. Y. 40; Buck v. Remsen, 34 N. Y. 383; Treadwell v. Davis, 34 Cal. 601; Davidson v. Gunsolly, 1 Mich. 388; McGowen v. Young, 2 Stew. 276; Pomeroy v. Smith, 17 Pick. 85; Gruman v. Smith, 81 N. Y. 27.

[3] Fowler v. Gilman, 13 Met. 267; Tenney v. State Bank, 20 Wis. 152; Briggs v. Boston, etc. R. R. Co. 6 Allen, 246; Case v. Hart, 11 Ohio, 364; Peebles v. Boston, etc. R. R. Co. 112 Mass. 498.

[4] Compton v. Martin, 5 Rich. L. 14.

[5] Hays v. Riddle, 1 Sandf. 248; Bailey v. Godfrey, 54 Ill. 507; Sheldon v. Southern Exp. Co. 48 Ga. 625; Spoor v. Holland, 8 Wend. 445; Ward v. Henry, 15 Wis. 239.

[6] Jarvis v. Rogers, 15 Mass. 389; Stearns v. Marsh, 4 Denio, 227; Belden v. Perkins, 78 Ill. 449; Wheeler v. Pereles, 43 Wis. 332; Chadwick v. Lamb, 29 Barb. 518; McCalla v. Clark, 55 Ga. 53.

property. The right of recoupment does not depend on a lien,[1] as we shall have occasion to notice under the next head.[2] In short, if the plaintiff, not being completely the owner, has the possession, or the right of possession as to the defendant, at the time of the conversion, so that he is under a contract obligation to preserve the property and deliver it to the owner, or is liable to him for it, however that liability may arise, he is entitled to recover the full value.

On the other hand, if he is not completely and absolutely the owner and is under no such obligation or liability, he can recover only the value of his own interest. The suit then, in some sort, accomplishes a partition; the plaintiff takes his part in value, and leaves the residue in the hands of the defendant. And in actions by the general owner, or one recovering in that right, the defendant is entitled to recoup for his special interest, whatever it may be, and for any cross demand growing out of the same transaction, whether it be a lien or interest or not. And he is, besides, entitled to mitigations, which we shall presently consider, arising from the principle of limiting the plaintiff's compensation to his actual loss. He may show that the plaintiff has not suffered so great a loss as his case, on his proof, imports, by reason of other facts which are part of the *res gestæ;* he may show payments or other acts done by the defendant in connection with the wrong of the conversion which have the effect to lessen the injury or partially to compensate it.

Where the vendee in a conditional sale sold the property before he acquired the title by fulfilling the condition of paying for it, the vendor in trover was held entitled to recover the full value without any deduction for payments received by him from his vendee.[3] But in Pennsylvania, where the party making the conditional purchase was the defendant, the plaintiff was held only entitled to recover the value of his beneficial interest; the defendant was allowed the benefit of his payments. As trover is an equitable action, this appears more just and in

[1] Baltimore Ins. Co. v. Dalrymple, 25 Md. 269; Johnson v. Stear, 15 C. B. N. S. 330.

[2] See Briggs v. Boston, etc. R. R. Co. 6 Allen, 246; Parish v. Wheeler, 22 N. Y. 494.

[3] Brown v. Haynes, 52 Me. 578; Buckmaster v. Smith, 22 Vt. 203; Smith v. Foster, 18 Vt. 182.

accordance with the principle of limiting recovery to just compensation.[1] The same rule has been laid down and applied in Georgia and Michigan.[2] A piano was sold conditionally, and title was to pass on all the payments being made. After a large part of the purchase money had been paid, the vendor sued for conversion of the instrument. The court held that the payments would go in mitigation; and that the defendant was also entitled to recoup the damages, if any, for breach of the warranties in the contract of sale.[3] A vendee of goods received them at a stipulated price, payable in certain indorsed notes, on condition that within a given period he should deliver the notes or return the goods; he afterwards refused to do either, and the vendor sued him for the goods in trover. It was held that the measure of damages was the actual value of the goods and interest; and that the vendee was not concluded by the agreed price. Under such circumstances it was thought that the agreed price was high evidence of actual value as against the wrongdoer, and should not be reduced except upon strong proof. Had the vendor, instead of electing to disaffirm the contract, sued in assumpsit, he would have been entitled to the agreed price; though subject even then to a deduction, if it turned out that the notes stipulated for were of less value.[4]

Where one of several part owners sues a stranger for conversion of the common property, he can only recover in respect of his part, and the damages will be apportioned.

Mitigation of damages.— If the case is such that the plaintiff can be fully compensated by a sum of money less than the full value of the property which was converted, the recovery will be limited to the amount that will suffice for complete indemnity. The plaintiff will be confined to compensation commensurate with the actual injury.[6] The recovery is so reduced

[1] Farmers' Bank v. McKee, 2 Pa. St. 318; Rose v. Story, 1 Pa. St. 190. See Andrews v. Durant, 18 N. Y. 496.

[2] Guilford v. McKinley, 61 Ga. 230; Boutell v. Warne, 62 Mo. 350; Johnston v. Whittemore, 27 Mich. 463.

[3] Guilford v. McKinley, supra.

[4] Stevens v. Low, 2 Hill, 132.

[5] Noland v. Johnson, 5 J. J. Marsh. 351; Powell v. Glenn, 21 Ala. 458.

[6] Cook v. Loomis, 26 Conn. 483; Chamberlin v. Shaw, 18 Pick. 278.

when the plaintiff has only a special property subject to which the defendant is entitled to the goods.[1] Courts of law, in actions of trover, are authorized to investigate the justice and equity of the particular case, in a manner and upon principles similar to those by which, in such courts, the defense of partial failure of consideration is sustained.[2] Where an officer was sued by the debtor for attaching exempt property, and such officer, by direction of the creditor who had become the legal owner of a mortgage of such property, sold it on the mortgage, and applied the proceeds thereon, it was held that the sum so applied should go in mitigation of damages.[3]

A special agent to whom a bill of lading was sent, with instructions to deliver it to a purchaser on his paying a forthcoming draft for the price, delivered it on a mere acceptance of the draft, and the purchaser obtained the goods from a common carrier on paying the freight; such purchaser then pledged the goods to the defendant. The latter was held liable for their value at the time of the conversion, less the freight paid by the pledgor; but no deduction was allowed for commissions which would have been due to the pledgor if the goods had been disposed of according to the owner's instruction.[4] The right to recoup for freight wrongfully paid has been denied in New York.[5]

If after the conversion of property it goes back into the possession of the plaintiff, and he accepts it, this will go in mitigation of damages, even though no agreement be shown on the part of the plaintiff that he will receive it.[6] So, if the property have gone to the plaintiff's use with his consent, ex-

[1] Id.; Hyde v. Cooksen, 21 Barb. 92; Pierce v. Benjamin, 14 Pick. 356.

[2] McGowen v. Young, 2 Stew. & Port. 160; Bates v. Murphy, id. 161. See Wilson v. Conine, 2 John. 280.

[3] Cooper v. Newman, 45 N. H. 339.

[4] Stollenwerck v. Thacher, 115 Mass. 224; Covell v. Hill, 6 N. Y. 374; Whitney v. Beckford, 105 Mass. 267; Peebles v. Boston, etc. R. R. Co. 112 Mass. 498.

[5] Walther v. Wetmore, 1 E. D. Smith, 7.

[6] Yale v. Saunders, 16 Vt. 243; Sparks v. Purdy, 11 Mo. 219; Reynolds v. Shuler, 5 Cow. 323; Easton v. Woods, 1 Mo. 506; Brady v. Whitney, 24 Mich. 154; Dailey v. Crowley, 5 Lans. 301; Wheelock v. Wheelwright, 5 Mass. 104; Cook v. Loomis, 26 Conn. 483; Hepburn v. Sewell, 5 Har. & J. 211. In Sprague v. McKinsie, 63 Barb. 60, it

pressed or implied, that fact may be shown in mitigation.[1] An offer to return the goods, after conversion, is of no avail.[2] But in an action for conversion of machinery in a workshop, it not appearing that the defendant had ever appropriated it to his own use, or removed it, or had actual possession of it, otherwise than by being in the rightful possession of the workshop; and the alleged conversion consisting in a refusal to allow the plaintiff to remove the machinery on demand; a subsequent notice to the plaintiff by the defendant that he relinquished all claim to the machinery, was held should be considered in mitigation.[3] If the plaintiff sell the property after conversion, it has been held he can recover no more than nominal damages.[4]

Where the property is returned an action may, notwithstanding, be brought for the conversion, and the measure of damages, as generally held, is the market value at the time of the conversion, less the market value at the time of the return.[5] It has been so held in Pennsylvania, and that these are not special damages which should be specially alleged in the declaration.[6]

The reason of the rule that the value of the goods, with

appeared that B converted A's horse by selling it to D. Without delay A took the horse from D; then sued B in trover for it. It was held that he was entitled to recover the full value, and that evidence of the retaking was not admissible in mitigation. Cady, J., said: "He (defendant) did nothing between the time he converted the mare and the trial of the cause in the court of common pleas in satisfaction of the plaintiff's demand against him; nor did the plaintiff do anything to the defendant to cancel the demand which he had for the conversion of the mare; but the plaintiff took the mare by force from the defendant's vendee, and that act, the court instructed the jury, reduced the plaintiff's demand to nominal damages. Had the defendant been compelled to repay his vendee the value of the mare in consequence of the plaintiff having taken her, there would have been an apparent equity in confining the plaintiff's recovery to the actual, not to nominal damages; but there was no pretense on the part of the defendant that he had repaid his vendee the money which he had received for the mare, or that he was liable to repay it, in consequence of the plaintiff's having retaken her." This reasoning is open to comment.

[1] Plevin v. Henshall, 10 Bing. 24; Irish v. Cloyes, 8 Vt. 30. See Locke v. Garrett, 16 Ala. 698.

[2] Norman v. Rogers, 29 Ark. 365; Stickney v. Allen, 10 Gray, 352.

[3] Delano v. Curtis, 7 Allen, 470.

[4] Brady v. Whitney, 24 Mich. 154.

[5] Lucas v. Trumbull, 15 Gray, 306; Ewing v. Blount, 20 Ala. 694; Irish v. Cloyes, 8 Vt. 30.

[6] Rank v. Rank, 5 Pa. St. 211.

interest, is the measure of damages, where the property has not been restored to the owner, is, that the value of the goods is equal to the goods themselves; and interest on the value is the legal damage for withholding such value. But where the property is returned to the owner, the reason for allowing interest ceases after that time; and in place of interest for its previous detention, compensation for the use, if valuable, should be allowed.[1]

If the property is injured, or suffers any deterioration from any cause, after the conversion, it is the loss of the wrongdoer, and the owner may recover for it in trover.[2] In such case, he cannot compel the owner to receive back the property; and if he does so, he only receives it in mitigation of damages, for what it is then worth.[3] One who hires a horse to go to a certain place, and drives him beyond, is guilty of a conversion, and he is liable for any decrease in the value of the horse occurring after that point, although it happen by the fault of the horse.[4] If the property, after conversion, be destroyed, or taken by an officer on process against a third person, it is the loss of the wrongdoer, as far as the owner is concerned; the cause of action in his favor is complete at the time and by the act of conversion, and if he is not able to return the property in some mode to the owner, he can have no mitigation of damages, but they will be computed by the general rule of the value at the date of conversion, and interest.[5]

If there was a wilful taking of the property, or a wilful refusal to surrender it on demand, or the property has suffered any injury or deterioration in value, the defendant cannot compel the plaintiff to accept the property in mitigation of damages.[6]

[1] Ewing v. Blount, 20 Ala. 694; Post v. Munn, 4 N. J. L. 61; Farrel v. Calwell, 30 N. J. L. 123.

[2] Jamison v. Hendricks, 2 Black, 94.

[3] Beach v. Raritan, etc. R. R. Co. 37 N. Y. 457; Mullen v. Ensley, 8 Humph. 428; Hooks v. Smith, 18 Ala. 338; Freer v. Cowles, 44 Ala. 314; Gray v. Crocheron, 8 Port. 191; Seay v. Marks, 23 Ala. 532.

[4] Perham v. Coney, 117 Mass. 102.

[5] Ball v. Lenig, 48 N. Y. 6; Wehle v. Butler, 61 N. Y. 245.

[6] Hart v. Skinner, 16 Vt. 138; Yale v. Saunders, 16 Vt. 243, note; Fisher v. Prince, 3 Burr. 1363; Olivant v. Perineau, 2 Str. 1191; Shotwell v. Wendover, 1 John. 65; Green v. Sperry, 16 Vt. 390.

But if the property came lawfully into the defendant's possession, and his refusal to surrender was qualified, or the conversion technical only, or without intentional wrong on the part of the defendant; and the property remains strictly in the same condition as before the conversion, the defendant may compel the plaintiff to accept it in mitigation.[1] In a late case in Wisconsin,[2] the court, by Taylor, J., say: "It has been a well established rule in the courts of England, for more than a century, that in actions of trover the court will, under certain circumstances, permit the defendant, after suit brought, to bring the property claimed into court for the defendant, with the costs up to that time, and will then order a stay of proceedings, or permit the defendant to proceed with the action at the risk of having the costs finally adjudged against him, unless he is able to show that he has been specially damaged by the conversion of the property by the defendant, in addition to its value at the time of its return. Or the courts will, in a proper case after verdict, upon a tender of the property, reduce the verdict to nominal damages." It is a practice which has been recognized in several of the states.[3]

The application for such an order is addressed to the discretion of the court.[4] The action must be for a specific chattel, quantity and quality, and unattended with any circumstances that enhance the damages above the real value; it must be a case where the real and ascertained value is the sole measure of damages.[5]

The wrongdoer cannot entitle himself to a reduction of damages by applying the property or its proceeds to the plaintiff's

[1] Pickering v. Truste, 7 T. R. 53; Earle v. Holderness, 4 Bing. 462; Tucker v. Wright, 3 Bing. 601; Whitten v. Fuller, 2 W. Bl. 902; Hayward v. Seaward, 1 Moore & Scott, 459.

[2] Churchill v. Welsh, 47 Wis. 39.

[3] Bucklin v. Beals, 38 Vt. 653; Hart v. Skinner, 16 Vt. 138; Rutland, etc. R. R. Co. v. Bank of Middlebury, 32 Vt. 639; Cook v. Loomis, 26 Conn. 483; Rogers v. Crombie, 4 Greenlf. 274; Tracey v. Good, 1 Clark (Pa.), 472; Shotwell v. Wendover, 1 John. 65; Stevens v. Low, 2 Hill, 132; Thayer v. Manley, 8 Hun, 550.

[4] Hart v. Skinner, supra; Churchill v. Welsh, supra.

[5] Fisher v. Prince, 3 Burr. 1364; Whitten v. Fuller, 2 W. Bl. 902; Tucker v. Wright, 3 Bing. 601; Gibson v. Humphrey, 1 Cr. & M. 544.

use without his consent.[1] And the fact that the defendant was a creditor of the plaintiff and took the property to satisfy the debt, or under a void process, or by a void service of a valid process, for such a purpose, will not in England, and in some of the states of the Union, mitigate the injury or reduce the damages.[2]

[1] Wanamaker v. Bower, 36 Md. 42; Sowell v. Champion, 6 A. & E. 407; Northrup v. McGill, 27 Mich. 234; Dalton v. Laudahn, id. 529; Bringard v. Stellwagen, 41 id. 54.

[2] Kelley v. Archer, 48 Barb. 68; Butts v. Edwards, 2 Denio, 164; Earl v. Spooner, 3 Denio, 246; Gillard v. Brittan, 8 M. & W. 576; White v. Brinstead, 76 E. C. L. 333; Attack v. Bramwell, 3 B. & S. 520; East v. Pace, 57 Ala. 521; Northrop v. McGill, 27 Mich. 234. In Edmondson v. Nuttall, 17 C. B. N. S. 280, it appeared that the plaintiff had certain looms in the defendant's mill, and demanded possession of them, the defendant having no right to detain them. The defendant, however, having obtained a judgment against the plaintiff in the county court, in respect of which he would be entitled to issue execution against him on the next day, refused to deliver them up, and the looms were taken in execution on the following morning, and sold. In an action for this wrongful conversion: Held, that the liability of the looms to the county court process, and the fact that by the wrongful seizure the plaintiff's debt was (apparently) satisfied, were not circumstances which the jury could take into consideration in estimating the damages.

Williams, J., said: "It was clearly established that the goods were wrongfully seized by the defendant. But it is contended that the rule, which is beyond all question a prima facie rule, that for an act of this sort the plaintiff is entitled to recover as damages the full value of the goods seized, ought not to prevail here, because the defendant shows mitigating circumstances, viz., that, after he had been guilty of wrongfully converting the goods of the plaintiff, he caused them to be applied so as to be apparently a satisfaction of a judgment debt due to himself. In other words, the defendant insists that, because with the proceeds of the plaintiff's goods, which he so wrongfully converted, he has satisfied his own debt, that fact must be taken into consideration by the jury in ascertaining what measure of damages the plaintiff ought to receive for the wrong done to him. I utterly decline to acknowledge the soundness of that argument. There is nothing unlawful in a man's withdrawing his goods for the purpose of avoiding an impending execution. He may choose to apply them in satisfaction of the claim of another creditor; and this he has a perfect right by law to do, apart from any question arising under the bankrupt or insolvency law. It is clearly no ground for mitigation of damages for the defendant to say that he has chosen to detain the plaintiff's goods in order that he may seize them and apply the proceeds in satisfaction of his own debt. If he might do this, what is there to prevent his doing

A different and more liberal rule generally prevails in this country. Where the defendant, in an honest and *bona fide* endeavor to enforce a right, or a supposed right, or to exercise a power, deals with the property in such a manner as constitutes a conversion, either because the right or the power was wholly or partially wanting, or has been exceeded or irregularly as-

so for the purpose of satisfying his friend's execution which he knows to be outstanding? The case has been likened to that of the redelivery of the thing converted, which is allowed to go in mitigation of damages. . . . Here, however, the goods were never redelivered to the plaintiff. He never had power to do as he pleased with them. There is no ground whatever for saying that the defendant ever restored to the plaintiff the control over his goods. Contrary to the plaintiff's wishes, he devoted them to the payment of his own debt. Then comes the main argument. It was said, that, if the plaintiff were allowed to recover by way of damages in this action, the full value of the goods, the consequence will be that the goods will be, by virtue of the judgment and execution, regarded as having been the property of the defendant from the time of the conversion. The obvious answer to that is, that, in the result, the seizure of these goods will not have operated in satisfaction of so much of the debt due to the defendant upon his judgment in the county court. The execution, having been satisfied so far out of what turns out to have been the execution creditor's own goods, is no satisfaction at all, and the now defendant may go to the county court and obtain leave to issue fresh process. There is no ground for urging what has been done in mitigation of damages."

Willes, J.: . . . "Such circumstances may exist either where the plaintiff has only a limited interest in the goods at the time of the conversion, or where the defendant has a lien upon them, or, as in Brierly v. Kendall, where the plaintiff had a defeasible right to the possession of them. There is nothing to make this case an exception from the general rule, that the plaintiff is entitled to recover all he has lost by the defendant's wrongful act. Then, there is the case in which the goods wrongfully seized have been afterwards returned. The cases of Fouldes v. Willoughby, 8 M. & W. 540, and Harvey v. Pocock, 11 M. & W. 740, afford a familiar illustration of the rule. The circumstances I have referred to have from very early times been considered admissible in mitigation of damages, because the plaintiff has had part satisfaction for the wrong. If the goods have been restored, and the plaintiff has consented to take them back in discharge of the claim, that might perhaps be pleaded by way of accord and satisfaction; if not, it would go in reduction of the amount of damages to which the plaintiff would be entitled for the wrongful conversion. There is also another case in which a mitigation of damages is allowed upon a very peculiar ground — the case of one who, as executor de son tort, has dealt with the goods of the deceased in a due course of administration, and relies on that as an answer to an action brought against him by the real

serted or exercised, the courts generally consider the whole transaction, and award only such damages as are necessary for complete reparation. Thus, in disposing of property rightfully distrained for rent, a necessary step was omitted, which made the sale irregular, legally a conversion; but the defendant was permitted to recoup the rent which the sale was made

executor appointed under the will. There, the character of the act of wrong is determined at the time it is done. The law, however, regards it with so much favor, that, if the real executor would have done the same, no recovery is allowed against the executor de son tort in respect of damages for that part of the estate which has been so applied. In all these cases, the damages are allowed to be mitigated, either in respect of the interest of the plaintiff in the goods being less, or of his having already received a partial satisfaction of the damages, or of the act being an act having a rightful character in respect of the persons towards whom it is done and in whose favor it operates at the time. But that principle cannot apply here, where the plaintiff had an unqualified right at the time to do as he liked with the goods, and the act of the defendant was wrongful and without any justification. I cannot help thinking that we should be violating the rule of law which prohibits a man from taking advantage of his own wrong, if we were to hold that the defendant's execution was to have a greater advantage or be more beneficial to him by reason of his wrongful act in seizing and detaining the plaintiff's goods for the purpose of making them amenable thereto. There clearly was nothing like a redelivery of the goods to the plaintiff here. So long as law shall endure, parties cannot be allowed to be judges or bailiffs in their own cases. In all cases save the exceptional one of distress, the final process of the law is to be executed by the officers of the law. A person who has in violation of the law taken upon himself to seize goods which he has no right to, ought not to be allowed to come and ask for any favor or encouragement, which we should in effect be allowing if we held that the subsequent seizure under the county-court process could qualify the defendant's wrongful act of detaining the goods on the previous day. I observe that my Brother Blackburn did not express any opinion on the point of law at the trial. He left the matter to the jury, not with a direction such as he would have given them in the case of a plaintiff having but a limited interest in the goods, or of a defendant having a lien, or in the case of a redelivery; but he simply told them that they *might* take the fact of the plaintiff having the benefit of the proceeds in reduction of his debt into account in estimating the damages. He evidently felt the difficulty of stating that as a proposition of law. To hold that the defendant is entitled to have the fact of the goods being liable to the county-court process taken into consideration in estimating the damages in this action, would be giving him a greater advantage than the law would give him in the ordinary case of a lien, or in the other cases which I have put. Considering what violence might ensue if a creditor

to satisfy, or to have it deducted in mitigation.[1] An officer, by abuse of his process of execution, was held to be a trespasser from the beginning, but he was allowed in mitigation to prove the amount of the proceeds he had applied on the judgment.[2] A tax collector became a purchaser at his own sale, which was held voidable for that reason; but in trover by the owner, for the property, against the collector, the amount of the tax paid was deducted from the damages.[3] An officer sold without giving notice, and he was held liable as for a conversion; but the proceeds having been applied to his debt, the owner was held entitled to recover only the damages he suffered from the failure to give such notice; this damage was supposed to be that a less price was obtained for the property.[4]

In an action of trover against an attaching creditor and the officer, it appeared that after the attachment of the property the attachment was abandoned, and the indorsement of service erased. Without surrendering the property, it was taken on a new writ for the same creditor and the same debt, and, after judgment, sold on execution and the proceeds applied to satisfy it. The action was brought for a conversion by the original taking. As the defendants could not justify, they suffered judgment by default, and on the assessment of damages they claimed the right to show such subsequent disposition of the property in mitigation, and were allowed to do so; and the

were allowed, for the purpose of securing his debt, to resort to an act unlawful at the time, and to justify it afterwards by something which did not then exist, I think we are not warranted in allowing the inchoate right of the defendant to have execution against the goods in question to operate in reduction of the damages which the plaintiff is entitled to for the wrongful seizure. There is a case where this doctrine was attempted to be carried to a very great length. I allude to the case of Gillard v. Brittan, 8 M. & W. 575. There, the seller of goods which had not been paid for, retook them by violence from the buyer, and, in an action brought against him by the buyer for the trespass, insisted that the jury might, in estimating the damages to which the plaintiff was entitled, allow the value of the goods so unpaid for in mitigation. But the court of exchequer took a different view of the matter, and held, for reasons which are equally applicable here, that the defendant must pay by way of damages for his unlawful act the full value of the goods seized."

[1] Tripp v. Grouner, 60 Ill. 474.

[2] Lamb v. Day, 8 Vt. 407.

[3] Pierce v. Benjamin, 14 Pick. 356.

[4] Wright v. Spencer, 1 Stew. 576.

court, by Waite, J., say: "If goods are tortiously taken, and a creditor of the owner afterwards attaches them, and disposes of them according to law, and applies the proceeds in satisfaction of a judgment against the owner, such proceeding may be shown, not as a justification of the taking, but in mitigation of damages. For it would be palpably unjust for the owner to receive the full value of his goods in their application to the payment of his debts, and then afterwards recover that value from another, who has received no substantial benefit from his property. This rule is not only in conformity with justice, but has the sanction of authority."[1] The case was held to be within the reason of that rule, although the subsequent process was in favor of one of the defendants, and executed by the other. "The plaintiff," the learned judge continued, "has no more right to complain of a second attachment than he would if made by any other creditor, or if there had been no previous taking of the property. When the goods were attached the second time, the copy left in service with him showed their situation. It was then at his option to regain the possession either by writ of replevin or by payment of the debt upon which they were attached, or suffer them to be applied in satisfaction of that debt. Had he obtained his goods in either of the former modes, it would hardly be claimed that he could afterwards recover their value of the defendants. The same result ought to follow if he suffers them to be applied in due form of law to the payment of his debt." This is in accordance with the course of decision in some other states.[2] If

[1] Curtis v. Ward, 20 Conn. 204; Bates v. Courtright, 36 Ill. 518. In Wehle v. Butler, 12 Abb. N. S. 139, it was held that evidence of payment, or of application of the fund in suit to plaintiff's benefit, cannot be introduced under a general denial (in code pleading); that if a defendant, when sued for a conversion of goods, sets up a subsequent valid sale on execution, in favor of the defendant and against the plaintiff, it constitutes a defense, and does not go in mitigation of damages, and must be specially pleaded. Murray v. Burling, 10 John. 172; Baker v. Freeman, 9 Wend. 39; Baldwin v. Porter, 12 Conn. 473; Ford v. Williams, 24 N. Y. 359; Hurlburt v. Green, 41 Vt. 490; McInvoy v. Dyer, 47 Pa. St. 118; Jamoaco v. Simpson, 19 C. B. N. S. 453; Kaley v. Shed, 10 Met. 317; Ward v. Benson, 31 How. Pr. 411.

[2] Stewart v. Martin, 16 Vt. 397; Board v. Head, 3 Dana, 489; Hopple v. Higbee, 23 N. J. L. 342; Morrison v. Crawford, 7 Oregon, 472.

the plaintiff procure return of the property, he is entitled to recover for time spent, and other outlays reasonably made to procure it.[1] He may recover for money paid to satisfy an exaction of one having the property, to obtain possession,[2] or at a wrongful public sale.[3] The sums so paid detract from the benefit the defendant will derive by way of mitigation of damages from the return of the property. The defendant will be entitled to a deduction from the damages which would otherwise be recoverable for any partial satisfaction of the wrong made by him, or by any of several jointly charged with or guilty of the same conversion, and accepted by the plaintiff. Where in such a case, against two, the plaintiff obtained judgment by default against one, and withdrew his action against the other upon receiving partial satisfaction, and agreeing no further to prosecute him personally therefor, it was held that damages might be assessed against the defaulted defendant for the value of the converted property, deducting therefrom the amount received by way of compromise from his co-defendant.[4]

[1] Greenfield Bank v. Leavitt, 17 Pick. 1; Ewing v. Blount, 20 Ala. 694; McDonald v. North, 47 Barb. 530; Sprague v. Brown, 40 Wis. 612. See Sprague v. McKenzie, 63 Barb. 60.

[2] Keene v. Dilke, 4 Exch. 388.

[3] Hurlburt v. Green, 41 Vt. 490; Baldwin v. Porter, 12 Conn. 473.

[4] Heyer v. Carr, 6 R. I. 45.

CHAPTER XIX.

REPLEVIN.

SECTION 1.

PLAINTIFF'S CASE.

Definitions — Measure of damages — Exemplary damages may be recovered — Special and consequential damages — Recovery where the property has not been obtained on the writ — Intermediate injury and depreciation — Where the value of the property has been increased by the wrongdoer.

DEFINITIONS.— Replevin and detinue are common law actions for recovery of specific personal property. The former enables the plaintiff to obtain possession at the commencement of the suit, on giving security to prosecute his action, and to return the property if return be adjudged; the other enforces delivery of the property by the final judgment and the process thereon. The remedy by claim and delivery, under the code, combines substantially the advantages of both of these actions.[1]

MEASURE OF DAMAGES.— Where the plaintiff obtains possession of the property on his writ of replevin, as is usually the fact where the defendant has no legal right to retain it by giving bond, and on the trial maintains his right to it, if the property is obtained without injury or deterioration, he is only entitled to damages for the caption and detention.

The ordinary measure of these damages is the interest on the value of the property.[2] This rule will be applied to securities for money not bearing interest, the detention of which prevents the owner from collecting the money they represent, or of making demand so as to put them upon interest, if payment should be delayed.[3] This rule, however, is not inflexible.

[1] See McLaughlin v. Piatti, 27 Cal. 451; Morgan v. Reynolds, 1 Mont. T. 163.

[2] Brizsee v. Maybee, 21 Wend. 144; State v. Smith, 31 Mo. 566; Bigelow v. Doolittle, 36 Wis. 115; Gillies v. Wofford, 26 Tex. 76; New York Guaranty, etc. Co. v. Flynn, 55 N. Y. 653; McDonald v. Scaife, 11 Pa. St. 381; Scott v. Elliott, 63 N. C. 215; McDonald v. North, 47 Barb. 530; Robinson v. Barrows, 48 Me. 186; Oviatt v. Pond, 29 Conn. 479.

[3] McCoy v. Cornell, 40 Iowa, 457.

Following the principle that the injured party is entitled to just compensation only, when there is no injury, or but a slight one, the damages will be only nominal, or according to the injury actually sustained. If securities for money, bearing interest at the legal rate, are detained, and the interest has not been paid, no more than nominal damages can be recovered.[1]

Where corporate stock was the subject of the action, and by statute the value at the date of the trial was the value recoverable, it was held that in addition to this value the plaintiff was entitled to the dividends that had been paid upon the stock as damages for the detention.[2]

Interest on the value will not be adequate compensation, and it is not the measure of damages where the use of the property detained is valuable. The owner is entitled to recover the value of the use, if he prefers it to interest, during the time he was deprived of possession.[3] Without alleging special damages, the plaintiff may recover in replevin such damages for the detention of the property as the jury, upon all the evidence, may be satisfied that the use of the property, considering its nature and character, was worth during the time of the detention.[4] Where the value at the time of the taking is adopted, and interest is added to that, it is erroneous to give compensation also for the use between the taking and the trial.[5]

In replevin for materials, which before their removal composed a fence attached to and a part of the realty, the plaintiff can recover only the value of the materials after their removal, and not the value of the fence as it stood before the removal.[6]

[1] Bartlett v. Brickett, 14 Allen, 62.

[2] Bercich v. Marye, 9 Nev. 312.

[3] Odell v. Hole, 25 Ill. 204; Clark v. Martin, 120 Mass. 549; Davis v. Davis, 30 Ga. 296; Morgan v. Reynolds, 1 Mont. T. 163; Allen v. Fox, 51 N. Y. 562; Carroll v. Pathkiller, 3 Port. 279; Fralick v. Presley, 29 Ala. 463; Dorsey v. Gassaway, 2 Har. & J. 413; Scott v. Elliott, 63 N. C. 215; Clapp v. Walter, 2 Tex. 130; Clements v. Glass, 23 Ga. 395; Butler v. Mehrling, 15 Ill. 488; Machette v. Wanless, 2 Col. 180; Hanover v. Bartels, 2 Col. 514; McGavock v. Chamberlain, 20 Ill. 219; Dunnahoe v. Williams, 24 Ark. 264. See Twinam v. Swart, 4 Lans, 263.

[4] Clark v. Martin, supra. It has been held that the failure to claim damage in a declaration in replevin is a fatal defect. Faget v. Brayton, 2 Har. & J. 350; Crosse v. Bilson, 6 Mod. 102. See Smith v. Dodge, 37 Mich. 354.

[5] Bigelow v. Doolittle, 36 Wis. 115; Freeborn v. Norcross, 49 Cal. 313.

[6] Pennybecker v. McDougal, 48 Cal. 160.

Where an engine was the subject of the action, it was held that damages for the use could not be recovered during the time of the detention, without a showing that, but for the detention, the owner was in a situation to use it.[1] He may recover for the use of a horse while it is detained, but not in addition for the natural depreciation in the value while in the defendant's possession.[2]

EXEMPLARY DAMAGES MAY BE RECOVERED.— Such damages may be recovered where the taking is accompanied with outrage and insult, or the detention is aggravated by bad faith and oppression.[3] On the question of damages, the means by which the goods have been taken or retained will be considered. In Pennsylvania, damages beyond the value of the property may be given in replevin, where the taking was accompanied with any wrong or outrage, though the declaration contain no count for special damages, nor any averment of such aggravation;[4] and the same rule has been recognized in Mississippi[5] and New York.[6]

Where the owner of Sioux half-breed scrip is wrongfully deprived of the same, he may recover its value to him, although the scrip, being unassignable, is valueless in the hands of third persons, and notwithstanding duplicates might be obtained from the land office at Washington on proof of the loss of the originals. A wrongdoer, it was held, will not be permitted to resort to such a defense.[7]

SPECIAL AND CONSEQUENTIAL DAMAGES.— These may be recovered by the plaintiff in replevin, arising naturally and proximately from a wrongful caption or detention.[8] In such an action to recover possession of a heifer which was secretly taken

[1] Barney v. Douglass, 22 Wis. 464.
[2] Odell v. Hole, 25 Ill. 204; Mayberry v. Cliffee, 7 Cold. 117.
[3] Heard v. James, 49 Miss. 236; Craig v. Kline, 65 Pa. St. 399; Schofield v. Ferrers, 46 Pa. St. 438; Burrage v. Melson, 48 Miss. 237; Cable v. Dakin, 20 Wend. 172; McDonald v. Scaife, 11 Pa. St. 381.
[4] Schofield v. Ferrers, 46 Pa. St. 438.
[5] Burrage v. Melson, 48 Miss. 237.
[6] Cable v. Dakin, 20 Wend. 172; Brizsee v. Maybee, 21 Wend. 144.
[7] Bradley v. Gamelle, 7 Minn. 331.
[8] Schofield v. Ferrers, supra.

from the possession of the plaintiff by the defendant, damages were held recoverable for time spent and expenses incurred by the plaintiff in searching for the heifer, after she was taken by the defendant; but such damages should be specially alleged.[1]

In Wisconsin, a complaint under the code, being in the statutory form (which does not allege damages), will let in proof of special damages for the detention, as the statute provides for their recovery. For that reason, the rule that special damages must be alleged is, to that extent, inapplicable. In replevin for a horse, it was held the plaintiff might recover as damages, not only the value of the use of the animal during the time it was unjustly detained, but, if injured while so detained by defendant's neglect, the plaintiff's expenses in taking care of and doctoring the animal, in excess of what those expenses would have been, but for the injury, and for the loss of the animal's services after the plaintiff had gained possession, as well as for the permanent depreciation of its value, resulting from the injury.[2]

Recovery where the property has not been obtained on the writ.— The plaintiff may still proceed with his action where he does not obtain the property, and he will be entitled to recover, in addition to damages, the property, or its value. If he is entitled to recover the value, the measure of damages is the same as in trover or trespass.[3] But the value and damages must be proved; otherwise the plaintiff will recover only nominal damages.[4]

In several of the states, the defendant has a right to retain the property by giving a counter bond, either to pay for the property or to deliver it, if the plaintiff shall succeed in establishing a right to it. In Pennsylvania, the defendant has an election to deliver the property on the writ when the sheriff calls for it, or to retain it by giving security. If the property be delivered to the plaintiff, and he sustains his action, the defendant is answerable in damages for the taking and detention

[1] Miller v. Garling, 12 How. Pr. 203; Blackwell v. Acton, 38 Ind. 425; Mitchell v. Burch, 36 Ind. 529.

[2] Zitske v. Goldberg, 38 Wis. 216.

[3] Bigelow v. Doolittle, 36 Wis. 115; Frazier v. Fredericks, 24 N. J. L. 162.

[4] Phenix v. Clark, 2 Mich. 327; Seabury v. Ross, 69 Ill. 533; Mann v. Grove, 4 Heisk. 403.

up to the time of delivery. If the property be retained, he is answerable in addition for the full value. In either case, the action thenceforth proceeds for damages alone. The property itself can in no event be recovered at law from the defendant; nor can he tender it afterwards, in discharge of the action, or even in satisfaction *pro tanto* of the damages claimed.[1] The claim and delivery of the code as generally adopted, allows the defendant to retain the property by executing the counter bond. The judgment, if given for the plaintiff, where this right of the defendant to retain the property has been exercised, is in the alternative after the model of the judgment in detinue; it is for delivery of the property, or for the value, if delivery cannot be had; and for damages absolutely. The value is found, and usually of the date of the trial. But the statutes are not entirely uniform on these points, nor the decisions, where the statutes are similar.

In Missouri, the plaintiff, if he succeeds, has the choice of taking the property or its value. And by the value is meant the value at the time of the valuation by the jury.[2]

In New York, this option does not exist; at the termination of the suit by judgment in his favor, the plaintiff must take the property if the defendant has it, and will permit him to take it.[3] The jury are required to assess the value of the property and the damages for the detention. The value is assessed of the date of the trial; and any intermediate deterioration or depreciation must be recovered for as damages.[4] The value at the time of the trial is the usual subject of the inquiry, and the proper subject of proof. Such value is to be accepted as a substitute for the property itself, if the sheriff cannot deliver possession, and it should be the equivalent thereof.[5] An action of claim and delivery may be brought against a wrongdoer, although he has parted with the possession of the property before the commencement of the action. If the jury find that the obtaining and sending away the property were fraudulent,

[1] Fisher v. Whoalling, 25 Pa. St. 197; Schofield v. Ferrers, 46 Pa. St. 438.

[2] Pope v. Jenkins, 30 Mo. 528.

[3] Dwight v. Enos, 9 N. Y. 470; Fitzhugh v. Wiman, 9 N. Y. 559; Brewster v. Silliman, 38 N. Y. 423.

[4] Id.; Allen v. Fox, 51 N. Y. 562.

[5] Brewster v. Silliman, supra.

the plaintiff has a right to recover their value if possession cannot be delivered.[1]

In Minnesota the alternative form of the judgment is required.[2] It is there held not to be necessary for the jury to assess the value of several articles, in question, separately; unless requested by the plaintiff, with a view to obtaining a part of the property where all cannot be delivered on final process.[3] Where part has been replevied and a part not, only the value of the latter need be found.[4] And the value is to be assessed at the time of the wrongful taking or detention. If the defendant recovers, the value is fixed at the time the property is replevied from him.[5]

In Tennessee, where the sheriff returns that he cannot get possession of the property described in the writ, and has made known the contents of the writ to the defendant, the plaintiff may elect to declare in trover or detinue, and proceed as in the form of action selected.[6]

In Nevada, the judgment for the plaintiff, in claim and delivery, where the property has remained in the possession of the defendant, is for the property, or for the value if delivery cannot be had. The defendant has a right to deliver it instead of paying the value.[7] The value is there fixed at the time of trial.[8]

In this contrariety of practice it is important to observe, with reference to the subject of damages, the distinction between those cases in which the actual pursuit of the property in specie ceases upon the return of the writ showing that it has not been obtained, either because it has been eloined, or retained by execution of a counter bond, and those cases in which the plaintiff continues the pursuit until the final judgment. At common law, if the plaintiff declares in the *detinuit*, he can recover damages for the detention only until replevin, though he should prov

[1] Ellis v. Lersner, 48 Barb. 539.

[2] Berthold v. Fox, 13 Minn. 51.

[3] Caldwell v. Bruggerman, 4 Minn. 270.

[4] Hecklin v. Ess, 16 Minn. 51.

[5] Sherman v. Clark, 24 Minn. 37.

[6] Act of 1816, ch. 65; Nashville Ins. & T. Co. v. Alexander, 10 Humph. 378.

[7] Lambert v. McFarland, 2 Nev. 58; Carson v. Applegarth, 6 Nev. 187; Buckley v. Buckley, 12 Nev. 423.

[8] O'Meara v. North Am. M. Co. 2 Nev. 112; Bercich v. Marye, 9 Nev. 312.

the property still in the defendant's possession.[1] Such declaration implies that the property has been taken and delivered to the plaintiff, and that the detention does not continue. The declaration depends on the return of the sheriff. If that shows that he has replevied the property, and delivered it to the plaintiff, his declaration is necessarily in the *detinuit*, for he has got the property, and complains only of the taking and detention until replevied. If, however, the return shows that the property has not been delivered to the plaintiff, the declaration is in the *detinet* and goes for damages including the value of the property.[2] Then the action is like trespass or trover; solely an action for damages; it is in effect trespass when the plaintiff was deprived of the property by a tortious taking; trover, if the wrong consists in an unlawful detention merely. The measure of damages is the same as in those actions upon the same state of facts. The same proof is admissible for compensatory and exemplary damages. The defendant is charged, by the rule generally recognized, with the value at the time of the taking or conversion and interest from that time to the trial.[3]

There is no principle upon which the defendant can be charged with the use of the property, though valuable, after the date at which he is charged with the value; for that would involve the inconsistency of allowing the plaintiff compensation for the use of the property after he will have ceased to be the owner on the satisfaction of the judgment. The same consideration is adverse to allowing him any benefit from any subsequent appreciation in market value, or by the defendant's labor. But other principles are invoked to sustain such recoveries. One is that the defendant should not be permitted to make a profit out of his own wrong. This principle is sound; but it is often loosely applied. If the wrongdoer is sued for the value of property which he has taken and converted, it is in anticipation that the judgment will be collected or paid. When it is satisfied, this principle does not derogate from the defendant's

[1] Truitt v. Revill, 4 Harr. (Del.) 71.

[2] Id.; Kehoe v. Rounds, 69 Ill. 351; Karr v. Barstow, 24 Ill. 580; Frazier v. Fredericks, 24 N. J. L. 162; Bruen v. Ogden, 11 N. J. L. 370; Field v. Post, 38 N. J. L. 346.

[3] Id.; Fisher v. Whollery, 25 Pa. St. 197; Schofield v. Ferrers, 46 Pa. St. 438; Heard v. James, 49 Miss. 236.

title to the property, nor from the beneficial incidents of his ownership. The owner is to have just compensation for the injury; this has been held to entitle him to any advance from general causes in price that he would immediately have realized, or which the defendant has or might have obtained. When any departure is properly allowed from the price at the time of the taking or conversion, it is justified only on the ground of giving full and adequate compensation. When that is paid the property belongs to the defendant, and by relation from the time he was charged with, and convicted of, taking and converting it. Whatever use, otherwise, he can make of the property, and whatever advantages he can derive from it, belong to him, without any prejudice from the circumstance that his title had a tortious inception. The plaintiff is entitled to the value at the time of the wrongful appropriation, and to interest from that date, at least; and therefore is not affected by any depreciation afterwards. If the property perishes, or is in any manner injured, after the time when the defendant's title, by relation, attaches, it is his loss, a loss incident to ownership.

Where the judgment in replevin is required, in case the property has not been replevied and delivered to the plaintiff, to be in the alternative, for delivery of the property, or for the value if delivery cannot be had, there is a strong implication that the value shall be assessed at the time when such delivery is adjudged in favor of the prevailing party. The value is the substitute for the delivery, and where the property is still within the defendant's control it has been deemed proper in detinue, from which this feature of the code remedy of claim and delivery is derived, to magnify the estimate of value to insure the actual delivery of the property.[1] So it has been held proper to reduce it under particular circumstances, on the principle of limiting the compensation to the actual injury.[2] It is, however, consonant to legal analogies to fix the value at the time when delivery is required to be made, rather than at another time.[3] But that is not the time to which the whole injury is referred;

[1] Goodman v. Floyd, 2 Humph. 59; Mayberry v. Cliffe, 7 Cold. 120; Cochrane v. Winburne, 13 Tex. 143; Hoeser v. Kraeka, 29 Tex. 450.

[2] Single v. Schneider, 24 Wis. 299; Buckley v. Buckley, 12 Nev. 423.

[3] Swift v. Barnes, 16 Pick. 194.

on the contrary, it is then merely adjusted and the due recompense ascertained. The wrong is done when the taking or conversion occurs; that wrong is a continuing one while the property, belonging to the plaintiff, is tortiously withheld from him. By the remedy for the recovery of specific property by which he is entitled and obliged to resort to final process for its delivery to him, he continues to assert a right to the property until he voluntarily receives the value for it.

The law aims to compensate the entire injury. It is usually satisfied if the plaintiff succeeds in obtaining the property, and it comes to him in as good condition, not depreciated, but worth as much as when taken, and he receives interest on its value; unless he has been put to greater expense and inconvenience from being deprived of its use than the interest will compensate; then in lieu of interest he may recover the value of the use; and where this is allowed, there ought not to be any compensation for the wear and depreciation naturally consequent upon such use.[1] If the defendant, by his wrongful conduct, has deteriorated the property, or a loss on its value has proximately and with certainty resulted from the wrongful detention, that should be recovered for, in addition to the value, in order to give the owner full indemnity. He is entitled to any advance in market value, for it is an appreciation of his own property. But in some cases where the alternative judgment is rendered, the value is fixed at the inception of the wrong.[2] This may be done without materially changing the result, by keeping in view that the time of trial is the day of final reckoning for surrender of title if the property itself cannot be had. In making up the account the owner is credited with the value at the time of the defendant's wrongful appropriation; this cannot be diminished by any injury to or depreciation of the property after that date, for which the defendant is the responsible cause, and whether any could occur for which he is not responsible, will be considered presently. But if it subsequently appreciates so that it is worth more at the trial, the owner must consider himself thereby injured, and add to the value noted at the date of the conversion the amount of such appreciation; so if the use of

[1] Odell v. Hole, 25 Ill. 204.

[2] Sherman v. Clark, 24 Minn. 37.

the property is worth more than the interest, he may elect to consider himself more injured by loss of the use than the interest will compensate, and claim the former. In this way, though the computation is very illogical, the same practical result may be reached.

INTERMEDIATE INJURY AND DEPRECIATION.— The property may suffer injury or depreciation in the hands of the defendant, intermediate the taking or wrongful detention, and the bringing of replevin when it is taken and delivered to the plaintiff; and in other cases it may suffer injury and depreciation during the pendency of the action, when the defendant retains the property, and the plaintiff, on recovery, is obliged to take an alternative judgment. The question whether the plaintiff, if he maintains his suit, must bear this loss, is the same in each of these cases. It is a loss relative to the property while it belongs to him by his original title and by the effect of the adjudication.

The defendant should be charged with this loss if he is the occasion of it; he should be held responsible for it, if it is the natural and proximate consequence of the wrongful taking or detention; or if in like manner it resulted from any subsequent act or negligence on his part, during such detention. Such a ground of liability existed in some of the cases which are sometimes cited to support a broader responsibility. A stock of merchandise is likely to suffer deterioration by seizure, removal and detention.[1] A loss may also result, in such case, from keeping the stock from market through the proper season for sale. As the defendant, in the cases supposed, retains the property upon an honest claim of ownership, he should preserve, manage and dispose of it as men having such property ordinarily do to make it most beneficial to them. On this principle, if it has a usable value he is charged with it; so if it is kept as a commodity for sale, he may be presumed to dispose of it at a reasonable time judiciously.[2]

There are cases which hold and some *dicta* in the books favoring the doctrine that the wrongdoer must make good all injury to the property and all deterioration which it suffers

[1] Rowley v. Gibbs, 14 John. 385; Beveridge v. Welch, 7 Wis. 394.

[2] Gordon v. Jenney, 16 Mass. 465.

while he detains it, whether such damage accrues through his fault or not. The owner can hold him responsible for such loss by suing in trespass or trover; for by that form of action the plaintiff gives effect to the wrongful taking or conversion to clothe the wrongdoer with the title from the date of his wrongful interference with the property; the wrongdoer is charged with the property at the time he takes or detains it; and the effect of recovery in such actions, followed by satisfaction, is to make him the owner from that time. Hence the subsequent loss, though wholly by accident, falls upon him as the owner. It is optional with the injured party to acquiesce in such taking or detention to make it a disposition of his property; by bringing trespass or trover he does so, even though he takes back the property; for when it is returned in such cases, it does not affect the cause of action, and only goes in mitigation of damages. But by bringing replevin, he expresses his determination not to acquiesce; his determination is to recover his property, and there is no interruption of his ownership; he continues his pursuit of the property in specie till the judgment. Every question affecting his indemnity, therefore, is to be decided on the theory and assumption of his continued and uninterrupted title to it. If it has suffered injury or deterioration, he must bear the loss as an incident of ownership, unless he can make a case for charging it upon some other person. He must be able to show that such loss naturally and proximately resulted from the defendant's act, or he cannot hold him liable for it; unless, indeed, there is some consideration of policy that imposes the loss on the defendant on some other terms. In an early Kentucky case,[1] the court held, in such an action, for a slave, that though the defendant acquired the possession of the slave rightfully, yet, if he continued the detention after suit brought to recover such slave, the possession became wrongful; that he who wrongfully detains the property of another does it at his own peril, and will be responsible to the proprietor, though the property be destroyed by accident, or taken from him by violence. And that doctrine seems to have become the settled law of that state,[2] as well as of

[1] Carrel v. Early, 4 Bibb, 270.

[2] Caldwell v. Fenwick, 2 Dana, 333; Gentry v. Burnett, 6 T. B. Mon. 115; Scott v. Hughes, 9 B. Mon. 104.

Alabama.[1] A case in the latter state was commenced in 1861, for the recovery of certain slaves. The action was of the nature of detinue, and, therefore, did not disturb the defendant's possession during the progress of the case. It was tried in 1866, and the plaintiff succeeded in establishing his title. The judgment was for the delivery of the property, or the payment of the alternate value, assessed at $20,000; although pending the suit, general emancipation had taken effect, of which the court had, of course, judicial notice. This change in the *status* of the subject was treated, not as a determination of the plaintiff's title to the several negroes named in the declaration, but as a death or destruction of the property; and that because it occurred while the defendant had a wrongful possession, he was liable for the value; and the value, not when the delivery was ordered, but at any time between the commencement of the suit and its termination.[2] Walker, C. J., said: "When an owner's property has been converted, there immediately springs up in his favor a right to have its value; and that right may be enforced in an action of trover, without the peril of defeat by the death or destruction of the property. If, in detinue, a recovery of the property or its alternate value is prevented by its death or destruction, it is obvious that that form of action is inadequate to redress the wrong or enforce the right in its full extent. The plaintiff must yield his desire to obtain the specific property, or he must incur the peril of losing it in the possession of the *tortfeasor*. The policy of this court has been so to shape its adjudications, in reference to the action of detinue, as to encourage the delivery of property wrongfully withheld. This policy, which seems to us to be wise, would not be consulted by placing the subject of litigation at the hazard of the owner, and relieving the wrongdoer from responsibility. Indeed, the contrary policy, when the property is of a perishable nature, would enable the defendant, by retaining the possession, and prolonging the litigation, to defeat the plaintiff's right to enjoy his own property." The plaintiff was a mortgagee, and it was plausibly said that,

[1] White v. Ross, 5 Stew. & P. 123; Rose v. Pearson, 41 Ala. 692; Fragin v. Pearson, 42 Ala. 335.

[2] Rose v. Pearson, 41 Ala. 692. See Johnson v. Marshall, 34 Ala. 522.

if he had obtained the possession, he might have sold it and realized its full value. And the learned judge further remarked: "It is unjust and unconscientious, under such circumstances, that the loss, if it had resulted from death, should fall upon the plaintiff."

In the case of Suydam v. Jenkins, which is noted for furnishing the opportunity, improved by a learned jurist, to write one of the best judicial opinions on the law of compensation to be found in the English language, Duer, J., expressed himself strongly in favor of the same doctrine. He said: "We cannot think that a wrongdoer is ever to be treated as a mere bailee, and that the property in his possession is to any extent at the risk of the owner. We have seen that the defendant in trover or trespass is in all cases responsible for the value of the property when taken or converted, and certainly it has never been supposed that he can discharge himself from this responsibility, in whole or in part, by showing that the property had been destroyed or injured by an inevitable accident, after he had obtained its possession. A plaintiff who, without right or title, has seized the property of another by a writ of replevin, is as much a wrongdoer as a defendant in trover. No reason can be given why his liability should be less extensive; and in fact, when the replevin suit is terminated, although he cannot be treated as a trespasser, he may be sued in trover at the election of the defendant.[1] The decision in Carpenter v. Stevens[2] is plainly inconsistent with the prior decision of the same court in Rowley v. Gibbs,[3] in which the defendants in a replevin, in addition to a return of the goods, were held to be entitled to damages for a deterioration in their value from the time of the replevy, although it was not pretended that the decrease in value was attributable in any degree to the act or default of the plaintiff, and it is irreconcilable with numerous cases in which it has been held expressly or by implication, that, in a suit upon the replevin bond, the value of the property, as fixed by the penalty of the bond, is at the election of the plaintiff, the measure of damages."[4] The question is the same, and is here treated as

[1] Yates v. Fassett, 5 Denio, 21.
[2] 12 Wend. 589.
[3] 14 J. R. 385.
[4] Citing Middleton v. Bryan, 3 M. & S. 158; Mattoon v. Pearce, 12 Mass. 406; Huggleford v. Ford, 11 Pick.

identical, where the plaintiff has obtained the property by his writ of replevin, and the defendant succeeds in his defense, and is entitled to a return, or the value, at his election.

In Massachusetts, the replevin bond was formerly, by statute, expressly conditioned for return of the goods in like good order and condition as when taken; and when that special requirement was dropped, by revision, no change was deemed to have been contemplated.[1] Therefore the defendant was entitled at least to have the property or what it was worth when taken; but being entitled to the property itself, its value when demanded on the writ of restitution could be recovered.[2] In Maine the bond requires the property to be returned in like good order and condition as when taken.[3] But there the plaintiff, in replevin, was held not liable for a horse which died, without his fault, while he held it pending the suit, on a judgment being recovered by the defendant for a return. This was held in an action on the replevin bond. Such a loss of property had been previously held available to exonerate a receiptor,[4] and also an officer having the property in custody on mesne process;[5] and the same principle was deemed applicable to a plaintiff in replevin, because his possession was a lawful one. The court say, by Kent, J.: "The distinction, in fact, is, that in the case at bar the replevin suit was instituted on the day the animal was seized on execution by the officer, for the purpose of selling it to satisfy the same. It is urged that this distinction is vital, on the ground that, if the replevin suit had not been interposed, the animal would have been sold in four days, and the proceeds thus secured to the creditors, whereas, in the cases cited, the animal was attached on mesne process, and held only as security to await final judgment, the animal dying before such judgment." After adverting to the grounds on which those cases were decided, and that of Carpenter v. Stevens,[6] the learned

223; Wood v. Braynard, 9 Pick. 322; Barnes v. Bartlett, 15 Pick. 71; Brizsee v. Maybee, 21 Wend. 144; McCabe v. Morehead, 1 W. & S. 513. To these may be added as supporting the same view, Young v. Willett, 8 Bosw. 486; Mayberry v. Cliffe, 7 Cold. 117.

[1] See Parker v. Simonds, 8 Met. 205.

[2] Swift v. Barnes, 16 Pick. 194.

[3] Berry v. Hoeffner, 56 Me. 170.

[4] Shaw v. Laughten, 20 Me. 266.

[5] Melvin v. Winslow, 10 Me. 397.

[6] 12 Wend. 589.

judge continued: "The result from these authorities seems to be, that the writ of replevin is one authorized by law to enable a party, who in good faith asserts a claim of title or right of possession in a chattel, to have his claim investigated and determined judicially." The property is treated as, in a certain sense, in the custody of the law. "The party who replevies, having given the bond required by the statute, is not a wrongdoer, if he acts fairly, although the result may show that he was mistaken in his belief of his right of property."[1] Why should not the same reasoning apply in favor of a defendant who got possession and retains it, in good faith, and in a manner which would be justified if "his belief of his right of property" had been well founded, though the result of the suit may show that he was mistaken? No rule can be adopted, in such a case, for the purpose of deterring one who believes himself to be the owner from exercising an owner's dominion and right of possession. He is technically a wrongdoer if he fails to maintain his title; and he is such, if he gets possession by a writ of replevin without having a right and title which will sustain it. Where there is an honest dispute about the ownership of specific property, and the parties determine to contest to obtain and retain it in specie, rather than for the value, one or the other must hold while the controversy is being settled; and if, in such a case, it perishes without the custodian's fault, it seems more just to regard the loss as one which must be borne by him who is really the owner. The subject of the controversy ceases to exist; and as it has gone out of existence without either's fault, why, from that point, should not the controversy cease, and be confined to the adjustment of compensation to the owner for any detention which occurred before that time?

It has been held in Missouri that if slaves are sued for, and they die in the hands of the defendant during the pendency of such a suit, the plaintiff has no just claim for more than damages for the detention up to the time of the death; that if the depreciation or death be produced by the defendant's illtreatment or neglect; or if the slaves be sold to another, the rule might be otherwise.[2] Napton, J., said: "In relation to the

[1] Walker v. Osgood, 53 Me. 422. [2] Pope v. Jenkins, 30 Mo. 528.

death of three of the slaves sued for, which occurred after the institution of the suit, and was suggested by a supplemental answer, the question presented is not free from difficulty and doubt, and, it must be confessed, has been very differently viewed by different courts. Our opinion, however, will be based principally upon our statute which regulates the action brought in this case, and upon what we believe to be principles of sound public policy and natural equity. . . . Before the adoption of our present code of practice, which abolishes the forms and names of actions as known to the common law, there was a distinction between detinue and trover, although in many cases it was at the option of the plaintiff to bring whichever he preferred. In trover, the plaintiff admitted the title to the property sued for to be in the defendant, and only asked damages for the conversion, which he asserted was wrongful. In detinue the plaintiff claimed to be the owner still, and demanded the specific property detained. As an act of God does an injury to no one, though it may occasion a loss, the loss of course falls upon the owner, and, therefore, where detinue was brought, and an accidental loss occurred by the death of the property sued for, it must fall upon the plaintiff, if determined to be the owner. But it was otherwise in trover where the plaintiff admitted the change of title, and only claimed damages for its conversion; there the loss would be the defendant's, upon the same principle that it would be the plaintiff's in detinue."[1] A plaintiff in replevin, retaining the articles replevied until judgment in the suit, cannot claim damages for any depreciation in their value during that period, because he may sell them immediately, in such manner as will ascertain their value, for which alone he is answerable on his bond.[2]

WHERE THE VALUE OF THE PROPERTY HAS BEEN INCREASED BY THE WRONGDOER.— If a wrongdoer has taken or converted the property without wilful fault, and by labor or money has improved it, and thus added to its value, if its identity has not

[1] Bethea v. McLennon, 1 Ired. 530; Austin v. Jones, Gilmer (Va), 341, per Coalter, J.; Buckley v. Buckley, 12 Nev. 423; Frey v. Drahos, 7 Neb. 194; Parker v. Simonds, 8 Met. 205. See Boylston Ins. Co. v. Davis, 70 N. C. 485.

[2] Gordon v. Jenney, 16 Mass. 465.

been destroyed the right of the owner to retake it, subject to some fixed, and some vague and unsettled limitations, is universally admitted. Extreme cases can be mentioned, where the exercise of the right would be very unjust, where a retaking would give the owner more than he ought to have, and impose an undeserved loss on the wrongdoer. This injustice, when it occurs, results from necessity; for the owner cannot be divested of his property without his consent or fault, and no wrongdoer can divest him by any unauthorized act done to the property which does not destroy its legal identity. While the owner's right subsists he cannot take his own without taking also the labor which has been bestowed upon it; therefore the wrongdoer, however innocent of intentional wrong, is unfortunate in having inseparably annexed his work to another's property, so that the latter must take it when he asserts his right to enjoy his own. The loss to the wrongdoer does not result from any principle or rule of damages, but from the exercise of an undoubted right of property.

We have seen that where trover is brought for a conversion, which has been succeeded by such improvement of the property, the plaintiff is confined in his recovery to the value of the property in the place or condition in which the defendant took or converted it.[1] The damages are measured against such a wrongdoer on the principle of compensation; and they do not include the value added by the labor of a wrongdoer who has improved the property under a mistaken belief that he owned it. The same rule has been applied in replevin where the defendant has retained the property — logs made from timber by him — and the value is assessed as a part of the damages.[2] Agnew, J., said: "It is in the power of the defendant in replevin to relinquish that proportion of its value which his labor or money has added to it, by suffering the sheriff to return it to the owner. But this result depends on himself. If he claim the additional value, it is always his right to retain the property by giving a property bond, and the effect of a verdict for damages in favor of the plaintiff is to transfer the title to the de-

[1] See ante, p. 509.

[2] Herdic v. Young, 55 Pa. St. 176.

fendant. If, therefore, he denies that his trespass was wilful and wanton, and claims a right to the additional value given to the chattel by his labor and money in converting and transporting it to the place where it is replevied, he has it in his power to bring the damages of the plaintiff to their true standard. In a case of inadvertent trespass, or one done under a *bona fide*, but mistaken, belief of right, this would generally be the value of the logs at the boom (the place of replevy), less the cost of cutting, handling and driving to the boom. Such a standard of damages, growing out of the nature of the act, and of the form of action, is reasonable, and does justice to both parties. It saves the otherwise innocent defendant his labor and money, and gives the owner the enhancement of the value of his property growing out of other circumstances, such as a rise in the market price, a difference in price between localities or other adventitious causes." The same ruling has been made in Wisconsin, though the judgment is there a judgment for delivery of the property if delivery can be had, and otherwise for the value.[1]

In Michigan, where the writ of replevin is peremptory for delivery of the property to the plaintiff on his executing the requisite bond, it has been held that where the property had been taken by the wrongdoer in good faith and immensely improved by converting it into a new species of property, as timber into hoops, replevin would not lie; that the defendant's labor had added such value to the original material that the latter was a mere incident, and to prevent the injustice of allowing the owner in such a case to retake it by judicial process, and thus obtain so much more than compensation, and subject the defendant to a loss so disproportioned to the injury he had done to the owner, it should be deemed that the identity of the property was lost.[2]

[1] Single v. Schneider, 24 Wis. 299; S. C. 30 Wis. 570. See Brewster v. Silliman, 38 N. Y. 423.

[2] Wetherbee v. Green, 22 Mich. 311.

Section 2.

DEFENDANT'S CASE.

Successful defendant's common law and statutory rights — A plaintiff obtaining possession by replevin and failing in his suit, a wrongdoer — Measure of damages — Special and consequential damages — Mitigation of damages — How recovery affected by special interest of the prevailing party — Recoupment — Recoveries when part of property found for each party.

Successful defendant's common law and statutory rights.— Damages in favor of a defendant, from whom property has been taken by a writ of replevin, were not allowed at common law, but merely a judgment for return of the property.[1] But this deficiency has been remedied to some extent in England, and fully in this country, generally, by statute. Defendants are not only allowed a return of the property, but are permitted to recover in the replevin suit the value of the property under some conditions in lieu of the property itself, and damages for the detention.[2] The defendant will be entitled to a return on

[1] White v. Lloyd, 3 Blackf. 390; Parnell v. Hampton, 10 Ired. 463. In Hopewell v. Price, 2 Har. & G. 275, Archer, J.: "The question presented for the consideration of the court in this case is whether upon a plea of property found for a defendant in replevin, he is entitled to an order in the nature of a writ of inquiry to assess the damages by him sustained in consequence of the loss of possession by the execution of the writ of replevin. . . . . The common law did not give damages in replevin to a defendant; but they were allowed to certain defendants by the statutes of 7 Hen. VIII, ch. 4, and 21 Hen. VIII, ch. 19. But these statutes only gave damages to avowants, and other persons making conusance, or justifying as bailiff in replevin for rents or services, and they have not been extended to defendants claiming property. 2 Bac. Abr. tit. Costs (F), 53; Turner v. Gallillee, Hard. 153.

"In the cases falling within the statutes above referred to, the damages recovered are such as are sustained before the institution of the suit. But to allow damages in this case, would be to give them for the injury arising from the institution of the suit, and the detention of the property by the plaintiff from that time, which would be a novel proceeding, and justified by no analogy of law. The remedy of the defendant will be found by a suit on the replevin bond executed by the plaintiff, the condition of which is sufficiently comprehensive to indemnify the defendant from any injury he may sustain by a nonsuit."

[2] See Whitwell v. Wells, 24 Pick. 25; Brown v. Stanford, 22 Ark. 76; Pierce v. Van Dyke, 6 Hill, 613. In School District v. Shoemaker, 5 Neb.

any termination of the plaintiff's case for irregularity before pleading; and afterwards, where the defendant succeeds upon such an issue as gives him a right to a return.[1]

36, it was held under the code in that state, in an action of replevin, if the jury find in favor of the defendant, they must assess for him such damages as they shall think just and proper, whether he pleads a general denial, new matter as a defense, or a demand for damages.

[1] Gould v. Barnard, 3 Mass. 199; Hill v. Bloomer, 1 Pin. (Wis.) 463; Hopkins v. Burney, 2 Fla. 42. In Fleet v. Lockwood, 17 Conn. 233, it was held that an avowry, or suggestion in the nature of an avowry, by the defendant in replevin, is not necessary to authorize the court to render a judgment of return, where the writ is abated or set aside on account of an irregularity or defect in the replevin process. For if there were any such pleading on the part of the defendant, or any suggestion of that nature, there could be no inquiry as to the truth thereon; for it "would not only be unreasonable, but inconsistent, to absolve the defendant from answering the charge of the plaintiff, by abating the writ, and, at the same time, to compel him to try the merits of the cause with the plaintiff," citing Potter v. North, 1 Saund. 347, and note 1; Cross v. Bilson, 6 Mod. 102; Anon. 1 Vent. 127; Foot's Case, 1 Salk. 93; Anon. id. 94. In this case, Storrs, J., said: "It is true, that the general rule, as stated in the books, is, substantially, that in order to entitle the defendant to a return, where the issue is found in his favor, it must appear, either from the pleadings, whether in abatement or bar, or by a proper suggestion, that he has a right to such return; and it is also stated that there is a distinction between pleas in abatement in actions of replevin and other actions, for that in the latter, the pleas go merely to the writ, and the defendant is placed *in statu quo*, by its abatement; whereas, in replevin, the defendant, by merely abating the writ, is not reinstated in his possession of it, and in order to obtain such possession, by the awarding of a return, must show that he is entitled to the possession. The terms in which we find these principles laid down, do not import that they were designed to embrace, nor are the authorities relied on applicable to, cases where property is irregularly replevied; on the contrary, in all the cases cited in support or illustration of these rules, stated thus generally, the process of replevin was regular, and, consequently, the delivery of the property under it; and the writ was abated for other causes than its defectiveness or irregularity. The writ and the proceedings under it being regular and valid, it might well be held, according to the theory of this species of action, that the defendant, seeking a return of the property, had become, as well as the plaintiff, seeking damages, an actor or plaintiff, and should therefore show a right to a return. But the propriety of considering the defendant a plaintiff or actor in any such sense, or of putting him to the vindication of his title, before the property has been regularly taken from him, is not perceptible. Nor is there any more reason why he should be required to avow or make title, in such case, than where the plaintiff

A PLAINTIFF OBTAINING POSSESSION BY REPLEVIN AND FAILING IN HIS SUIT, A WRONGDOER.[1]— Dispossessing a defendant of personal property by means of a writ of replevin is in legal contemplation a wrong, where the plaintiff does not prosecute his writ and suit to effect; and subjects the plaintiff to damages for the taking and detention on the same principles that govern the recovery of damages in favor of a prevailing plaintiff against a defendant. But the redress which a defendant can obtain in the replevin suit, beyond a return of the property, on a discontinuance, nonsuit or trial, depends upon local statute. He is, however, generally allowed to recover damages where he is entitled to a return;[2] but not everywhere.[3]

becomes nonsuited before declaration, where in England it is well settled, that the defendant need not avow; and the reason given is, because the plaintiff has given him no opportunity to do so. 18 Vin. Abr. 586, 591-2; Parker v. Mellor, Carth. 398; S. C. 1 Ld. Raym. 217; Butcher v. Porter, id. 243; S. C. Shower, 400; Salkold v. Skelton, Cro. Jac. 519; Wildman v. North, 2 Lev. 92; S. C. nomine; Wildman v. Norton, 1 Vent. 249; Allen v. Darby, 1 Show. 99." See Hartgraves v. Duval, 6 Ark. 506.

[1] See post, p. 559.

[2] Mikesill v. Chaney, 6 Ind. 52; Ramsey v. Thomas, 45 Mo. 111; Berghoff v. Heckwolf, 26 Mo. 511; Collins v. Hough, 26 Mo. 149; Smith v. Winston, 10 Mo. 299; Dickinson v. Woland, 7 Ark. 26; Haviland v. Parker, 11 Mich. 103; Campbell v. Head, 13 Ill. 122; Broadwell v. Paradice, 81 Ill. 474; Hooker v. Hammill, 7 Neb. 231; Gould v. Scannell, 13 Cal. 430; Bonner v. Coleman, 3 B. Mon. 464; Smith v. Snyder, 15 Wend. 324. Where the writ was void because the property was not described in it as required by the statute, an assessment of damages was refused; for the right to an assessment given by the statute was limited to cases where the property is described in the writ. Parsell v. Circuit Judge, 39 Mich. 542.

[3] In Collamer v. Page, 35 Vt. 387, a replevin suit for a flock of sheep was dismissed because brought in the wrong county. The error in the proceedings was treated as an irregularity, not a want of jurisdiction of the subject matter. It was held to be the duty of the court to render judgment for return of the property, and without any plea or avowry by the defendant, and that the plaintiff had no right to contest such a judgment on the ground that he owned the property. But a judgment of return, in such a case, was held not conclusive of the right in another action. And the court also held, that after a dismissal of the plaintiff's action on some ground not relating to the merits of the case, the defendant is not entitled to have his right to damages for the taking and detention, or improper use of the replevied property, tried or adjudicated. The damages sought to be recovered was wool shorn from the sheep after the replevy. See Hood v. Breman, 3 Mich. 160; Haviland v. Parker, 11 Mich. 103.

MEASURE OF DAMAGES.— When the defendant is entitled to return, and damages for the detention, the general measure of damages is interest on the value to the date of the judgment.[1] He is entitled to damages for the interruption of his possession, the loss of the use of the goods from the time they were replevied till their restoration, and for any deterioration resulting from the taking, detention, or the defendant's misuse or want of care.[2] The replevin is to him a wrong; and he is entitled to damages on the same principles as a plaintiff.[3] If the

In Ware River R. R. v. Vibbard, 114 Mass. 458, the court refused an order for return upon this state of facts. Motion was made after nonsuit in replevin for the return of the property, which was a large quantity of imported railroad iron, and for damages for its detention. It appeared, by the officer's return, that he had replevied the iron, and delivered it to the plaintiff, and, by an indorsement upon the writ, that the plaintiff had received it; but it also appeared that from the time of its importation by the defendant, it had been in bond under the laws of the United States; that the plaintiff had never obtained actual possession, the warehouse receipt and the custom-house delivery order, the possession of which the parties regarded as a necessary means of obtaining possession, and without which the warehouseman refused to deliver, being in the possession of the defendant, who refused to transfer them to the plaintiff; held, that the defendant having prevented the plaintiff's obtaining actual possession of the property, was not entitled to damages for its detention; and that, as there had never been an actual change of possession, an order for return was unnecessary.

[1] Suydam v. Jenkins, 3 Sandf. 614; Smith v. Dillingham, 33 Me. 384; Barnes v. Bartlett, 15 Pick. 71; McCabe v. Morehead, 1 W. & S. 513; Wood v. Braynard, 9 Pick. 322; Miller v. Whitson, 40 Mo. 97; Hooker v. Hammill, 7 Neb. 231; Moore v. Kopner, 7 Neb. 291; Hurd v. Gallaher, 14 Iowa, 394; Washington Ice Co. v. Webster, 62 Me. 341. In Atherton v. Fowler, 46 Cal. 323, the action was brought for hay in May, 1863, and the plaintiff obtained possession at the commencement of the suit, and the suit was finally tried in April, 1871. The defendant obtained a verdict, and judgment thereon was rendered in October, 1872. The value of the hay was taken in pursuance of the opinion in Page v. Fowler, 39 Cal. 412, about a year subsequent to the taking by the replevin, with a view to giving the owner the price he would have realized if he had kept it, and interest on that value from the commencement of the suit; held, it was erroneous to add interest from a date prior to that when the value was taken. Interest was computed on the verdict to the date of the judgment, and this was held erroneous. But see McCarty v. Quimby, 12 Kans. 494; Smith v. Robey, 6 Heisk. 546.

[2] Whitwell v. Wells, 24 Pick. 25; Beveredge v. Welch, 7 Wis. 394.

[3] Suydam v. Jenkins, 3 Sandf. 614; Berghoff v. Heckwolf, 26 Mo. 512;

property is valuable for use, the value of the use may be recovered instead of interest.[1]

In some of the states, judgment for return is not rendered, but a judgment for the value, and it is assessed at the time of the replevy, together with interest.[2] In others, the value is assessed for an alternative judgment, to be paid or collected, if return cannot be had; or because it can be and is waived. In the former case it is assessed at the date of the trial;[3] in the other, when taken, and then interest is added.[4]

Where the alternative judgment is given, the value being collectible only on the contingency of the specific property not being delivered or returned, must be separately assessed.[5]

The party injured is entitled to full indemnity for the injury he suffers in consequence of being deprived of his goods by means of a replevin; and the time when their value will be estimated, and the manner of the estimate, may be varied to meet any peculiarities of the case, with a view to adjusting the compensation to the actual loss.[6] Such damages are frequently

Fallon v. Manning, 35 Mo. 274; McArthur v. Lane, 15 Me. 245; Pierce v. Van Dyke, 6 Hill, 613; Dawson v. Wetherbee, 2 Allen, 461; Jansen v. Effey, 10 Iowa, 227; Wilkins v. Treynor, 14 Iowa, 391. See ante, p. 550.

[1] Allen v. Fox, 51 N. Y. 562. See ante, p. 539.

[2] Messer v. Bailey, 31 N. H. 9; Kendall v. Fitts, 22 N. H. 1; Bell v. Bartlett, 7 N. H. 178.

[3] Walls v. Johnson, 16 Ind. 374. In Treman v. Morris, 9 Bradw. (Ill.) 237, it was held that the defendant was entitled to the value of the property when taken, and interest from that time; and if the property increased in value, the increase at the date of the order for return should also be added.

[4] Woodburn v. Cogdal, 39 Mo. 222; Miller v. Whitson, 40 Mo. 97; Hutchins v. Buckner, 3 Mo. App. 595; Berthold v. Fox, 13 Minn. 501; Brizsee v. Maybee, 21 Wend. 144; McCabe v. Morehead, 1 W. & S. 513; Swift v. Barnes, 16 Pick. 194; Ormsbee v. Davis, 18 Conn. 555; Walker v. Osgood, 53 Me. 422; Smith v. Dillingham, 33 Me. 384; West v. Caldwell, 23 N. J. L. 736; Huggleford v. Ford, 11 Pick. 223; Hopkins v. Ladd, 35 Ill. 178; Barnes v. Bartlett, 15 Pick. 71; Hurd v. Gallaher, 14 Iowa, 394; Middleton v. Bryan, 3 M. & S. 155; Story v. O'Dea, 23 Ind. 326. In Darling v. Tegler, 30 Mich. 54, it was held that where judgment is given in favor of a defendant for the value of his special interest, that includes all his damages, and to give other damages is erroneous.

[5] Sayers v. Holmes, 2 Cold. 259; Pickett v. Bridges, 10 Humph. 172.

[6] Parker v. Simonds, 8 Met. 205; Eaton v. Caldwell, 3 Minn. 134; Berry v. Vantries, 12 S. & R. 89; Backenstoss v. Stahler, 33 Pa. St. 257.

recovered most beneficially in an action on the bond, as where there is a judgment for return simply, and return is not effected.[1] But this is not always the case, since the scope of recovery depends on the terms and comprehensiveness of the obligation and the statute governing the remedies.[2]

SPECIAL AND CONSEQUENTIAL DAMAGES.— In the action of replevin under statutes or a practice allowing a recovery of the damages for detention, special and consequential damages, and even exemplary damages,[3] may be recovered. The expenses of procuring teams and appurtenances, actually incurred for the purpose of removing ice, the subject of the suit, were allowed to be recovered as part of the damages, they having been rendered useless by the wrongful replevin.[4]

A manufacturer from whom the entire machinery of his cloth printing factory, in running order, and actual use, was replevied, including steam apparatus for supplying the power, took judgment for a return, and for damages assessed by computing interest on the appraised value of the property from the date of the writ to that of the judgment, under an agreement expressly provided to be without prejudice to his action on the replevin bond. On demand of the officer upon the writ of return, tender was made of all the machinery except the steam apparatus, with an offer to pay the value of that or replace it. The tender was not accepted; and the writ was returned in no part satisfied, and suit brought on the bond. It was held, 1, that the officer had a right to treat the property as an organized whole, and refuse the offer to return part of it; 2, that the manufacturer's claim for damages in the action of replevin included compensation for the general inconvenience and loss resulting from the interruption of his possession, and for the expense, trouble and delay of restoring the factory to its former condition, as well as interest on the value of the property;

[1] Vol. II, pp. 45–49; Swift v. Barnes, 16 Pick. 194; Howe v. Handley, 28 Me. 251; Smith v. Dillingham, 33 Me. 384. See Hemstead v. Colburn, 5 Cr. C. C. 655; also Nickerson v. Cal. Stage Co. 10 Cal. 520.

[2] See White v. Van Houten, 51 Mo. 577.

[3] McCabe v. Morehead, 1 W. & S. 513; Cable v. Dakin, 20 Wend. 172; Brizsee v. Maybee, 21 Wend. 144.

[4] Washington Ice Co. v. Webster, 62 Me. 341.

but 3, that the claim was an entire claim, and no portion of it recoverable in the suit on the bond, notwithstanding the proviso in the agreement under which he took his judgment; and 4, that the measure of his damages in the suit on the bond was the sum which, under the ordinary circumstances attending a sale, might reasonably be agreed on as a fair price for the property between a seller desirous of selling, and a buyer desirous of buying it as a whole, to be used in the place from which it was taken and for the purposes for which it was intended and arranged.[1]

An interesting case arose in Nevada illustrating, and containing an instructive discussion of, the distinction between matters which must be estimated as part of the value, if return cannot be had, and damages which are to be paid or collected in any event. An action of replevin was brought for a band of sheep, and was pending for several years. The defendant, in her answer, claimed to be the owner of the property, and demanded a return. She succeeded in establishing her title, and was entitled to that judgment. During the pendency of the action, the band, which was large, was largely increased by lambs; and the plaintiff yearly derived considerable sums from the wool which he sheared and marketed; and during this period many of the sheep died without his fault, and he bestowed much care, labor and attention, and incurred considerable expense, in the keeping, preservation and management of the flock, and in shearing and marketing the wool. These facts were the subject of supplemental answers. The trial court treated not only the band replevied, but the lambs added by natural increase, and the wool shorn after the plaintiff got possession, as constituent parts of the property in controversy, and adjudged a return of each separately, or, if return could not be had, that their value respectively be collected. Evidence of the necessary cost and expense of keeping and preserving the band, raising the lambs, shearing and marketing the wool, etc., was rejected.[2] On appeal, it was held that the

[1] Stevens v. Tuite, 104 Mass. 328.

[2] The following is section 202 of the Nevada practice act: "In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession, or the value thereof in case a delivery cannot be had, and damages for

judgment was erroneous; that the lambs were a constituent part of the property, and might be included in the judgment for return, and the alternate value be paid; but that the wool must be recovered for as damages for the use of the property, and from these damages should be deducted the reasonable and necessary labor and expense of keeping, preserving and managing the flock, and shearing and marketing the wool. It was also considered that the plaintiff should not be charged with the loss of such sheep as had died without his fault.[1] Leonard, J., speaking for a majority of the court, said: "If the original band belongs to the respondent, it is certain that she has rights in the lambs and wool which the law will protect in this or a subsequent action. All the rights of the parties should be settled in one action, if this can be done without doing violence to well established rules of practice, or going counter to provisions of law. As a rule in actions of this character, and such is the case here, all, or nearly all, damages for detention, or for the use of the property, accrue after the defendant files his answer. In such cases he is unable to insert in his pleadings even a proper general allegation of damages; and certainly in cases where he is obliged to plead special causes of damages, he oftentimes may be unable to frame his pleadings so as to obtain full compensation for the injury. And yet the statute declares that he may have damages for taking and withholding the property, or the value of its use in every case. . . . It is plain that the 'damages for taking and withholding' referred to are such as accrue after the action is commenced. They are damages which accrue after the property has been delivered to the plaintiff, and that can never be done until after the commencement of the action. So, aside from the general rule allowing damages accruing after the commencement of the action, where the subsequent damages are the mere incident or accessory of the principal thing

the detention, or the value of the use thereof. If the property have been delivered to the plaintiff, and the defendant claims a return thereof, judgment for the defendant may be for the return of the property, or the value thereof in case a return cannot be had, and damages for the taking and withholding the same, or the value of the use thereof."

[1] Buckley v. Buckley, 12 Nev. 423.

demanded, or where no subsequent action can be maintained for them, it is plain that the statute, in a proper case, and with proper pleadings, permits judgment in favor of defendant for damages that accrue subsequent to the commencement of the action on account of the wrongful taking and withholding of the property in dispute by the plaintiff. Admitting as a fact, then, that the original band belonged to respondent at the time they were replevied by the plaintiff, as the jury found, and so continued until the trial, it follows that respondent was entitled to judgment for their return, if a return could be had; otherwise, their value, together with such damages as with their return in one case, or their value in the other, was necessary in order to completely indemnify her on account of the wrongful act of the appellant. And under the maxim *partus sequitur ventrem*, her rights relative to the increase were precisely the same as those just stated concerning the original flock."[1] The learned judge quoted what was said in Jordan v. Thomas as follows: "It may be true, as a general proposition, that things which did not exist at the commencement of the suit could not be embraced in the judgment of the court. But this rule, however correct it may be as a general rule, can have no application to that which is merely an incident to the subject matter of the suit. For instance, a suit may be commenced to enforce the payment of a debt the day after it is due. No interest has then accrued, yet interest is recovered, not that it existed when the suit was commenced, but because it is an incident to the subject matter. So in regard to the hire of slaves, to recover which an action is brought; and, indeed, we may say in regard to everything which is but an incident, or profits accruing pending the litigation. When, therefore, the jury determined the plaintiff's rights to the slave, they at the same time determined that which was incidental to the right. The title to the mother carried with it a title to her offspring when born. Having a right to the mother, the plaintiff could recover that which the mother produced pending the suit, and the only question which could arise would be whether it was

[1] Newman v. Jackson, 12 Wheat. 570; Seay v. Bacon, 4 Sneed, 103; Jordan v. Thomas, 31 Miss. 558; McVaughten v. Elder, 2 Brev. S. C. 12; Tyson v. Simpson, 2 Hayw. N. C. 321.

even necessary to name the offspring in the judgment of the court."

Referring to the other subject of the judgment below, the wool, he continued: "But respondent could not recover a valid judgment for the wool itself, for the reason that the moment it was shorn it became separate and independent property; and thereafter, in this action, brought prior to shearing, to recover the sheep, etc., it could no more be recovered in specie than could wool shorn from other sheep belonging to respondent, but in the wrongful possession of appellant. As to the wool, respondent's remedy was a judgment in damages for taking and withholding the sheep, or for the value of their use. If the property sued for had been milch cows, it would hardly be claimed that judgment for a return of their milk, or the butter or cheese made therefrom, would be proper in an action to recover the cows. In that case respondent's remedy would have been a judgment in damages for withholding the cows, or for the value of their use. It is equally so in this case as to the wool.

"Briefly stated, then, conceding the verdict of the jury to be correct as to the ownership of the original flock, respondent was entitled to a judgment for the return of them, and the increase, if a return could be had, together with such damages as were necessary, if any, with the return, to indemnify her for all certain, actual losses sustained on account of the unlawful taking and withholding, or on account of the use of the sheep.

"If a return could not be had, she was entitled to judgment for the value of such portion of the original band and increase as appellant was bound to return or pay for, together with such damages as were necessary, with the value, to indemnify her for all certain actual losses sustained." Returning to the assignment of error for rejection of testimony of the cost and expense of plaintiff's care and labor in the management of the sheep, shearing and marketing the wool, as well as to the general question of damages, the learned judge said: "What the rule may be where the elements of fraud, malice and wrong accompany the taking, it is unnecessary to inquire, for in this case no facts appear which take it out of the general rule stated. We

find no evidence that in commencing the action, and taking possession of the original band, according to the forms of law, or the subsequent retention of the property in controversy, appellant was actuated by any improper motive, or that he intentionally committed a wrong upon respondent. . . .

"Upon the question of 'damage for taking and withholding the property, or the value of its use,' we shall therefore consider the case stripped of all elements of exaggeration on the part of appellant.

"What then were the rights of the respective parties in the matter of damages, considering the value of the property in dispute, as found by the jury, satisfactory to both parties? . . . The law aims to make good the certain, natural and proximate losses of the one, but there it stops, unless after full compensation is made there yet remains in the hands of the other a pecuniary benefit or profit. In such case we think with the court in Suydam v. Jenkins,[1] the wrongdoer should be required to pay beyond indemnification to the extent of his gains. No person should be permitted to enrich himself by the wrongful use of another's property, no matter how innocent his intentions may have been in taking and withholding it; and certainly, if he has acted in good faith, with equal truth it may be said that he should not be compelled, at a personal sacrifice, to pay beyond the actual damage sustained in consequence of his conduct. This case is, in many respects, analogous to that class of cases, above referred to, where the property honestly, but wrongfully converted, has been improved, and its intrinsic value enhanced, by the labor and expenditure of a wrongdoer. The value of the band at the time of trial was much greater than that of the original flock, and the value of the wool being added, the difference is increased still more. In such cases, it is by no means an unvarying rule in trover even to give to the successful party the benefit of the proper necessary labor and expenditure of the other, in addition to his real damages; and in replevin, when punitory damages are not allowable, if a return cannot be had, the rule very generally adopted, and certainly the one most consonant with the principle of

[1] 3 Sandf. 614.

awarding complete indemnity to the owner, and doing no injustice to the wrongdoer, is to allow the latter out of the enhanced value all of his legitimate outlay, or such portion as remains after the indemnification of the former is assured. There are reported cases which not only give to the rightful owner the property itself, in its improved state, if a return can be had, but also its enhanced value if it cannot be returned, without any deduction for the expenditure of the wrongdoer, after the true owner has been fully compensated for his actual damages. To this rule we cannot give our concurrence, in cases like this, for it would confer upon one party more than he can in justice demand, and take from the other that which he has a right to call his own.

"It is generally and perhaps always true, so long as the identification is practicable, or until the original property taken becomes of insignificant importance in comparison with the article in its improved and altered condition, that the owner is entitled to that of which he has been wrongfully deprived without making compensation to the wrongdoer for his expenditure, for the reason that as a rule the property to which he is entitled, and of which he has been deprived without fault on his part, cannot be separated from that portion which is not in fact his, and, in order to take the former, he is compelled to take the latter. Under such circumstances, the wrongdoer must lose, and the rightful owner gain. But when compensation in money is to be given for the property taken, together with damages for taking and withholding the same, or for the value of its use, a different rule in reason and justice should, and in our opinion does, obtain, by great weight of authorities. In such case, the rights of the respective parties can and should be protected.[1] Applying these principles to this case, if a return could not be had, and considering respondent's admissions as to the losses of sheep from year to year, she was entitled to

[1] Single v. Schneider, 24 Wis. 300; 30 id. 570; Hungerford v. Redford, 29 Wis. 345; Suydam v. Jenkins, 3 Sandf. 614; Moody v. Whitney, 38 Me. 178; Hyde v. Cookson, 21 Barb. 103; Wetherbee v. Green, 22 Mich. 311; Herdic v. Young, 55 Pa. St. 178; Curtis v. Ward, 20 Conn. 206. Note to Baker v. Wheeler, 8 Wend. 508; Sedgw. on Meas. Dam. 501, and note 3.

judgment for the value of the original flock and their increase, less such losses as occurred, together with a sum equal to legal interest upon such values, from the time appellant became possessed of the original band and the increase respectively, as damage for the taking and withholding the property, or for the value of its use; for to this much, at least, the rightful owner is always entitled in an action of this kind. From the balance of the value of the entire flock and the wool, at the time of trial, if in possession of appellant, and if not, the amount received therefor by him, or the amount he could have received, appellant was entitled to deduct his proper legitimate expenses in the care and support of the sheep, their shearing and the disposition of the wool; and the remainder, if any, should have been added as damages to the amount already deducted, equal to interest, making respondent's entire damages for the taking and withholding the sheep, or for the value of their use. If a return could have been had, it should have been left to the jury to decide according to the principles herein stated, whether or not respondent, in addition to a return, was entitled to damages, and if so, the amount. If the value of the flock to be returned was less at the time of the trial than the aggregate value of the original band and the increase (the necessary losses being deducted), together with legal interest upon the value of the original band, and of the increase from the time appellant became possessed of each, respectively, until the trial, then certainly she was entitled to the difference in addition to a return, and after deducting such difference, if any, from the value of the wool, appellant should have been allowed from the balance his proper necessary expenditures, and the remainder, added to the difference just stated, should have been awarded to respondent as damages."[1]

[1] Beatty, J., dissented from some of the views of the majority, and in the following excerpt from his opinion the grounds of his dissent are pithily stated: "I think it is a correct doctrine that he whose breeding ewes have been wrongfully taken, may recover in specie not only the original flock but also their natural increase, in an action brought before the birth of the young; and whether or not it is necessary in such a case for the owner to file a supplemental complaint or answer, setting up the fact of such natural increase, it is at least certain

The defendant is entitled to damages for the time the sheriff holds the property for the plaintiff to give security, where he

that, if he is permitted to do so, that furnishes no ground of complaint to the opposite party.

"The principle from which this conclusion follows is, that the identity of the flock remains notwithstanding its natural increase and decrease; lambs may be born and old sheep may die, but the flock remains the identical thing it was in the beginning. If this is the principle, and I can conceive of no other, upon which a recovery of the flock in specie can be allowed, there are other consequences which also necessarily flow from its adoption. One is that where proof of the value of the flock is made at the time of the trial, account must be taken, not only of the natural increase of the flock, but also of its natural decrease. If the value of the lambs is taken into the account, the value of the old sheep that have died from natural causes must be deducted. Up to this point I understand there is no difference between myself and the court. But I go further. The verdict of the jury in cases of this character, when it is in favor of the party out of possession of the property, must include a finding as to the value of the property and as to the damages of the owner on account of the taking and detention. This is what the jury has to decide, and it is all it has to decide. It is not called upon to determine, and it cannot determine, whether a return of the property can be had or not, and it cannot, therefore, assess damages in an amount to fit the case of a return, and in another amount to fit the case where a return of the property cannot be had. The value of the property must be fixed in one sum without any alternative, and the amount of the damages must be fixed in one sum without any alternative. This I understand to be the law, and this so far as I know is the universal practice. I have seen no procedure for a judgment awarding damages in one amount to be recovered with the property, and damages in a different amount to be recovered with its assessed value in case a return cannot be had. . . .

"At what time is the condition and value of the property to be estimated? It has been twice decided in this court, and as I think correctly decided, that the condition of the property at the time of the trial can alone be considered in assessing its value — its value at the date of the trial is the value which the jury must fix by its verdict. Bercich v. Marye, 9 Nev. 312; O'Meara v. North Am. M. Co. 2 Nev. 112. Applying the rule of these decisions to this case, it appears clear to my mind that the jury should have assessed the value of this flock of sheep in its condition at the time of the trial. In doing so they were bound to make allowance not only for the natural losses by the death of the old sheep, but for the actual decrease of the flock from whatever cause, accident, sales or wilful destruction by the wrongdoer. The only flock of sheep that could be returned was the actual flock in existence and capable of identification; and the only value that could be assessed to be recovered as an alternative, in case a return could not be had, was the value of that actual flock. To hold otherwise would lead to this consequence: Either that the damages would have to be assessed in two different

fails to furnish it, and the property is returned to the defendant, and he recovers in the action. He is entitled to damages

sums — one to be recovered in case the property was returned, and the other in case it was not returned — or else the amount actually received by the defendant would vary according to her ability or inability to find and identify her sheep, or according to the choice of the plaintiff to return the property or to pay its assessed value. To my mind it seems to be an absurd conclusion that the amount of compensation to be recovered by the injured party in cases of this kind is to be left to depend on his good or bad luck after judgment, and as for a judgment for damages in alternative amounts, there is, as I have said, no precedent for such a judgment, to my knowledge, and there is no provision for such a judgment in the statute.

"Assuming then that the duty of the jury was to find the value of the flock as it existed, capable of identification, at the time of the trial, the other special finding which they were required to make was the damage which the plaintiff had suffered by reason of the taking and detention of the property.

"Her damages consisted, in case the value of the flock at the time of the trial was less than that of the original flock at the time of the taking, of the amount of such depreciation, plus the interest on the original value, or the amount of the depreciation plus the value of the use of the flock, if that was proved to be greater than the interest. In case the value of the flock at the time of the trial was greater than that of the original flock at the time of the taking, then her damages would have been the amount of legal interest, or the value of the use of the flock, if that was greater than the interest, less the amount of the appreciation in the value of the property. If the value of the flock at the time of the trial was greater than its original value, together with the interest or the value of the use, then she was entitled to no damages.

"It is at this point that the widest divergence of opinion occurs between myself and the court. We are entirely agreed that the rule of the statute is plain; that aside from such special damages as may be recovered for depreciation in the value of the property between the time of taking and the trial, the owner is not entitled to recover both interest on its value, and the value of its use. We agree that he may have interest at least, and, if he proves that the value of the use is greater than interest, that he may recover that in the place of, but not in addition to, interest. What we differ about is the practical operation of the rule announced in the majority opinion, that the defendant, if she was the owner of the sheep, was entitled to recover at least the value of the original flock and of the increase, together with interest on such values. In my opinion this is allowing double damages — interest and value of use. The increase of a flock by breeding is a part of the use of the flock just as much as the shearing of the wool is a part of the use. He who gets the increase gets the value of the use as much as he who gets the value of the wool that is shorn. Interest is allowed as damages on the theory that the owner might have sold his property and invested the value at interest;

for that disturbance of his possession; and he may recover interest on the value and any depreciation in consequence of the taking and the expense of replacing the property.[1]

Mitigation of damages.— The plaintiff may show on assessment of value and damages under a judgment for return and for damages for detention, that shortly after the delivery of the property to him, the defendant repossessed himself of the greater part of it.[2]

It is held in some states, that where the property replevied is an animal, and dies, without the fault of the plaintiff, while in his possession, pending the suit, that fact may be proved to exonerate him from a liability for the value.[3] In Arkansas it was held that death of the property after judgment does not relieve the party bound to deliver.[4] And in Kentucky and Alabama, the party having a wrongful possession is held liable for the property, though it perish without his fault.[5]

In Illinois it was held that where a replevin suit is dismissed, and the court proceeds to assess the plaintiff's damages for the detention of the property, it is competent for the plaintiff to prove that the defendant is a mere pledgee of the property, to secure a debt from the plaintiff, as the defendant would not in such a case be entitled to recover anything for its use.[6] In Michigan, where a plaintiff is nonsuited, the defendant has, by statute, a right to a return of the property, or to waive return and recover the value. If he waive a return, he is entitled to a

the value of the use is allowed upon the theory that he would have kept his property and got the advantage of its use. He is allowed, in claiming damages, to take either position, but he cannot take both. No man can sell his flock and invest the proceeds at interest, and at the same time keep his flock and get the increase." See Sherman v. Clark, 24 Minn. 37.

[1] Morris v. Baker, 5 Wis. 389.

[2] DeWitt v. Morris, 13 Wend. 496. In Case v. Babbett, 16 Gray, 278, the action was against the officer who served the writ, by the defendant in replevin, for taking an informal bond, after obtaining a dismissal of the action on that ground. The court held that the officer might show, in mitigation, that the property replevied, at the time of the service of replevin, was, and has since remained, the property and in the possession of the plaintiff in the replevin.

[3] Walker v. Osgood, 53 Me. 422. See ante, pp. 548, 549.

[4] May v. Jameson, 11 Ark. 368.

[5] See ante, pp. 547–553.

[6] McArthur v. Howett, 72 Ill. 358.

judgment for its full value; and in an action on the replevin bond afterwards, the measure of damages is the amount of the judgment; and the obligors cannot show, in mitigation of damages, that the defendant in replevin was but a part owner of the property.[1]

How recovery affected by special interest of the prevailing party.— Where the plaintiff or defendant is entitled to recover the value, the same principles apply as in trover or trespass, in regard to recovering full value or only that of his special interest. If the party made liable is a stranger, and has no right or title whatever in the property, the judgment will be for the full value to the party whose possession or right of possession has been invaded.[2] If a party has a general or special property in goods, either alone or in connection with others, he can maintain an action of replevin in the detinet against a stranger; and the mere fact that the plaintiff owns the property with others, and not alone, is no bar to the action, either under the plea of non-detinet, or when it is specially pleaded; but it is proper matter of a plea in abatement.[3] On the other hand, where the party recovering has but a limited interest, and is under no duty to account for any surplus to any other party, and the defendant represents that residue, the recovery will be limited to the special interest of the prevailing party.[4]

If the defendant's right of possession expires before trial, judgment for return will not be ordered, and damages for detention will be limited accordingly.[5] The same rule applies to a plaintiff when he is entitled to recover value and damages; he can only recover the value of the right while it existed, and damages for detention.[6]

[1] Williams v. Vail, 9 Mich. 162.

[2] First Nat. Bank v. Crowley, 24 Mich. 492; Frei v. Vogel, 40 Mo. 149; Delworth v. McKelvey, 30 Mo. 149; Nelson v. Leichtenmeyer, 49 Mo. 56; Fallen v. Manning, 35 Mo. 271; Morss v. Stone, 5 Barb. 516.

[3] Wright v. Bennett, 3 Barb. 451.

[4] Union L. Co. v. Tronson, 36 Wis. 126; Hass v. Prescott, 38 Wis. 146; Wolfley v. Rising, 12 Kans. 535; Weber v. Henry, 16 Mich. 399; Jennings v. Johnson, 17 Ohio, 154; Scrugham v. Carter, 12 Wend. 131; Dodge v. Chandler, 13 Minn. 114; Walrath v. Campbell, 28 Mich. 111. See Veazie v. Somerby, 5 Allen, 280.

[5] Wheeler v. Train, 4 Pick. 168.

[6] Barham v. Massey, 5 Ired. 192.

RECOUPMENT.— Set-off does not exist in replevin, but when the goods are the subject of a lien or charge, the charge upon them may be enforced by way of recoupment; for the charge is inseparable from the thing itself, and, therefore, when the value of the thing is to be allowed in damages, the charge may be admitted to reduce the damages by way of recoupment, in order to do justice to both parties.[1] So where property is distrained for rent, and replevied, the plaintiff may answer the justification of seizure for rent by way of recoupment, that the landlord has failed to keep his covenants in the lease.[2]

PART OF PROPERTY FOUND FOR EACH PARTY.— On the issue made by the plea of property in the defendant, a jury may find that a part of the property belonged to the plaintiff, and assess damages for its detention; and that the residue of the property did not belong to the plaintiff, and assess damages for the defendant. In such case, the verdict is considered as rendered upon an issue, because effect is given to it in the same manner as though the declaration had contained two counts for the respective articles, or the defendant had avowed for each separately.[3] Each party may have judgment for damages and costs as far as he is successful.[4] And doubtless the general power of the court will extend to the setting off of these mutual recoveries, and issuing execution for the balance, where no reason exists for a contrary course.[5]

[1] Macky v. Dillinger, 73 Pa. St. 85; Babb v. Talcott, 47 Mo. 343.

[2] Lindley v. Miller, 67 Ill. 248; Fairman v. Flack, 5 Watts, 516; Phillips v. Monges, 4 Whart. 226; Peck v. Brewer, 48 Ill. 55; Peterson v. Haight, 3 Whart. 150; Warner v. Caulk, 3 Whart. 193; Nichols v. Dusenbury, 2 N. Y. 283; Guthman v. Castleberry, 49 Ga. 272; Wade v. Halligan, 16 Ill. 507; Hatfield v. Fullerton, 24 Ill. 279.

[3] Williams v. Beede, 15 N. H. 483; Powell v. Hinsdale, 5 Mass. 342.

[4] Id.; Brown v. Smith, 1 N. H. 36; Wright v. Mathews, 2 Blackf. 187; Clark v. Keith, 9 Ohio, 72; Seymour v. Billings, 12 Wend. 286; Vallum v. Simpson, 2 Bos. & P. 368; McLarren v. Thompson, 40 Me. 284; Poor v. Woodburn, 25 Vt. 239.

[5] Poor v. Woodburn, supra.

CHAPTER XX.

FRAUD.

Scope of the natural and proximate consequences — False representations — Measure of damages — Exemplary damages.

SCOPE OF THE NATURAL AND PROXIMATE CONSEQUENCES.— Fraud is an odious tort; and when actual injury proceeds from it, damages are allowed as for other tortious injuries. It is necessary to a cause of action for fraud that it cause actual injury; damage is of the gist of the action in such cases. In other words, fraud and damage must concur to give a cause of action.[1] Sometimes the wrong is done chiefly by the defendant; at other times the injured party is duped into becoming the immediate and unwilling agent to consummate it. He is entitled to recover compensation for the injury, including all the natural and proximate consequences of the fraud. In determining the scope of these consequences, the law applies no new principle; but that which guides and controls the inquiry of damages in all cases of tort, namely, that the wrongdoer is answerable for all those consequences of his misconduct which happen in the natural course of things, and were to be expected to ensue according to the general experience of mankind.[2]

Whenever one person, by any breach of confidence, deception or departure from the course of fair dealing, deprives another of his property, or any pecuniary advantage, the law gives the latter adequate compensation for the injury in damages as for a fraud. If the plaintiff, or injured party, is not chargeable with negligence in yielding to the deceit, it is immaterial whether the party who practices the fraud is the chief actor in causing the loss, or whether the injured party, while under the influence of the deception, contributes to his own injury in a manner which was antecedently probable and might and should have been foreseen. A few examples will make

[1] Zabriskie v. Smith, 13 N. Y. 322; Bennett v. Terrill, 20 Ga. 83; Hanson v. Edgerly, 29 N. H. 343; Upton v. Vail, 6 John. 181; Tryon v. Whitmarsh, 1 Met. 1.

[2] Vol. I, p. 21.

these propositions clear. An auctioneer pretended to have received a bid, not actually made, and thus run up the price of the property he was employed to sell, from $20,000, which was the last real bid, to $40,000. The vendee had no knowledge of this deception, and he brought suit for redress, and it was decreed that the vendor should refund $20,000, the excess above the highest real bid.[1] A broker undertook to invest money for a customer upon a safe bond, well secured by mortgage; he was employed by and received remuneration from a borrower, which he did not disclose to the lender; he falsely represented to such lender that a security offered was ample. Such broker was held liable to make good the loss arising from the insufficiency of the security.[2] Another broker was employed to sell certain real estate, under a contract by which he was to have as his commission all he could obtain above $6,000. He procured G to become a joint purchaser with himself for $8,000, concealing from him that he was acting as the vendor's agent. After the consummation of the sale by which the vendor conveyed three-fourths to G, who paid $6,000, and one-fourth to the broker, who paid $2,000, and which was, according to the vendor's agreement, refunded to him as commission, it was held that the transaction as between the broker and G was a fraud on the latter, and that the law would not permit the broker to retain the advantage of such fraud.[3]

Where several persons are engaged in a joint enterprise for their mutual benefit, each has a right to demand and expect from his associates good faith in all that relates to their common interest; and no one of them will be permitted to take to himself a secret and separate advantage to the prejudice of the others; and where, unknown to his associates, one causes to be transferred to the association, property previously purchased by himself, at a price exceeding that paid by him therefor, he is accountable to his associates for the profits thus made. Thus, four persons owning and having interests in certain oil lands which cost them about $30,000, agreed to combine their interests to organize a company and transfer their interests

[1] Veazie v. Williams, 8 How. 134.
[2] Turnbull v. Gadsden, 2 Strobh. Eq. 14; Bacon v. Bronson, 7 John. Ch. 194.
[3] Grant v. Hardy, 33 Wis. 668.

thereto at a large price above the cost, and divide the profits. To carry out this purpose they procured a subscription paper to be drawn up, by which the subscribers agreed to pay the sums subscribed for "the purchase of property," specifying therein the lands above mentioned, at the sum of $125,000. Each of them subscribed $5,000, and caused certain others to sign as decoy subscriptions for about one-half the amount to be subscribed. These subscriptions were not intended to be paid, and were not in fact paid, although so marked. The plaintiffs, induced by the fraudulent assurances of one of the originators of the scheme and of their agent, that the lands originally cost $125,000, and upon the belief that they became subscribers, on a footing of equality with the others, subscribed also and paid in their subscriptions, as did others, to the amount required. The moneys so paid were received and divided by the four associates. A company was thereupon organized, the property transferred to it, and the stock taken in payment and divided among the subscribers, as well those who had not as those who had paid, in proportion to their subscriptions. The plaintiffs subsequently made loans to the company, and under executions issued upon judgments rendered thereon, sold a portion of the lands. In an action for the fraud, it was held that said four associates were each and all liable. 1st, because the putting the subscription paper in circulation with their names subscribed, under the circumstances stated, was a gross fraud upon every subscriber ignorant of the facts; 2d, because the original purchases inured to the benefit of the *bona fide* subscribers, and in receiving and dividing the large profits a fraud was perpetrated upon them; 3d, because the four associates might be regarded as partners in that adventure; and all were responsible for false representations made by either or by their agent; that the plaintiffs could not, on account of such fraud, recover all the moneys paid by them, because they could not restore said associates to the position they were in before the transfer to the company; but that such associates could be required to account for the profits made upon the lands thus fraudulently appropriated, and the plaintiffs could recover their pro rata share.

[1] Getty v. Devlin, 54 N. Y. 403.

In such cases the fraud consists in the wrongdoer appropriating to himself, by deceptive practices, profits belonging to the injured party; the undue gain of the defrauding party is the amount of the injury to the defrauded party. The latter is in all cases entitled to be made good for the injury suffered, and the advantage gained by the fraud is not the measure of that injury, though, as in the foregoing instances, the gain of one and the loss to the other may be the same amount. An interesting and instructive case arose in New Jersey, and was decided in the court of errors and appeals of that state in 1869. As an example, it illustrates the scope of natural and proximate consequences taken into account to give compensation for injury and loss caused by fraud. The defendant had purchased in connection with another party a tract of oil lands. Proposing to form an oil company, he applied to the plaintiff and solicited him to become a member. The defendant represented that the original cost of the land was $28,000, and that the scheme would require a working capital of $4,000, making the amount of immediate investment $32,000. His proposition was to divide the property into eight shares of $4,000 each, and one of which he offered to the plaintiff, who accepted and paid for it. In a few months the associates finding themselves in debt, each paid in the further sum of $500. A small portion of the property was subsequently sold with the assent of all the members for $16,000. The property purchased, originally, had been conveyed to the defendant in trust for the members of the association. The speculation turned out a failure. The false representation relied on to support an action for fraud, was that relating to the cost of the property. The real price paid did not exceed $18,000. Other facts in the case are referred to as giving this false representation force to induce the plaintiff to make the purchase, and to give the price paid. The trial court instructed the jury that the proper measure of damages was the entire loss sustained by the plaintiff in the transaction, into which he was inveigled by the fraud of the defendant. A verdict was given accordingly, but erroneously ignoring the value of the plaintiff's interest in the land standing in the defendant's name in trust. The defendant contended for reversal on the ground that the proper measure of damages was one-eighth

of the difference between $18,000, the real cost of the property, and $28,000, the false price, constituting the fraudulent representation. Beasley, C. J., said: "I can find nothing in the reason of the thing, nor in the precedents, for the adoption of such a standard. Regarding this case simply as a sale of lands, which is the view most favorable to the contention, this rule could not be, in any case, applied with propriety. The principle of justice, as I understand the law, is, that the party injured is to be compensated, to the extent that redress is awarded judicially, for the actual loss sustained. The effort is to reach this measure as near as possible, and, unless in cases fit for punitive damages, nothing more than this is to be given. But the criterion contended for is in no sense compensation, but a mere arbitrary amount, bearing, it may be, no just relation to the quantum of damage. . . . Nor can I perceive how this rule sought to be established can properly be received for the purpose of establishing the ultimate limit to which damages are to extend. There appears no reason for circumscribing the damages of a vendee of property to the difference between the actual and represented cost price of the property. It is obvious that often his loss will exceed such bound. If the fraudulent representation has been the efficient cause of the purchase, the actual loss sustained would seem to be the proper and usual measure of redress. But if, on the other hand, the effect of the fraud has been merely to induce the payment of a larger price than otherwise would have been paid, then there would seem to be some substantial ground for the theory that the sum recovered should be the sum comprised in the over-estimate of the cost of the property. In this latter case, upon the assumption that the sale would have taken place if the truth had been known, all that the fraud produced is the payment by the vendee of an excessive price; the reduction, therefore, of such excess would afford a fair reparation. But where the sale itself is the product of fraud, the vendee may either repudiate the contract, or claim, by way of damages, the difference between the price paid by him and the real value of the property which he has acquired. This I regard as the general and well established rule.

"But the present case has peculiar characteristics which

seem to require a modification of the ordinary rule by which damages are measured in cases of fraudulent sales. The plaintiff, in this instance, by reason of the fault of the defendant, became something more than a mere purchaser of real estate. By the fraudulent practice of the defendant, the plaintiff was induced to embark in a speculation. . . . The original understanding was that the land was to be held and improved, and a company was to be formed. The land was retained, except a small portion sold with the assent of all the parties, officers appointed and expenses incurred. These steps were taken in conformity with the scheme of proceeding adopted by the parties in the inception of the business. Starting, then, from the position that the jury, on the trial of this cause, have found the fact that the plaintiff was induced to enter into this speculation by the falsehood of the defendant, it seems to me clear that, in conformity to well settled rules, we must hold the defendant answerable for the loss of the moneys which the plaintiff, without fault on his part, lost in this speculation.

"The rule to be applied in cases of this character is, that the defendant is responsible for those results, injurious to the plaintiff, which must be presumed to have been within his contemplation at the time of the commission of the fraud. When the defendant unlawfully enticed the plaintiff into his speculation, he was aware that the plaintiff would put at risk such sums as he might commit to the venture. With this knowledge, by false pretenses, he drew the plaintiff in. On what principle is it, then, that the wrongdoer is not to be made to answer for the loss which he must have foreseen as probable, and which would not have happened without his fault? I think clearly these damages are not too remote. . . . The test is that these results are proximate, which the wrongdoer, from his position, must have contemplated as the probable consequence of his fraud or breach of contract."[1]

The foregoing case suggests the remark that courts differ as to the effect of a misrepresentation of the cost of property by a vendor,[2] and that, if such misrepresentation is held to be a

[1] Crater v. Binninger, 33 N. J. L. 513.

[2] Van Epps v. Harrison, 5 Hill, 63; Sanford v. Handy, 23 Wend. 260; Medbury v. Watson, 6 Met. 246.

fraud, its effect in inducing the payment of a larger price is for the jury. There is certainly no legal relation between the amount of such over-statement and the price the defrauded party is thereby induced to pay; in other words, upon the proof of the misrepresentation, a court cannot say, as matter of law, what amount, if anything, the vendee as a consequence consented to pay. There is, therefore, great force to the remarks made in the course of the chancellor's opinion in the same case. He said: "I think the rule laid down, although the proper rule in some cases, is not the rule to be applied in this case. The proper rule, upon principles of equity and justice, to be applied in all cases of fraudulent misrepresentations in sales, is to assess damages to the amount of the loss that was occasioned by the misrepresentation. In some cases these are the same as the loss in the whole transaction, in others not. They may be less or greater. They may be serious in amount when the whole transaction proves profitable; they may be slight when the loss in the operation is great.

"If a vendor represents that the assessment on lots sold are all paid, and the representation is false, the purchaser can recover if the assessments are but $500, and he makes a profit of $5,000 on the transaction. The true rule is the loss occasioned by the fraud and falsehood. This is the rule laid down by the supreme court of New York in an able opinion by Justice Cowen in Cary v. Gruman,[1] and in the opinion of Justice Bronson in Van Epps v. Harrison,[2] and by the supreme court of Massachusetts in Medbury v. Watson.[3] The rule laid down in many cases of sale, that the damages should be the difference in the value of the thing sold, as it was represented to be, and the value as it really was at the sale, is upon this principle.[4] But that rule will not apply here, nor in many other cases. In this case the land was just as valuable if Binninger paid only the price that he did pay, as if he had paid the price he alleged he had paid. The principle is the same in all cases, but the rule or manner of applying it must differ with the circumstances of each case.

[1] 4 Hill, 627.
[2] 5 Hill, 63.
[3] 6 Met. 257.
[4] Stiles v. White, 11 Met. 358.

"In this case Crater was willing to go in with Binninger at the cost price. Had Binninger told him truly that the cost was $18,000, he would no doubt have been willing to go in at that price, and would have paid at that rate; and if any subsequent loss was sustained, would have had no claim against Binninger; and the true measure of damages appears to me to be the excess which he was induced to pay by the false and fraudulent representation of Binninger. If that was the difference between $18,000 and $28,000, the one-eighth would be $1,250, which, with the interest, would be the real damage. And the plaintiff would be entitled to recover these damages, although he had made double the amount out of the enterprise as clear profits. If, however, the jury should believe that Crater, if he had been told the real price, would not have entered into the transaction at that price, but would have taken a share in the lands only at the higher price, then his embarking in the transaction at all was the result of the fraud of Binninger, and the rule of the judge at the trial was the correct one, but it should have been so stated to the jury."[1]

Where a vendor selling a mare falsely and fraudulently represented her to be perfectly gentle and kind, and the purchaser, confiding in the truth of the representation, attempted to drive the mare, soon after the purchase, before a buggy, and the mare, by running and kicking, broke the buggy, and he broke one of his legs in jumping to the ground to save himself, he was held entitled to recover, among other things, for the injury to himself and to the buggy, if the jury should find that such injuries resulted from the viciousness of the mare, and were the probable and natural consequences of the defendant's fraud.[2] The same rule and scope of responsibility is recognized in cases of sales of domestic animals known by the vendor to have a contagious disease, and either warranting the animals to be sound, or even concealing the fact of the animals having such disease. The association of such animals with others is a probable consequence of the sale, and the ignorance of the purchaser that the animals have the disease; and, therefore,

[1] See Rohrschneider v. Knickerbocker L. Ins. Co. 76 N. Y. 216.

[2] Sharon v. Mosher, 17 Barb. 518.

such a sale is a fraud, and the vendor is held liable for any loss in respect to the animals sold, as well as by communication of the disease to other animals.[1] Where the plaintiff had invented a certain medicine, and the defendant prepared an inferior article, which he sold as and for the medicine of the plaintiff, it was held to be a fraud for which the plaintiff might maintain an action without proof of special damage.[2] The purchaser of a vessel, falsely represented by the seller to be eighteen instead of twenty-eight years old, having sent her to sea before he had knowledge that such representation was false, was held entitled to recover as part of his damages those occasioned by so sending her to sea, she having been condemned in a foreign port.[3]

False representations.— A large part of the cases of fraud, in which damages are sought, are those where the deceit consists of false representations. The principle of compensation for the injury readily adapts itself to each individual case, though the class is of infinite variety; it embraces very obviously the direct and immediate injury; it extends also, as has been shown, to all the natural and proximate consequences, and these are construed to comprehend all those which ensue naturally from the fraud, and could be foreseen as its probable effect, according to the usual course of events and the general experience. A count for deceit averring that the defendant, who was employed by the plaintiff to procure a lease, represented to the plaintiff that the lessor required a premium of 150*l*., whereas he in fact only required 100*l*., whereby the defendant fraudulently obtained from the plaintiff 50*l*., which he converted to his own use, was held sufficient.[4] A fraudulent misrepresentation may result from a person's conduct, as well as be made in words; it is then usually a fraudulent concealment. Thus a vendor is liable in an action for deceit if he sells an article having a secret defect rendering it essentially less

[1] Mullett v. Mason, L. R. 1 C. P. 559; Wintz v. Morrison, 17 Tex. 372; Jeffrey v. Bigelow, 13 Wend. 518; Faris v. Lewis, 2 B. Mon. 375; Bradley v. Rea, 14 Allen, 20; Marsh v. Webber, 13 Minn. 109; S. C. 16 id. 418; Langdon v. Sherrod, 21 Iowa, 518; Johnson v. Wallower, 18 Minn. 288; S. C. 15 Minn. 472.

[2] Thomson v. Winchester, 19 Pick. 214.

[3] Tuckwell v. Lambert, 5 Cush. 23.

[4] Pewtress v. Austin, 6 Taunt. 522.

valuable than it appears, for such price as the article appears to be worth. Knowing the defect and not revealing it, and knowing or believing that the purchaser would not buy if he knew of its existence, is a fraud.[1] Wherever confidence is reposed the law exacts frank truthfulness, requires the truth and the whole truth. In Bench v. Sheldon [2] the court say: "In the case of the sale of property, the law presumes that the purchaser reposes confidence in the vendor as to all such defects as are not within the reach of ordinary observation, and therefore it imposes upon the vendor the duty to disclose fully and fairly his knowledge of all such defects." [3] Where one undertakes to recommend another as worthy of credit, either voluntarily, or in answer to inquiry, even statements which imply only a favorable opinion, if there be a suppression of facts known to the person making such recommendation, and material as tending to contradict the opinion, will amount to a fraud if made with intent to deceive, and the person relying upon them is injured.[4] So selling a note which the seller had fraudulently procured to be indorsed by a minor, is an implied assertion of the liability of such indorser that he is a person who could bind himself. Any person buying the note, relying upon that indorsement, may have an action on the case for the injury he sustains from the falsity of such representation.[5] The action lies for selling land which has no existence.[6]

It was decided long ago in Pasley v. Freeman,[7] that a false affirmation made by the defendant with intent to defraud the plaintiff, whereby the plaintiff received damage, is the ground of an action in the nature of deceit; and that it is not necessary that the defendant should be benefited by the deceit, or that he should collude with the person who received the benefit. The doctrine of this case is now universally acknowledged.[8]

[1] Paddock v. Strowbridge, 29 Vt. 470; Brown v. Gray, 6 Jones L. 103. See Paul v. Hadley, 23 Barb. 521.

[2] 14 Barb. 66, 72.

[3] Nickley v. Thomas, 22 Barb. 654; Stevens v. Fuller, 8 N. H. 463.

[4] Eyre v. Dunsford, 1 East, 327; Ward v. Center, 3 John. 271; Upton v. Vail, 6 John. 181; Allen v. Addington, 7 Wend. 9; Corbett v. Gilbert, 24 Ga. 454; Viele v. Goss, 49 Barb. 96.

[5] Lobdell v. Baker, 3 Met. 469; S. C. 1 id. 193.

[6] Wardell v. Fosdick, 13 John. 325.

[7] 3 T. R. 51.

[8] Haycraft v. Creasy, 2 East, 92;

Where a person pretending to be the agent of the injured party, when he was not, collected money of trespassers, they were held entitled to recover back the money so paid.[1] All false affirmations, however, made with such intent, even relied on, and damage ensuing, will not support an action. The representation must be as to a past or existing fact substantially or materially affecting the interests of the other party, and relating to a matter as to which he may be presumed to repose confidence, and is thereby in fact deceived.[2] The representation must be of facts, as contradistinguished from statements of opinion or judgment. The mere affirmation or expression of opinion by a seller in regard to the property he is attempting to sell, or of a purchaser in regard to the value of the property or chose in action he desires the seller to take in payment for property he is attempting to buy, can never be safely relied on by the other party. To such affirmations the maxim *caveat emptor* applies. The party to whom they are made has no right to rely upon them, and although false and intended to deceive, the party who confides in them is not entitled to relief.[3]

To entitle a party to maintain an action for deceit by means of false representations, he must, among other things, show that the defendant made false and fraudulent assertions in regard to some fact or facts material to the transaction in which he was defrauded by means of which he was induced to enter into it. The misrepresentation must relate to alleged facts, or to the condition of things as then existent. It is not every misrepresentation, relating to the subject matter of the contract, which will render it void, or enable the aggrieved party to maintain an action for deceit. It must be as to matters of fact, substantially affecting his interests,

Russell v. Clark, 7 Cranch, 69; Upton v. Vail, 6 John. 181; Patten v. Gurney, 17 Mass. 182; Medbury v. Watson, 6 Met. 246; Ewins v. Calhoun, 7 Vt. 79; Hubbard v. Briggs, 31 N. Y. 529.

[1] Wells v. Waterhouse, 22 Me. 131.

[2] Homer v. Perkins, 124 Mass. 431; Hazard v. Irwin, 18 Pick. 105; Benton v. Pratt, 2 Wend. 385; Belcher v. Costello, 122 Mass. 189; Mason v. Raplee, 66 Barb. 182; Vernon v. Keys, 12 East, 632.

[3] Homer v. Perkins, supra; Medbury v. Watson, 6 Met. 246; Manning v. Albee, 11 Allen, 520; Veasey v. Doton, 3 Allen, 380.

not as to matters of opinion, judgment, probability or expectation.[1] Representations made in respect to a fact to transpire in the future must be a mere promise or an opinion, and will not of themselves support an action for fraud,[2] though a party may be liable for fraud by obtaining property on promises which he never intends to fulfil.[3] Fraud cannot be predicated of misrepresentations of the law, however false they may be, and whether the deception is by misrepresentation or suppression of the truth. Every person is bound to know the law.[4] If the representations were of such a nature that they will bear either the interpretation that they were intended as a mere expression of opinion, or as a statement of facts, the question of the actual intention must be decided by the jury.[5] But to justify a finding that they were representations of fact, they must be statements susceptible of knowledge as distinguished from matters of mere belief or opinion.[6] The representations must relate to material facts and have been relied upon.[7] What facts are material is matter of law. A misrepresentation of such facts may induce a party to enter into a contract, when he would not have entered into it at all if he had known the truth; or the falsehood may have had the effect of enhancing the price, or subjecting him to some specific loss on some detail of the transaction. The nature and effect of the representations in these aspects will be important on the question of damages.[8] It is

[1] Long v. Woodman, 58 Me. 49.

[2] Gallager v. Brunel, 6 Cow. 347; Markel v. Moudy, 11 Neb. 213.

[3] Oldham v. Bentley, 6 B. Mon. 430; Schufeldt v. Schintzler, 21 Hun, 462; Johnson v. Monell, 2 Keyes, 663; Eaton, etc. Co. v. Avery, 83 N. Y. 31; Burrill v. Stevens, 73 Me. 395; Durell v. Hale, 1 Paige, 492; Buckley v. Artcher, 21 Barb. 585; Nichols v. Pinner, 18 N. Y. 306; Rawdon v. Blatchford, 1 Sandf. Ch. 344; Morrill v. Blackman, 42 Conn. 324.

[4] Burt v. Bowles, 69 Ind. 1.

[5] Teague v. Irwin, 127 Mass. 217; Litchfield v. Hutchinson, 117 id. 195; Morse v. Shaw, 124 id. 59. When representations of value are not treated as mere expressions of opinion, but of a fact. Bacon v. Frisbie, 15 Hun, 56; Nowlin v. Snow, 40 Mich. 699; Dwight v. Chase, 3 Ill. App. 67; Medbury v. Watson, 6 Met. 246.

[6] Morse v. Shaw, supra; Safford v. Grout, 120 Mass. 20; Litchfield v. Hutchinson, supra.

[7] Dobell v. Stevens, 3 B. & C. 623; Bower v. Fenn, 90 Pa. St. 359; Markel v. Moudy, 11 Neb. 213; McAleer v. Horsey, 35 Md. 439; Stafford v. Maus, 38 Iowa, 133; Crosland v. Hall, 33 N. J. Eq. 111; Stout v. Merrill, 35 Iowa, 47.

[8] Crater v. Binninger, 33 N. J. L. 513.

not necessary that the false representations be the sole inducement to the act of the injured party from which the injury arises.[1] It has been held in Nevada that where misrepresentations made by a seller are shown to be material and false, it is for him to show that the buyer did not rely upon them, and that without them the purchase would have been made.[2]

It is a question of some importance in all such cases whether the injured party was negligent in not availing himself of other means of information, and whether he exercised due caution in acting upon the representations, and this question is generally for the jury.[3] If the facts are not known to him, and he has not equal means of knowing the truth, there is no legal duty not to rely on the statements of the other party.[4] Where the representations related to the size and location of lots which were the subject of negotiation, it was held in Minnesota, that the plaintiff could not be charged with negligence for relying upon the representations instead of consulting the recorded plat.[5] In Illinois, it was held that where the land relative to which the representations were made was only six miles away, the plaintiff had a right to rely on the representations.[6] And so in Massachusetts, where the matters were peculiarly, though not exclusively, within the knowledge of the defendant.[7] The purchaser of an interest in goods has a right to rely on the seller's representations that he is the owner; and he is not negligent if he fail to test the correctness of such representations.[8] The court say: "We are not inclined to encourage falsehood and dishonesty, by protecting one who is guilty of such fraud, on the ground that his victim had faith in his word, and for that reason did not pursue inquiries that would have disclosed the falsehood."[9] The constructive notice by the record of a mortgage will not deprive a purchaser of the right to rely on the vendor's positive statements, fraudulently made, that the

[1] Shaw v. Stine, 8 Bosw. 157.
[2] Fishback v. Muller, 15 Nev. 428.
[3] Roberts v. Plaisted, 63 Me. 335; Savage v. Stevens, 126 Mass. 207; Greene v. Hallenback, 24 Hun, 116.
[4] Id.
[5] Porter v. Fletcher, 25 Minn. 493.
[6] Nolte v. Reichelm, 96 Ill. 425.
[7] Nowlan v. Cain, 3 Allen, 261.
[8] Hale v. Philbrick, 42 Iowa, 81.
[9] Bondurant v. Crawford, 22 Iowa, 40; Van Epps v. Harrison, 5 Hill, 63; Bank of Woodland v. Hiatt, 58 Cal. 234.

property is unincumbered, nor will it prevent him from suing for the false representations.[1] The representations may be shown though the parties contracted in writing, and concerning a matter within the statute of frauds, and the writing is silent on the subject of the representations.[2] The action will lie for false and fraudulent representations, whether there is a warranty or not.[3] And damages for such fraud may be recovered whether the agreement be rescinded or not.[4]

To constitute a basis for damages the representations must not only be false but fraudulent. If the person making the representations which are material, and which he intends shall influence another, knows them to be false, the case is clear.[5] Some question has been raised whether positive representations made without knowledge, and believed to be true by the party making them, will sustain an action for damages in the nature of deceit. But the doctrine which seems supported by a great weight of authority is, that if a person states as of his own knowledge material facts which are susceptible of knowledge to one who relies and acts upon them as true, it is no defense, if the representations are false, to an action for deceit, that the person making them believed them to be true.[6] The falsity and

[1] Weber v. Weber, 47 Mich. 569.

[2] Nowlan v. Cain, supra; Lumm v. Port Deposit, etc. Asso. 49 Md. 233; Dobell v. Stevens, 3 B. & C. 623.

[3] Walton v. Jordan, 23 Ga. 420; Cravens v. Gant, 4 T. B. Mon. 126; S. C. 2 id. 117. See Van Vleet v. McLean, 23 Hun, 207.

[4] Warren v. Cole, 15 Mich. 265; Mullen v. Old Colony R. R. Co. 127 Mass. 86; Dayton v. Monroe, 47 Mich. 193; Krumm v. Beach, 25 Hun, 293; Gould v. Cayuga Co. Nat. Bank, 86 N. Y. 75; Allaire v. Whitney, 1 Hill, 484; Whitney v. Allaire, 1 N. Y. 305; Ely v. Mumford, 47 Barb. 629; Sallund v. Johnson, 27 Minn. 455; Miller v. Barber, 66 N. Y. 558; Merrill v. Nightingale, 39 Wis. 237.

[5] Page v. Bent, 2 Met. 374.

[6] Litchfield v. Hutchinson, 117 Mass. 195; Milliken v. Thorndike, 103 id. 382; Savage v. Stevens, 126 Mass. 207; Hazard v. Irwin, 18 Pick. 105; Page v. Bent, 2 Met. 374; Bird v. Kleiner, 41 Wis. 134; Cotzhausen v. Simon, 47 Wis. 103; Bennett v. Judson, 21 N. Y. 238; Bower v. Fenn, 90 Pa. St. 359; Snyder v. Findley, 1 N. J. L. 48; Buford v. Caldwell, 3 Mo. 477; Eaton v. Winnie, 20 Mich. 156; Hamilton v. Billengsley, 37 Micb. 107; Baughman v. Gould, 45 Mich. 481; Beatty v. Ebury, L. R. 7 H. L. 102; Beebe v. Knapp, 28 Mich. 53; Bankhead v. Alloway, 6 Cold. 56; Cabot v. Christie, 42 Vt. 121; Wheelden v. Lowell, 50 Me. 499; Thomas v. McCann, 4 B. Mon. 601; Boyd v. Browne, 6 Pa. St. 310; Lockridge v. Foster, 5 Ill. 56; Van Arsdale v. Howard, 5 Ala. 596; Munroe

fraud consist in representing that he knows the facts to be true of his own knowledge when he has not such knowledge.[1] For false warranty an action for damages in tort will lie, and according to the general course of decision, it is not necessary to allege or prove that the defendant knew the warranty to be false.[2]

It is not necessary that the false representations be made to deceive the plaintiff in particular; nor that the deceiving party obtain for himself the benefit he intended as the result of the deception. C made a sale of what purported to be certificates of stock in an incorporated company organized for the manufacture of artificial stone. He was aided in making this sale by circulars made by the defendants, as the officers of the supposed company, falsely stating its incorporation, purposes and prospects. In an action brought by the purchaser against these officers for the misrepresentation which these circulars contained, contributing to deceive the plaintiff, and to induce him to make the purchase, in the belief, contrary to the fact, that such company had a lawful existence, and for assuming to be and to act as the officers of a duly incorporated company, and in issuing certificates of capital stock, it was held that they were liable to

v. Pritchett, 16 id. 785; Parham v. Randolph, 4 How. (Miss.) 435; Phillips v. Jones, 12 Neb. 213; Bank of Woodland v. Hiatt, 58 Cal. 234; Taylor v. Leith, 26 Ohio St. 428; Duff v. Williams, 85 Pa. St. 490; McKoun v. Furgason, 47 Iowa, 636; Dunn v. White, 63 Mo. 181; Wharf v. Roberts, 88 Ill. 426. Some cases in New York do not seem to be fully in accord with the proposition in the text. Craig v. Ward, 3 Keyes, 387; Marsh v. Tealker, 40 N. Y. 562; Van Vleet v. McLean, 23 Hun, 206; Meyer v. Camden, 45 N. Y. 169; Oberlander v. Spiers, id. 175. But in Wakeman v. Dalley, 51 id. 27, the court held that an action founded upon the deceit and fraud of the defendant cannot be maintained in the absence of proof that he believed or had reason to believe at the time he made them, that the representations made by him were false, and that they were for that reason fraudulently made, or that he assumed or intended to convey the impression that he had actual knowledge of their truth, though concious that he had no such knowledge. See Stitt v. Little, 63 N. Y. 427; Lindsay v. Mulgueen, 26 Hun, 485.

[1] Litchfield v. Hutchinson, supra; Page v. Bent, 2 Met. 371; Stone v. Denny, 4 Met. 151; Milliken v. Thorndike, 103 Mass. 382; Fisher v. Mellen, id. 503.

[2] Williamson v. Allison, 2 East, 446; Fowler v. Abrams, 3 E. D. Smith, 1; Carter v. Glass, 44 Mich. 154.

him for the damages he thereby sustained, though the defendants had no intent to defraud him in particular. And it was held, also, that it was not necessary to show that they were interested in the sale.[1] Where a member of a firm made to a mercantile agency statements known by him to be false, as to the capital invested in the firm business, with the intent that the statements should be communicated to persons interested in ascertaining the pecuniary responsibility of the firm, designing thus to procure credits with and to defraud such persons, and such statements were communicated to one who, in reliance thereon, sold goods to the firm upon credit, it was held that an action for deceit could be maintained by such vendor against the partner who made such representations.[2] Chancellor Walworth said upon this point: "It is not necessary that the defendant should have had any particular individual in view as the person who was to be defrauded." And again: "Where a party plans a deliberate fraud, and furnishes the means to another to carry that plan into effect upon some one of a particular class of persons, . . it is idle to contend that he is not answerable for the consequences, because he did not know upon what particular individual of the class the fraud would be perpetrated."[3]

THE MEASURE OF DAMAGES.— Following the principle that the recovery should be commensurate with the injury, if one is fraudulently induced to enter into a contract from which expenditures have naturally succeeded; or in consequence of which he has been compelled to pay money, these expenditures will be elements of damage.[4] The party guilty of the fraud is to be charged with such damages as have naturally and proximately resulted therefrom.[5] He is to make good his representations as though he had given a warranty to that effect. He is to make compensation for the difference between the real state of the case and what it was represented to be. Thus, in case of sales

[1] Fenn v. Curtis, 23 Hun, 384; Hubbard v. Briggs, 31 N. Y. 518; Mead v. Mali, 15 How. Pr. 347; Cross v. Sackett, 6 Abb. Pr. 247; Scott v. Dixon, 29 L. J. Ex. 62.

[2] Eaton, etc. Co. v. Avery, 83 N. Y. 31.

[3] Addington v. Allen, 11 Wend. 374.

[4] Crater v. Binninger, 33 N. J. L. 513; Suydam v. Watts, 4 McLean, 162.

[5] Benton v. Pratt, 2 Wend. 385.

where there is a fraudulently false representation of quantity, quality or title, the measure of damages is the difference in value between that which is actual and that which was represented to exist.[1] And interest, at least, in the discretion of the jury, on this difference, may be added.[2]

For fraudulently inducing a person to purchase a note of an insolvent as good, he is entitled to recover the full amount payable by its terms.[3] In an action for damages for false representations it appeared that the defendant had sold the plaintiff a lot knowing that he intended to build a dwelling house upon it, and had falsely represented that there was a street upon the north side of the lot; that the plaintiff after purchasing erected a valuable house for residence on the lot, relying upon such representation. It was held that the plaintiff was entitled to recover as special damages in addition to the difference in the value of the lot, the difference in the market value of the house as a residence, with a street as represented, and without such street, it appearing that the public records did not show the condition of the property with respect to streets.[4] A purchase was made of land lying near the city of Albany for the declared

[1] Morse v. Hutchins, 102 Mass. 439; Miller v. Barber, 66 N. Y. 558; Russell v. Clark, 7 Cranch, 69; Sibley v. Hulbert, 15 Gray, 509; Neff v. Clute, 12 Barb. 466; Tackwell v. Lambert, 5 Cush. 23; Burpee v. Sparhawk, 97 Mass. 342; Bean v. Wells, 28 Barb. 465; Rheem v. Naugatuck W. Co. 33 Pa. St. 356; Platt v. Brown, 30 Conn. 336; Quimby v. Carter, 20 Me. 218; Kidney v. Stoddard, 7 Met. 252; Briggs v. Brushaber, 43 Mich. 330; Kendall v. Wilson, 41 Vt. 567; Ferris v. Comstock, 33 Conn. 513; Markel v. Moudy, 11 Neb. 213; Crosland v. Hall, 33 N. J. Eq. 111; White v. Smith, 54 Iowa, 233; Mason v. Raplee, 65 Barb. 180; Clark v. Baird, 9 N. Y. 183; Clare v. Maynard, 7 C. & P. 743; Ives v. Carter, 24 Conn. 392; Campbell v. Hillman, 15 B. Mon. 508; Page v. Parker, 43 N. H. 363; S. C. 40 id. 47; Fisk v. Hicks, 31 id. 535; Carr v. Moore, 41 id. 131; Stiles v. White, 11 Met. 356; Sollund v. Johnson, 27 Minn. 455; Wright v. Roach, 57 Me. 600; Hiner v. Richter, 51 Ill. 299; Page v. Wells, 37 Mich. 415; Hamilton v. Billingsley, 37 Mich. 107; Parker v. Walker, 12 Rich. L. 138; Foster v. Kennedy, 38 Ala. 359; Gaulden v. Shehee, 24 Ga. 438; Warren v. Cole, 15 Mich. 265; Brown v. Woods, 3 Cold. 183; Ahrens v. Adler, 33 Cal. 608; Monell v. Colden, 13 John. 395; Davis v. Elliott, 15 Gray, 90. See Rice v. White, 4 Leigh, 474.

[2] Wright v. Roach, 57 Me. 600; Morse v. Hutchins, 102 Mass. 439.

[3] Sibley v. Hulbert, 15 Gray, 509; Neff v. Clute, 12 Barb. 466; Slingerland v. Bennett, 65 N. Y. 611. See Clayton v. O'Connor, 35 Ga. 193.

[4] White v. Smith, 54 Iowa, 233.

purpose of laying it out into building lots, and the vendor fraudulently represented it to be even and requiring no grading. The property was not adapted by location for the purpose the vendor bought it for, but not having rescinded the contract of purchase, on the ground of fraud, the court held he was entitled to recoup damages for the fraud. On the question of damages the court say: "The cause must, as far as practicable, be tried just as it would have been tried the day after the contract was made, if the question had arisen at that time. The jury must assume, what the parties then believed, that the land was valuable as the site of a town, and then inquire how much less the land was worth for building purposes, taking the surface as it actually existed, than it would have been worth for those purposes had the plaintiff's representations concerning the surface been true. One mode of arriving at the correct result, and perhaps the only one, would be to inquire into the probable expense of reducing and conforming the surface of the ground to a condition corresponding with the plaintiff's representation. This would, I think, give the correct rule of damages."[1] Where one, with intent to cheat and defraud another, induces him by fraudulent means and representations to purchase for value stock which he knows to be worthless, he is liable for the damages sustained whether the purchase is made from him or from another. The measure of damages is the difference between the value of the stock, as the condition of the company issuing it really was, and what it would be if the condition of the company had been as the purchaser was fraudulently induced to believe it was. The market price of the stock about the time, or soon after the purchase, is strong evidence of its value, and in the absence of other proof will control. But where the real pecuniary condition of the company is shown, from which it appears that the stock was worthless, such market price is entitled to no weight upon the question of value. The purchaser, after discovery of its worthlessness, is not bound to mitigate the loss by himself cheating some other ignorant purchaser.[2]

In some cases the rule in question between a defrauded purchaser and the defrauding vendor is stated to be the difference

[1] Van Epps v. Harrison, 5 Hill, 63. [2] Hubbard v. Briggs, 31 N. Y. 581.

between the real value and the amount which the former was induced to pay.[1] This rule is based on the assumption that the amount paid is the measure of the value as fixed by the parties; but a party purchasing does not buy to sell again at the same price, and to compel him arbitrarily to accept compensation by that standard is to deprive him of such benefit of his purchase as the state of the market would have enabled him to realize if there had been no fraud.[2] As said by Mr. Justice Gray,[3] "to allow the plaintiff only the difference between the real value of the property and the price which he was induced to pay for it, would be to make any advantage lawfully secured to the innocent purchaser in the original bargain inure to the wrongdoer; and, in proportion as the original price was low, would afford a protection to the party who had broken, at the expense of the party who was ready to abide by, the terms of the contract." The amount paid is evidence of the value, but on principle, and according to the general course of decision, it is not conclusive of the value as it was represented to be.[4]

This general rule does not embrace all the damages which a defrauded vendee may suffer in all cases. In the case of Slingerland v. Bennett,[5] the defendant induced the plaintiff to purchase, as good, a note against an irresponsible party. The purchaser brought suit and obtained judgment on the note, but was unable to collect it. In an action for the fraud, it was held that the costs of obtaining this judgment were not proper elements of damage; that they were not the proximate result or natural consequence of the fraud. The correctness of this conclusion may well be doubted. If these costs were incurred judiciously and in good faith to enforce the demand as being such as it was represented to be, certainly they were the natural and probable

[1] Clayton v. O'Conner, 35 Ga. 193; Hallam v. Todhunter, 24 Iowa, 166; Hiner v. Richter, 51 Ill. 299.

[2] Reggio v. Braggiotti, 7 Cush. 166, 169.

[3] Morse v. Hutchins, 102 Mass. 440.

[4] Stiles v. White, 11 Met. 356; Cary v. Gruman, 4 Hill, 625; Fisk v. Hicks, 31 N. H. 535; Carr v. Moore, 41 id. 131; Page v. Parker, 40 id. 47; S. C. 43 id. 363; Tuttle v. Brown, 4 Gray, 457; Woodward v. Thatcher, 21 Vt. 580; Sherwood v. Sutton, 5 Mason, 1; Muller v. Eno, 14 N. Y. 597; Drew v. Beall, 62 Ill. 164; Loder v. Kekule, 3 C. B. N. S. 128; Dingle v. Hare, 7 id. 145; Jones v. Clarke, 3 Q. B. 194. See Thompson v. Sheplar, 72 Pa. St. 160.

[5] 66 N. Y. 611.

effect of the sale, as good, of a note against a debtor unable to pay. A warranty of title justifies a suit or a defense to maintain it, and if the title fails the costs and expenses are proper items of damage in an action upon the warranty.[1] So where a person falsely pretends to be the agent of the owner and makes a contract for the sale of his property, the purchaser is entitled to recover the costs of an unsuccessful suit to enforce the contract against the supposed principal.[2]

One who has been fraudulently induced to buy animals falsely represented or warranted to be sound, but having disease, may recover as damages for the fraud not only the loss or depreciation of the animals by reason of the disease, but the trouble and expense of attempting their cure; and if in reliance upon the warranty or representation such animals have been associated with others, and communicated the disease to them, the loss or depreciation of the latter, as well as the expense and trouble of their treatment for cure, may also be recovered.[3] The recovery may include compensation for personal injuries and incidental expenses, where such injuries result from the ordinary use of warranted property and the warranty proves false.[4]

The defrauded party may, on discovery of the fraud, restore what he has received and rescind the contract, and recover back what he has paid; or on such rescission sue for the fraud.[5]

If he affirms the contract and sues for the fraud, he is not necessarily entitled to recover for all he has done or paid on the contract, for he may have derived some benefit from it. But when the contract is repudiated on account of the fraud, the defrauded party is entitled to be put in *statu quo*, and where this cannot be literally accomplished it may be done by damages. Thus, a defendant represented the water power connected with his tannery to be sufficient to work it continuously throughout the year, and the plaintiff having no knowledge of

[1] Vol. I, pp. 141, 142; Vol. II, p. 419.

[2] Vol. I, p. 140.

[3] Sherrod v. Langdon, 21 Iowa, 518; Marsh v. Webber, 16 Minn. 418; Wintz v. Morrison, 17 Tex. 372; Johnson v. Wallomer, 18 Minn. 288; Brown v. Wood, 3 Cold. 182; Rose v. Wallace, 11 Ind. 112; Pinney v. Andrus, 41 Vt. 631.

[4] Sharon v. Mosher, 17 Barb. 518; George v. Skivington, L. R. 5 Ex. 1; Thomas v. Winchester, 6 N. Y. 397.

[5] Warren v. Cole, 15 Mich. 265; Atlanta, etc. R. R. Co. v. Hodnett, 29 Ga. 461.

the premises, and relying upon this representation, was thereby induced to purchase; thereupon, after taking a bond for it and giving his notes for the price, he entered into possession, and under the advice of the defendant expended large sums in repairs. The water failing, he abandoned the property and notified the defendant that he considered the contract of purchase rescinded. The defendant resumed possession and had the benefit of the repairs. And it was held that assumpsit would lie to recover for such repairs; that the law would, under such circumstances, imply a promise to pay for them.[1]

For the fraud of falsely representing a third person to be worthy of credit, whereby the person deceived by such representations has been induced to sell goods to such third person, he being insolvent, the vendor is entitled to recover the value of the goods sold.[2]

Damages for fraud must be shown with reasonable certainty. Remote, contingent and conjectural losses will not be taken into consideration. For the fraud of inducing by false representation the payee of a note secured by mortgage to indorse it in blank, by means whereof it has got into the hands of a *bona fide* holder, there can be no recovery until such indorser has actually paid the note. Until then he will suffer no injury. The mortgage debt may be made out of the security or the maker of the note.[3] But all such liability to loss from fraud as a ground of damage is not rejected as conjectural and contingent. It has been held in New York,[4] that if a vendor fraudulently represents goods sold to be his own, when he knows them to belong to a stranger, an action on the case lies to recover damages therefor, though the real owner has not recovered the property nor the vendee suffered any actual damage. A recovery was had on the basis of an unsatisfied liability in Kenyon v. Woodruff,[5] and upon very safe principles. The defendants by fraud induced the plaintiff innocently to take and remove and thereby convert the property of a third person for their benefit. They took upon themselves the defense of an

[1] Farris v. Ware, 60 Me. 482.

[2] Viele v. Goss, 49 Barb. 96; Bean v. Wells, 28 id. 466; Rheem v. Naugatuck W. Co. 33 Pa. St. 356.

[3] Freeman v. Venner, 120 Mass. 424.

[4] Case v. Hall, 24 Wend. 102.

[5] 33 Mich. 310.

action of trover brought against him by the true owner, and judgment therein was recovered, which he had abundant property to satisfy. They were held liable to him for the amount of that judgment, and interest upon it, though it had not been collected or paid. The court held that there was no analogy between the relations of these parties and the relations which exist between principal and surety. Graves, J., said: "The relation of principal and surety grows out of the consent of all the parties, and the principles which belong to it, in regard to the right of recovery over, can have no necessary application to a case where the relation does not arise by consent, but is caused by a positive wrong committed by one against another. It would be very unreasonable to hold that where one is drawn by the fraud of another to perform an act which gives a third party a right of action against him, and which has eventuated in a judgment which is indisputably collectible of him, the wrongdoer may still insist that his responsibility to the party he has by his fraud caused to be accountable to the third party is required to be governed by those rules which naturally and justly apply where one by choice assumes a relation of accountability on behalf of one to another."

In an Iowa case,[1] the defendants had sold and assigned to the plaintiff for a money consideration a bond of the school fund commissioner, for a deed to a tract of school land. It appeared that the interest for one year had not been paid by the defendants, although they so represented when they assigned the bond to the plaintiff. The trial court found that the plaintiff had not paid that year's interest, but paid the defendants that amount more than was due according to their agreement, and that the county held the defendants' note, which contained their obligation to pay the interest. It was held that the plaintiff was not entitled to recover for that interest, because he had not paid it; that he had not yet suffered any damage by means of the defendants' representations. The court say: "He has not yet paid the money due the school fund, nor is it alleged that the defendants are insolvent or unable to pay the sum. Their note is with the proper officer, and the defendants

[1] Kimmans v. Chandler, 13 Iowa, 327.

are liable to an action thereon at any time. The plaintiff's recovery in this case would not prevent the school fund from suing and recovering at any time for the same interest. The defendants should not be made twice liable for the same debt." It may be observed in respect to this case, that the defendants could have protected themselves from the double liability to pay by paying the interest in question to the school fund, even after this action was brought, and therefore they were not, except by their own fraud and negligence, placed in peril of a double recovery. They having received from the plaintiff an amount equal to that interest, on their false representation that they had paid it, it would seem just that he should recover damages to an equal amount, since the defendants, on the action being brought, persisted in the wrong by defending, instead of making their representation good by immediate payment to the school fund.[1] In Bradley v. Fuller,[2] the court held that a false and fraudulent representation by which a creditor was induced to abandon an intention to sue out an attachment against his debtor, followed by a loss of his debt in consequence of other creditors attaching all his property, is not actionable; that a plaintiff, on that state of facts, has suffered no legal damage; that it must necessarily be uncertain whether the plaintiff would have attached the property and applied it to his debt if the alleged representation had not been made.[3] It is not easy to perceive why the execution of such an intention might not be proved with sufficient certainty. It might almost be presumed under the circumstances stated because of the interest of the creditor to secure his debt. Readiness to perform a contract is sufficient to evince the intention of a party to fulfil it, so that if the other by any act or omission prevent its performance, the former may recover damages estimated on the assumption that he would have proceeded. In Remington Sewing Machine Co. v. Kezertee,[4] in a case where a surety was drawn into the execution of a contract by false representations or suppression of the truth, it was held that the testimony of the surety was admissible that he would not have become a surety if he had

[1] See Dunne v. Thorpe, B. D. & O. 128; Barmon v. Lithauer, 4 Keyes, 317.

[2] 118 Mass. 239.

[3] See Vol. I, p. 52, note.

[4] 49 Wis. 409.

known the facts concealed. In a late Georgia case, the holder of a deed tainted with usury stated at a sheriff's sale of the land that he held an equitable mortgage on the premises for $1,500, and the purchaser would buy subject to that incumbrance. He bid in the land himself, knowing that $500 of the $1,500 secured by his deed was for one year's interest on the remaining $1,000. On evidence that another would have given $500 more for the land at the sale, had the truth been told, the mortgagor was held entitled to recover that sum from the buyer.[1] In Benton v. Pratt,[2] it was held that where a contract would have been fulfilled but for the false and fraudulent representations of a third person, an action would lie against such third person for the fraud, although the contract could not have been enforced by action.[3]

A creditor at large, who has taken no proceedings against his debtor to acquire a lien upon his property, cannot maintain an action against a person who takes possession or converts the debtor's property under a conveyance or transfer which is made to hinder, delay and defraud his creditors.[4] But it is otherwise if the creditor has a lien, and it is reduced in value by the fraudulent conduct of another;[5] or if its release is procured by fraud.[6] So, a creditor may compel the fraudulent grantee of his debtor to account for the property after such creditor has obtained a judgment, and under it a right to resort to the equitable assets of his debtor.[7]

Plaintiffs who are jointly interested in the damages sought to be recovered for fraud may join in the action.[8] Where there were two purchasers of land which the vendor fraudulently misrepresented as to size and location, it was held that such purchasers might join though they have since made partition.[9]

[1] Denham v. Kirkpatrick, 64 Ga. 71.

[2] 2 Wend. 385.

[3] See Parks v. Alta Cal. Tel. Co. 13 Cal. 422.

[4] Adler v. Fenton, 24 How. U. S. 407; Moran v. Dawes, Hopk. Ch. 365; Lamb v. Stone, 11 Pick. 527; Wellington v. Small, 3 Cush. 145; Austin v. Barrows, 41 Conn. 287.

[5] Yates v. Joyce, 11 John. 136.

[6] Marshall v. Buchanan, 35 Cal. 264.

[7] Robinson v. Boyd, 17 Mich. 128.

[8] Medbury v. Watson, 6 Met. 257-8; Stiles v. White, 11 Met. 356.

[9] Porter v. Fletcher, 25 Minn. 493. See Patten v. Gurney, 17 Mass. 182.

Where fraud is the ground of action, the plaintiff must allege all circumstances necessary for the support of the action with such certainty that the defendant may know what he is called on to answer.[1] Evidence is admissible of only the false statements alleged in the declaration.[2]

EXEMPLARY DAMAGES FOR FRAUD.— There is not an entire agreement of the authorities on the question whether exemplary damages may be allowed in actions for deceit; nor are the cases numerous in which the point has been considered. On the principle upon which such damages are allowed where the doctrine of punitory damages prevails, it is not easy to see how such damages are to be excluded as matter of law, in cases of wilful and deliberate fraud followed by actual damage.[3]

[1] Duffy v. Byrne, 7 Mo. App. 417.
[2] Jackson v. Collins, 39 Mich. 557.
[3] Vol. I, p. 724; Nye v. Merriam, 35 Vt. 438; Byram v. McGuire, 3 Head, 530; Oliver v. Chapman, 15 Tex. 400; Platt v. Brown, 30 Conn. 336; Ives v. Carter, 24 id. 392. But see Lane v. Wilcox, 55 Barb. 615.

CHAPTER XXI.

INFRINGEMENT OF PATENT RIGHTS.

Statutory provisions regulating remedies for — Damages recoverable in actions at law — Compensation for infringement obtainable in equity.

PROVISIONS OF THE PATENT ACTS REGULATING REMEDIES FOR INFRINGEMENT.— Pecuniary redress for infringement of patent rights may be obtained pursuant to the legislation of congress by actions at law and by suits in equity. In the former, damages may be recovered in an action on the case in the name of the party interested, either as patentee, assignee or grantee. And whenever in any such action a verdict is rendered for the plaintiff, the court may enter judgment thereon for any sum above the amount found by the verdict as the actual damages sustained, according to the circumstances of the case, not exceeding three times the amount of such verdict, together with the costs.[1] The legal remedy has been substantially the same since the passage of the act of July 4, 1836.[2] The equitable remedy was enlarged by the act of 1870. It provides that upon a decree being rendered in any such case for an infringement, the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby; and the court shall assess the same, or cause the same to be assessed under its direction. And the court shall have the same power to increase such damages in its discretion, as is given to increase the damages found at law.[3] Mr. Justice Clifford, in a late case,[4] thus summarized the legal and equitable remedies for this wrong: "Prior to the passage of the act of the 8th of July, 1870, two remedies were open to the owner of a patent whose rights had been infringed, and he had his election between the two; he might proceed in equity and recover the gains and profits which the infringer had made by the unlawful use of his invention, the infringer in such a suit being regarded as the trustee of the owner of the

[1] Act of July 8, 1870; § 4919, R. S.
[2] 5 St. at Large, 123, sec. 14.
[3] § 4921, R. S.
[4] Birdsall v. Coolidge, 93 U. S. 68.

patent as respects such gains and profits; or the owner of the patent might sue at law, in which case he would be entitled to recover, as damages, compensation for the pecuniary injury he suffered by the infringement, without regard to the question whether the defendant had gained or lost by his unlawful acts,—the measure of damages in such case being not what the defendants had gained, but what the plaintiff had lost.[1]

"Where the suit is at law, the measure of damages remains unchanged to the present time, the rule still being that the verdict of the jury must be for the *actual* damages sustained by the plaintiff, subject to the right of the court to enter judgment thereon for any sum above the verdict, not exceeding three times that amount, together with costs.[2]

"Damages of a compensatory character may also be allowed to the complainant suing in equity, in certain cases, where the gains and profits made by the respondent are clearly not sufficient to compensate the complainant for the injury sustained by the unlawful violation of the exclusive right secured to him by the patent. Gains and profits are still the proper measure of damages in equity suits, except in cases where the injury sustained by the infringement is plainly greater than the aggregate of what was made by the respondent; in which event the provision is, that the complainant 'shall be entitled to recover, in addition to the profits to be accounted for by the respondent, the damages he has sustained thereby.'

"Cases occurred under the prior patent act where manifest injustice was done to the complainant in equity suits, by withholding from him a just compensation for the injury he sustained by the unlawful invasion of his exclusive rights, even when the final decree gave him all that the law allowed. Examples of the kind may be mentioned where the business of the infringer was so improvidently conducted that it did not yield any substantial profits, and cases where the products of the patented improvements were sold greatly below their just and market value, in order to compel the owner of the patent, his assignees and licensees, to abandon the manufacture of the patented product.

[1] Curtis on Pat. (4th ed.) 461; 5 Stat. 123.

[2] 16 Stat. 207.

"Courts could not, under that act, augment the allowance made by the final decree, as in the case of a verdict of a jury; but the present patent act provides that the court shall have the same powers to increase the decree, in its discretion, that are given by the act to increase the damages found by verdicts in actions at law. Such difficulties could never arise in an action at law, nor can it now, as both the prior and present patent acts authorize the court to enter judgment on the verdict of the jury for any sum above the verdict, not exceeding three times the amount. No discretion is vested in the jury, but they are required to find the *actual damages* under proper instructions from the court." [1]

Damage recoverable in actions at law.— Where the plaintiff has sought his profit in the form of a royalty paid by his licensees, and there are no peculiar circumstances in the case, the amount to be recovered will be regulated by that standard,[2] when a sufficient number of licenses or sales have been made to establish a market value.[3] Whenever an inventor finds it profitable to exercise his monopoly by selling licenses to make or use his improvements, he has himself fixed the average of his actual damage when his invention has been used without his license. If he claims anything above that amount, he is bound to substantiate his claim by clear and distinct evidence.[4]

The foregoing rule of damages is deemed subordinate to the measure fixed by the statute — the actual damages,— and therefore it will be departed from wherever the court can see that it will give less or more than the actual damages.[5] There is no rule of damages that will equally apply to all cases. The mode of ascertaining actual damages must necessarily depend on the nature of the monopoly granted.[6]

[1] Day v. Woodworth, 13 How. 372; Seymour v. McCormick, 16 id. 488.

[2] Philp v. Nock, 17 Wall. 460; Burdell v. Denig, 92 U. S. 716; Seymour v. McCormick, 16 How. 480; Birdsall v. Coolidge, 93 U. S. 64.

[3] Packet Co. v. Sickles, 19 Wall. 611; Sickles v. Borden, 4 Blatchf. 14; Suffolk Co. v. Hayden, 3 Wall. 315; Livingston v. Jones, 3 Wall. Jr. 330. See Bussey v. Excelsior M. Co. 1 McCrary, 161.

[4] Seymour v. McCormick, 16 How. 480, 490.

[5] Id.; Birdsall v. Coolidge, supra.

[6] Id.

In cases where there is no established patent or license fee, general evidence may be resorted to in order to get at the measure of damages; then, evidence of the utility and advantage of the invention over the old modes or devices that had been used for working out similar results is competent and appropriate.[1] In some cases this advantage, or the value of the use of the plaintiff's invention, is adopted as the measure of the actual damages.[2] A man who invents or discovers a new combination of matter, such as vulcanized India rubber, or a valuable medicine, may find his profit to consist in a close monopoly, forbidding any one to compete with him in the market, the patentee being himself able to supply the whole demand at his own price. If he should grant licenses to all who should desire to manufacture his composition, mutual competition might destroy the value of each license. This may be the case, also, where the patentee is the inventor of an entire new machine. If any person could use the invention or discovery by paying what a jury might suppose to be the fair value of a license, it is plain that competition would destroy the whole value of the monopoly. In such case, the profit of the infringer may be the only criterion of the actual damage to the patentee. It is, however, only when, from the peculiar circumstances of the case, no other rule can be found, that the defendant's profits become the criterion of the plaintiff's loss.[3]

[1] Suffolk Co. v. Hayden, 3 Wall. 315; Philp v. Nock, 17 Wall. 460. The amount paid by the defendant for a license to use another patented invention, which he used after he had ceased to infringe upon the plaintiff's patent, and as a substitute for the plaintiff's device, was held to be the proper measure of the value of the plaintiff's invention to him. Sargent v. Yale Lock Manufacturing Co. 17 Blatchf. 249.

[2] Brodie v. Ophir S. M. Co. 5 Sawyer, 608; Carter v. Baker, 1 Sawyer, 527.

[3] Seymour v. McCormick, supra; Cowing v. Ramsey, 8 Blatchf. 36. In Packet Co. v. Sickles, 19 Wall. 611, Miller, J., said: "The rule in suits in equity of ascertaining by a reference to a master the profits which the defendant has made by the use of the plaintiff's invention, stands on a different principle. It is that of converting the infringer into a trustee for the patentee as regards the profits thus made; and the adjustment of those profits is subject to all the equitable considerations which are necessary to do complete justice between the parties, many of which would be inappropriate in a trial by jury. With these corrective powers, in the hands of the chancellor, the rule of assuming profits as the groundwork for esti-

In cases where profits are the proper measure, it is the profits that the infringer makes, or ought to make, which govern, and not the profits which the plaintiff can show that he might have made.[1] The jury, in ascertaining the damages, are not to estimate them for the whole term of the patent, but only for the period of the infringement; for the recovery does not vest the infringer with the right to continue the use.[2]

The patentee may sue at law for the damages which he has sustained, and these damages he is entitled to recover whether the defendant has made any profits or not. In such an action it is precisely what is lost to the plaintiff, and not what the defendant has gained, which is the measure of the damages to be awarded.[3]

mating the compensation due from the infringer to the patentee has produced results calculated to suggest distrust of its universal application even in courts of equity. Certainly any unnecessary relaxation of the rule we have laid down in courts of law, where the patentee has been in the habit of selling his invention, or licenses to use it, so that a fair deduction can be made as to the value which he and those using it have established for it, does not commend itself to our judgment, nor is it encouraged by our experience.

"The reason of this rule is still stronger when the use of the patented invention has been with the consent of the patentee, express or implied, without any rate of compensation fixed by the parties." In the subsequent case of Burdell v. Denig, 92 U. S. 716, the supreme court, speaking by the same learned judge, said: "Profits are not the primary or true criterion of damages for infringement in actions at law. That rule applies eminently and mainly in cases in equity, and is based upon the idea that the infringer shall be converted into a trustee, as to these profits, for the owner of the patent which he infringes,—a principle which it is very difficult to apply in a trial before a jury, but quite appropriate on a reference to a master, who can examine the defendant's books and papers, and examine him on oath, as well as all his clerks and employés. On the other hand, as we have repeatedly held, sales of licenses of machines, or of a royalty established, constitutes the primary and true criterion of damages in an action at law.

"No doubt, in the absence of satisfactory evidence of either class in the forum to which it is most appropriate, the other may be resorted to as one of the elements on which the damages or the compensation may be ascertained; but it cannot be admitted . . . that in an action at law the profits which the other party might have made is the primary or controlling measure of damages."

[1] Id.

[2] Suffolk Co. v. Hayden, 3 Wall. 315. See Perrigo v. Spaulding, 13 Blatchf. 389.

[3] Cowing v. Rumsey, 8 Blatchf. 36.

Where the defendant's profits are sought to be made the measure of the plaintiff's recovery, it is a practical question, the solution of which will determine that claim, or the extent to which it may be maintained, whether the defendant has, by the infringement, diverted the patronage of the plaintiff, or diminished his profits from his invention. It was at one time ruled at the circuit, that the law would presume that the plaintiff's profits were diminished in proportion to the profits made by the infringer;[1] but this was held erroneous in Seymour v. McCormick.[2] It is now settled that there is no such legal inference or presumption. Actual damages are required to be proved; and they cannot be found unless the plaintiff furnishes the jury some data for the computation.[3] The plaintiff must show his damages by evidence. They must not be left to conjecture. They must be proved, and not guessed.[4] But the general principle stated in another place[5] is not lost sight of in this class of actions where the infringement was wanton, or the evidence which will show more exactly the loss resulting therefrom is peculiarly within the defendant's possession or control. Under such circumstances the respondents ought to be held to the most rigid accountability, and no intendment ought to be made in their favor, founded on the alleged inconclusiveness of the plaintiff's proofs of loss. Such proof ought to be considered and interpreted most liberally in the plaintiff's favor, within the limit of an approximately accurate ascertainment of his damages.[6] On the trial of an action for the infringement of a patent for a writing fluid, no proof was given of the cost of the manufacture of the fluid, or of the sale price; but it was shown that sales were highly profitable, and that the defendant had made and sold very large quantities. The defendant gave no evidence of the amount of their manufactures or sales, or of the cost value of the article. The jury

[1] Wilbur v. Beecher, 2 Blatchf. 132; Buck v. Hermance, 1 id. 398; Hall v. Wiles, 2 id. 194.

[2] 16 How. 480.

[3] Corporation of N. Y. v. Ransom, 23 How. 487; Seymour v. McCormick, supra; Blake v. Robertson, 94 U. S. 728; Cowing v. Rumsey, 8 Blatchf. 36; Philp v. Nock, 17 Wall. 460; Ingersoll v. Musgrove, 14 Blatchf. 541.

[4] Philp v. Nock, supra.

[5] Vol. I, p. 784.

[6] Bigelow Carpet Co. v. Dobson, 13 Reporter, 265.

found a verdict for $2,000 for the plaintiff, and it was held that it must stand, it not being one of palpable extravagance; that in such cases the plaintiff is not held to the most exact proof of the amount of his damages, and the jury are warranted in exercising a liberal discretion. If the defendant prefers to leave the damages to general inference and the estimate of the jury, when he might make the amount reasonably certain by evidence on his part, the finding of the jury will not be interfered with, except in a case of palpable extravagance.[1] The damages will be computed on what the jury find from evidence is the loss the plaintiff has in some way sustained in consequence of the infringement. The profits of the defendant, to the extent that the jury find that they represent a loss of profits or gains which the plaintiff, but for the infringement, would have realized, may be accepted as the measure of his loss, but no further.[2]

Where the infringement is confined to a part of the thing used or sold by the infringer, the recovery will be limited accordingly. It cannot be as if the entire thing were covered by the patent, or, where that is the case, as if the infringement were as large as the monopoly.[3] The plaintiff is entitled to recover in respect of any loss by reduction of the price of the article containing his invention in consequence of the infringement.[4] But it was held in Ingersoll v. Musgrove,[5] that where the patentee claims, in a suit, damages for a reduction of his price, caused by the defendant infringing the patent, he must establish, by satisfactory evidence, not only that a reduction of his prices was caused by the infringement, but how much such reduction was; how much of it was occasioned by the acts of the defendant, and how much of it was due to the fact that the infringing article contained the invention. Such evidence must not be estimate, conjecture and opinion, but must be such as to afford a sound and safe basis of calculation.[6]

The only persons who can be held for damages for the

[1] Stephens v. Felt, 2 Blatchf. 37.

[2] Id.; Pitts v. Hall, 2 Blatchf. 229; Ingersoll v. Musgrove, 14 Blatchf. 541; Carter v. Baker, 1 Sawyer, 527.

[3] Philp v. Nock, supra.

[4] Carter v. Baker, 1 Sawyer, 527.

[5] 14 Blatchf. 541.

[6] See Buerk v. Imhaeuser, 14 Blatchf. 19.

infringement of a patent are those who own, or have some interest in, the business of making, using or selling the thing which is an infringement; and an action at law cannot be maintained against the directors, shareholders or workmen of a corporation which infringes a patented improvement.[1] Demands for damages and for profits for past infringements are assignable, and such assignee may recover for infringements which occurred when he was not the owner of the patent.[2]

Interest on the damages.— The damages in these cases being unliquidated, interest is not generally allowed.[3] In one case the jury were allowed to add interest from the commencement of the action,[4] and in another to add interest in their discretion, without restriction, to the time of commencing the action.[5]

Exemplary damages.— The jury are required to find the actual damages, and have no discretion, and can be allowed no discretion, to go beyond that measure,[6] nor allow counsel fees as part of the actual damages.[7] The power to inflict such damages is committed to the discretion and judgment of the court within the limit of trebling the actual damages found by the jury.[8] It is only exercised where special reasons are shown, such as malice, insufficiency of the verdict, or the like.[9] It is a power to be exercised in view of all the circumstances of the case. It may be exercised to remunerate parties who have been driven to litigation to sustain their patents by wanton and

[1] United Nickel Co. v. Worthington, 13 Fed. Rep. 392.

[2] Consolidated Oil Well Packer Co. v. Eaton, 12 Fed. Rep. 865; Dibble v. Augur, 7 Blatchf. 86; Gordon v. Anthony, 16 id. 234.

[3] Parks v. Booth, 102 U. S. 96; Silsby v. Foote, 20 How. 378, 386; Littlefield v. Perry, 21 Wall. 205, 229; Mowry v. Whitney, 14 Wall. 620.

[4] Pitts v. Hall, 2 Blatchf. 229.

[5] Tatham v. Le Roy, 2 Blatchf. 478.

[6] Day v. Woodworth, 13 How. 372; Birdsall v. Coolidge, 93 U. S. 64; Seymour v. McCormick, 16 How. 480, 489; Buck v. Hermance, 1 Blatchf. 398.

[7] Philp v. Nock, 17 Wall. 460; Day v. Woodworth, supra.

[8] Id.

[9] Schwarzel v. Holenshade, 2 Bond, 29; S. C. 3 Fish, Pat. Cas. 116.

persistent infringement.[1] It will not be exercised in favor of a mere assignee of a right of action.[2]

Compensation for infringement obtainable in equity.—As has been stated, the present patent law gives to the successful plaintiff, in an equity suit for an infringement, the damages which he has sustained in addition to the profits to be accounted for by the defendant. As interpreted, this statute does not, in every case, entitle the plaintiff to such damages; but only when they are necessary to give him adequate compensation. If it appears that the injuries which he sustained are greater than the gains and profits realized by the defendant, then the plaintiff is entitled to recover compensation in the form of damages for the excess of the injuries sustained beyond the gains and profits received by the defendant.[3] Where the infringement is not wilful, it is only compensation for actual loss that can be recovered in any event, or in any form.[4]

There was nothing in the statutes relating to patents before the act of 1870, providing expressly for the recovery of the gains and profits of an infringement of a patent by suit in equity. The right must have been derived from the application of the general principles of justice, as administered in courts of equity, to the relations between the owners of patents and infringers, created by the patent laws. The patentee owns the monopoly of the patented invention. When an infringer converts any part of the monopoly into money, or into anything else, the owner has the right to follow his property in its new form. The person in whose hands it is, becomes his trustee; not because he was ever a trustee of the invention or monopoly, or had any right whatever to dispose of it for the owner, but because he had the money or other thing in his hands, which the owner of the invention had the right to claim because the invention brought it. It is what is received for the invention that belongs to the owner of the patent, and, when that is not

[1] Brodie v. Ophir S. M. Co. 5 Sawyer, 608.

[2] Schwarzel v. Holenshade, 2 Bond, 29; S. C. 3 Fish, Pat. Cas. 116.

[3] Buerk v. Imhaeuser, 14 Blatchf. 19; Carew v. Boston Elastic F. Co. 3 Cliff. 356, 370; Birdsall v. Coolidge, 93 U. S. 64.

[4] Buerk v. Imhaeuser, supra.

mixed with what is received for anything else, there can be no difficulty about how much the owner of the patent is entitled to; when it is, the difficulty is wholly in making the separation.[1]

The profits made in violation of a patent right, within the meaning of the law, are to be computed and ascertained by finding the difference between cost and yield. In estimating the cost, the elements of price of materials, interest, expenses of manufacture and sale, and other necessary expenditures, if there be any, and bad debts, are to be taken into the account, and usually nothing else. The calculation is to be made as a manufacturer calculates the profits of his business. Profit is the gain made upon any business or investment, when both the receipts and payments are taken into the account. The rule is founded in reason and justice. It compensates one party and punishes the other. It makes the wrongdoer liable for actual, not possible gains. The controlling consideration is, that he shall not profit by his own wrong. A more favorable rule would afford a premium to dishonesty, and invite to aggression.[2] A decree enjoining infringement and for account of profits does not subject the defendant to liability to more than the profits he has actually realized; it cannot be made to embrace others which the defendant by diligence might have realized.[3]

[1] Steam Stone Cutter Co. v. Windsor Man. Co. 17 Blatchf. 24, 26; S. C. 18 id. 47; Littlefield v. Perry, 21 Wall. 205; Burdell v. Denig, 92 U. S. 716; Packet Co. v. Sickles, 19 Wall. 611; Livingston v. Woodworth, 15 How. 546; Williams v. Rome, etc. R. R. Co. 18 Blatchf. 181.

[2] Rubber Co. v. Goodyear, 9 Wall. 788, 804.

[3] Livingston v. Woodworth, 15 How. 546. In this case Mr. Justice Daniel, delivering the opinion of the court, said: "In the instructions to the master it will be seen that he is ordered 'to ascertain and report the amount of profits which may have been, or with due diligence and prudence might have been, realized by the defendants for the work done by them, or by their servants, by means of the machines described in the complainants' bill, computing the same upon the principles set forth in the opinion of the court, and that the account of such profits commence from the date of the letters patent issued with the amended specification.' The master, in this report, made in pursuance of the instructions just adverted to, admits that the account is not constructed upon the basis of actual gains and profits acquired by the defendants by the use of the inhibited machine, but upon the theory of awarding damages to the complainants for an infringement of their monopoly.

Where contractors laid a pavement for a city which infringed the patent of N, and the city paid them as much therefor as the city would have had to pay N had he done the work, thus realizing no profits from the infringement, it was held that in a suit in equity to recover profits against the city and the contractors, the latter alone were responsible, although the

He admits, too, that the rate of profits assumed by him was conjectural, and not governed by the evidence; but he attempts to vindicate the rule he had acted upon by the declaration that he was not aware that he had 'infused into the case any element unfavorable to the defendants. That by the decision of the court they were trespassers and wrongdoers, in the legal sense of these words, and consequently in a position to be mulcted in damages greater than the profits they have received; the rule being, not what benefit they have received, but what injury the plaintiffs have sustained.' To what rule the master has reference in thus stating the grounds on which his calculations have been based, we do not know. We are aware of no rule which converts a court of equity into an instrument for the punishment of simple torts; but upon this principle of chastisement the master admits that he has been led, in contravention of his original view of the testimony, and upon conjecture as to the reality of the facts, and not upon facts themselves, to double the amount which he had stated to be a compensation to the plaintiffs below, and the compensation prayed for by them, and the circuit court has, by its decree, pushed this principle to the extreme, by adding to this amount the penalty of interest thereon from the time of filing the bill to the date of the final decree.

"We think the second report of the master, and the final decree of the circuit court, are warranted neither by the prayer of the bill, by the justice of the case, nor by the well established rules of equity jurisprudence.

"If the appellees, the plaintiffs below, had sustained an injury to their legal rights, the courts of law were open to them for redress, and in those courts they might, according to a practice which, however doubtful in point of essential right, is now too inveterate to be called in question, have claimed not compensation merely, but vengeance, for such injury as they could show that they had sustained. But before a tribunal which refuses to listen even to any save those whose acts and motives are perfectly fair and liberal, they cannot be permitted to contravene the highest and most benignant principle of the being and constitution of that tribunal. There they will be allowed to claim that which, *ex æquo et bono*, is theirs, and nothing beyond this.

"In the present case, it would be peculiarly harsh and oppressive, were it consistent with equity practice, to visit upon the appellants any consequences in the nature of a penalty. It is clearly shown that the appellants, in working their machine, were proceeding under an authority equal to that (the same, indeed) which bestowed on Woodworth and his assignees the right to their monopoly. The appellants were using a machine patented by the

former might have been enjoined before the completion of the work, and perhaps would have been liable in an action for damages.[1] If an infringer has realized no profit from the use of the invention, he cannot be called upon to respond for profits; the patentee in such a case is left to his remedy for damages. A patentee is entitled to recover the profits that have been actually realized from the use of his invention, although from other causes the general business of the defendant, in which the invention is employed, may not have resulted in profits,— as where it is shown that his invention produced a definite saving in the process of a manufacture. On the contrary, though the defendant's general business be ever so profitable, if the use of the invention has not contributed to the profits, none can be recovered.[2]

Interest on capital stock and "manufacturer's profits" are rejected, as not entering into the cost; but wear and tear, and repairs, and the value of the use of such real and personal estate belonging to the infringer, such as shops, fixtures, and machinery employed in making the infringing machines, may properly be compensated as part of the cost.[3] The amount paid for insurance on such property, the insurance being for the

United States to Hutchinson, and might well have supposed that the right derived to them from such a source was regular and legitimate. They were, then, in no correct sense, wanton infringers upon the rights of Woodworth, or of those claiming under him. So soon as the originality and priority of the Woodworth patent was ascertained by law, the appellants consented to be perpetually enjoined from the use of their machine (the Hutchinson machine), and account for whatever gains and profits they had received from its use. Under these circumstances, were the infliction of damages by way of penalty ever consistent with the practice of courts of equity, there can be perceived in this case no ground whatever for the exercise of such a power. On the contrary, those circumstances exhibit in a clearer light the propriety of restricting the account, in accordance with the prayer of the bill, to the actual gains and profits of the appellants (the defendants below) during the time their machine was in operation, and during no other period." Dean v. Mason, 20 How. 198; Burdell v. Denig, 92 U. S. 716; Packet Co. v. Sickles, 19 Wall. 611.

[1] Elizabeth v. Pavement Co. 97 U. S. 126.

[2] Id.; Mowry v. Whitney, 14 Wall. 434; Cawood Patent, 94 U. S. 695.

[3] Rubber Co. v. Goodyear, 9 Wall. 788, 804; Steam Stone Cutter Co. v. Windsor Man. Co. 17 Blatchf. 24.

safety of the property generally, and not for the benefit of the manufacture of the infringing machines, will not be allowed as an item of the cost; nor is the amount paid for local taxes on such property.[1] The infringer being a corporation may employ stockholders in the infringing work or business, and their wages or salaries paid in good faith for services actually rendered, and not for the purpose of dividing or concealing profits, will be allowed as part of the deductions to arrive at net profits.[2] So, if the defendant has cheapened the cost of producing the infringing device by an improvement of his own, he is entitled to a corresponding credit in the ascertainment of the profits.[3] It is not the profits of the infringer's business, as a business, that is to be considered, but the advantage derived by the infringer in the diminished cost of carrying on the business by the use of the invention. Thus, in the case of the Cawood Patent,[4] it was urged against the recovery of the profits found from the defendants' infringing use of the plaintiff's patented invention for mending the crushed and exfoliated ends of railroad rails, that it would have been better for the defendants, if, instead of repairing such rails, they had cut off the ends and relaid the sound parts, or had caused the rails to be rerolled. Mr. Justice Strong, delivering the opinion of the court, thus refers to and answers this exception: "Experience, it is said, has proved that repairing worn out ends of rails is not true economy, and hence it is inferred that defendants have derived no profits from the plaintiff's invention. The argument is plausible, but it is unsound. Assuming that experience has demonstrated what is claimed, the defendants undertook to repair the injured rails. They had the choice of repairing them on the common anvil, or on the complainant's machine. By selecting the latter they saved a large part of what they must have expended in the use of the former. To that extent they had a positive advantage growing out of their invasion of the complainant's patent. If their general business was unprofitable, it was the less so in consequence of their use of the plaintiff's property. They gained, therefore, to the extent that they saved themselves from

[1] Steam Stone Cutter Co. v. Windsor Man. Co. 17 Blatchf. 24.

[2] Id.

[3] Mason v. Graham, 23 Wall. 261.

[4] 94 U. S. 710.

loss. In settling an account between a patentee and an infringer of the patent, the question is not what profits the latter has made in his business, or his manner of conducting it, but what advantage he has derived from his use of the patented invention."[1] The making and selling articles or machines which are an infringement are so far separable, that, if there is a benefit on one portion and loss on another, the owner of the patent may claim the profits on those infringing machines which yielded a profit, without any deduction for the losses sustained by the infringer on others.[2]

[1] Knox v. Great Western Q. M. Co. 6 Sawyer, 430. Where profits are recovered for sales of an infringing article, the right to the thing sold must be parted *solutio pretii emptionis loco habetur*. 2 Kent Com. 387. The recovery of such profits, especially if followed by satisfaction, will preclude the owner of the patent from any action against the purchaser of the infringing article, and will prevent the original vendor, when sued for the profits, from availing himself of any supposed liability to such purchasers to enhance the cost or diminish the profits. Steam Stone Cutter Co. v. Windsor M. Co. 17 Blatchf. 24.

[2] In Steam Stone Cutter Co. v. Windsor Manufacturing Co. supra, Wheeler, J., thus explains this point: "Here the Windsor Manufacturing Co. made eleven sales of eleven infringing machines, for profit; and, whatever of that profit arose from the appropriation of these patented inventions by the making and selling those machines, the orator is entitled to here, and no more. Other machines were made by the defendant, embodying the invention, which have been disposed of without profit, or are still on hand and cannot be disposed of, and which, as they are left, involve serious loss to the defendant; but these facts do not vary the amount received for those sold, on which the profit was made. The defendant did not make nor sell any of them for the orator. The whole was done on its own account, as part of its own business, exclusively. Each infringement was separate, and no claim accrued in favor of the defendant against the orator, on account of any of them. The losses of unfortunate attempts were the defendant's own losses, and there is nothing to set off against the orator's right to the avails of the successful attempts. If the defendant had been acting for the orator, and the whole enterprise, in connection with making this kind of machines, had been the enterprise of the orator, the net result would have been what the orator would have to stand to; but the enterprise was an enterprise of the defendant; none of the machines were made by the defendant for the orator; neither has the orator adopted the making or selling any machine, as having been done for itself. It had nothing to do with any of the machines, except as they included the patented invention, nor with the sale of any of the machines, except as the sale included so much of the invention, and, as to that, it only claims what the invention brought, which is the same as if

The account for profits of the infringement is not limited to the commencement of the suit nor to the date of the decree. In such cases it is held proper to extend the account down to the accounting, unless the infringement has ceased before that time. The rights of the parties are settled by the decree, and nothing remains but to ascertain the damages and adjudge their payment. This practice saves a multiplicity of suits, time and expense, and promotes the ends of justice.[1] In a late case which was tried and decided in the district of California, one exception to the master's report was that he should have limited his accounting to one furnace which contained the patented invention constructed prior to the commencement of the suit, and not extended it to two furnaces erected and used at the same mine pending the suit; that as to the latter the causes of action had not arisen; that they were not therefore involved in that accounting. But the court overruled the exception, and Sawyer, J., said: "The suit is for an infringement of complainant's patent by the use of his invention. It is not a matter of any moment by what particular machine defendant accomplished the infringement. He was infringing at the commencement of the suit, which is to obtain an account of profits resulting from the infringement, and an injunction against further infringement. Defendant continued the infringement by using the same furnace then in use, and by constructing and using others at the same mine. The profits resulting from the infringement in the use of the invention are sought to be recovered. The supreme court has held that the accounting should be continued down to the time of taking the account; and if so, I see no reason why it should not cover the profits of the entire use of the invention, by whatever machine effected, as well as the profits resulting from the use of the particular machine used at the time of the commencement of the suit.

anything else belonging to the orator had been put into and sold with the machines, and the orator claimed what that brought. The orator waives the tort, and proceeds for the money arising from the tort. The money arising here is what would be left, after deducting the cost of the machines which the defendant furnished, from the avails of the sales of the machines, including the invention that belonged to the orator." See S. C. 18 Blatchf. 47.

[1] Rubber Co. v. Goodyear, 9 Wall. 800.

If the infringement is by the manufacture and sale of the invention, the accounting must necessarily extend to all sales to the time of the accounting, or the accounting must stop at the commencement of the action; for the same machine cannot well be made and sold before the bringing of the suit, and again after its commencement. I can perceive no reason for applying a different rule in the case of the use of an invention from that applicable to its manufacture and sale. Besides, an injunction would certainly not be limited to the machine in use before, or at the time of, the institution of the suit. I think the accounting properly embraced all the machines containing the invention used by the defendant at its mine down to the time of accounting."[1]

In cases where the patent is for a distinct improvement, separable from the rest of the article, and not embracing the whole,[2] or is an inseparable improvement of it,[3] the profits must be limited accordingly.[4] The profits recoverable are only those which have accrued from the use of the patented improvement; and in such case, the owner of the patent is not entitled to all the profits made from the entire article.[5] And it is as true of a process invented as an improvement in a manufacture, as it is of an improvement in a machine, that an infringer is not liable to the extent of his entire profits in the manufacture. The question is, what advantage did the defendant derive from using the plaintiff's invention over what he had in using other processes then open to the public and adequate to enable him to obtain an equally beneficial result? The fruits of that advantage are his profits.[6] In Mowry v. Whitney, the defendant was charged by the master with $91,000 as profits arising from

[1] Knox v. Great Western Q. M. Co. 6 Sawyer, 430.

[2] Buerk v. Imhaeuser, 14 Blatchf. 19; Tremolo Patent, 23 Wall. 518; Mason v. Graham, id. 261.

[3] Gould's Man. Co. v. Cowing, 14 Blatchf. 315; Jones v. Morehead, 1 Wall. 155.

[4] Philp v. Nock, 17 Wall. 460; Seymour v. McCormick, 16 How. 480, 490; Jones v. Morehead, supra; Ingels v. Mast, 1 Flip. 424; Buerk v. Imhaeuser, 14 Blatchf. 19; Gould's Manuf'g Co. v. Cowing, 12 id. 243; S. C. 14 id. 315; Black v. Munson, id. 265.

[5] Id.

[6] Mowry v. Whitney, 14 Wall. 620; Littlefield v. Perry, 21 Wall. 205; Knox v. Great Western Q. M. Co. 6 Sawyer, 430.

the plaintiff's patent in manufacturing car wheels, which was the profit obtained from the manufacture of the entire wheel. Mr. Justice Strong, in delivering the opinion of the court, said: "It is clear that Whitney is not entitled to recover more than the profits actually made in consequence of the use of his process in the manufacture of nineteen thousand eight hundred and nineteen wheels. It is the additional advantage the defendant derived from the process — advantage beyond what he had without it — for which he must account; . . . but the master charged the profit obtained from the entire wheel, instead of that resulting from the use of Whitney's invention in a part of the manufacture."

In Gould's Manufacturing Co. v. Cowing,[1] the master reported that the profits resulting from the patented portion of the pump could not be separated from those resulting from any other part of it; because, making a comparison between the machine as it stands with its patented improvements and what would be left of the same machine if these patented improvements were taken away, the machine would be valueless without the improvements, and would, in fact, be no machine at all. Therefore he reported as profits to be recovered the entire profits of the pump. This was held erroneous. The court observed that pumps have been in use since the earliest ages of the world. After adverting to the part of the pump covered by the patent, Hunt, J., said: "The portion of the pump in question which belongs to or is included in the improvement of the plaintiffs is very small, and a machine constructed upon other known principles and devices applicable to pumps, omitting the plaintiffs' improvement, would include nearly everything useful that is to be found in the present machine. . . . The patentee takes the well known portions of a pump used in pumping gas-oil, with passages, valves, piston, chambers, openings, etc., as ordinarily made and used, and adds a chamber of an important construction, as it is alleged, and a combination with certain other parts described. Now, if this addition is not a new and useful improvement, no damages can be claimed for its use. If it is such an improvement, the improvement, in its nature and

[1] 12 Blatchf. 243.

by law, is and must be capable of being described and pointed out, and must be described and pointed out. Every skillful mechanic must be able to learn from the patent itself precisely what the monopoly covers.[1] If this alleged improvement is so confounded with portions of the machine which are the subjects of other patents, or which, from long continued use, are open to the public, that it cannot be separated from them, or if, when so separated, it has no value, it is not a patentable invention, and no damages are due for its use. The decree in this case has adjudged the patent in this case to be valid. In its nature, therefore, it is, and must be, capable of separation and distinction from other portions of the machine." On appeal,[2] the supreme court reversed the decree on the accounting, and held that the rule laid down in Mowry v. Whitney [3] was applicable. That rule gave the patentee the fruits of the advantage which the defendant derived from using his invention over what he had in using other processes open to the public and adequate to enable him to obtain an equally beneficial result. "It does not necessarily follow," Waite, C. J., said, "that where the patent is for one of the constituent parts, and not for the whole of a machine, the profits are to be confined to what can be made by the manufacture and sale of the patented part separately. If, without the improvement, a machine adapted to the same uses can be made which will be valuable in the market, and salable, then, as was further said in that case, the inquiry is, 'What was the advantage in cost, in skill required, in convenience of operation or marketability,' gained by the use of the patented improvement? If the improvement is required to adapt the machine to a particular use, and there is no other way open to the public of supplying the demand for that use, then it is clear the infringer has by his infringement secured the advantage of a market he would not otherwise have had, and that the fruits of this advantage are the entire profits he has made in that market. Such we think is this case. Pumps for all ordinary, and many extraordinary, uses were very old; but in the new developments of business, something was wanted

[1] Act of July 8, 1870; § 2616, U. S. St. at Large, 201.

[2] 105 U. S. 253.

[3] 14 Wall. 620.

to take gas from the casing of an oil well and conduct it safely to the furnace of the engine. 'With that special purpose in view,' this inventor took the well-known parts of an ordinary double-action pump, changed some of them slightly in form, added a new device, and produced something which would do what was wanted. While nominally he only made an improvement in pumps, he actually made an improved pump. For ordinary uses the improvement added nothing to the value of the old pump, but for the new and special purpose in view, the old pump was useless without the improvement. The testimony shows that there was no market for pumps adapted to this particular use, except in the oil-producing regions of Pennsylvania and Canada. The demand was limited, as well as local. Less than a thousand pumps actually supplied all who wanted them. But for that particular use no other pump could at the time be sold. If the appellants kept the control of its monopoly under the patent, it alone had the advantage of this market. Unless the appellees got the improved pump, they could not become competitors in that field; and just to the extent they got into the field they drove the appellant out. Through their infringement they got the advantage of selling the pumps that had upon them the patented improvement. Without it no such sales would have been effected. The fruits of the advantage they gained by their infringement were, therefore, necessarily the profits they made on the entire sale.

"This is an exceptional case. A limited locality required a particular kind of pump, to be used only in that locality for a special purpose. The market was not only limited to a particular locality, but it was unusually limited in demand. A single manufacturer, possessing the facilities the appellants had, could easily, and with reasonable promptness, fill every order that was made. There was no other pump that could successfully compete with that controlled by the patent. Under these circumstances, it is easy to see that what was the appellees' gain in this business must necessarily have been the appellant's loss, and consequently the appellant's damages are to be measured by the appellees' profits from their business in that special and limited market. This, as it seems to us, is the logical result of the rule

which has been stated. By infringing on the plaintiff's rights, the appellees obtained the advantage of the increased marketability of their pump. The action of the court below, therefore, limiting the field of inquiry as to damages, cannot be sustained."

In the case of a patent for an ornamental chair, as a new article of manufacture, where there is a difference in kind between the patented chair and prior chairs, and where what was open to the public could not make a chair like the patented article in its peculiar characteristics, the patentee is not, in ascertaining the damages sustained by him by the infringement of his patent, limited to the advantage derived by the defendant from using the peculiar features of the patented chair over what advantage he would have had from using what was so open to the public.[1] The plaintiff is entitled to recover an equivalent for any advantage which the defendant has derived from an unlawful use of the patented invention, and this advantage may be estimated either from profits made therefrom separately or in combination with something else which the patent does not cover. The profits will be computed in the manner best suited to afford the injured party the full benefit of his patent, unlawfully used, and a just indemnity for the injury he has thereby sustained.[2] If the improvement is only a constituent of a machine, but required to adopt the machine to a particular use, and there is no other way open to the public of supplying the demand for that use, then the infringer has, by his infringement, secured the advantage of a market he would not otherwise have had, and the fruits of his advantage in that case are the entire profits he had made in that market.[3] In response to an order of reference to take an account of the plaintiff's damages and of the defendant's profits for infringement, the master reported that there were no damages and no profits, but that the plaintiff was entitled to compensation for the defendant's use of his patent. It appeared that the use of the patent restored the salable character of the article the defendant made,

[1] Mulford v. Pearce, 14 Blatchf. 141.

[2] Mason v. Graham, 23 Wall. 261.

[3] Gould's Manufacturing Co. v. Cowing, supra.

and thus saved him from loss. It was held that the money value of this advantage could be recovered as compensation.[1] Remote profits or advantages of the infringement are not taken into account. Where the defendant, by the use of the plaintiff's patented process for preserving fish, was enabled to withdraw fish from the market, and thus obtain a higher price for his unpreserved fish than he would otherwise have received, it was held that the profits resulting from such increased price were too remote and indirect to be charged to the defendant as profits realized from the infringement.[2]

In determining the profits from the infringement of a patent which covers only a part of a machine or article made and sold, a ratable proportion of the cost of production and sale must be taken into the account. In the case of the Tremolo Patent,[3] the defendants were vendors of musical instruments, including organs and melodeons, which they purchased from the manufacturers. Some of these instruments contained the tremolo attachment, and others did not. For those containing such attachments they paid an additional price, and they sold them also for an increased price. They were found guilty of infringing the plaintiff's patent in making sales of the organs having that attachment. In the ascertainment of the profits made by the sale of the tremolo attachment, the defendants were allowed by the master to prove the general expenses of their business incurred in effecting the sales of all musical instruments, and to deduct a ratable proportion from the profits made by the sale of those attachments. It was contended in behalf of the plaintiff that the patent infringed was not for the tremolo itself, but for the combination of the organ and tremolo, and it is argued that if the defendants obtained an extra price for the organ combined with the tremolo, without incurring any additional expense, the whole of that extra price was obtained from the addition of the combination; also that the true rule in such a case was, that if the infringing device is an integral part of the whole instrument, without which it is incapable of use, and for which a single charge is made, then in ascertaining profits on a

[1] Sargent v. Yale Lock Manuf. Co. 17 Blatchf. 249.

[2] Piper v. Brown, 1 Holmes, 196.

[3] 23 Wall. 518.

part of the organization, general expenses should be apportioned according to the cost, or by some other equitable rule. But when the infringing device is an optional one, used or not at pleasure, and an extra price is charged and received for it, when used, the true profit made is the extra sum received for the addition, deducting only such expenses as are incurred by reason of the addition. In answer to this argument the court say: "We think such a rule, even if it sometimes may be just, is inapplicable to the present case. We cannot see why the general expenses incurred by the defendants in carrying on their business, such expenses as store rent, clerk hire, fuel, gas, porterage, etc., do not concern one part of their business as much as another. It may be said that the selling a tremolo attachment did not add to their expenses, and therefore that no part of those expenses should be deducted from the price obtained for such an attachment. This is, however, but a partial view. The store rent, the clerk hire, etc., may, it is true, have been the same, if that single attachment had never been bought or sold. So it is true that the general expenses of their business would have been the same, if instead of buying and selling one hundred organs, they had bought and sold only ninety-nine. But will it be contended that because buying and selling an additional organ involved no increase of the general expenses, the price obtained for that organ above the price paid was all profit? Can any part of the whole number sold be singled out as justly chargeable with all the expenses of the business? Assuredly no. The organ with the tremolo attachment is a single piece of mechanism, though composed of many parts. It was bought and sold as a whole by the defendants. It may be said the general expenses of the business would have been the same if any one of these parts had been absent from the instrument sold. If, therefore, in estimating profits, every part is not chargeable with a proportionate share of the expenses, no part can be. But such a result would be an injustice that no one would defend. We think it very plain, therefore, that there was no error in the rule adopted for the ascertainment of the profits made by the defendants out of their infringement of the complainant's patent."[1]

[1] See Steam Stone Cutter Co. v. Windsor M. Co. 18 Blatchf. 47.

The owner of the patent is entitled in equity to recover profits made by the infringer, though such owner of the patent was exercising his monopoly by granting of licenses. He is not limited in that forum to such license fees, though such profits exceed in amount what he would have realized in license fees for what was done by the infringer. By the express provisions of the statute the plaintiff is entitled to recover, in addition to the profits to be accounted for by the defendant, "the damages sustained by the infringement."[1] This shows that, in contemplation of law, the profits actually realized by the infringer belong to the patentee, and that, when the profits would not compensate for the damages sustained, as they might not, in many cases, he is entitled to the damages beyond.[2]

The right given by the statute to recover in equity damages besides profits is not intended to give the owner double compensation; but the net profits made from the unlawful use of his invention, and such supplemental damages proved as will make the decree on the whole a full compensation. If the business of the infringer is so improvidently conducted that he makes no substantial profits, the owner of the patent may have his compensation calculated on the basis of a license fee.[3] In the ascertainment of such damages there is required the same certainty of proof as at law. Where there is a loss of profits in the plaintiff's business by a diversion of his customers by the defendant's sale of an infringing article or machine, or a reduction of price from the same cause, damages may be recovered therefor.[4] It will not be presumed as matter of law, but must be established as matter of fact, that because the defendant has sold an infringing article there has been a corresponding or any falling off of the plaintiff's business. In one case,[5] the court say: "It was not made to appear that the plaintiff could have sold his watches to the persons who purchased from the defendants. The watches have been adjudged

[1] R. S. § 4921.

[2] Wooster v. Taylor, 14 Blatchf. 403; Carew v. Boston, etc. Co. 3 Cliff. 356; Williams v. Rome, etc. R. R. Co. 18 Blatchf. 181.

[3] Marsh v. Seymour, 97 U. S. 348; Birdsall v. Coolidge, 93 id. 64.

[4] Buerk v. Imhaeuser, 14 Blatchf. 19; Carter v. Baker, 1 Sawyer, 527; Birdsall v. Coolidge, supra.

[5] Buerk v. Imhaeuser, supra.

to be identical in principle, but they differ in structure and appearance; and it cannot be known that those who bought the infringing article would have bought the plaintiff's watches under any circumstances. The difference in structure, as well as the difference in price, enter into that question, and no means are afforded for determining it by proofs.[1] Profits when recovered being regarded as unliquidated damages, interest is not usually allowed until they have been judicially liquidated.[2] Interest may be refused altogether, or allowed after interlocutory decree, or after final decree, according to the circumstances of the case."

[1] Smith v. Pryor, 2 Sawyer, 461; Carter v. Baker, 1 id. 512; Seymour v. McCormick, 16 How. 480; Ingersoll v. Musgrove, 14 Blatchf. 541.

[2] Mowry v. Whitney, 14 Wall. 653; Parks v. Booth, 102 U. S. 96; Steam Stone Cutter Co. v. Windsor M. Co. 17 Blatchf. 35; S. C. 18 id. 47; Littlefield v. Perry, 21 Wall. 205, 229. See Silsby v. Foote, 20 How. 378.

CHAPTER XXII.

INFRINGEMENT OF COPYRIGHT.

Copyright is statutory — Compensatory and penal recoveries for infringement of copyright.

COPYRIGHT IS STATUTORY.— The law recognizes and protects literary property, which is the right of the owner to possess, use and dispose of intellectual productions.[1] It is a property which does not come into being until some mental conception has been embodied in written or spoken language, or otherwise signified as an intellectual creation in such manner as to be capable of recognition and identification. It includes copyright, playright and original proprietorship in works of art.[2] It is property held by a peculiar tenure. Whatever may have been the English common law, it seem to have been long settled on both sides of the Atlantic, that beyond an absolute right to such productions before publication, the author or his assigns has only such special right in them afterwards as is granted by statute.[3] An author has the same right to his unpublished

[1] Drone on Copyr. 97.

[2] Lord Mansfield, in Millar v. Taylor, 4 Burr. 2396, said: "I use the word 'copy' in the technical sense in which that name or term has been used for ages to signify an incorporeal right to the sole printing and publishing of somewhat intellectual, communicated by letters."

The intellectual productions to which the law extends protection are of three classes: *First*, writings or drawings capable of being multiplied by the arts of printing and engraving; *second*, designs of form or configuration capable of being reproduced upon the surface or in the shape of bodies; *third*, inventions in what are called the useful arts. To the first class belong books, maps, charts, music, prints, and engravings; to the second class belong statuary, bas-reliefs, designs for ornamenting any surface and configuration of bodies; the third class comprehends machinery, tools, manufactures, compositions of matter, and processes or methods in the arts. According to the practice of legislation in England and America, the term *copyright* is confined to the exclusive right secured to the author or proprietor of a writing or drawing which may be multiplied by the arts of printing in any of its branches. Property in other classes of intellectual objects is usually secured by letters-patent, and the interest is called patent-right. But the distinction is arbitrary and conventional. Bouv. L. Dic.

[3] In 1874 the House of Lords, in England, submitted to the judges three questions in Donaldsons v.

manuscripts as to any other property, and may resort to the same legal and equitable remedies in case of actual or threatened infractions. He may publish them or not as he chooses, and may prevent any publication without his consent. But when he has published them he is supposed to have thereby obtained remuneration, and thenceforth he has no special property in his productions; he then has no exclusive right to multiply copies or to control the subsequent issue of copies by others. The right to multiply copies, to the exclusion of others, is the copyright, and is restricted and governed by the statutes on that subject.[1]

Beckel, 4 Burr. 2408. 1. Whether, at common law, an author of any book or literary composition had the sole right of first printing and publishing the same for sale; and might bring an action against any person who printed, published and sold the same without his consent? 2. If the author had such right originally, did the law take it away upon his printing and publishing such book or literary composition; and might any person afterwards reprint and sell, for his own benefit, such book or literary composition, against the will of the author? 3. If such action would have lain at common law, is it taken away by the statute of 8th of Anne? And is an author by said statute precluded from every remedy, except on the foundation of the said statute, and on the terms and conditions prescribed thereby? Nine of the twelve judges concurred in answering the first in the affirmative; eight concurred in answering the second in the negative, and were equally divided on the third—and the House of Lords decided affirmatively. Turner v. Robinson, 10 Irish Ch. N. S. 121, 510; Oliver v. Oliver, 11 C. B. N. S. 139; Prince Albert v. Strange, 1 MacN. & G. 25; Wheaton v. Peters, 8 Pet. 656; Boucicault v. Wood, 2 Biss. 33; Crowe v. Aiken, id. 208; Wall v. Gordon, 12 Abb. N. S. 349; Palmer v. Dewitt, 47 N. Y. 532; Stevens v. Gladding, 17 How. U. S. 447; Little v. Hall, 18 How. U. S. 165.

[1] Id.; Short's Law of Lit. 48; Parton v. Prang, 3 Cliff. 537; Bartlette v. Crittenden, 4 McLean, 300; Paige v. Banks, 13 Wall. 608; Carter v. Bailey, 64 Me. 458; Banker v. Caldwell, 3 Minn. 94; Kiernan v. Manhattan Q. T. Co. 50 How. Pr. 194. In Drone on Copyright, p. 100, the author says: "Property in intellectual productions is recognized and protected in England and the United States, both by the common law and by statute. But as the law is now expounded, there are important differences between the statutory and the common law right. The former exists only in works which have been published within the meaning of the statute; and the latter, only in works which have not been so published. In the former case, ownership is limited to a term of years; in the latter it is perpetual. The two rights do not co-exist in the same composition; when the statutory right begins, the common law right ends. Both may be defeated by publication. Thus, when a work is published in print, the owner's common law rights are lost;

COMPENSATORY AND PENAL RECOVERIES FOR INFRINGEMENT OF COPYRIGHT.— The present statute enacted by congress provides a distinct remedy for infringement in respect to the different classes of literary property, and according to the nature of the wrong.[1] After the title page has been deposited, the author can maintain an action for an infringement or violation of his rights.[2]

and, unless the publication be in accordance with the requirements of the statute, the statutory right is not secured."

[1] § 4964. Every person who after recording of the title of any book as provided in this chapter, shall within the term limited, and without the consent of the proprietor of the copyright first obtained in writing, signed in the presence of two or more witnesses, print, publish or import, or knowing the same to be so printed, published or imported, shall sell or expose to sale, any copy of such book, shall forfeit every copy thereof to such proprietor, and shall also forfeit and pay such damages as may be recovered in a civil action by such proprietor in any court of competent jurisdiction.

§ 4967. Every person who shall print or publish any manuscript whatever, without the consent of the author or proprietor first obtained, if such author or proprietor is a citizen of the United States, or resident therein, shall be liable to the author or proprietor for all damages occasioned by such injury.

§ 4965. If any person, after the recording of the title of any map, chart, musical composition, print, cut, engraving, or photograph or chromo, or of the description of any painting, drawing, statue, statuary, or model or design intended to be perfected and executed as a work of the fine arts, as provided in this chapter, shall, within the time limited, and without the consent of the proprietor of the copyright first obtained in writing, signed in the presence of two or more witnesses, engrave, etch, work, copy, print, publish, or import, either in whole or in part, or by varying the main design, with intent to evade the law, or, knowing the same to be so printed, published or imported, shall sell or expose to sale, any copy of such map, or other article as aforesaid, he shall forfeit to the proprietor all the plates on which the same shall be copied, and every sheet thereof, either copied or printed, and shall further forfeit one dollar for every sheet of the same found in his possession, either printing, copied, published, imported, or exposed for sale; and in the case of a painting, statue or statuary, he shall forfeit ten dollars for every copy of the same in his possession, or by him sold or exposed for sale; one-half thereof to the proprietor and the other half to the use of the United States.

§ 4966. Any person publicly performing or representing any dramatic composition for which a copyright has been obtained, without the consent of the proprietor thereof, or his heirs, or assigns, shall be liable for damages therefor, such damages in all cases to be assessed at such sum, not less than one hundred dollars for the first, and fifty dollars for every subsequent performance, as to the court shall appear to be just.

[2] Roberts v. Myers, 13 Law Rep. 398; Boucicault v. Wood, 2 Biss. 34.

But after publication, it must be shown as a condition of recovery, that, within ten days from publication, he delivered at the office of the librarian of congress, or deposited in the mail properly addressed to that officer, two copies of such copyright book.[1]

The forfeitures declared in the statute can only be recovered by actions at law.[2] And it is so with regard to the damages, other than profits as such.[3] In this particular the remedy in equity is less comprehensive than that allowed by the statute for infringement of patent rights. By the statute,[4] jurisdiction is given to the courts of the United States of suits and actions arising under the copyright laws, and power is given them to grant injunctions according to the course and practice of courts of equity, an incident of which is a right to an account of profits.[5] In Stevens v. Gladding, the court refer to Colburn v. Simms,[6] in which the court said: "It is true that the court does not, by an account, accurately measure the damage sustained by the proprietor of an expensive work from the invasion of his copyright by the publication of a cheaper book. It is impossible to know how many copies of the dearer book are excluded from sale by the interposition of the cheaper one. The court, by the account, as the nearest approximation it can make to justice, takes from the wrongdoer all the profits he has made by his piracy, and gives them to the party who has been wronged. In doing this, the court may often give the injured party more in fact than he is entitled to, for *non constat* that a single additional copy of the more expensive book would have been sold, if the injury by the sale of the cheaper had not been committed. The court of equity, however, does not give anything beyond the account." In the case of Stevens v. Gladding, at the circuit,[7] the court held the owner of a copyright is entitled to the profits arising from the sales on commission of pirated copies; that a court of equity may decree an account of such profits, as it would those realized by a part-

[1] Merrell v. Tice, 104 U. S. 557.

[2] Stevens v. Cady, 2 Curt. 200; Stevens v. Gladding, 17 How. U. S. 447.

[3] Chapman v. Ferry, 12 Fed. Rep. 693.

[4] § 4970.

[5] Stevens v. Gladding, supra; Chapman v. Ferry, supra.

[6] 2 Hare, 554.

[7] 2 Curt. 608.

nership.[1] The case of Backus v. Gould[2] arose under the act of 1831, and in the argument of Mr. Bayard is a statement of the English and American statutes on the subject of copyright, up to that time. Section six of that act provided, among other things, that the infringer "shall forfeit and pay fifty cents for every sheet which may be found in his possession, either printed, printing, published, imported, or exposed to sale, contrary to the intent of this act." It was held that this clause was penal, and should be strictly construed; therefore the penalty was only collectible in respect of sheets found in the possession of the infringer. The corresponding section in the present patent law substitutes for the foregoing clause one for the recovery of damages. But section four thousand nine hundred and sixty-five contains a similar clause relative to pirated maps, charts, musical compositions, prints, cuts, engravings, photographs or chromos. There are not many decisions in respect to damages at law, under the provisions of the statute providing for their recovery. In Boucicault v. Wood,[3] the court submitted the question of the amount generally to the jury, stating that it is a question of proof, and upon that the jury were to form their own conclusions as to the damages the plaintiff had actually sustained. It is believed that the same considerations that apply in legal actions for infringement of patent rights would apply. The injury is similar, and such cases would appear to be analogous.

[1] In this case, Curtis, J., said: "I perceive no sound reasons for restricting those gains to the difference between the cost and the sale price of a map or book, or limiting the right to an account to those persons who have sold the work solely on their own account. He who sells on commission does in truth sell on his own account, so far as he is entitled to a percentage on the amount of sales. What he so receives is the gross profit coming to him from the proceeds of the sale, and what he so receives diminishes the net profit of him who employs him to sell. When the latter is called on to account, he has an allowance for the commissions he has paid, because those sums, though part of the gross profits of the sales, he has not received."

In Pike v. Nicholas, L. R. 5 Ch. 260, note, V. Ch. James thus laid down the rule of accounting in equity, in case of invasion of a copyright: "The defendant is to account for every copy of his book sold, as if it had been a copy of the plaintiff's, and to pay the plaintiff the profit which he would have received from the sale of so many additional copies."

[2] 7 How. U. S. 798.

[3] 2 Biss. 34.

CHAPTER XXIII.

INFRINGEMENT OF TRADE MARKS.

Nature of the right to trade marks, and of the wrong of infringement — The measure of damages.

NATURE OF THE RIGHT TO A TRADE MARK, AND OF THE WRONG OF INFRINGEMENT.— This injury is one to the good will of a business. Redress for it by recovery of damages is founded on the obvious principle that if one by any false pretense draws away another's customers, either with intent to lessen the latter's profits or to unlawfully appropriate them, he commits a wrong for which compensation may be recovered proportioned to the injury. This principle embraces all deceits by which that injurious loss of business is accomplished. Thus, a merchant designated his goods by a label which would not be protected as a trade mark; the words in the label were not strictly true, but contained nothing calculated to deceive or injure the public. Another merchant adopted the same label, placed it upon inferior goods, which he put upon the market. It was held that he was liable in an action in the nature of deceit; that specific damage need not be alleged or proved, as essential to sustain the action, but the jury might give general damages.[1]

Everywhere courts of justice proceed upon the ground that a party has a valuable interest in the good will of his trade, and in the labels or trade mark which he adopts to enlarge and perpetuate it.[2] A dealer has a property in his trade mark. The ownership is allowed him that he may have the exclusive benefit of the reputation which his skill has given to articles made or sold by him, that no other person may be able to sell to the public as his, that which is not his.[3] And there is no difference

[1] Conrad v. Uhrig B. Co. 8 Mo. App. 277; McLean v. Fleming, 96 U. S. 245; Wotherspoon v. Currie, L. R. 5 App. Cases, 508; Rogers v. Nowill, 6 Hare, 325; S. C. 5 M. G. & S. 109; Lee v. Haley, L. R. 5 Ch. App. 155. See Auburn, etc. P. R. Co. v. Douglass, 12 Barb. 557.

[2] Id.; Amoskeag Man. Co. v. Spear, 2 Sandf. 599; Colloday v. Baird, 4 Phila. 139; Partridge v. Menck, 2 Barb. Ch. 101; Walton v. Crowley, 3 Blatchf. 440; Levy v. Walker, 27 Eng. R. 17, note.

[3] Clark v. Clark, 25 Barb. 76; Williams v. Johnson, 2 Bosw. 1; Dixon

between citizens and aliens in respect to their rights in trade marks, and in being entitled to have such rights protected in our courts.[1] The infringement of a trade mark causes injury by legal presumption as the result of a fraudulent representation that the infringer's use of that mark is the proprietor's use. If it be a label or mark upon goods manufactured or sold, there is in the infringer's use of it an implied representation by him that his goods on which he places the label or mark are those of the person who adopted the mark and has been accustomed to designate his goods by it. Such infringement may injure the proprietor of the mark in two ways: by dividing, and to some extent diminishing the demand of him for his goods, and by depreciating them by having their merits determined by the deceived consumers of or the dealers in the inferior article.[2] The quality, however, of the simulated article is immaterial, except as it affects the amount of the injury. The proprietor of the trade mark suffers injury, and has an undoubted claim to damages, if the natural effect of the transaction of the infringer is to palm on the public a different article from that which they intended to buy, and to interfere with the right of such proprietor to profits to which the reputation of his article justly entitled him.[3] One commits a legal wrong when he adopts a trade mark which is untrue and deceptive, to sell his own goods as the goods of another, for thereby the latter is injured and the public deceived.[4]

The infringement is presumed to proceed from a fraudulent purpose of inducing the public, or those buying the article, to believe that the goods wrongfully designated by it are those

Crucible Co. v. Guggenheim, 2 Brewster, 321; Derringer v. Plate, 29 Cal. 292; Marshall v. Pinkham, 52 Wis. 572; Congress Spring Co. v. High Rock Spring Co. 45 N. Y. 291. See Trade Mark Cases, 100 U. S. 82.

[1] Taylor v. Carpenter, 2 Woodb. & M. 1; Coats v. Holbrook, 2 Sandf. Ch. 586.

[2] Peltz v. Eichele, 62 Mo. 171; Morison v. Salmon, 2 M. & G. 385; Blanchard v. Hill, 2 Atk. 484; Singleton v. Bolton, 3 Doug. 293; Blofield v. Payne, 4 B. & Ad. 410; Southern v. How, Poph. 143; Graham v. Plate, 40 Cal. 593; Taylor v. Carpenter, 2 Woodb. & M. 1; Taylor v. Carpenter, 2 Sandf. Ch. 603, and note to Coats v. Holbrook, id. 599.

[3] Coats v. Holbrook, 2 Sandf. Ch. 586; Taylor v. Carpenter, id. 603, and note to Coats v. Holbrook, id. 599; S. C. 11 Paige, 292.

[4] Newman v. Alvord, 51 N. Y. 195; Morison v. Salmon, 2 M. & G. 385.

made or sold by the owner of the trade mark, and to supplant him in the good will of his trade.[1] Damages will be presumed from infringement, and at least nominal damages can be recovered.[2] Positive proof of fraudulent intent on the part of the infringer is not required where the infringement is clearly shown, as the liability of the infringer arises from the fact that he is enabled, through the unwarranted use of the trade mark, to sell a simulated article as and for the one which is genuine.[3] It is sufficient to show the proprietary right of the plaintiff and its actual infringement.[4]

THE MEASURE OF DAMAGES.[5] — The compensation to the owner of a trade mark, for the injury he suffers from a wrongful and unauthorized use of it by another, is ascertained and computed on substantially the same principles as damages for infringement of patents and copyrights. In equity, where there is

[1] Taylor v. Carpenter, 11 Paige, 292; S. C. 2 Sandf. Ch. 603; McLean v. Fleming, 96 U. S. 245; Marsh v. Billings, 7 Cush. 322; Thomson v. Winchester, 19 Pick. 214; Blofield v. Payne, supra; Rodgers v. Nowill, 5 M. G. & Scott, 109; Coffeen v. Brunton, 4 McLean, 516. In the case of Delaware Canal Co. v. Clark, 13 Wall. 311, Strong, J., said: "No one can claim protection for the exclusive use of a trade mark, or trade name, which would practically give him a monopoly in the sale of any goods other than those produced by himself. If he could, the public would be injured rather than protected, for competition would be destroyed. Nor can a generic name, or a name merely descriptive of an article of trade, of its qualities, ingredients and characteristics, be employed as a trade mark, and the exclusive use of it be entitled to legal protection. . . . No one can apply the name of a district of country to a well known article of commerce and obtain thereby such an exclusive right to the application as to prevent others inhabiting the district, or dealing in similar articles coming from the district, from truthfully using the same designation. It is only when the adoption or imitation of what is claimed to be a trade mark amounts to a false representation; express or implied, designed or incidental, that there is any title to relief against it."

[2] Blofield v. Payne, 4 B. & Ad. 410.

[3] McLean v. Fleming, 96 U. S. 253; Wotherspoon v. Currie, L. R. 5 App. Cas. 512; Davis v. Kendall, 2 R. I. 566.

[4] Colman v. Crump, 70 N. Y. 578; American Grocer v. Grocer Pub. Co. 25 Hun, 402; Dale v. Smithson, 12 Abb. Pr. 237; Guilhon v. Lindo, 9 Bosw. 605; Kinshan v. Bolton, 15 Ir. Ch. N. S. 75; Filley v. Fassett, 44 Mo. 168; Stonebreaker v. Stonebreaker, 33 Md. 252; Holmes v. Holmes, etc. Co. 37 Conn. 278; Edelsten v. Edelsten, 9 Jur. N. S. 479.

[5] See Trade Mark Cases, 100 U. S. 82, declaring the trade mark legislation of congress unconstitutional.

ground for invoking its jurisdiction, and an infringement has been found and decreed, and there has been no unreasonable delay in commencing the suit,[1] an account of profits will be decreed, which means the net profits the infringer has actually realized.[2] Where a defendant is so ordered to account, he cannot be charged with bad debts as profits; and on the other hand, he cannot charge the plaintiff with the cost of manufacturing the goods in respect of which the bad debts were incurred.[3]

There is the same singularity of different modes of estimating and proving compensation in equity and at law as exists in case of infringement of the other rights referred to. The net profits may be recovered in equity as profits made by the use of the plaintiff's property, and the defendant, as constructive trustee, compelled to account for them. But at law only damages can be recovered, and they will be measured by the plaintiff's loss, and not by the defendant's gain; the profits are there held not to be the measure of damages, nor an element of them, where there is any other method of ascertaining and measuring them. Profits may, at law, be shown when necessary; they do not, however, measure the damages, except as they are shown to represent loss to the plaintiff by a corresponding decrease of profits in his own business, occasioned by such competition. The defendant's profits, as such, do not at law, as they do in equity, belong to the plaintiff. Nor will the proof of the defendant's profits warrant a legal presumption that the

[1] Harrison v. Taylor, 11 Jur. N. S. 408; S. C. 12 L. T. R. N. S. 339; Amoskeag Man. Co. v. Garner, 4 Am. L. Times, N. S. 176.

[2] Hostetter v. Vowinkle, 1 Dill. 329; Wilder v. Gaylor, 1 Blatchf. 511. In Hostetter v. Vowinkle, supra, the court seemed to limit the profits to those realized on that amount of the infringer's trade which represented the consequent diminution of the plaintiffs'. Dillon, J., said: "From the evidence of one of the defendants, I find that he admits sales to the extent of two hundred bottles. The evidence shows that the sales of the plaintiffs, in Omaha, fell off during the time the defendants were manufacturing and selling their imitation bitters even to a greater amount than this. I am satisfied that the plaintiffs' sales have been lessened at least to the extent of the two hundred dozen bottles, and that their profits would have been on each case of one dozen bottles, the sum of four dollars."

[3] Edelsten v. Edelsten, 10 L. T. R. N. S. 780.

plaintiff's loss is a corresponding amount. Perhaps the difference comes from a claim made in the one case of damages, which is properly cognizable at law, and in the other a claim of profits recoverable as the fruit of a constructive trust, cognizable only in equity. On a bill in equity to restrain the infringement of the plaintiff's trade mark a decree had been obtained for an injunction. A decree for an account of profits had been offered by the court, and refused by the plaintiff, who elected to take in lieu thereof an inquiry as to damages for the defendant's unlawful use of the trade mark. On that inquiry, the plaintiff did not prove direct damages, and could not show to what extent his trade mark had been used; he claimed damages equal to all the profits made by the defendant on all his sales of the article on which the pirated trade mark was used, but the court rejected this claim, holding that the plaintiff was not so entitled; that on such an inquiry the onus lies on the plaintiff of proving some special damage, by loss of custom or otherwise; and that it will not be intended, in the absence of evidence, that the amount of goods sold by the defendant by the fraudulent use of the trade mark would otherwise have been sold by the plaintiff.[1]

[1] Leather Cloth Co. v. Hirschfield, 13 L. T. N. S. 427; S. C. L. R. 1 Eq. 299; Seymour v. McCormick, 16 How. U. S. 480; Ransom v. Mayor, etc. 1 Fish, Pat. Cas. 252. In Peltz v. Eichele, 62 Mo. 171, it appeared that the defendant, who was a manufacturer of and dealer in matches in the city of St. Louis, entered into a contract with the plaintiff for the sale to him, for a certain sum, his entire factory and stock in trade, together with the good will, proprietary stamp, trade marks, brands, and the use of the names of A. Eichele and A. Eichele & Co. employed by him in such business. This contract contained the following covenant: "Said Eichele, further covenanting, agrees that he will not enter into the manufacture of matches at this, or any other place, for the term of five years, nor lend his influence, skill, name or countenance to any other party or parties so engaged, to the detriment of the business so transferred." In about a year the defendant erected a new factory in the city of St. Louis, about six blocks from the one he sold to the plaintiff, and at once engaged in the manufacture and sale of matches under the name and style of P. Eichele & Co. The trial court instructed the jury that the measure of damages is not the difference of plaintiff's profits subsequent to the re-entry of defendant into business, but only so much of this difference as was reaped by the defendant, and the proof of how much was thus reaped by defendant devolves on the plaintiff. That while, as part of the circumstantial

The jury are to give the actual damages which the plaintiff has sustained,—not vindictive nor speculative damages, but such damages as the plaintiff, by his proof, has shown to the

proof in the cause, plaintiffs have been permitted to show their sales during the several years, the jury are not to adopt, as the measure of damages, the profits of one year computed on sales compared with those computed on the sales of another year, unless they believe, from the evidence, that the difference between the sales of the different years had no other cause than that the defendant re-entered into the business. Hence, if the jury believe, from the evidence, that the customers who left plaintiffs to return to defendant bought not solely of defendant, but of other parties, then the measure of damages would be only upon the sales made by defendant, and proof of this amount devolves on the plaintiff, and the jury, in the absence of proof, cannot presume what amount they were.

The plaintiff having obtained a verdict and judgment, on the defendant's appeal, the supreme court affirmed the judgment, and Hough, J., said: "We have been referred to a number of cases on the measure of damages in patent and trade mark cases, as containing the true rule for our guidance in the case at bar. These cases are somewhat similar, but not analogous to the present one. The rule adopted in cases for the infringement of a patent is not strictly applicable to a case for the infringement of a trade mark; and neither the rule applicable in trade marks, nor in patent cases, is fully applicable to the case at bar. The good will of a business as embodied in a firm name, or in the labels used, will be protected on principles analogous to those applied in cases of infringement of trade marks. It is true that a trade mark is held by some of the text writers, and, perhaps, in some adjudicated cases, to be a part of the good will, and necessarily included in the sale thereof.

"The object in purchasing the good will undoubtedly was to retain the old customers of A. Eichele & Co., and labels or wrappers bearing the name of the firm, or other brands or marks, by which the goods manufactured by that firm might be identified, are *quasi* trade marks. But there is no allegation that the good will transferred to the plaintiffs was in any way injured or impaired by defendant having used his trade mark or labels.

"The profits made by the defendants, therefore, to which the plaintiffs claim they are entitled, are not the profits made on articles, the exclusive right to manufacture and sell which belonged to the plaintiffs, nor the profits derived from the use of a label or trade mark, the exclusive right to which was in the plaintiffs, though the exclusive right to make the goods on which it was used was not in the plaintiffs; but the profits realized from the general decline and diversion of the plaintiffs' business, occasioned by the defendant. If plaintiffs lost less than the defendant made, they cannot recover the whole of defendant's profits; if the plaintiffs lost more than the defendant made, they would not be limited to defendant's profits. What the plaintiffs have lost by the defendant's breach of covenant, and not what the defendant has gained thereby, is the legal

satisfaction of the jury that he has actually sustained by the infringement.[1] M agreed with S, the lessee of the Revere House, to keep good carriages, horses and drivers, on the arrival

measure of damages in this case. If the plaintiffs had manufactured matches to the utmost capacity of their factory, and sold all they made at unreduced prices, notwithstanding the defendant may have, in violation of his covenant, engaged in the same business in St. Louis, and realized large profits, the plaintiffs could only have recovered nominal damages, for, in that case, they would have lost nothing. On the other hand, if the defendant had infringed the exclusive right of the plaintiffs to manufacture and sell a particular article, the defendant, in an action against him for damages, would be held to account to them for all profits made by the manufacture and sale of such article, regardless of the fact whether he thereby interfered in any manner with the plaintiff's business or his customers, in any particular place, or whether the product of the plaintiffs' factory and their sales were in any manner affected thereby or not; and this is understood by us to be the rule in patent cases. In such cases, the entire profits are taken, because the defendant has no right at all to deal in the article, and must account as a kind of trustee for what he has made from another's capital, while in the present case he will be held to respond in damages only for the injury he has inflicted upon the plaintiffs by reason of his dealing in the article at a particular place in violation of his covenant. In ascertaining the amount of this damage, the profits made by the defendant constitute an element, but only such profits made by the defendant as the plaintiffs have lost by reason of the wrongful act of the defendant complained of in the petition. In ascertaining the profits lost to the plaintiffs, the profits made by the defendant may properly be given in evidence in connection with the diversion of customers from plaintiffs to defendant, and the amount of their purchases, the product of the plaintiffs' factory, and the amount of their sales, and the reduction in price of the articles sold, if any, in consequence of the unlawful competition of defendant.

"By the first instruction given at the instance of the defendant, which inaccurately stated the measure of damages by confining it to profits, but of which he has no reason to complain, the burden of proof was declared to be upon the plaintiffs to prove what proportion of the profits, received by the defendant, they were entitled to recover as a part of their loss; and the only question remaining to be considered in this connection, is, whether there is any testimony whatever tending to support the verdict. . . . It would be impossible in a case like the present for the plaintiffs to prove with accuracy the damages they have sustained; but the data from which the jury might reasonably infer the amount of their loss were in evidence, and it is not for the defendant to say that there was obscurity in matters which it was peculiarly within his power to make plain."

[1] Ransom v. Mayor, etc. 1 Fish, Pat. Cas. 252; Parker v. Hulme, id. 44.

of certain specified trains, at a railroad station, to convey passengers to the Revere House, and in consideration thereof, S agreed to employ M to carry all the passengers from the Revere House to the station, and authorized him to put upon his coaches and the caps of his drivers, as a badge, the words "Revere House." A similar agreement, previously existing between S and B, had been terminated by mutual consent; but B continued to use the words "Revere House" as a badge on his coaches, and on the caps of his drivers, although requested not to do so by S; and his drivers called "Revere House" at the station, and diverted passengers from M's coaches into B's. In an action on the case, brought by M against B for using said badge and diverting passengers, it was held that M, by his agreement with S, had an exclusive right to use the words "Revere House," for the purpose of indicating that he had the patronage of that house for the conveyance of passengers; that if B used these words for the purpose of holding himself out as having the patronage and confidence of that establishment, and in that way to induce passengers to go in his coaches rather than in M's, this would be a fraud on the plaintiff, and a violation of his rights, for which the action would lie, without proof of actual, specific damage, and that M would be entitled to recover such damages as the jury, upon the whole evidence, should be satisfied that he had sustained, and not merely for the loss of such passengers as he could prove to have been actually diverted from his coaches to the defendant's.[1]

It has sometimes been stated and held at law that the proprietor of a trade mark may recover the value of the illegal user while it continued, or in other words, the amount of profits.[2] In a comparatively late case in California,[3] the court, by Crockett, J., thus vindicates that measure and mode of redress: "It is clearly in proof that the defendant has made a profit of $1,770 by sale of pistols made in imitation of the Derringer pistol, and bearing Derringer's trade mark stamped thereon without his consent; and the court rendered a judgment for this amount against the defendant. It is insisted, on

[1] Marsh v. Billings, 7 Cushing, 322.

[2] Taylor v. Carpenter, 2 Woodb. & M. 1; Guyon v. Serrell, 1 Blatchf. 244.

[3] Graham v. Plate, 40 Cal. 593.

behalf of the defendant, that the profit realized by him from sales of the spurious article under the simulated trade mark is not a proper measure of damages. It is conceded that this is the proper rule in an action for damages for the infringement of a patent. It is said that the patentee, having the exclusive right to manufacture and vend the patented article, is entitled, legally and equitably, to all the profits made by any one from the manufacture and sale of it in violation of the rights of the patentee; but one who has acquired an exclusive right to use a particular trade mark has not thereby acquired an exclusive right to make and vend the commodity to which the trade mark is affixed; that any one has the right to make and vend the same commodity, in exact imitation of that made by the owner of the trade mark, and that the offense consists, not in imitating the commodity, but the trade mark only. Hence, it is argued, the profit made by a sale of the commodity ought not to be a measure of the damages; but the party is entitled to only such damages as resulted from a piracy of the trade mark; and the profit realized by a sale of the commodity does not establish the amount of this damage, which may be greater or less than the amount of the profit. It is evident that the profit realized by the wrongdoer is not the *only* measure of damages. The spurious article may have injured the credit of the genuine one, and the profits of the owner of the trade mark may have been greatly reduced, whilst the wrongdoer has made little or no profit. But whilst the profit made by the latter does not limit the recovery, the owner of the trade mark is entitled to all the profit which was in fact realized. In sales made under a simulated trade mark, it is impossible to decide how much of the profit resulted from the intrinsic value of the commodity in the market, and how much from the credit given to it by the trade mark. In the very nature of the case it would be impossible to ascertain to what extent he could have effected sales, and at what prices, except for the use of the trade mark. No one will deny that on every principle of reason and justice the owner of the trade mark is entitled to so much of the profit as resulted from the trade mark. The difficulty lies in ascertaining what proportion of the profit is due to the trade mark, and what to the intrinsic value of the commodity; and as this can-

not be ascertained with any reasonable certainty, it is more consonant with reason and justice that the owner of the trade mark should have the whole profit than that he should be deprived of any part of it by the fraudulent act of the defendant. It is the same principle which is applicable to a confusion of goods. If one wrongfully mixes his own goods with those of another, so that they cannot be distinguished and separated, he shall lose the whole, for the reason that the fault is his; and it is but just that he should suffer the loss rather than an innocent party, who in no way contributed to the wrong."

CHAPTER XXIV.

SLANDER AND LIBEL.

SECTION 1.

PLAINTIFF'S CASE.

Nature of the wrong — Damages; general damages need not be proved — Special damages — Exemplary damages may be recovered — Special damages from publication of words not actionable in themselves — Slander of title.

NATURE OF THE WRONG.— The wrong now to be considered is one by which the wrongdoer injures the reputation of another by publishing a falsehood concerning him. The extent of the injury, and the consequent right to damages therefor, depend on how good the previous reputation of the injured party was, and the nature of the false charge made against him. The law presumes, until the contrary is shown, that every person is innocent; that he has done nothing to forfeit the good opinion of the community, and hence enjoys its respect and confidence. The law regards this good reputation as valuable to its possessor, and its preservation important to his happiness. The public utterance of a false accusation by which such good name is destroyed or sullied is, therefore, an injury for which damages may be recovered.

Slander and libel are different names for the same wrong committed in different ways. Slander is oral defamation published without legal excuse, and libel is defamation published by means of writing, printing, pictures, images, or anything that is the object of the sense of sight.[1]

Certain vocal utterances are actionable *per se;* an action will lie for them without any allegation or proof of actual damage, because it is legally presumed that they cause injury as a natural and immediate consequence. Other utterances of a defamatory tendency are not so obviously injurious that injury therefrom is presumed. When such defamation is the subject of an action, special injury must be alleged and proved to sustain the action.[2]

[1] Cooley on Torts, 193. [2] Id. 203.

In the following cases the words falsely spoken are actionable in themselves: *First*, where the words impute to another the commission of some criminal offense involving moral turpitude, for which, if the charge is true, he may be indicted and punished; or, as the test is more generally stated, where the charge, if true, must subject the party charged to indictment for a crime involving moral turpitude, or subject him to infamous punishment.[1] The injury from such a slander consists not in the exposure to prosecution for the implied crime, but the disgrace and loss of reputation which the law presumes to result from such imputation.[2] It makes no difference that the person of whom the words were spoken is not in the state where he is punishable for the imputed crime; for, though the crime have locality, the effect of the imputation has not.[3] *Second*, where the words falsely spoken of a person impute that he is infected with some contagious disease, where, if the charge is true, it would exclude him from society.[4] The charge must be such as can have the effect mentioned after the words are spoken, and, therefore, must impute the existence of the disease at the present time.[5] *Third*, where the words falsely spoken of a person impute to him misconduct in office, or a want of fitness to perform its duties, or those which pertain to his trade or profession.[6]

[1] Pollard v. Lyon, 91 U. S. 225; McCuen v. Ludlum, 17 N. J. L. 12; Brooker v. Coffin, 5 John. 188; Anonymous, 60 N. Y. 262; Hoag v. Hatch, 23 Conn. 585; Davis v. Brown, 27 Ohio St. 326; Hollingsworth v. Shaw, 19 id. 430; Dial v. Holter, 6 id. 228; Montgomery v. Deeley, 3 Wis. 709; Filber v. Dautermann, 26 id. 518; Ranger v. Goodrich, 17 id. 78; Miller v. Parish, 8 Pick. 384; Dottarer v. Bushey, 16 Pa. St. 204; Stitzell v. Reynolds, 67 Pa. St. 54.

[2] Cooley on Torts, 200; Davis v. Brown, 27 Ohio St. 326.

[3] Shipp v. McCraw, 3 Murph. 463; 9 Am. Dec. 611.

[4] Pollard v. Lyon, supra; Feise v. Linder, 3 B. & P. 374, note a.

[5] Taylor v. Hall, 2 Stra. 1189; Bruce v. Soule, 69 Me. 566; Williams v. Holdredge, 22 Barb. 396; Carslake v. Mapledoram, 2 T. R. 473; Nichols v. Guy, 2 Ind. 82; Kancher v. Blinn, 29 Ohio St. 62; Irons v. Field, 9 R. I. 216.

[6] Pollard v. Lyon, supra; Camp v. Martin, 23 Conn. 86; Sumner v. Utley, 7 id. 258; Jones v. Diver, 22 Ind. 184; McMillan v. Birch, 1 Binn. 178; 2 Am. Dec. 426; Lewis v. Hawley, 2 Day, 495; 2 Am. Dec. 121; Burtch v. Neckenon, 17 John. 217; Hogg v. Dorrah, 2 Port. 212; Hayner v. Cowden, 27 Ohio St. 292; Goodenow v. Tappan, 1 Ohio, 38; Chaddock v. Briggs, 13 Mass. 248; Hartley v. Herring, 8 T. R. 130; Craig v. Brown, 5 Blackf. 44; Gove v.

To render the defamatory words of this latter class actionable without averment or proof of special damage, they must apply to the party defamed in respect to his office or employment, or to his conduct relative thereto, and be calculated to prejudice him in an office of which he is an incumbent, or a profession or calling in which he is engaged.[1]

Blethen, 21 Minn. 80; Robbins v. Treadway, 2 J. J. Marsh. 540; Oram v. Franklin, 5 Blackf. 42; Lansing v. Carpenter, 9 Wis. 540; Lindsey v. Smith, 7 John. 359; Forward v. Adams, 7 Wend. 204; Secor v. Harris, 18 Barb. 425; Carroll v. White, 33 id. 615; Rice v. Cottrel, 5 R. I. 340; Garr v. Selden, 6 Barb. 416; Ayre v. Craven, 2 Ad. & El. 7; Gallwey v. Marshall, 24 Eng. L. & Eq. 463.

[1] Bellamy v. Burch, 16 M. & W. 590; Forward v. Adams, 7 Wend. 204; Edwards v. Howell, 10 Ired. 211; Allen v. Hillman, 12 Pick. 101; Orr v. Skofield, 56 Me. 483; Whittemore v. Weiss, 33 Mich. 348; Backus v. Richardson, 5 John. 476. The test to bring a case within the first class is arbitrary, and appears to have been adopted for the purpose of having a fixed and precise rule. It is worthy of notice that notwithstanding it is desirable to have a definite rule, the law determines the actionable character of other slanders and of libel from their intrinsic nature. The law of libel authorizes the court to hold any matter libelous and actionable *per se* when the imputation is such as, if believed, would naturally tend to expose the plaintiff to public hatred, contempt or ridicule, or exclusion from society. So of other kinds of slander; they are actionable *per se* if injurious to one in his office, trade or profession, or tend to exclude him from society for having an infectious disease. Their intrinsic character and injurious tendency are recognized and determined by the court. But when the words, falsely spoken, impute to him pestilent or flagrant immorality, no matter how gross or outrageous, if not made a crime, indictable and punishable in the temporal courts, they are not legally presumed to be injurious, although the judge who so declares the law, and every juror who must follow it as so declared, knows as a man, that the imputation, to the extent that it is believed, will render the defamed party odious, subject him to contempt, and tend to exclusion from decent society.

The case of Davis v. Brown, 27 Ohio St. 326, is an illustration of the severe arbitrariness of the test referred to. The words spoken charged the plaintiff with sodomy, which was not at that time a crime indictable and punishable by law. The court say: "It is conceded that the charge here is of the highest degree of moral turpitude, and tends to exclude a man from all decent society," and also that "in view of the injurious consequences of such a shocking charge, we confess to being strongly tempted to make one further innovation; but looking back to that period of doubt and uncertainty to which we have referred, and remembering that it is of more importance to have a rule well understood and easily defined, of practical application, and sufficiently comprehensive to meet the ordinary demands of justice, than

The wrong done by libel is like that done by slander; but it is defamation communicated and published in a form and manner which imply more deliberation, and is likely to be more widely disseminated and more lasting in detrimental effect. For this reason there is broader scope of libelous matter which is actionable *per se;* the law will presume damage from less seri-

to have one varying with the changing views of the judges, or variable standards of moral conduct in different communities, or at different periods, we are unwilling to make further innovation, but prefer to remit the matter to the only proper tribunal — the law-making power of the state." Such an innovation was made in an earlier case, that of Malone v. Stewart, 15 Ohio, 319, in which the court held and maintained with vigorous logic, that to call a woman a hermaphrodite is actionable without alleging special damages; that words spoken of a female, having a tendency to wound her feeling, bring her into contempt, and prevent her from occupying such position in society as is her right as a woman, are actionable in themselves. Reed, J., delivering the opinion of the court, said: "It is a well established principle of law, that words which impute a charge necessarily tending to injure a man, or his trade, or occupation or profession, or to exclude him from society, are actionable in themselves. A more gross or indelicate slander could not well have been uttered against a female—especially a young girl — or one more calculated to wound her feelings and do her mischief. It unsexes her; makes her a thing to be stared at; converts her into a monster, whose very existence is shocking to nature; and would be certain, among the young and thoughtless, to bring her into ridicule and contempt; and excludes her from social intercourse and all hopes of marriage. It is infinitely worse than a charge of incontinence, as to its injurious results, to the feelings and prospects of the female.

"To hold that there was no remedy for cases of this sort would be an utter disgrace to the law and ourselves. It is said, if the plaintiff would inquire around, and if she could ascertain that she had been especially injured to a certain amount, in dollars and cents, the law would assist her to recover it; in other words, that it is a case where the action must be sustained upon the ground of special damage. It is said the common law has not gone further; that the English courts have not gone further. It is sufficient to reply, that this court will not permit so gross a wrong to pass without a remedy. We shall apply the spirit of the law to embrace every case properly falling within it. . . .

"The case falls clearly within the oldest and soundest principles of the law when properly understood and rightly applied. It is admitted that if words are spoken to injure a man, to the value of a few dollars and cents, in his trade, it is actionable; but contended that to speak words of a young girl, which necessarily inflict the deepest wound upon her feelings, break up her hopes, and exclude her from society, is not actionable. Such a conclusion cannot be tolerated. This court, in protecting reputation — remedy for

ous matter when thus published than when orally uttered. Though no special damage is alleged, and no averments of such extrinsic facts as might be requisite to make the publication in question import a charge of crime are made, the action is nevertheless maintainable if the published charge is such as, if believed, would naturally tend to expose the plaintiff to public hatred, contempt or ridicule, or deprive him of the benefits of public confidence and social intercourse.[1] The nature of the charge must be such that the court can legally presume that the plaintiff has been disgraced in the estimation of his acquaintances, or of the public, or has suffered some other loss, either in his property, character or business, or in his domestic or social relations, in consequence of the publication.[2]

Malice, which is said to be the gist of the action for libel and verbal slander, does not mean malice or ill-will towards the individuals affected in the ordinary sense of the term. In ordinary cases of slander, the term maliciously means intentionally, and wrongfully, without any legal ground of excuse. Malice is an implication of law from the false and injurious nature of the charge, and differs from actual malice and ill-will towards the individual frequently given in evidence to enhance the damages.[3] If a plaintiff has been injured in his character or feelings by an unauthorized publication, it is the duty of a jury to award him a full compensation in damages without reference to any particular ill-will entertained against him by the defendant. Actual ill-will or malice will enhance the damages and may be shown for that purpose; but need not be shown to entitle the plaintiff to recover.[4]

an injury to which is guarantied by the constitution — will be careful that the judicial decisions of the law shall reflect that same delicate and profound respect of female character and feeling, which constitutes the proudest and dearest characteristic of our people." It is suggestive that this case even in that state is treated as making an innovation and as standing alone. Davis v. Brown, supra.

[1] Tillson v. Robbins, 68 Me. 298; State v. Smily, 37 Ohio St. 33; Watson v. Trask, 6 Ohio, 531; Tappan v. Wilson, 7 id. 190; Smart v. Blanchard, 42 N. H. 151; Price v. Whitely, 50 Mo. 439; Liudley v. Horton, 27 Conn. 58; Cary v. Allen, 39 Wis. 481; Atwill v. Mackintosh, 120 Mass. 177; Hand v. Winton, 38 N. J. L. 122; Cramer v. Noonan, 4 Wis. 231; Sanderson v. Caldwell, 45 N. Y. 398.

[2] Stone v. Cooper, 2 Denio, 299.

[3] King v. Root, 4 Wend. 113.

[4] King v. Root, supra; Langton v. Hagerty, 35 Wis. 150. In Wilson v. Noonan, 35 Wis. 349, the court by

DAMAGES; GENERAL DAMAGES NEED NOT BE PROVED.— There is no legal measure of damages in actions for such a wrong. The amount which the injured party ought to recover is referred

Dixon, C. J., said "that malice or bad intent is not an essential element of the wrong of which the plaintiff complains [libel]; not a fact which he must establish in order to entitle himself to verdict and judgment against the defendant in the action. To this rule there is exception in but a single class of cases, those of privileged communications, where malice, or, as it is sometimes termed, express malice, must be averred and proved. In certain communications denominated privileged, namely, those which are made in the course of judicial proceedings, and some others of a public nature, there exists absolute immunity from liability on the part of the speaker or writer. See Larkin v. Noonan, 19 Wis. 82, and authorities cited. In all other actions for libel and slander, malicious intent constitutes no part of the issue, but is or may be considered only as a circumstance in aggravation of damages. Actual damages, that is, compensation for injury to the reputation and injury to the feelings, or for mental sufferings, so far as the same can be measured in money, to which may be added also any pecuniary loss, in proper cases, or where that ensues, may always be recovered, regardless of the intent or conception of mind with which the publication was made, or words spoken, or whether such intent was good or bad at the time in the writer or speaker. If A *untruly* says of B that he is a thief, in a communication not privileged, then, no matter that A may say so under circumstances which induce him truly and sincerely to believe that B is a thief, and which show he is actuated by no bad motive or evil design to injure B, yet he is bound to make reparation to B for such loss or damage as B actually sustains. . . Townshend on Slander & L. §§ 82–92; Sans v. Joerris, 14 Wis. 663; Duncan v. Thwaites, 3 B. & C. 556, 585.

"Considering, therefore, the nature of the action, and that malice, whether it be such as is inferred from the libelous publication itself, or such as is superadded or proved by evidence of other facts and incidents, is a mere circumstance in aggravation, used only to enhance the damages by way of punishment to the defendant, and for public example, it seems the more appropriate that evidence of the absence of it, that is, direct evidence of the kind here spoken of [the defendant's denial of it as a witness], should be admitted under the general denial [in the answer]; and it seems also the more clear that it was not the intention of the provision of the code . . to exclude it. Counsel for the plaintiff contends, and he sustains himself by numerous references, that it is competent for the plaintiff, without specific allegation or anything in the complaint to point to the facts to be proved, to introduce evidence and accumulate proofs of malice, aside from and beyond that to be implied from the publication itself, for the sole purpose of enhancing the damages to be recovered. If this is so, and we do not question it, it is manifest, as to the aggravating circumstances so proved, that the plaintiff has decided advantage over the defendant,

to the sound discretion of the jury. The damages are intended to repair the injury done; and all that the law can determine in a given case is what facts proved may be taken into account,

who, when it comes to the mitigating circumstances relied upon by him, must spread them upon the record by proper allegations in his answer. This may be looked upon as a very unfair rule; and yet it seems to follow from the provision of the code in actions of this nature.

"And here it seems proper to correct what may be an erroneous impression derived from the language of the former opinion in this case (27 Wis. 610, 611), that there is or may be a distinction, in actions of this kind, between express malice or malice in fact, and implied malice or malice in law, such that the former may be rebutted or disproved, but that the latter admits of no disproof or explanation. The language also seems to proceed on the theory that malice of some kind, at least that which is called *implied*, is necessary to sustain the action. Rejecting that theory, as we now do, it follows that we must also reject the supposed distinction between the different kinds of malice, which in truth seems never to have rested on any good foundation. Mr. Townshend, in the sections above referred to, has exhausted the learning upon this subject, and has helped us to what we consider the true explanation of the terms 'express malice' and 'implied malice,' as used in the law. It is that given by that distinguished lawyer, Nicholas Hill, in argument in Darry v. The People, 10 N. Y. 123. Mr. Hill says: 'The term *express* malice originally meant malice proved independently of the mere act from which death resulted, and *implied* malice the reverse. They therefore described *only different modes of proving* actual guilt, *not different* degrees of it; and they belonged to the law of evidence, and not to a definition of homicide. They did *not even indicate different degrees* of evidence, both kinds, when sufficient, being conclusive until overcome. And they were applicable to every case where proof of the actual intent was requisite to characterize the offense.'

"And the same definition is given by Selden, J., in Lewis v. Chapman, 16 N. Y. 372, which was an action for libel. He says: 'It has been sometimes divided into legal malice or malice in law, and actual malice or malice in fact. These terms might seem to imply that the two kinds of malice are different in their nature. The true distinction, however, is not in the malice itself, but simply in the evidence by which it is established. In all ordinary cases, if the charge or imputation complained of is injurious, and no justifiable motive for making it is apparent, malice is inferred from the falsity of the charge. The law, in such cases, does not impute malice not existing in fact, but presumes a malicious motive for making a charge which is both false and injurious, when no other motive appears. Where, however, the circumstances show that the defendant may reasonably be supposed to have had a just and worthy motive for making the charge, there the law ceases to infer malice from the mere falsity of the charge, and requires from the plaintiff other proof of its existence. It is actual malice in either case; the proof only is dif-

and what are fair considerations to influence their judgments. They are to consider the plaintiff's injured feelings and tarnished reputation, taking into consideration the nature of the imputation, the extent of its publicity, the character, condition and influence of the parties.[1] Where the publication is action-

ferent.'" Whether the alleged defamatory matter is actionable *per se* or not is to be decided by the court. Wagaman v. Byers, 17 Md. 183; Hume v. Arrasmith, 1 Bibb, 165; 4 Am. Dec. 626.

[1] Littlejohn v. Greeley, 13 Abb. 41; Fulkerson v. George, 3 id. 75; Flint v. Clark, 13 Conn. 361; Markham v. Russell, 12 Allen, 573. In True v. Plumley, 36 Me. 466, the action was brought by husband and wife for slander of the latter, by charging her with adultery and calling her a whore. The trial court instructed the jury in these words: "As to damages, you will consider the pain and anguish occasioned by defendant's slander, the cost and trouble, the suffering occasioned by that slander, her prospects in life as affected thereby, the wealth and position of the defendant, and his power therefrom to injure, and give such damage as she is entitled to." On exceptions, this instruction, among others, came under review. The court, in its opinion delivered by Appleton, J., say: "Damages are given as a compensation, recompense or satisfaction to the plaintiff for an injury actually received by him from the defendant. They should be precisely commensurate with the injury; neither more nor less; and this whether to his person or to his estate. 2 Greenlf. Ev. § 253." After quoting some discordant judicial declarations on the subject, the learned judge continues: "Whatever rule may be the true one, the plaintiffs are entitled to such damages as upon the evidence can be awarded in conformity therewith, and not to damages assessed upon other erroneous principles. Now no rule was given to the jury. Are they to be a law unto themselves, and freed from all legal restraints to assess damages at their own will and pleasure? The jury were directed to give the plaintiffs the damages to which they were entitled. To what are the plaintiffs entitled? The question unanswered recurs. To damages which are simply compensatory, and to the extent of any injury sustained? to those which would by way of example be sufficient to deter others? or to such as, beside compensating, and deterring by example, may impose a punishment on the defendant as for a crime? thus infusing into the civil proceedings the effect of a criminal procedure, and erecting the jury into a tribunal which shall in each case impose a penalty. Either of these principles might have been adopted by the jury. Which, in fact, they did adopt, we know not and cannot know. As was remarked by Rogers, J., in Rose v. Story, 1 Pa. St. 190, where somewhat similar instructions were given, 'this is giving them discretionary powers without stint or limit, highly dangerous to the rights of the defendant. It is leaving them without any rule whatever.' Most of the matters referred to in this instruction might be regarded as elements proper for the consideration of the jury, but still some rule should have

able *per se*, the legal presumption of damage goes to the jury, and they, in view of the particular circumstances of the case, are required, in the exercise of their judgment, to determine what

been given to the jury, unless the law is that they are to determine the damages without any restraints, and in each case, according to their arbitrary discretion.

"In actions brought to recover damages for an injury to the person or to the reputation, the injuries which may have arisen, as well as those likely to occur, must receive compensation in one and the same suit, if at all. The jury must regard the probable future as well as the actual past. In no other way can compensation be obtained. In Gregory v. Williams, 1 Car. & Kir. 568, the instructions given were, that, in estimating damages, the jury might consider the prospective damages which might accrue from the defendant's act. 'It is said,' remarked Bosanquet, J., in Ingram v. Lawson, 8 Scott, 471, 'that the damages sustained at the time of the commencement of the action is all that the plaintiff could recover, and that the jury were erroneously directed that they might take into account the prospective injury. But it appears to me that the jury were warranted in proportioning the damages to the amount of injury that would naturally result from the act of the defendant, though it might affect him at a subsequent period.'" A new trial was granted because the jury were instructed that "it was not necessary defendant should have *any* malice against the plaintiffs, or intention to injure them, to maintain the suit; that, if defendant's 'malice was entirely towards another person, in slandering whom he uttered the slanderous words against the plaintiffs, the action was maintainable, and the *damages would be just as great* as if the malice of the defendant had been towards the plaintiff.'"

Referring to this instruction he also said:

"Malice in its legal sense means a wrongful act done intentionally, without just cause or excuse. Commonwealth v. York, 9 Met. 115. Doing a wrongful act, knowing it to be such, constitutes malice. So far as regards the maintenance of the suit, it is equally maintainable whether there be malice in fact or not. But in a civil cause, where the jury are to assess damages, nothing is more clearly established by an entire uniformity of decision, than that damages in slander may be increased upon proof of malice in fact. The instruction of the court amounts to this, that the same damages are to be given when malice in fact exists, as when it is only an inference from the speaking of the words. Now such we do not consider to be the law."

In Burt v. McBain, 29 Mich. 260, which was slander by imputing to the plaintiff, a female, a want of chastity, these instructions to the jury were approved on error: "You should consider whether there is any evidence showing express, positive malice on the part of the plaintiff. If you are satisfied by the testimony in the case that she was governed in the utterance of these words by actual, existing malice, then the compensation or award of damages should be higher and more severe than if you were satisfied that the words were uttered without any express malice. If they were

sum will afford proper reparation.[1] To enable the jury justly to determine the amount of damages, it is important to know what effect can and should be given to the speaking or publishing the same defamatory charges at other times than those stated in the declaration. Such unalleged repetitions are generally allowed to be proved;[2] but in certain states it is held that they are to be considered only as evidence of malice in the speaking or publication charged, and cannot themselves be the ground of additional damages, except as they increase the damages by showing greater malice than would otherwise be implied.[3] For this purpose it is held no objection to the proof of words not charged in the declaration, that they have been charged and recovered for in a previous action,[4] are words for which an ac-

thoughtlessly uttered, without any due consideration of the import of the words, without any intent to injure the plaintiff — if there is no express malice proven in the case to your satisfaction, you should give less damages than you would if it is proven. You should take another matter into consideration in fixing the amount of damages. Satisfy your minds before fixing upon the amount whether this defendant originated this story herself, or whether she simply repeated what she heard. If she originated the story, and it is false; if it was the outgrowth of a wicked heart; if it is the offspring of her own brain; the coinage of her own mind; her guilt would be greater than it would be if she received it from some one else, and simply gave further circulation thoughtlessly, without any design to injure, without any intent to wrong. The proof upon this point you should carefully consider, and see to it that your verdict is not as light in the one case as it would be in the other."

[1] Miles v. Harrington, 8 Kan. 425; Pool v. Devers, 30 Ala. 672; Alley v. Neeley, 5 Blackf. 200; Herrick v. Lapham, 10 John. 281.

[2] Leonard v. Pope, 27 Mich. 148; Barlow v. Brands, 15 N. J. L. 248; Cavanagh v. Austin, 42 Vt. 576; Stearns v. Cox, 17 Ohio, 590; State v. Jeandell, 5 Harr. 475; Elliott v. Boyles, 31 Pa. St. 65; Johnson v. Brown, 57 Barb. 118; Alpin v. Morton, 21 Ohio St. 536; Delegall v. Highley, 8 C. & P. 444; Perry v. Breed, 117 Mass. 155; Severance v. Hilton, 32 N. H. 289.

[3] Ward v. Dick, 47 Conn. 300; McAlmont v. McClelland, 14 S. & R. 359; Robbins v. Fletcher, 101 Mass. 115; Meyer v. Bohlfing, 44 Ind. 238; McGlemery v. Keeler, 3 Blackf. 488; Van Derveer v. Sutphin, 5 Ohio St. 294; Baldwin v. Soule, 6 Gray, 321; Hinkle v. Davenport, 38 Iowa, 355; Ellis v. Lindley, id. 461; Beardsley v. Bridgman, 17 id. 290; Chamberlin v. Vance, 51 Cal. 75; Parmer v. Anderson, 33 Ala. 78; Trabue v. Mays, 3 Dana, 138; Adkins v. Williams, 23 Ga. 222; Symonds v. Carter, 32 N. H. 458; Markham v. Russell, 12 Allen, 573.

[4] Swift v. Dickerman, 31 Conn. 285.

tion is barred by the statute of limitations,[1] or even spoken after the commencement of the action.[2]

In Connecticut it is also held that of this nature is the allegation in the plea of the truth of the charge by way of justification made for the purpose of spreading and perpetuating the slander; it is only to be considered as so much more evidence of malice in the original speaking.[3] On this theory each utterance or publication of the same charge must be regarded as a distinct wrong; but in practice it must be difficult, where there is a succession of suits, to prevent double recoveries for the same wrong, if all the repetitions of the same charge may be proved in each case. In other states and in England such testimony is admitted without restriction to increase damages. All the utterances of the same charge constitute one slander, as all the copies of a newspaper containing a libel constitute one publication. The frequency of the utterances, or the number of the issues of a newspaper, may be shown to prove the extent of publicity given to the defamatory charge, and only one recovery is allowed.[4] In Brunswick v. Harmer,[5] a newspaper had published a libel more than six years before suit, and the case was made out by the purchase of a single copy within six years, and the court refused to confine the damages to the injury arising out of publication by that single copy. In Barwell v. Adkins,[6] suit was brought on a libelous article published in a newspaper, and on the trial the judge allowed proof of a second article published afterwards, reasserting the same charges, and told the jury to take both paragraphs with them, "and give the plaintiff such damages as they considered he was

[1] Harmon v. Harmon, 61 Me. 233; Throgmorton v. Davis, 4 Blackf. 174; Lincoln v. Chrisman, 10 Leigh, 338.

[2] Beardsley v. Bridgman, 17 Iowa, 290; Schrimper v. Heilman, 24 Iowa, 505; Parmer v. Anderson, 33 Ala. 78; Hinkle v. Davenport, 38 Iowa, 355; Bodwell v. Swan, 3 Pick. 376; Ellis v. Lindley, 38 Iowa, 461; McAlmont v. McClelland, 14 S. & R. 359; Smith v. Wyman, 16 Me. 13; Norris v. Elliott, 39 Cal. 72; Baldwin v. Soule, 6 Gray, 321; Thompson v. Bowers, 1 Doug. (Mich.) 321; McIntire v. Young, 6 Blackf. 496.

[3] Ward v. Dick, supra.

[4] Fry v. Bennett, 28 N. Y. 324; Guthercole v. Miall, 15 M. & W. 319; Defries v. Davis, 7 C. & P. 112.

[5] 14 Q. B. 185.

[6] 1 Man. & Gr. 807.

entitled to under the circumstances."[1] In Root v. Lowndes,[2] Bronson, J., said: "When the plaintiff does not go beyond the words laid in the declaration, I see no reason why he may not show that these words have been spoken on a dozen different occasions, although there may be but one count in the declaration. If the defendant has told twenty persons, at as many different times, that the plaintiff is a thief, it cannot be necessary to insert twenty counts, precisely alike, for the purpose of enabling the plaintiff to prove all the conversations, allowing the proof can work no injury to the defendant. He is advised by the declaration what words the plaintiff intends to give in evidence; and whether all the different occasions of speaking them are proved or not, the judgment will be a bar to another action."[3] An action for libel was held barred by a judgment in an action for malicious prosecution, where the arrest was made under papers containing the libelous matter.[4]

Repetitions of the same slander or libel are so far distinct wrongs that if repeated after suit brought a new action may be brought as for a fresh injury; and such repetitions are not admissible for any purpose in the first action.[5] Nor are other slanders or libels than those alleged in the declaration provable

[1] Leonard v. Pope, 27 Mich. 148, 149.

[2] 6 Hill, 518.

[3] Campbell v. Butts, 3 N. Y. 174; Howard v. Sexton, 4 id. 157; Wallis v. Mease, 3 Bin. (Pa.) 546; Kean v. McLaughlin, 2 S. & R. 469; Hansbrough v. Stinnett, 25 Gratt. 495.

[4] Rockwell v. Brown, 36 N. Y. 207. In Leonard v. Pope, supra, Campbell, J., said: "This principle appears just and sensible, and avoids the difficulty of drawing intangible distinctions which no jury can appreciate, between allowing testimony of repetition of wrongs to bear upon an important element in a case, and yet not allowing damages except for the original wrongful act independent of the wrong done by the repetition. Such niceties are not to be favored, and should not be introduced where they can be avoided.

"It was only the accident of calling one witness before another that would have prevented any one of the slanders proven to have stood as the one to which the defendant claims the recovery should be confined. Any one of them would have made out a cause of action under the declaration. A justification of one would have answered them all. A future action for any of them is therefore barred."

[5] Frazier v. McCloskey, 60 N. Y. 337; Daly v. Byrne, 77 N. Y. 182; Woods v. Pangburn, 75 N. Y. 495; Keenhalts v. Becker, 3 Denio, 346; Howell v. Cheatham, Cooke, 247.

for the purpose of showing malice, even with a caution not to allow additional damages for them, for they would imperceptibly influence the judgment of the jury as to the damages, and thus the defendant might be twice subjected to damages for the same wrong.[1] But it has been held that the fact that the defendant, after he had once been sued for a slander and had admitted its falsity, and his consequent liability for it, by settling the suit, deliberately uttered it again, is strong evidence to warrant giving punitive damages, if the jury think proper to award them.[2]

Damages will be increased by every circumstance which aggravates the wrong and adds to the injury. Repetition of a slander does this in two ways: by giving greater publicity to the defamation, and by evincing greater malice.

There is a conclusive presumption of malice from falsely speaking words actionable in themselves, unless a legal justification or excuse is shown. The malicious intent of a slander or libel is not a question of fact; it is a conclusion of law;

[1] Root v. Loundes, 6 Hill, 520, 521; Thomas v. Croswell, 7 John. 264; Finnerty v. Tipper, 2 Camp. 72. In Howard v. Sexton, 4 N. Y. 161, Gardiner, J., said: "It has sometimes been argued that proof of this character shows general malice upon the part of the defendant, which may properly enhance the damages against him. So would evidence that he had set fire to the house of the plaintiff, or committed battery upon his person, furnish stronger proof of general malice than mere words, however opprobrious. The principle does not stop with proof of different words, but extends to the whole conduct of the defendant. Some of the adjudged cases certainly seem to go this length. Finnerty v. Tipper, 2 Camp. 72; 2 Stark. Ev. 635, note A. And if the proposition we are considering is sound, they were rightly decided. But the modern, and I think the better doctrine, is, that the action for slander was not designed to punish the defendant for general ill-will to his neighbor, but to afford the plaintiff redress for a specific injury. To constitute that injury, malice must be proved, not mere general ill-will, but malice in the special case set forth in the pleadings, to be inferred from it and the attending circumstances. The plaintiff may show a repetition of the charge for which the action is brought, but not a different slander for any purpose; and if such evidence is received without objection, with a view to establish malice, the plaintiff may, notwithstanding, bring a subsequent action for the same words, and recover. Root v. Loundes, 6 Hill, 519; Campbell v. Butts, 3 Comst. 174." Medaugh v. Wright, 27 Ind. 137; Fry v. Bennett, 28 N. Y. 328; Barr v. Hack, 46 Iowa, 308.

[2] Glanders v. Graff, 25 Hun, 553.

being so, the plaintiff is not required to prove it, except by showing the publication of the defamatory matter; nor can the defendant deny or disprove it as a separate element of the wrong.[1] This is malice in law, but it is nevertheless a bad intent assumed to exist in fact. As the injury will be aggravated by showing more malice than the law implies from mere proof of the defamation alleged, the plaintiff may prove any circumstances which tend to magnify the malice; they will tend not only to confirm as true in fact what the law so presumes, but they may also show that the wrong and injury did not result from mere heedless and aimless gossip, but a malevolent eagerness to inflict pain and destroy reputation by originating or giving currency to a conscious fabrication.[2]

The true rule seems to be, that when the words are actionable in themselves and are not uttered upon a lawful occasion, and with justifiable motives, the law will infer malice, so as to enable the plaintiff to recover damages, although none be proved. But of this technical or legal malice, as it may be termed, there may be various degrees, as indicated by the manner in which and the circumstances under which the slanderous charges were made. And other circumstances may exist, which show not merely technical malice, but actual hatred and revengeful feelings, the malignant design of the slanderer to do the utmost possible injury. For acts done or words uttered under such different circumstances, and with such different motives and purposes on the part of the slanderer, the same measure of damages cannot be properly awarded.[3]

Actions for such wrongs are designed not only to furnish some indemnity, so far as money can do it, for the injury in-

[1] Fry v. Bennett, 1 Code R. N. S. 243; 5 Sandf. 54; Littlejohn v. Greeley, 13 Abb. 55; Weaver v. Hendrick, 30 Mo. 502; Sanderson v. Caldwell, 45 N. Y. 308; Dexter v. Spear, 4 Mason, 115; Mason v. Mason, 4 N. H. 110; Wilson v. Noonan, 35 Wis. 321; Bodwell v. Osgood, 3 Pick. 379; Harwood v. Keech, 4 Hun, 389; Daly v. Byrne, 1 Abb. N. C. 150; Fox v. Broderich, 14 Irish L. N. S. 453; Gilmer v. Eubank, 13 Ill. 271.

[2] Welch v. Ware, 32 Mich. 84; Detroit Daily Post v. M'Arthur, 16 Mich. 447; Fry v. Bennett, 28 N. Y. 324; McDonald v. Woodruff, 2 Dill. 244; Sawyer v. Hopkins, 22 Me. 268; Shilling v. Carson, 27 Md. 175; Townshend on Sland. & L. § 392.

[3] Symonds v. Carter, 32 N. H. 467.

flicted, but to vindicate the character of the person unjustly assailed, and to protect against a repetition of the outrage. It is right that juries should make a discrimination in the damages they award, according to the circumstances, position, conduct, motives and purposes of the slanderer, disclosed in the proofs; and they may rightfully award more severe damages for the wilful, designed, malicious and mischievous repetition of a story known to be false, and repeated with a design to injure, than for the idle and garrulous repetition of a tale supposed, or even believed without examination, to be true. If the defendant has indicated his intention to injure, by his direct declarations, by repetitions of the slander, or his other acts, having a tendency to show malice in its common acceptation of personal ill-will, that may be shown in evidence.[1]

Evidence that the defendant knew the charge to be false when he uttered it may be shown to aggravate damages, for the necessary inference from such proof must be hatred and malignity.[2] To show that the defendant knew of the falsity of a charge of theft from the person, published by him, it was allowed to be proved by the plaintiff that, after the stated time of the theft, the defendant continued upon friendly terms with him.[3] So where the defendant made the defamatory charge, professedly on information stated by him to be derived from certain named persons who were witnesses of the crime charged, evidence by such persons that they had given no such information was received to show actual malice.[4] Preferring a bill of indictment against the plaintiff, which is ignored by the grand jury, may be shown to prove malice.[5]

The refusal of an editor of a newspaper to publish a retraction of a libel published in such paper does not tend to prove the *animus* of the proprietor to have been malicious, but such refusal is admissible for the purpose of enhancing damages.[6] In an action for slander in charging an infant with larceny, evi-

[1] Symonds v. Carter, 32 N. H. 467.

[2] Stow v. Converse, 3 Conn. 325; Harwood v. Keech, 4 Hun, 389; Bullock v. Cloyes, 4 Vt. 304; Sexton v. Brock, 15 Ark. 345; Farley v. Ranck, 3 W. & S. 554; Fountain v. Boodle, 3 Q. B. 5. But see Hartranft v. Hesser, 34 Pa. St. 117.

[3] Burton v. March, 6 Jones L. 409.

[4] Harwood v. Keech, 4 Hun, 389.

[5] Tolleson v. Posey, 32 Ga. 372.

[6] Edsall v. Brooks, 2 Robt. 414.

dence of a previous quarrel between the defendant and the plaintiff's father and next friend is inadmissible to prove malice in the defendant towards the plaintiff.[1] The plaintiff may give in evidence any expressions of the defendant, whether they are oral or written, which indicate spite or ill-will, for the purpose of showing the temper and disposition with which he made the publication complained of.[2] The style and character of the language are also circumstances which may be left, with others, to the consideration of the jury, on the question whether the words were spoken maliciously, and especially when the question is if they were maliciously uttered under color of privilege.[3] The manner in which the publication is made may offer in itself strong evidence of malice. The transmission unnecessarily of libelous matter by telegraph or by post-card, when it might be sent by letter, is evidence of malice.[4] Where the defamatory matter is published upon a lawful occasion, that is, upon an occasion which furnishes *prima facie* a legal excuse for it, as where it is done in the discharge of some public or private duty, whether legal or moral, or in the conduct of the defendant's own affairs, in matters where his interest is concerned,[5] it is said to be conditionally a privileged communication or publication. The legal excuse for the publication rebuts the presumption of malice from the falsity of the communication; and where such matter is the subject of an action the plaintiff must show malice to maintain the action.[6]

The plaintiff may prove, in aggravation of damages, his rank and condition in society;[7] and, though there is much conflict of authority on the point, it is believed that the better opinion is,

[1] York v. Pease, 2 Gray, 282.

[2] Folkard's Stark. on Slan. & L. 452; Wright v. Woodgate, 2 C. M. & R. 573.

[3] Toogood v. Spyring, 1 C. M. & R. 181; Fryer v. Kennersley, 15 C. B. N. S. 422; Cooke v. Wildes, 5 E. & B. 328.

[4] Williamson v. Freen, L. R. 9 C. P. 393.

[5] Toogood v. Spyring, 1 Cr. M. & R. 181.

[6] Cockayne v. Hodgkisson, 5 C. & P. 543; Servatius v. Pickel, 34 Wis. 292; Townshend on S. & L. pp. 248, 249. See Howard v. Keech, 4 Hun, 389.

[7] Klumph v. Dunn, 66 Pa. St. 141; Smith v. Lovelace, 1 Duv. 215; Bodwell v. Swan, 3 Pick. 376; Howe v. Perry, 15 id. 506; Justice v. Kirlin, 17 Ind. 588; Hosley v. Brooks, 20 Ill. 115; Peltier v. Mict, 50 Ill. 511; Tillotson v. Cheetham, 3 John. 56. Larned v. Buffinton, 3 Mass. 546.

the rank, condition and wealth of the defendant may be shown for the same purpose, that is, to affect as well compensatory as punitive damages.[1] The injury will be proportioned to the rank and influence of the defendant in the community where he publishes the defamatory matter. A knowledge of his standing in the community is important to enable the jury to appreciate the injury resulting from his slanderous declarations; to enable the jury to determine what the injured party ought to receive for compensation, and, in their discretion, what the defendant, for example and punishment, should pay.[2] The right of the plaintiff to prove his rank and condition in society includes that of showing his good character at and before the time of the publication of the defamatory matter. But it is held in some jurisdictions that the law presumes good character; that the general issue admits the falsity of the imputation, and that until the defendant has attacked it the plaintiff is not entitled to introduce any evidence on that subject. Thus, in a Pennsylvania case, Strong, J., said: "Evidence of his reputation is important only as affecting the measure of the compensation to which he is entitled. The injury is less when his character is bad. In a certain sense, therefore, the character (reputation) of the plaintiff in every such action may be said to be put in issue. The plaintiff offers it to the attack of the defendant. The law presumes that it is good, but the defendant may traverse this presumption. Such a traverse is presented when the defendant offers evidence to show that it is bad. But until then a plaintiff is not at liberty to adduce evidence that his character is good; for, until it is attacked, the law presumes, and the defendant

[1] Vol. I, pp. 744, 745; Johnson v. Smith, 64 Me. 553; Humphreis v. Parker, 52 id. 507, 508; Stanwood v. Whitmore, 63 Me. 209; Barber v. Barber, 33 Conn. 335: Brown v. Barnes, 39 Mich. 211; Buckley v. Knapp, 48 Mo. 152; Bodwell v. Osgood, 3 Pick. 379; Karney v. Paisley, 13 Iowa, 89; Lewis v. Chapman, 19 Barb. 252; Kniffen v. McConnell, 30 N. Y. 289; Bennett v. Hyde, 6 Conn. 24; Case v. Marks, 20 Conn. 248; McAlmont v. McClelland, 14 S. & R. 359; Adcock v. Marsh, 8 Ired. 360; Wilms v. White, 26 Md. 380; Kunkel v. Markell, id. 390; 2 Greenlf. Ev. 299. But see Myers v. Malcolm, 6 Hill, 292; Palmer v. Haskins, 28 Barb. 90; Morris v. Barker, 4 Harr. 520; Ware v. Cartledge, 24 Ala. 622.

[2] Id.

admits, such to be the fact. Until then the defendant has refused to accept the issue tendered. This is an almost universal rule, not only in this state, but in England, and in our sister states. Nor does the proof which, under the general issue, may be given of circumstances that may have awakened in the mind of the defendant a suspicion of the plaintiff's guilt, open the door for testimony in support of his character. Evidence of such circumstances is received in mitigation of damages, not because it shows that injury inflicted upon the plaintiff's reputation is any the less, but because it tends to disprove the existence of malice in the defendant. It is, of course, no answer to this to prove that the plaintiff was of good repute. His reputation may have been untarnished, and the circumstances under which the actionable words were spoken may have been such as to indicate that there was very little malice in the defendant. It is, therefore, only where evidence has been given directly attacking the character of the plaintiff that he is at liberty to introduce proof of his good reputation."[1]

The plea of not guilty puts in issue the general reputation of the plaintiff. The amount of his recovery will be affected by any evidence which supports or disparages that reputation. It is presumptively good when the trial begins, and until the presumption is overturned by proof. It is trite to say that what the law presumes, and so long as the presumption continues, need not be proved; but where proof may add to what the law presumes, or make specific what the law presumes only in a general way, and such addition or particularity may legitimately increase damages, it is admissible in the first instance; as is the case on the element of malice. As the reputation of the plaintiff is in issue by the very nature of the proceeding, if the jury can estimate the damages with a more intelligent appreciation of the injury after they have heard affirmative evidence of the plaintiff's reputation than if the case is submitted to them on the mere supposition which the law raises that it is good, it is reasonable and proper such evidence be received. In Burton v. March[2] it was held not error to re-

[1] Chubb v. Gsell, 34 Pa. St. 115. [2] 6 Jones L. 409.

ceive it. Other cases recognize the propriety of the plaintiff showing affirmatively, as part of his case, his good reputation.[1]

In cases of defamation character is the object of attack, and in actions for that wrong the injury to character is the *gravamen* complained of, and its vindication the object of the action.[2] It is said in another case in Connecticut,[3] that the plaintiff's character is not made the subject of inquiry, at the defendant's option, and shut out of view, or the subject of investigation, as shall best subserve the defendant's pleasure and interest. To a rule so inequitable, for the want of mutuality, the courts of that state have never acceded; but they have recognized and acted on the principle, that the final object of the plaintiff's suit is the vindication of his character; and that his reputation, of consequence, is put in issue by the nature of the proceeding itself; he may introduce evidence of his reputation, not only to sustain it from attack, but to prove its excellence. In a late case in Wisconsin,[4] the court say: "In actions of slander, it is well settled that the plaintiff's general character is involved in the issue; and evidence showing what it is, and consequently its true value, may be offered on either side to affect the amount of damages.[5] The rule thus stated has frequently received the sanction of this court."[6] But all cases recognize the right of the plaintiff to answer the defendant's evidence against his general reputation by proof to support it.[7]

The evidence in regard to the plaintiff's reputation must be directed to his general reputation, or his general reputation

[1] Bennett v. Hyde, 6 Conn. 24.

[2] Bennett v. Hyde, supra.

[3] Stow v. Converse, 4 Conn. 42.

[4] Campbell v. Campbell, 54 Wis. 97.

[5] Citing 2 Greenlf. Ev. § 275; Earl of Leicester v. Walter, 2 Camp. 251; Larned v. Buffinton, 3 Mass. 546; Stone v. Varney, 7 Met. 86; Burnett v. Simpkins, 24 Ill. 264.

[6] Maxwell v. Kennedy, 50 Wis. 645; Wilson v. Noonan, 27 id. 590; B——— v. I———, 22 id. 372; Haskins v. Lumsden, 10 id. 359. The court add: "Whether plaintiff in the first instance, and before his character had been assailed, can give evidence of his own good character, it is not necessary here to decide."

[7] Harding v. Brooks, 5 Pick. 244; Byrket v. Monohon, 7 Blackf. 83; Smith v. Lovelace, 1 Duv. 215; Waters v. Jones, 3 Port. 442; Seymour v. Merrills, 1 Root, 459; Sheahan v. Collins, 20 Ill. 325; Moyer v. Moyer, 49 Pa. St. 210.

in regard to the trait involved in the imputation.[1] Particular acts to affect reputation cannot be proved.[2]

Where the reputation of the plaintiff is consequentially attacked by proving the truth of the imputation, it is held that he is not entitled to answer it by proving his good reputation; in other words, he is not entitled to prove his good reputation to countervail the evidence of the specific act or acts shown to establish the plea of justification. In criminal cases respondents are permitted to give evidence of general character, in order to repel the charge, upon the ground that a presumption of innocence arises from former conduct in society, as evidenced by general character, since it is not probable that a person of known probity or humanity would commit a dishonest or outrageous act in the particular instance.[3] But this species of evidence is not available in civil actions for torts, generally, nor to rebut the evidence that alleged slanderous words were true.[4]

Language may be actionable *per se* though it do not impute any crime. It is so if by it one is charged with having either of certain diseases.[5] So if one is disparaged in his office, profession, trade or business in such manner as that by natural and proximate consequence he will be prevented from deriving therefrom that pecuniary reward which probably he might otherwise have obtained.[6] The special character in respect of which such

[1] Lambert v. Pharis, 3 Head, 622; Maynard v. Beardsley, 7 Wend. 560; B—— v. I——, 22 Wis. 372; Birchfield v. Russell, 3 Cold. 228; McAlexander v. Harris, 6 Munf. 465; Steinman v. McWilliams, 6 Pa. St. 170; Brunson v. Lynde, 1 Root, 354; Sheahan v. Collins, 20 Ill. 325; Burton v. March, 6 Jones L. 409; Moyer v. Moyer, 49 Pa. St. 210; Powers v. Presgroves, 38 Miss. 227; Bennett v. Matthews, 64 Barb. 410; Leonard v. Allen, 11 Cush. 241; Shilling v. Carson, 27 Md. 175; Wright v. Schroeder, 2 Curtis, 548; Fountain v. West, 23 Iowa, 9; Lamos v. Snell, 6 N. H. 413.

[2] Andrews v. Vanduser, 11 John. 38; Swift v. Deckerman, 31 Conn. 285; Lamos v. Snell, supra; Burke v. Miller, 6 Blackf. 155; Parkhurst v. Ketchum, 6 Allen, 406.

[3] 2 Stark. Ev. 365.

[4] Matthews v. Huntley, 9 N. H. 146; Severance v. Hilton, 24 N. H. 147; Shipman v. Burrows, 1 Hall, 399; Wright v. Schroeder, 2 Curt. 548; Stow v. Converse, 3 Conn. 325; Bamfield v. Massey, 1 Camp. 460; Haun v. Wilson, 28 Ind. 296; Miles v. Van Horn, 17 id. 245; Rhodes v. Ijames, 7 Ala. 574; Holley v. Burgess, 9 id. 728.

[5] Townshend on S. & L. § 175.

[6] Foulger v. Newcomb, L. R. 2 Ex. 327; Babonneau v. Farrell, 15 C. B. 360.

imputations will be actionable may be any lawful employment in which a livelihood may be gained or from which emoluments are derived. The language must be such as, if true, would disqualify him or render him less fit to fulfil the duties of the special character he has assumed.[1] To charge a partnership with insolvency;[2] a chief engineer of a city fire department with being drunk at a fire;[3] saying a school mistress is a dirty slut;[4] insane;[5] or wanting in chastity;[6] that a blacksmith keeps false books;[7] that a shop-keeper had nothing but rotten goods in his shop,[8] is to utter actionable words.

It is not enough that the language tends to injure the person in his office, profession or trade; it must be published of him in his official or business character.[9] Where, however, one is in business, words spoken of him in his private character may be actionable on account of their necessary effect to injure him in that business; as any words affecting the credit of a man who is a merchant, or pursues any business in which pecuniary credit is important.[10] When the words spoken have such a relation to the profession or occupation of the plaintiff that they directly tend to injure him in respect to it, or to impair confidence in his character or ability; when, from the nature of the business, great confidence must necessarily be reposed, they are actionable, though not applied by the speaker to the profession or occupation of the plaintiff; but when they convey an imputation upon his character equally injurious to every one of whom they might be spoken, they are not actionable, unless such application be made.[11] In an action for libel, the fact that the words used had reference to the profession or business of the

[1] Townshend on S. & L. § 190.

[2] Titus v. Follett, 2 Hill, 318.

[3] Gottbehuet v. Hubachek, 36 Wis. 515.

[4] Wilson v. Runyon, Wright, 651.

[5] Morgan v. Lingen, 8 L. T. R. N. S. 800.

[6] Bodwell v. Osgood, 3 Pick. 379.

[7] Burtch v. Nickerson, 17 John. 217.

[8] Burnett v. Wells, 12 Mod. 420. For other illustrations see Townshend on S. & L. ch. VIII.

[9] Van Tassel v. Capron, 1 Denio, 250; Worten v. Searing, 1 Vic. Law Rep. 122; Redway v. Gray, 31 Vt. 292; Buck v. Hersey, 31 Me. 558; Doyley v. Roberts, 3 Bing. N. C. 835.

[10] Jones v. Littler, 7 M. & W. 423; Fowler v. Bowen, 30 N. Y. 23; Lewis v. Hawley, 2 Day, 495; 2 Am. Dec. 121; Starr v. Gardner, 6 U. C. Q. B. O. S. 512; Hogg v. Dorrah, 2 Port. 22; Davis v. Ruff, 1 Cheves, 17.

[11] Sanderson v. Caldwell, 45 N. Y. 405.

plaintiff is not the substantive ground of the action. The actionable quality of the words used does not in any case depend upon that consideration. And the plaintiff, in such a case, is entitled to recover for damages to him in his profession by reason of the libel, without specific proof in regard to them.[1] In this respect, as has been before remarked, there is a distinction between libel and verbal slander. A charge of drunkenness against one who is a minister;[2] or a master mariner in command of a vessel;[3] or a female,[4] is actionable.

For such actionable words spoken or libelous matter published, the damages are left to the discretion of the jury upon the particular facts of each case. Compensatory damages may properly include recompense for the loss of patronage;[5] and where the imputation is actionable because of its necessary operation to cause such injury, and is of a want of personal fitness, a want of any necessary moral trait, or is an imputation of gross dereliction in professional practice, injury to the feelings, mental anxiety and suffering may be taken into consideration. In a Connecticut case,[6] the defamatory words spoken of a practicing physician were such as to imply that he was so ignorant and unskilful that most of his patients lost their lives by following his prescriptions; and upon this point Sanford, J., said: "It is true that the words spoken relate only to the plaintiff's professional character and are aimed especially at his pecuniary interests dependent upon his professional calling and employment. But the natural, if not the necessary, effect of professional degradation and disgrace is personal anxiety and suffering on account of it. And that anxiety and suffering were proper subjects for compensation to the plaintiff, and ought to be atoned for by the defendant.

"There is, and there ought to be, no other rule upon the subject, than that a tortfeasor shall be held responsible in damages for the full amount of all the immediate injury caused by his wrongful acts. This rule was adopted by the superior court, and

[1] Sanderson v. Caldwell, 45 N. Y. 405.

[2] McMillen v. Birch, 1 Binn. 178; 2 Am. Dec. 426; Chaddock v. Briggs, 13 Mass. 248. But see Tighe v. Wicks, 33 U. C. Q. B. 479.

[3] Irwin v. Brandwood, 2 H. & C. 960.

[4] Brown v. Nickerson, 5 Gray, 1.

[5] Weiss v. Whittemore, 28 Mich. 353.

[6] Swift v. Dickerman, 31 Conn. 294.

sanctioned by this court in the recent case of Lawrence v. Housatonic R. R. Co.,[1] in that of Seger v. Barkhamsted,[2] and in many other cases.

"It is difficult to conceive how a member of either of the learned professions can be injured in his professional character without being at the same time subjected to anxiety and mental suffering,— suffering on account of professional dishonor, to be followed as it naturally and almost necessarily is, and *always ought to be*, by social degradation and disgrace, and the ultimate loss of professional employment with its honors and emoluments. Bodily pain comprises but a very small part of the suffering endured by rational beings, and the injuries which the calumniator inflicts act, often entirely and always immediately, upon the mental sensibilities of his victim. Mental suffering, then, constitutes an important element in the calculation of compensation to be made for such an injury."

Special damages.— If the defamed party suffers a particular injury, which the jury would not be entitled to consider as the necessary result of the actionable publication, but which is a natural and proximate consequence of it, it may be made a subject of additional compensation. Consequential damages, as distinguished from direct and necessary damages, are generally special.[3] What are special damages distinctively is very clearly stated in a Maryland case,[4] in which the court held that whether the words in themselves are actionable, or only become so because of some special damage, no evidence of any particular loss or injury, caused by the words spoken, is admissible, unless such loss or injury is particularly alleged in the declaration. In certain actions special damages for defamation are essential to be shown in order to their maintenance. This is the case in all actions for language not actionable *per se*. And the special damages which must be shown in such cases may be alleged and proved, besides the necessary or general damages, in the class of cases which have been considered, and they cannot otherwise be recovered.[5] If alleged and not proved, the

[1] 29 Conn. 390.
[2] 22 Conn. 290.
[3] Vol. I, pp. 763–766.
[4] Dicken v. Shepherd, 22 Md. 399.
[5] Dicken v. Shepherd, 22 Md. 399; Shipman v. Burrows, 1 Hall, 399;

action may still be maintained and substantial damages recovered.[1]

EXEMPLARY DAMAGES MAY BE RECOVERED.—Wherever such damages are recoverable at all for malicious wrongs they are recoverable for libel and slander. But to justify the finding of any sum beyond fair compensation for the injury, in order to punish the defendant, the nature of the defamation and circumstances of the case should be such as to satisfy the jury that there was actual malice, or a recklessness equivalent to malice.[2] The amount of damages in these cases, both compensatory and exemplary, are in the discretion of the jury; and being so, the verdict must be palpably and grossly excessive to induce the court to set it aside.[3]

Harcourt v. Harrison, id. 474; Servatius v. Pickel, 34 Wis. 294; Rummell v. Otis, 60 Mo. 365; Price v. Whitely, 50 Mo. 439.

[1] Weiss v. Whittemore, 28 Mich. 353; Wier v. Allen, 51 N. H. 181; Smith v. Thomas, 2 Bing. N. C. 380.

[2] Tillotson v. Cheetham, 3 John. 56; Taylor v. Church, 8 N. Y. 452; Symonds v. Carter, 32 N. H. 458; Cramer v. Noonan, 4 Wis. 231; Klinck v. Colby, 46 N. Y. 427; Kendall v. Stone, 2 Sandf. 269; Gilreath v. Allen, 10 Ired. 67; Bonnin v. Elliott, 19 La. Ann. 322; Kinney v. Hosea, 3 Harr. 397.

[3] Douglass v. Tousy, 2 Wend. 352; King v. Root, 4 id. 113; Sanders v. Johnson, 6 Blackf. 50; Bell v. Howard, 4 Litt. 117; Riley v. Nugent, 1 A. K. Marsh. 431; Ross v. Ross, 5 B. Mon. 20. The result of adjudications in Michigan are thus stated in Scripps v. Reilly, 38 Mich. 23: "1. In any injury entitling the party to redress, damages to the person, property and reputation, together with such special damage as may he shown, are recoverable. 2. Where the act done is one which from its very nature must be expected to result in mischief, or where there is malice, or wilful or wanton misconduct, carelessness or negligence so great as to indicate a reckless disregard of the rights or safety of others, a new element of damages is allowed, viz.: for injury to the feelings of the plaintiff. 3. Damages for injuries to feelings are only allowed for those torts which consist of some voluntary act or very gross neglect, and depend in amount very much upon the degree of fault evinced by all the circumstances. 4. Where the tort consists of some voluntary act, but no element of malice is shown to have existed, but the wrong was done in spite of proper precaution, the damages to be awarded on account of injured feelings will be reduced to such sum as must inevitably have resulted from the wrong itself. 5. Where, however, the elements exist in a case, entitling a party to recover damages for injured feelings, the amount to be allowed for shame, mental anxiety, insulted honor, and suffering and indignation consequent on the wrong, may be increased or aggravated by the vin-

SPECIAL DAMAGES FROM PUBLICATION OF DEFAMATORY WORDS NOT ACTIONABLE IN THEMSELVES.— Language from the false speaking or publication of which the law does not infer damage, if defamatory,[1] and the cause of actual injury, may be the basis of an action to recover the resulting damage. The injury must be of a pecuniary nature, or cause detriment to important temporal interests; and must appear to be the natural and proximate consequence of the defamatory publication. This kind of slander is only actionable in respect of some special

dictive feelings, or the degree of malice, recklessness, gross carelessness or negligence of the defendant, as the injury is much more serious where these elements, or either of them, are shown to have existed. 6. This increase of damages dependent upon the conduct of the defendant must be considered in this state as actual damages, although usually spoken of as exemplary, vindictive or punitory, and the amount thereof to be recovered, where recoverable at all, as they are incapable of ascertainment by any other known rule, must rest in the fair and deliberate judgment and discretion of the jury acting upon their own sense of justice in view of all the circumstances, both mitigating and aggravating, appearing in the case, and which can fairly be said to give color to or characterize the act, aided, however, by such instructions from the court as will tend to prevent the allowance of damages merely fanciful, or so remote as not fairly resulting from the injury. 7. So far as these damages are concerned, the fact that an indictment may or may not be pending or threatened for the same wrong is wholly immaterial, as they are allowed by way of remuneration for the injury sustained. If this allowance also operates by way of punishment, this is an indirect result equally applicable to damages allowed for injuries to person or property. 8. In cases of libel the publication is always considered a voluntary act, and is presumed to have proceeded from malicious motives. The actual motive may, however, be shown either in aggravation or reduction of damages to the feelings of the person injured. In other words, the spirit and intention of the defendant in publishing the libel may be considered by the jury in estimating the injuries done to the plaintiff's feelings. 9. Want of proper precaution in the employment of agents or assistants, or of proper care in the conduct of the paper, or the retention of improper employees after ascertaining their incompetency, carelessness or negligence, may be shown to increase the damages to wounded feelings; but express malice in the employees would not be admissible for such purpose, where the act was done without the knowledge or consent of the defendant, when proper care had been exercised in their employment and retention. Detroit Daily Post Co. v. McArthur, 16 Mich. 447; Welch v. Ware, 32 Mich. 77, and authorities cited on p. 86; Elliott v. Van Buren, 33 Mich. 56; Livingston v. Burroughs, 33 Mich. 511; Friend v. Dunks, 37 Mich. 25."

[1] Terwilliger v. Wands, 17 N. Y. 54.

damage proceeding from it; such damage is the gist of the action, and must be specially alleged and proved or the action will fail.[1] There is some contrariety of decision as to what will constitute special damage sufficient to support the action. There is no question or conflict where the direct or necessary consequence is confessedly a pecuniary loss. Strong, J., in Terwilliger v. Wands,[2] said: "The action for slander is given by law as a remedy for injuries affecting a man's reputation or good name by malicious, scandalous words, tending to his damage and derogation.[3] It is injuries affecting the reputation only which are the subject of the action. In the case of slanderous words actionable *per se*, the law, from their natural and immediate tendency to produce injury, adjudges them to be injurious, though no special loss or damage can be proved. But with regard to words that do not apparently, and upon the face of them, import such defamation as will of course be injurious, it is necessary that the plaintiff should aver some particular damage to have happened.[4] As to what constitutes special damage, Starkie mentions the loss of a marriage, loss of hospitable gratuitous entertainment, preventing a servant or bailiff from getting a place, the loss of customers by a tradesman;[5]

[1] Keenholts v. Becker, 3 Denio, 346; Terwilliger v. Wands, 17 N. Y. 61; Beach v. Ranney, 2 Hill, 309; Hallock v. Miller, 2 Barb. 630; Herrick v. Lapham, 10 John. 281; Hersh v. Ringwalt, 3 Yeates, 508. In Cook v. Cook, 100 Mass. 194, the court say: "To sustain the action on this ground, it is necessary that the declaration should set forth precisely in what way such special damages resulted from the words relied on. It is not sufficient to allege generally that the plaintiff has suffered special damages, or that he has been put to great costs and expenses thereby. . . . It must be made to appear, by proper avermeuts, how these special damages were occasioned by the words alleged to have been uttered falsely or maliciously."

[2] Supra.

[3] 3 Black. Com. 123; Stark. on Sland. Prelim. Obs. 22–29; id. 17, 18.

[4] 3 Black. Com. 124.

[5] Townshend on S. & L. § 198. Special damage consists in, among other things, the loss of marriage, loss of *consortium* of husband and wife (Lynch v. Knight, 5 L. T. R. N. S. 291; 9 House L. 577; Parkins v. Scott, 6 L. T. R. N. S. 394; 1 Hurl. & C. 153; Roberts v. Roberts, 33 L. J. Q. B. 249; 5 B. & S. 384; and see Passiman v. Fletcher, Clayton, 73); loss of emoluments, profits, customers, employment, gratuitous hospitality (Moore v. Meagher, 1 Taunt. 39; Williams v. Hill, 19 Wend. 305); or by being subjected to any other inconvenience or annoyauce occasioning or involving an actual or

and says that, in general, whenever a person is prevented by the slander from receiving that which would otherwise be conferred upon him, though gratuitously, it is sufficient.[1] In Olmsted v. Miller,[2] it was held that the refusal of civil entertainment at a public house was sufficient special damage. So in Williams v. Hill,[3] was the fact that the plaintiff was turned away from the house of her uncle and charged not to return until she had cleared up her character. So in Beach v. Ranney,[4] the circumstance that persons, who had been in the habit of doing so, refused longer to supply fuel, clothing, etc.[5] . . .

"It would be highly impolitic to hold all language, wounding the feelings, and affecting unfavorably the health and ability to labor, of another, a ground of action; for that would be to make the right of action depend often upon whether the sensibilities of a person spoken of are easily excited or otherwise; his strength of mind to disregard abusive, insulting remarks concerning him; and his physical strength and ability to bear them. Words which would make hardly an impression on most persons, and would be thought by them, and should be by all, undeserving of notice, might be exceedingly painful to some, occasioning sickness and an interruption of ability to attend to their ordinary avocations. There must be some limit to liability for words not actionable *per se*, both as to the words and the kind of damages; and a clear and wise one has been fixed by the law. The words must be defamatory in their nature; and must in fact disparage the character; and this disparagement must be evidenced by some positive loss arising therefrom directly and legitimately as a fair and natural result." It is therefore generally held that mere injury to the feelings, though resulting in sickness and inability to labor, is not such special damage as will support the action for defamatory words

constructive pecuniary loss. Woodbury v. Thompson, 3 N. H. 194; Kelly v. Partington, 3 Nev. & M. 116; Keenholts v. Becker, 3 Denio, 346; Foulger v. Newcomb, L. R. 2 Ex. 330; Hartley v. Herring, 8 T. R. 130. The special damage must be the loss of some material temporal advantage. Loss of *consortium vicinorum* is not sufficient. Roberts v. Roberts, 33 L. J. Q. B. 250; Beach v. Ranney, 2 Hill, 309.

[1] Citing Stark. on Sland. 195, 202; Cook's Law of Def. 22–24.

[2] 1 Wend. 506.

[3] 19 Wend. 305.

[4] 2 Hill, 309.

[5] 2 Stark. on Sland. 872, 873.

not actionable in themselves.[1] Nor will the allegation that the plaintiff has fallen into disgrace, contempt and infamy, and has lost his or her credit, reputation and peace of mind.[2]

[1] Wilson v. Goit, 17 N. Y. 442; Bedell v. Powell, 13 Barb. 183; Samuels v. Evening Mail Asso. 6 Hun, 5; Allsop v. Allsop, 5 H. & N. 534. But see Olmsted v. Brown, 12 Barb. 657; Bradt v. Towsley, 13 Wend. 253; Fuller v. Fenner, 16 Barb. 333; Underhill v. Welton, 32 Vt. 40; McQueen v. Fulghau, 27 Tex. 463.

[2] 1 Saund. 243, note 5; Beach v. Ranney, 2 Hill, 309; Bassett v. Elmore, 48 N. Y. 561; Woodbury v. Thompson, 3 N. H. 194. In Roberts v. Roberts, 5 B. & S. 384, the declaration was by husband and wife, alleging that she was a member of a sect of Protestant Dissenters, and also a member of one of the private societies of that sect, and that the sect and its societies are subject to rules and regulations, and the members of the sect and its societies are subject to rules and regulations, and under the control and authority of the societies and their leaders with respect to the moral and religious conduct of the members, and their being allowed to be and continue members; and by the rules and regulations a member of one society in the sect cannot become a member of another society in the sect unless the leaders or elders of the first certify that the member is morally and otherwise fit to be a member; and that by reason of words spoken of the wife, imputing a want of chastity to her, she was not allowed to continue a member of the society, and the leaders or elders refused to certify that she was morally or otherwise fit to be a member of the sect, etc., and she was not allowed to become a member of the society in L, and was prevented from attending religious worship, and she became injured in her good name and reputation, and sick and greatly distressed in body and mind. On demurrer it was held that the special damage was not sufficient to make the words actionable. Lord Campbell said: "It is admitted that the loss of *consortium vicinorum* is not sufficient; and I am of opinion that the loss by the female plaintiff of membership of this society and congregation, which appears to have been constituted for religious or spiritual purposes, amounts at most to no more than the loss of the merely nominal distinction of being able to call herself a member of it. It does not appear that any real or substantial advantages attach to membership; such as a loss of a seat in the chapel, or of the opportunity of attending divine worship there. If by reason of the words spoken the female plaintiff had been excluded from meetings for religious worship, or from anything substantial by which right attached to membership of the society, I should be disposed to hold that it was sufficient special damage. I think that to prevent a woman whose character for chastity is assailed from bringing an action for the purpose of vindicating it, is cruel; but, as the law at present stands, such an action is not maintainable unless it be shown that the loss of some substantial or material advantage has resulted from the speaking of the words. That is not shown in this declaration, and, therefore, I reluctantly hold that the demurrer is good." Crompton, J., said: "Here is no loss of a tem-

Being shunned by her neighbors, and turned out of the moral reform society, does not constitute special damage.[1]

The loss of a marriage to a party of either sex is sufficient special damage. If the words spoken were defamatory, as that a female plaintiff has had an illegitimate child, or is wanting in chastity;[2] or, if spoken of a man, that he is a whoremaster, or the like;[3] or of one who was a widower, that he had kept his wife basely, and starved or denied her necessaries;[4] or to say of one he is a bastard,[5] and it is shown to be followed with the loss of marriage as a consequence, the action will lie. But a loss of suitors is not special damage to a female.[6]

The judges in England were not agreed in Lynch v. Knight,[7] that a wife may maintain an action against a slanderer for words not actionable in themselves, based on the loss of her husband's society, as special damage, he having deserted her in consequence of the words spoken; but she was held entitled to recover in respect of her loss of maintenance by the husband for such cause.

Loss of employment, of customers, or of any position from which the defamed party derived support or any substantial or pecuniary advantage, is so manifestly special damage that it is unnecessary to state the cases in detail.[8] In such actions.

poral nature; or, if there be any, it is merely nominal. Though I wish the law were different in the case of words affecting the chastity of a woman, yet the line must be drawn somewhere between words which are and words which are not actionable; and, if we hold that the action of slander could be supported by the allegation that the plaintiff had suffered some nominal special damage, we must thereby encourage actions which ought not to be brought."

[1] Id.

[2] Restor v. Pomfreich, Cro. Eliz. 639; Shepard v. Wakeman, 1 Sid. 79; Davis v. Gardiner, 4 Coke, 16; Matthews v. Cross, Cro. Jac. 323.

[3] Matthews v. Cross, Cro. Jac. 323; Taylor v. Tully, Palmer, 385; Southold v. Daunston, Cro. Car. 269.

[4] Wicks v. Shepherd, Cro. Car. 155.

[5] Nelson v. Staff, Cro. Jac. 422.

[6] Barnes v. Prudlin, 1 Sid. 396.

[7] 9 H. L. Cas. 577.

[8] Campbell v. White, 5 Ir. C. L. N. S. 312; Corcoran v. Corcoran, 2 Ir. C. L. N. S. 272; Moore v. Meagher, 1 Taunt. 39; Hartley v. Herring, 8 T. R. 130; Peaks v. Oldham, 1 Cowp. 277; Bignell v. Buzzard, 3 H. & N. 217; Sterry v. Foreman, 2 C. & P. 592; Evan v. Harries, 1 H. & N. 25; Knight v. Gibbs, 3 Nev. & M. 467; 1 A. & E. 43; Shipman v. Burrows, 1 Hall, 399; Williams v. Hill, 19 Wend. 305.

where loss of trade or customers is relied upon as special damage, if the plaintiff intends to show particular instances, he must allege them;[1] in other words, where the plaintiff alleges, by way of special damages, the loss of customers in the way of his trade, the loss of marriage, or of service, the names of such customers, the name of the person with whom marriage would have been contracted, or service performed, should be stated.[2] But the rule is relaxed when the individuals may be supposed to be unknown to the plaintiff, or where it is impossible to specify them, or where they are so numerous as to excuse a specific description on the score of inconvenience.[3]

[1] Rose v. Groves, 5 M. & G. 618; Trenton Mut. L. & F. Ins. Co. v. Perrine, 23 N. J. L. 402; Moore v. Meagher, 1 Taunt. 39; Shipman v. Burrows, 1 Hall, 399; Tobias v. Harland, 4 Wend. 537; Hallock v. Miller, 2 Barb. 630; Townshend on S. & L. § 345; 1 Stark. on Sland. 203.

[2] Id.

[3] Trenton Mut. L. & F. Ins. Co. v. Perrine, supra; Hartley v. Henning, 8 T. R. 130; Hargrave v. Le Breton, 4 Burr. 2422; Westwood v. Cowne, 1 Stark. 172; 2 Saund. 411; Riding v. Smith, L. R. 1 Ex. Div. 91. See Hewit v. Mason, 24 How. Pr. 366. In Weiss v. Whittemore, 28 Mich. 373, the publication was actionable *per se*, and had reference to the plaintiff in his business as a dealer in Steinway pianos. The declaration alleged that prior to the time of the publication he had been and was carrying on the business of the agency, "and had in the way of his aforesaid trade and business, as agent for the sale of the Steinway pianos, acquired great gains and profits, and was up to that time daily and honestly acquiring great gains and profits to himself, as such agent in the sale thereof." It was further alleged that by means of the publication the plaintiff had been and is greatly injured in his said trade and business, and has lost and been deprived of divers great gains and profits in his said business, which would but for such publication have arisen and accrued to him. It was objected that these allegations were too general; that the plaintiff should have shown how he had suffered the damage, the particular amount, and the particular sales the publication had prevented him from making. But the court, by Christiancy, J., said: "The case is not like that of Shipman v. Burrows, upon which the defendants rely, where the plaintiff, a shipmaster, alleged generally that in consequence of the publication, etc., certain insurance companies refused to insure any vessel commanded by him, or any goods on board, etc., without setting forth any particular application to, or refusal by, any such company. In that case, whether correctly decided or not, the plaintiff must have known, and could therefore easily have set forth, the particular of refusal. But how could the plaintiff thus know and specify the particular instances here where parties simply omitted to call for the purchase of these pianos? Had he been in the habit of carrying them around

There ought to be no difference, and in principle there is none, between words actionable in themselves, and other defamatory words followed by actual injury, beyond the change in the burden of proof. In the former case the injury is presumed; in the latter it must be alleged and proved. The intrinsic nature of the wrong and injury is the same in both cases. What the jury may take into consideration, in the one case, without proof, in the assessment of damages, ought, when proved in the other, to sustain the action, and be considered in the award of damages. Where the words relate to persons, and not exclusively to things, and the words impute a crime involving moral turpitude or infamous punishment, they are in themselves actionable. The law conclusively presumes damage, if they are false, and the publication was not privileged. This damage is assessable by a jury, and no legal standard for measuring the amount exists. This, however, does not imply, nor is it true, that the law does not define the nature of the injury and decide what elements may enter into compensation for it. The injury is a malicious one to reputation,[1] and pecuniary loss, in theory at least, the gist of the action for its redress.[2] This loss is presumed; and also injury to the feelings, because the dissemination of the scandal has a tendency, more or less strong according to the nature of the imputation and the standing and influence of the traducer, to exclude the person to whom it refers, from society and from the confidence and respect of

to supply customers, perhaps the case might have been analogous to that of the shipmaster; but this does not appear. Nor is this like the loss of trade from such a cause in many other cases, where the same customers are in the habit of resorting to the same shop for dry goods or groceries frequently needed; pianos are not bought at frequent, but at very distant intervals, by the same person. Almost every customer must, in the nature of things, be a new one. And yet when the injury complained of is a loss of trade, in ordinary cases, from slander or a libel, it seems to be settled upon authority, and we think upon sound principle, that the names of the customers driven away or lost need not be mentioned; but the general loss of trade is sufficient, and the declaration may be supported by evidence of such general loss. See Evans v. Harries, 38 Eng. L. and Eq. 347; Hartley v. Herring, 7 T. R. 130; Ashley v. Harrison, 1 Esp. 48; Trenton, etc. Ins. Co. v. Perrine, 3 Zab. 402."

[1] Terwilliger v. Wands, 17 N. Y. 54.

[2] Townshend on S. & L. § 57.

the community; there is in fact, and by implication of law, mental suffering at once upon knowledge of the defamatory publication. The law authorizes the jury to consider upon their knowledge of the general experience, that the false and malicious imputation, however limited the publication, causes injury of which mental suffering is an ingredient; that suffering ensues from the shock of the disparagement to the mental sensibilities of one who has a consciousness of innocence, and from the natural apprehension that his reputation will suffer by a popular belief or suspicion that the imputation is true. This injury to the feelings is not the principal ingredient for which the law affords redress; it is incidental to and dependent on other phases of the wrong; it is generally rather an aggravation than a substantive and independent ground of recovery. If the law would sustain an action and allow the recovery of damages for every word or act which in fact causes injury to feelings, it would thereby, in the language of Crompton, J.,[1] "encourage actions which ought not to be brought." Therefore, in actions for words not actionable in themselves, special damage of a nature corresponding to those which are presumed to result principally from language actionable *per se* must be alleged and proved; and it is only when, in addition to such loss, the words are of such a nature as to injure reputation, that injury to the feelings or mental suffering may be incidentally considered.[2] A mere apprehension of loss or of ill consequences will not constitute special damages to support an action for slanderous words not actionable. It is insufficient to allege that in consequence of the words discord happened between husband and wife, and the plaintiff was in danger of a divorce; or that the words exposed the

[1] Roberts v. Roberts, 5 B. & S. 384.

[2] Falsely and maliciously to impute in the coarsest terms, and on the most public occasion, want of chastity to a woman of high station and unspotted character, or want of veracity or courage to a gentleman of undoubted honesty and honor, cannot be made the foundation of any proceeding civil or criminal; whereas an action may be maintained for saying that a cobbler is unskilful in mending shoes, or that one has held up his hand in a threatening posture to another. Report of Committee of House of Lords on Defamation and Libel, July, 1843; Townshend on S. & L. § 57.

plaintiff to the displeasure of her parents, and she was in danger of being put out of her house.[1]

The special damage must be the natural as well as the proximate consequence of the defamatory publication. As was well said by Mullett, J.:[2] "It is a rule equally consistent with good sense, good logic and good law, that a person who would recover damages for an injury occasioned by the conduct of another, must show, as an essential part of his case, the relation of cause and effect between the conduct complained of and the injury sustained." This subject has been treated at large in another place.[3] The injury must be such as, according to the usual course of things, or the general experience of mankind, was likely to ensue from the publication complained of. It is not deemed natural for a parent to withhold favors in the way of instruction and dress to his minor child in consequence of a charge of self-pollution which he disbelieves.[4] Grover, J., said, in that case: "I do not think special damage can be predicated upon the act of any one who wholly disbelieves the truth of the story. It is inducing acts injurious to the plaintiff, caused by a belief of the truth of the charge made by the defendant, that constitutes the damage which the law redresses." When, however, the charge made, independent of belief of its truth, has caused the person to whom it was published or addressed to act upon it, and to turn out of employment a servant to whom the charge referred, the disbelief, or testimony of it,

[1] Folkard's Stark. § 385; Barnes v. Strudd, 1 Lev. 261; Townshend on S. & L. § 200.

[2] Olmsted v. Brown, 12 Barb. 652.

[3] Vol. I. p. 48.

[4] Anonymous, 60 N. Y. 262. In Lynch v. Knight, 9 H. L. Cas. 577, the wife brought the action, joining the husband for conformity, against A for slander uttered by him to her husband, imputing to her that she had been "all but seduced by B before her marriage, and that her husband ought not to suffer B to visit his house," and the special damage alleged was that in consequence of the slander the husband had compelled her to leave his house and return to her father, whereby she lost the *consortium* of her husband; it was held that the cause of complaint thus set forth would not sustain the action, inasmuch as the special damage relied upon did not arise from the natural and probable effect of the words spoken by the defendant, but from the precipitation or idiosyncrasy of the husband in dismissing his wife from his house when he was only cautioned not to let her mix in society. Folkard's Stark. § 383.

has been held immaterial.[1] "It may often happen," say the court, "that a person may not believe what is told, and yet not have courage to keep the individual who labors under the imputation." Park, J., said: "It is said that the witness would have turned the plaintiff away on the defendant's wish to that effect being intimated, although no slanderous words had been used. But it is clear that if the words in question had not been used, the plaintiff would not have been dismissed; and it is sufficient for this action, to show that she was turned out in consequence of such words of the defendant. The effect of the evidence may be that the witness would have turned the plaintiff away if different words had been used; but different words were not used, and she was sent away in consequence of these."

In many cases the special injury results from the action of one to whom the slanderous charge has been repeated by the person to whom the defendant published it. And it has been held that the defendant is not liable for the damage resulting from such repetition, unless he authorized it, or it was a privileged communication. Thus it is said by Strong, J., in Terwilliger v. Wands,[2] that "where words are spoken to one person, and he repeats them to another, in consequence of which the party of whom they are spoken suffers damage, the repetition is, as a general rule, a wrongful act, rendering the person repeating them liable in like manner as if he alone had uttered them. The special damages, in such a case, are not a natural, legal consequence of the first speaking of the words, but of the wrongful act of repeating them, and would not have occurred but for the repetition, and the party who repeats them is alone liable for the damages."[3]

[1] Knight v. Gibbs, 1 A. & E. 43.

[2] 17 N. Y. 57.

[3] Citing Ward v. Weeks, 7 Bing. 211; Hastings v. Palmer, 20 Wend, 225; Keenholts v. Becker, 3 Denio, 346; Stevens v. Hartwell, 11 Met. 542. In Olmsted v. Brown, 12 Barb. 662, Mullett, J., said: "A man may be justly held responsible for the necessary or ordinary legitimate consequences of his own acts. And such consequences may be included in the chain of causes which connect the original act with the final effect. But he cannot be made accountable for the unauthorized illegal acts of other persons, although his own conduct may have indirectly induced or incited the commission of the acts." Vicars v. Wilcocks, 8

It appears to the writer that this doctrine, though advanced by very able jurists and sanctioned by courts of distinguished learning and influence, is unsound. If the liability of the party first uttering the defamatory words for the damages resulting from a culpable repetition of them were denied on the ground that such repetition was not a natural or probable consequence of the first publication, the conclusion would harmonize with the principle which fixes the limit of responsibility generally for the consequences of torts. An error in holding that the repetition of a scandal is not so likely to occur, as that the utterer should be held to contemplate it, is of minor consequence; if that holding were true, the exemption from liability could be rested safely on that ground. The damages would then be rejected as too remote. But it is not true, probably, that when one utters a scandal he expects it to have no further circulation; that a subsequent repetition by his hearer is a consequence so contrary to the general experience, that he cannot be reasonably held responsible for it. The relation of cause and effect is a matter which cannot always be actually ascertained; but if in the ordinary course of events a certain result usually follows from a given cause, the immediate relation of

East, 1; Moody v. Baker, 5 Cow. 357; Beach v. Ranney, 2 Hill, 314; McPherson v. Daniels, 10 B. & C. 263; Dole v. Lyon, 10 John. 447. He adds: "These decisions, and the reasons upon which they are founded, most clearly and fully establish the doctrine that the repetition of slander is unlawful, unless made with justifiable intentions and upon a justifiable occasion. And the conclusion is inevitable, that, when so unlawful, it is not an ordinary or necesary legitimate consequence of the defendant's original unlawful act, and cannot be used to make out the relation of cause and effect between the defendant's original slanders and the injury attributed to it, and which might not have happened but for the unjustifiable and illegal interference of another.

"This rule presupposes what the law plainly declares, that there may be intentions and occasions which will justify the repetition of slanderous words. And those who duly appreciate the rights of the social, domestic, religious and mere business relations of civilized life, will find no difficulty in judging when these occasions occur. Where they do occur, the repetition of slanderous words, with the proper intentions, may be considered the ordinary or necessary and legitimate consequences of the uttering by the first slanderer, and render him accountable for all the injuries occasioned by such legitimate repetition."

one to the other may be considered to be established.[1] The cases, from the doctrine of which we dissent, do not hold that the damages suffered from such repetition are remote within this rule, though in many cases particular losses may be so; they hold that such damages do not naturally and legitimately proceed from the first speaking; and they hold that if the repetition occurs under such circumstances that the person who repeats the scandal incurs no liability, the damages resulting therefrom may be charged to the first speaker, and are not remote. It is possible to suppose that the first utterer of the imputation might reasonably be held to anticipate an injurious privileged repetition, though not a wrongful one; but to hold him liable for the former on that ground, and not for the latter, would be to make his liability depend on a subtile and shadowy distinction. Whether a repetition was likely to ensue under the particular circumstances of a given case is often, and perhaps generally, a proper question for the jury, as whether alleged consequences were antecedently probable in other cases of tort. Whether a particular special injury sought to be made an element of damage is a natural and proximate consequence of a repetition of the slanderous charge, is a question of law. But the doctrine that where the repetition is unlawful, and the person repeating the defamatory words is liable therefor, no recourse can be had to an earlier publisher of the scandal, and that redress must be sought exclusively against the person who is the more immediate cause of the injury, is unsound. Each is liable for the natural and proximate consequences of his acts; neither is relieved from this responsibility because the other is the more immediate agent to produce those consequences, and acted tortiously and illegally in doing so. Many illustrations of such double liability might be mentioned.[2] Where a marriage promise is broken in consequence of one of the parties being traduced, there is a right of action for such breach of the promise; but this has never been supposed to preclude an action against the slanderer who induced that breach. The loss of the marriage is a recognized element of damages in the

[1] Ionides v. Universal Ins. Co. 14 C. B. N. S. 259.

[2] See Vol. I, pp. 49, 64, 68.

latter action, though it is the very loss to be compensated in the other.[1]

SLANDER OF TITLE.— Defamatory language maliciously spoken of things is actionable, and only actionable, when it ...urally and proximately causes damage to the owner.[2] The language must be false, spoken without legal excuse, and occasion pecuniary damage.[3]

Misrepresentations by which a business is intentionally injured is a tort for which the law affords redress. Such torts are akin to slander and libel; but they are remediable within the broad principles which govern the action on the case. It lies for all wrongful acts unaccompanied by force from which injury ensues.[4] Slander of title falls within these principles. The publication must be malicious; the language must be false, and must occasion, as a natural and proximate consequence, a pecuniary loss,— a special damage.[5] The allegation of damages must be special.[6]

[1] Folkard's Stark. § 386, and note (a); Townshend on S. & L. § 201; Lumley v. Gye, 2 E. & B. 216; Green v. Button, 2 C. M. & R. 707; Toms v. Corporation of Whitby, 35 U. C. Q. B. 195; Meller v. Butler, 6 Cush. 71; Chapman v. Thornburgh, 17 Cal. 87.

[2] Swan v. Tappan, 5 Cush. 104; Malachy v. Soper, 3 Bing. N. C. 371; Ingram v. Lawson, 6 id. 212; Evans v. Harlow, 5 Q. B. 624.

[3] Id.

[4] Snow v. Judson, 38 Barb. 212; Wren v. Wield, L. R. 4 Q. B. 213; White v. Merritt, 7 N. Y. 352; Gallager v. Brunel, 6 Cow. 346; Wier v. Allen, 51 N. H. 177; Pitt v. Donovan, 1 M. & S. 639; Cousins v. Merrill, 16 U. C. C. P. 114; West Counties Manure Co. v. Lower Chemical Manure Co. L. R. 9 Ex. 218.

[5] Townshend on S. & L. §§ 206–206c; Kendall v. Stone, 5 N. Y. 14; Like v. McKinstry, 41 Barb. 186; 4 Keyes, 397; Smith v. Spooner, 3 Taunt. 246; Hill v. Ward, 13 Ala. 310; Bailey v. Dean, 5 Barb. 297; Linden v. Graham, 1 Duer, 670; Paull v. Halferty, 63 Pa. St. 46; Re Madison Ave. Bap. Church, 26 How. Pr. 72.

[6] Ashford v. Choate, 20 U. C. C. P. 471; Malachy v. Soper, 3 Bing. N. C. 371; Delegall v. Highley, 8 C. & P. 444; Kendall v. Stone, 5 N. Y. 14; Like v. McKinstry, 41 Barb. 186.

SECTION 2.

THE DEFENSE.

Effect of pleading and not establishing justification — Evidence in mitigation; bad character of the plaintiff — Same; admissibility of rumors and common reports that the plaintiff was guilty of the imputed charge — Proof tending to show that the words were true not admissible in mitigation — Evidence in mitigation generally.

EFFECT OF PLEADING AND NOT ESTABLISHING JUSTIFICATION.— A plea of justification puts upon record a repetition of the defamatory charge, and includes a deliberate averment of its truth. Where such a plea is made, with no intention to support it by proof, or without some reasonable ground for believing that the charge is true, and can be proved, it is generally regarded as evidence of malice in the original speaking. It is treated as an aggravation of the wrong complained of, which may be considered by the jury for the enhancement of damages.[1] In Fero v. Roscoe,[2] Bronson, C. J., said: "When one who is sued for defamation deliberately reaffirms the slander, and puts it on the record of the court by way of justification, if he fails to establish the truth of his plea, he has done the plaintiff a new injury, which may properly be regarded as an aggravation of the original wrong. It is said that the attempt to justify may be made in good faith, or in the honest belief that the plaintiff is guilty of the matter laid to his charge. That may be so; but the injury to the plaintiff is not diminished by the mistaken belief of the defendant. And when a man is called into court for charging another with a crime, he ought to pause and examine before he repeats the charge and places it on record; and if he makes a mistake in such a matter, it should be at his peril, and not at the peril of the injured

[1] Jackson v. Stetson, 15 Mass. 48; Alderman v. French, 1 Pick. 1; Lea v. Robertson, 1 Stew. 138; Updegrove v. Zimmerman, 13 Pa. St. 619; Gorman v. Sutton, 32 id. 247; Gilman v. Lowell, 8 Wend. 573; Shartle v. Hutchinson, 3 Oregon, 337; Robinson v. Drummond, 24 Ala. 174; Pool v. Devers, 30 Ala. 672; Beasley v. Meigs, 16 Ill. 139; Spencer v. McMasters, id. 405; Doss v. Jones, 5 How. (Miss.) 158; Wilson v. Nations, 5 Yerg. 211; Faucitt v. Booth, 31 U. C. Q. B. 263; Wilson v. Robinson, 14 L. J. Q. B. 196. See Caulfield v. Whitworth, 18 L. T. N. S. 527.

[2] 4 N. Y. 165.

party." In New York and some other states, pleading and failing to establish a justification has been held conclusive evidence of malice, and to preclude any mitigating effect from the evidence given in support of the plea, as well as to deprive the defendant of other mitigations.[1]

[1] Id.; Van Benschoten v. Yaple, 13 How. Pr. 97; Shelton v. Simmons, 12 Ala. 466. In Larned v. Buffinton, 3 Mass. 546, Chief Justice Parsons said: "We are satisfied that evidence of certain facts and circumstances may be received under the general issue, which ought to be rejected under this justification. In the former case the defendant may prove that the words were spoken through heat of passion, and not from malice; or that they were spoken with an honest intention, through mistake, and not with a design to injure the plaintiff. But if the defendant, when called upon to answer in a court of law, will deliberately declare in his plea that the words are true, he precludes himself from any attempt to mitigate the damages by any of these facts or circumstances, because his plea of justification is inconsistent with them. But we are not prepared to declare that there are no facts or circumstances from which the jury may mitigate the damages under a special justification of the truth of the words, in which he shall fail. When through the fault of the plaintiff the defendant, as well at the time of the speaking the words as when he pleaded his justification, had good cause to believe they were true, it appears reasonable that the jury should take into consideration this misconduct of the plaintiff to mitigate the damages."

In Root v. King, 7 Cow. 613, it was held that public report of a fact stated in a libel cannot be given in evidence, in mitigation of damages, when the libel expressly disavows all reliance on reports, and professes to go on the ocular observation of the author. Nor is such report admissible to mitigate damages in an action for slander, after the defendant has made an unsuccessful attempt to justify by giving the truth in evidence, on a plea of notice, accompanied with the general issue. Nor is it admissible where such a plea or notice has been interposed, though there be no attempt to support it by proof. Such plea or notice was held to preclude all such other evidence merely in mitigation as goes to repel the inference of malice; for example, such as relate to the manner and occasion; as that the words were spoken in a passion, not maliciously, or through mistake, etc. But where the general issue is pleaded, and there is no plea of the truth in justification, these matters, which would be precluded by such plea or notice, may be given in evidence, either in mitigation or total excuse, according to their nature and effect. Savage, C. J., said: "When a defendant undertakes to justify because the publication is true, the plea, or, which is the same thing, a notice of justification is a republication of the libel. It is an admission of the malicious intent with which the publication was first made. Hence it is the uniform practice of this court not to allow such a plea to be withdrawn, without an affidavit of its falsity to be put upon the record. And upon the

In other states such a plea is not necessarily evidence of express malice. If the defendant, having reasonable cause and good grounds to believe the plaintiff guilty on evidence creating a strong presumption of guilt, pleads a justification for the purpose of getting these circumstances in evidence, and not for the purpose of repeating the slander, such plea is not evidence of express malice.[1] If the defendant fails to make good such a plea, it is in itself a circumstance which the jury may consider in fixing the damages as an aggravation of the tort;[2] but the jury is not bound in all cases so to consider it. On the contrary, if the defendant shows strong grounds in support of the charge he has made, though he does not fully support his plea, the jury may, if they see fit, consider these grounds as mitigating circumstances, and reduce the damages accordingly.[3] So it

trial the jury are instructed that if the plea is false it is an aggravation of the offense, and calls for enhanced damages. Such a state of the case and such an instruction to the jury is totally inconsistent with the plea of justification resting upon the absence of malice. That is a confession upon the record."

In Bisbey v. Shaw, 12 N. Y. 72, Ruggles, J., speaking of a case in which, before the adoption of the code, a justification was pleaded, said: "In such a case, the justification on the record was held to be a deliberate reiteration by the defendant of the slanderous words, after having had the opportunity of inquiring whether they were true or false. It was adjudged to be conclusive evidence of malice. Proof tending to establish the truth of the words was admitted under such a plea; but if the proof fell short of establishing that the slanderous allegation was true, the jury was directed . . . to disregard it as evidence in mitigation of damages, although it clearly established that the words complained of were spoken in a mistaken belief that they were true, without actual malice, and with honest and even laudable motives. The result was that until the adoption of the code a defendant could, under no state of pleading on the record, introduce evidence in mitigation of damages, whenever, as generally happened, the evidence tended to prove, or formed a link in the chain of proof, to show the truth of the words complained of as slanderous." Mapes v. Weeks, 4 Wend. 659.

[1] Parke v. Blackiston, 3 Harr. 373; Thomas v. Fischer, 71 Ill. 576; Ransone v. Christian, 49 Ga. 491; Sloan v. Petrie, 15 Ill. 425; Thomas v. Dunaway, 30 id. 373; Pallet v. Sargent, 36 N. H. 496; Rayner v. Kinney, 14 Ohio St. 283; Huson v. Dale, 19 Mich. 17.

[2] Robinson v. Drummond, 24 Ala. 174; Dewit v. Greenfield, 5 Ohio, 225; Cavanaugh v. Austin, 42 Vt. 576; Wilson v. Nations, 5 Yerg. 211.

[3] Ransone v. Christian, supra; Byrket v. Monohan, 7 Blackf. 83; Landis v. Shanklin, 1 Ind. 92; Shank v. Case, id. 170; West v. Walker, 2 Swan, 32; Kennedy v. Holburn, 16 Wis. 457.

has been held that where the plea of justification was so defectively drawn that judgment could not be rendered upon it,[1] or was withdrawn before trial,[2] it is not to be considered in aggravation of damages. In Illinois it has been held that the withdrawal of the plea, on the trial, may be considered by the jury on the question of damages.[3] It has been ruled otherwise in Michigan.[4]

Now in New York and in some other states, by statute, the plea of justification, put in in good faith, though unsustained by proof, is no longer evidence of malice to be considered by the jury for the enhancement of damages.[5] In Distin v. Rose,[6] Church, C. J., said: "The code has made this change in the law as it previously stood, that although the justification is not sustained, yet the facts adduced for that purpose may be used in mitigation of damages, if they tend to show good faith, or a belief in the truth of the words uttered. But when there is a total failure of proof tending in this direction, and the circumstances evince malice in reiterating the slander in the pleadings, it is allowable for the jury to take that circumstance into consideration.[7] I see no difference in principle whether the action be for breach of promise or slander. If a defendant in the former case takes advantage of his position as a party to maliciously invent a slander and spread it upon the record, or in the latter to repeat one already invented, it makes no difference. The law will not justify either. This rule should be applied with care and moderation, and I think should be confined to cases of bad faith in incorporating the justification in the pleading, and this can scarcely be said to be true, under the code, when the facts proved ought legitimately to go in mitigation of damages, because it seems incongruous to say that a failure to establish a justification may enhance the damages, and yet the facts proved under it may mitigate them." In Massachusetts, it is provided by statute that if the defendant fail to establish a plea of justification, it shall not of itself be proof of malice;

[1] Braden v. Walker, 8 Humph. 34.

[2] Gilmore v. Borders, 2 How. (Miss.) 824.

[3] Beasley v. Meigs, 16 Ill. 139; Spencer v. McMasters, id. 405.

[4] Evening News Asso. v. Tryon, 42 Mich. 549. See Simpson v. Robinson, 12 Q. B. 513; 18 L. J. Q. B. 73; Warwick v. Faulkes, 12 M. & W. 507; Shirley v. Keathy, 4 Cold. 29.

[5] Klinck v. Colby, 46 N. Y. 427; Vol. I, pp. 235, 236.

[6] 69 N. Y. 122.

[7] Thorn v. Knapp, 42 N. Y. 474

but the jury shall decide the whole case, whether such plea was or was not made with malicious intent.[1]

EVIDENCE IN MITIGATION; BAD CHARACTER OF THE PLAINTIFF.—The defendant is entitled to offer, under the general issue, evidence of the plaintiff's general bad character at the time when the libel or slander was published, although the defendant has also filed a plea of justification.[2] The plaintiff's character is in issue in such actions. It is presumed by law to be good, though it is generally so averred in the complaint or declaration.[3] Such an averment is unnecessary, and requires no denial in an answer under the code to let in disparaging proof; nor was it traversable at common law.[4] If denied, the denial will not have the effect of an unsupported plea of justification, if no attempt is made to support the denial by proof, so as to aggravate the injury and authorize the jury to add to the amount of damages.[5]

Evidence of the plaintiff's bad character is admitted for the reason that a person of disparaged fame or bad character does not suffer the same injury, and is not entitled to the same measure of reparation, as one whose character is unblemished.[6] The inquiry for this purpose must be confined to general character or reputation.[7] Particular acts or instances of miscon-

[1] St. 1826, ch. 107, § 2.

[2] Stone v. Varney, 7 Met. 86; Henry v. Norwood, 4 Watts, 347; Powers v. Presgroves, 38 Miss. 227; Root v. King, 7 Cow. 613; Pope v. Welsh, 18 Ala. 631; Anonymous, 8 How. Pr. 434; Young v. Bennett, 5 Ill. 43; Barton v. March, 6 Jones L. 409; Moyer v. Moyer, 49 Pa. St. 210. But see Myers v. Curry, 22 U. C. Q. B. 470; Smith v. Shumway, 2 Tyler, 74; Jones v. Stevens, 11 Price, 235.

[3] Shilling v. Carson, 27 Md. 175.

[4] Ayres v. Covill, 18 Barb. 260; Bennett v. Matthews, 64 Barb. 410; Pink v. Catanich, 51 Cal. 420; Sayre v. Sayre, 25 N. J. L. 235; Parkhurst v. Ketchum, 6 Allen, 406.

[5] Pink v. Catanich, supra.

[6] Watson v. Christie, 2 B. & P. 224; Sayre v. Sayre, supra; Ayres v. Coville, 18 Barb. 260; Root v. King, 7 Cow. 634; Hamer v. McFarlin, 4 Denio, 509; Campbell v. Campbell, 54 Wis. 97; Stone v. Varney, 7 Met. 86; Case v. Marks, 20 Conn. 251.

[7] Vick v. Whitfield, Mart. & Hayw. 396; Powers v. Presgroves, 38 Miss. 227; Bell v. Farnsworth, 11 Humph. 608; Pease v. Shippen, 80 Pa. St. 513; Dewit v. Greenfield, 5 Ohio, 225; Fisher v. Patterson, 14 Ohio, 418; Parkhurst v. Ketchum, 6 Allen, 406; McLaughlin v. Cowley, 131 Mass. 70; Shilling v. Carson, 27 Md. 175; Fuller v. Dean, 31 Ala. 654; Sayre v. Sayre, 25 N. J. L. 235; Clark v. Brown, 116 Mass. 504; Lamos v. Snell, 6 N. H. 413; Leonard v. Allen, 11 Cush. 241; Buckley v. Knapp, 48 Mo. 152.

duct cannot be proved;[1] nor rumors and reports, unless they are so general and prevalent that they have affected the general character.[2] The admissibility of this evidence is not, as has just been stated, affected by the fact that there is a plea of justification. It should, however, not be allowed to have any effect upon the issue formed upon that plea, but be confined to the question of damages.[3]

In some states the inquiry may be as to the plaintiff's general character in respect to the trait involved in the imputation.[4] In others it is as to general reputation without such restriction.[5]

It is not to be denied that there are some cases which favor the admission of evidence, to affect the plaintiff's character, of common rumor and suspicions that he has been guilty of the acts imputed to him in the alleged slanderous words.[6]

[1] Buckley v. Knapp, 48 Mo. 152.

[2] Bowen v. Hall, 20 Vt. 232; Inman v. Foster, 8 Wend. 602.

[3] Bowen v. Hall, supra.

[4] Bowen v. Hall, supra; Treat v. Browning 4 Conn. 408; Bell v. Farnsworth, 11 Humph. 608; Dewit v. Greenfield, 5 Ohio, 225; Wright v. Schroeder, 2 Curtis, 548; Bridgman v. Hopkins, 34 Vt. 532; Conroe v. Conroe, 47 Pa. St. 198; McNutt v. Young, 8 Leigh, 542; Shilling v. Carson, 27 Md. 175; Lambert v. Pharis, 3 Head, 622; Drown v. Allen, 91 Pa. St. 393. In Clark v. Brown, 116 Mass. 504, it was held that the defendant might introduce evidence in mitigation that the plaintiff's general reputation was bad, or show that his general reputation is bad in respect to the charge made by the alleged slanderous words.

[5] Goodbread v. Ledbetter, 1 Dev. & Bat. L. 12; Paddock v. Salisbury, 2 Cow. 811; Andrews v. Vanduren, 11 John. 38; ——— v. Moor, 1 M. & S. 284; Leicester v. Walter, 2 Camp. 251; Rodriquez v. Tadmire, 2 Esp. 720; Sheahan v. Collins, 20 Ill. 325; Bailey v. Hyde, 3 Conn. 463; Van Benschoten v. Yaple, 13 How. Pr. 97; Stiles v. Comstock, 9 id. 48; Richardson v. Northrup, 56 Barb. 105; 29 Am. Dec. 266; Sayre v. Sayre, 25 N. J. L. 239. In Jones v. Stevens, 11 Price, 235, the court of exchequer held that, in actions for libel, general evidence of the plaintiff's bad character was irrelevant and inadmissible, either to contradict the averments of good character contained in the declaration, or in mitigation of damages. Graham, B., said: "On the present occasion, there is a full concurrence of opinion amongst the whole court, that such general evidence of bad character, whether offered on the general issue, or in proof of matter pleaded by way of justification, is not admissible, and principally on the ground that a party cannot be expected to be prepared to rebut it; and that if it were received, any man might fall a victim to a combination made to ruin his reputation and good name, even by means of the very action which he should bring to free himself from the effects of malicious slander."

[6] Case v. Marks, 20 Conn. 248; Leicester v. Walter, 2 Camp. 251; ——— v. Moor, 1 M. & S. 284.

SAME; ADMISSIBILITY OF EVIDENCE OF RUMORS AND COMMON REPORT THAT PLAINTIFF WAS GUILTY OF THE IMPUTED CHARGE.— If only not guilty is pleaded, the defendant has been allowed in some jurisdictions to show, solely in mitigation of damages, by rebutting in some degree the presumption of malice, that before the alleged speaking of the words, it was a common rumor in the neighborhood that the plaintiff had been guilty of the specific offense charged.[1] In Shilling v. Carson,[2] the court said that whether the defendant will be permitted under the general issue to give such evidence is not universally agreed. But where the evidence goes to prove that the defendant did not act wantonly, and under the influence of actual malice, or it is offered solely to show the real character and degree of malice which the law implied from the falsity of the charge, all intention of proving the truth being disclaimed, it may be admitted and considered by the jury.[3] The admission of such evidence is thus maintained by Pennington, J.:[4] "The defendant . . offered to prove by a witness that it was so said and reported by other persons before the words were spoken by him; and that witnesses had been examined before the presbytery who had sworn to the facts; and that the plaintiff himself had acknowledged there was a report in circulation, and that it originated in his own family. So far at least as the testimony went to show there was such a report in circulation, and that it originated in the family of the plaintiff, I think the court erred in not receiving the testimony. The *quo animo* with which the words were spoken was the point in issue, as malice constitutes the gist of the action. It appears to me that the testimony was proper to show with what temper of mind the defendant spoke the

[1] Edgar v. Newall, 24 U. C. Q. B. 215; Skinner v. Powers, 1 Wend. 451; Wetherbee v. Marsh, 20 N. H. 561; Cook v. Barkley, 1 Penn. (N. J.) 169; Fuller v. Dean, 31 Ala. 654; Calloway v. Middleton, 2 A. K. Marsh. 372; Van Derveer v. Sulphin, 5 Ohio St. 293; Galloway v. Courtney, 10 Rich. 414; Brigman v. Hopkins, 34 Vt. 532; Kennedy v. Gregory, 1 Binn. 85; Henson v. Veatch, 1 Blackf. 369; Morris v. Barker, 4 Harr. 520; Fletcher v. Burrows, 10 Iowa, 557; Foot v. Tracy, 1 John. 45; Nelson v. Evans, 1 Dev. 9; Hinkle v. Davenport, 38 Iowa, 355.

[2] 27 Md. 175.

[3] See Lambert v. Pharis, 3 Head, 622.

[4] Cook v. Barkley, 1 Penn. (N. J.) 169.

words; whether from a malicious design to injure the plaintiff, or from a laudable motive to preserve the purity of character so essentially requisite in a person exercising the functions of the plaintiff [who was a clergyman, and the defendant one of his congregation]; or from mere inadvertency; or even if it should appear to the jury that the defendant had pursued the inquiry with so much zeal as to indicate an evil intent; yet if it should appear that he did not give rise to the slander, but only repeated what he had heard from others, giving credit to it as coming from the plaintiff's own family, and the more especially if it should be found that this was done in the course of prosecuting the plaintiff before the sessions or presbytery, it certainly might and ought to go in mitigation of damages. . . . Supposing one of my neighbors, for instance, the parson of the parish, shall call at my house, and very gravely inform me that one of our neighbors had been found out and fully detected in the commission of some scandalous offense, and detail the circumstances, both of the commission of the offense, and of the detection; that other persons of good credit were to drop in and relate the same story, so that I should fully believe that the facts were not only true, but that they were public; and that in conversation afterwards with some other person, I was to mention that there was such a report in circulation, without thinking it necessary to name the persons from whom I had it, and it should turn out afterwards to be a mistake, that it was another person resembling the one spoken of in name, or in other circumstances, which had led to the error; if the party should think proper to bring an action against me, I could not plead that I had it from other persons, and that it was a general report in the neighborhood, but I must plead the general issue, that I was not guilty of a malicious slander; reason and justice, however, would say that I might give in evidence the whole transaction, the manner and occasion of speaking the words; that, if it would not wholly excuse me, it might at least go in extenuation of the injury. . . . All the circumstances connected with the words should go fully and fairly to the jury, who must judge from them of the guilt or innocence of the defendant; and in case they find him blamable, to assess such damages as the more or less aggravated cir-

cumstances of the case will justify. Justice and reason call for this rule; and the law, I apprehend, does not deny it; nor can I perceive what inconvenience can result from it. An intelligent court will always instruct the jury in what light to apply the testimony; distinguishing between that which goes to the point in issue, and that which goes in mitigation or aggravation. Is it not as reasonable to mitigate as to aggravate? Our law does not delight in exposing the dark side of the human character; it seeks truth; it is not vindictive; it is merely just. It is too dignified and enlightened to put on the same footing, the vile inventor, fabricator and publisher of a malignant slander, and him who inadvertently repeats what is already in circulation." The weight of authority it is believed is opposed to the admission of such evidence either on a plea of justification or in mitigation.[1]

In Wilson v. Fitch,[2] Crockett, J., said: "It has often been decided that it is not admissible to prove in mitigation that prior and up to the time of the publication the plaintiff had been generally reported and suspected to have been guilty of the acts imputed to him in the libel. Some of the earlier cases hold such proof to be admissible. But the current of modern authorities is to the contrary. These decisions proceed on the theory that public policy, the good order and repose of society, and a due regard for the protection of private character, demand that no one should be permitted to excuse or palliate the offense of defaming the reputation of another on so slight a ground as public rumor or general suspicions, which are often unfounded, and the result of malice or misapprehension. If

[1] Peterson v. Morgan, 116 Mass. 350; Clark v. Munsell, 6 Met. 373; Alderman v. French, 1 Pick. 1; Walcott v. Hall, 6 Mass. 514; Inman v. Foster, 8 Wend. 602; Wilson v. Fitch, 41 Cal. 363; Chamberlin v. Vance, 51 id. 75; Beardsley v. Bridgman, 17 Iowa, 290; Fisher v. Patterson, 14 Ohio, 418; Kenney v. McLaughlin, 5 Gray, 3; Bodwell v. Swan, 3 Pick. 376; Watson v. Moore, 2 Cush. 133, 141; Anthony v. Stephens, 1 Mo. 254; 13 Am. Dec. 497; Dame v. Kenney, 25 N. H. 323; Moberly v. Preston, 8 Mo. 466; Scott v. McKinnish, 15 Ala. 664; Pallet v. Sargent, 36 N. H. 496; Bowen v. Hall, 20 Vt. 232; Sheahan v. Collins, 20 Ill. 325; Saunders v. Mills, 6 Bing. 215; Mills v. Spencer, 1 Holt, 535; 3 E. C. L. 177; Collins v. Stephenson, 8 Gray, 438; Mapes v. Weeks, 4 Wend. 659; Matson v. Buck, 5 Cow. 499.

[2] Supra

the defendant had offered to prove in mitigation that the plaintiff was commonly reported and generally believed to have been guilty of the acts imputed to him in the alleged libel, I think the proof would not have been admissible in mitigation of damages, under the rule established by the almost unbroken current of modern decisions."[1] Savage, C. J., in Gilman v. Lowell,[2] thus forcibly states the objections to such evidence: "That reports of a similar character were prevalent in the neighborhood, might show a less degree of malice in the defendant; but they have a tendency to prove the truth, and are, therefore, inadmissible; not that reports are testimony to convict of a crime, but they destroy reputation, and have, in fact. the same effect as proof. It often happens that reports prejudicial to the plaintiff have prevailed extensively before he commences a suit, and the fact that his character is suffering, from these reports, unmerited opprobrium, drives him to a prosecution. If, then, he is to be met by these reports, and only allowed a nominal verdict, which is about equal to a verdict against him, 'he had better,' in the language of Chief Justice Parsons,[3] which I have before quoted in Matson v. Buck,[4] 'sink privately under the weight of unmerited calumny, lest by attempting his vindication he give notoriety to slanders which before had been circulated only in whispers.'"

In an action for words imputing unchastity to a woman, it was held no defense to show that the defendant spoke the

[1] In 13 Am. Dec. 500, the annotator says: "The correct doctrine, it is conceived, is that laid down in Bowen v. Hall, 20 Vt. 232, that reports or suspicions of the plaintiff's guilt are inadmissible unless they have become so general as to affect the reputation or character. Of course the defendant ought not to be held responsible for damage done to the plaintiff's character by the slander before he (the defendant) took any part in circulating it. But, on the other hand, it is certainly the sounder, as well as the safer rule, to require every person who assists in giving currency to a defamatory report concerning another, to take upon himself the risk of its being false, unless he repeats the report not merely from an honest belief in its truth, but also for justifiable ends. The mere tattler and scandal-monger should be held to a strict accountability, whether he is the originator of the slander, or only aids in its circulation. Every individual who wantonly or negligently contributes to the perpetration of the injury should be responsible for its consequences."

[2] 8 Wend. 579.

[3] 6 Mass. 518.

[4] 5 Cow. 500.

words to her, and was led to do so by her general conduct, and especially by her deportment with a particular man, believing the imputation to be true. Evidence of particular instances was held not admissible.[1] Rumors and reports short of general reputation are inadmissible because they are generally held not to afford any extenuation of the wrong of aiding to continue the scandal,[2] and facts which might lead to a suspicion and reasonable belief of the truth of the imputation are excluded under the rule that requires a plea of justification to let in proof tending to show the truth of the words.[3] But under the statutes now general in this country, allowing facts and circumstances alleged either in justification or in mitigation to be considered in mitigation, where the justification, pleaded in good faith, is not established, facts and circumstances known to the defendant at the time of speaking the words, and calculated to induce a belief in the truth of the words, may be proved and considered.[4]

Proof tending to show that the words were true, not admissible in mitigation.— To prevent surprise on the trial to the plaintiff, it has been universally held since Underwood v. Parks,[5] that the defendant shall not introduce evidence of the truth of the imputation, unless he has specially pleaded that the words were true, by way of justification.[6] In the absence of such a plea, evidence tending to establish the truth of the charge is generally held inadmissible for the purpose of mitigation.[7] But the defendant may prove under the general issue the circumstances which induced him erroneously to make the

[1] Parkhurst v. Ketchum, 6 Allen, 406; McLaughlin v. Cowley, 131 Mass. 70; Fitzgerald v. Stewart, 53 Pa. St. 343; Dewit v. Greenfield, 5 Ohio, 225; Vick v. Whitfield, 2 Hayw. 222; R—— v. M——, 21 Wis. 50; Watson v. Moore, 2 Cush. 133. See Lawler v. Earle, 5 Allen, 22; Shoulty v. Miller, 1 Ind. 544.

[2] See ante, pp. 683, 684; Proctor v. Houghtaling, 37 Mich. 41; Bush v. Prosser, 11 N. Y. 347; Willover v. Hill, 72 N. Y. 36.

[3] Brickett v. Davis, 21 Pick. 407, 408.

[4] Bush v. Prosser, supra; Hatfield v. Lasher, 81 N. Y. 246; Distin v. Rose, 69 id. 127.

[5] 2 Str. 1200.

[6] Vol. I, p. 232; Townshend on S. & L. 682; Bodwell v. Swan, 3 Pick. 376; Watson v. Moore, 2 Cush. 133; Root v. King, 7 Cow. 613; Pallet v. Sargent, 36 N. H. 496; Young v. Bennett, 5 Ill. 43; Beardsley v. Bridgman, 17 Iowa, 290; Ridley v. Perry, 16 Me. 21; Minesinger v. Kerr, 9 Pa. St. 312; Porter v. Botkins, 59 Pa. St. 484; 11 Am. Dec. 130, note.

[7] Id.

charge.[1] Particular facts which might form links in the chain of circumstantial evidence against the plaintiff cannot be proved. Accordingly it was held that proof that the plaintiff was in possession of the property alleged to have been stolen, and returned it to the owner about the time of the prosecution of another person for the stealing of other property alleged to have been taken at the same time, was held inadmissible on that ground.[2] The defendant may prove any facts in the conduct of the plaintiff in relation to the transaction which was the occasion of the slanderous language complained of, tending to excuse the uttering of the words, provided the facts do not tend to prove the truth of the charge, but in fact relieve the plaintiff from the imputation.[3] Thus, when a party charged another, against whom a justice's judgment had been obtained, with false swearing in making oath that he was a freeholder, he was allowed to show that on search for the deed in the proper office where by law it was required to be recorded, it was not found, owing to a mistake of the recording officer in indexing his records.[4]

In estimating the damages the degree of the defendant's

[1] Id.; Treat v. Browning, 4 Conn. 408; Eagan v. Gault, 1 McMull. 468; Dewit v. Greenfield, 5 Ohio, 225; Bailey v. Hyde, 3 Conn. 463; Fero v. Ruscoe, 4 N. Y. 162; Warmouth v. Cramer, 3 Wend. 395; Van Ankin v. Westfall, 14 John. 232; Shepard v. Merrill, 13 id. 475; Matson v. Buck, 5 Cow. 499; Laine v. Wells, 7 Wend. 175; Samuel v. Bond, Litt. Sel. Cas. 158; Shirley v. Keothy, 4 Cold. 29; McCampbell v. Thornburgh, 3 Head, 109; Bourland v. Eidson, 8 Gratt. 27; Thompson v. Bowen, 1 Doug. 321, overruled in Farr v. Rasco, 9 Mich. 353; Parke v. Blackiston, 3 Harr. 373; Bisbey v. Shaw, 12 N. Y. 67; Hutchinson v. Wheeler, 35 Vt. 330; Haywood v. Foster, 16 Ohio, 88; Wilson v. Apple, 3 id. 270.

[2] Warmouth v. Cramer, supra.

[3] Bourland v. Eidson, supra; Purple v. Horton, 13 Wend. 9.

[4] Gilman v. Lowell, 8 Wend. 573; Chestwood v. Mayo, 5 Munf. 16. In Hutchinson v. Wheeler, supra, under the general issue, it was held competent for the defendant to show in mitigation, as tending to evince his belief in the words charged, — which were that the plaintiff had poisoned his cow,— that his cow had been poisoned; that for some time previous to the loss, there had been a bitter, hostile feeling on the part of the plaintiff towards the defendant; that the defendant having poisoned the plaintiff's dog, the plaintiff had several times threatened to pay the defendant in his own coin; that the defendant had attempted to instigate a prosecution against the plaintiff, and that shortly before the defendant's cow was poisoned a new quarrel had broken out between the parties.

malice is always to be considered; therefore any circumstances, consistent with an admission of the falsity of the words spoken, tending to show that the defendant uttered them under a mistaken belief that they were true, may be proved under the general issue in mitigation.[1] In the nature of things, the scope of this evidence is very limited, and the manifest hardship of compelling a defendant to plead justification, with the hazard of aggravating the damages if it be not established, or of depriving him of the privilege of proving a state of facts which, though tending to prove the words true, and therefore of an extenuating nature, were insufficient for that purpose, have led to some diversities of decision. Some courts have applied the rule with more liberality than others. In Bush v. Prosser,[2] Selden, J., said: "The courts in England, under a sense of the admitted right [of the defendant to mitigate damages by showing the absence of malice], have in a number of cases decided that facts and circumstances falling short of proving, although tending to prove, the truth of the charge, might be received in mitigation.[3] But the courts in this state and in Massachusetts, with less justice but better logic, have uniformly held that a rule which excluded proof of the truth of the charge must necessarily exclude evidence tending to prove it. But it is a little surprising to observe how often judges have asserted, in the same paragraph, both the right to mitigate by disproving malice, and the rule which effectually precluded the exercise of the right, without any apparent consciousness of the conflict between the two. I will refer to a few only out of the many instances. In the case of King v. Root,[4] Judge Savage says that the defendant 'may show in evidence under the general issue, by way of excuse, anything short of a justification which does not necessarily imply the truth of the charge or tend to prove it true, but which repels the presumption of malice arising from the fact of publication.' The same judge, in Purple v. Horton,[5] says: 'Facts and circumstances may be shown in mitigation, when they disprove malice, and do not tend to prove the charge,

[1] Wilson v. Apple, 3 Ohio, 270.
[2] 11 N. Y. 347.
[3] Knobell v. Fuller, Norris' Peake, Append. 130; Chalmers v. Shackell, 6 C. & P. 475; Leicester v. Walter, 2 Camp. 251.
[4] 7 Cow. 613.
[5] 13 Wend. 9.

or form a link in the chain of evidence to prove a justification.' Again, Judge Bronson in Cooper v. Barber[1] says: 'Facts and circumstances which tend to disprove malice by showing that the defendant, though mistaken, believed the charge true when it was made, may be given in evidence in mitigation of damages.' It does not appear to have occurred to either of these eminent judges that there was any incongruity between the two branches of the proposition thus asserted by them. But it is certainly difficult to comprehend how a defendant is to disprove malice, by showing 'that he believed the charge true when it was made,' without giving evidence tending to establish its truth; since a belief based on information derived from others cannot be shown." In Michigan, the doctrine of this narrow privilege of mitigation has been rejected; there, facts tending to establish the truth of the words may be shown; the plea of the general issue, without notice of justification, is treated as a conclusive admission of the falsity of the words, and that such facts merely disprove malice, by showing that the defendant, at the time he uttered the words, mistakenly believed them to be true.[2] A rule nearly as liberal is recognized in Ohio.[3]

It is very generally provided by statute, and especially in those states which have adopted the code, that the defendant may in his plea or answer allege both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages, and whether he prove the justification or not, he may give in evidence the mitigating circumstances.

Under this statute matters in mitigation may and probably should be specially stated in the answer. This is implied by the permissive language of the statute.[4] For this purpose facts and circumstances may be set up which tend to prove the truth of the charge to show an absence of malice, by proper averments

[1] 24 Wend. 105.

[2] Huson v. Dale, 19 Mich. 17.

[3] Haywood v. Foster, 16 Ohio, 88; Dewit v. Greenfield, 5 Ohio, 225; Wilson v. Apple, 3 id. 270; Reynolds v. Tucker, 6 Ohio St. 516.

[4] McKyring v. Bull, 16 N. Y. 297; Vol. I, pp. 257, 389; Willover v. Hill, 72 N. Y. 36, 38; Spooner v. Keeler, 51 N. Y. 527; Bower v. Derideker, 37 Iowa, 418. It is optional in Indiana. O'Connor v. O'Connor, 27 Ind. 69.

that the defendant was, by such facts, induced to believe the defamatory matter to be true at the time of the publication.[1] The defendant may in his answer allege the truth of the matters charged and mitigating circumstances, or either. It is not necessary to plead the former in order to aver and have the benefit of the latter. All matters receivable in evidence in mitigation may be pleaded for that purpose either with or without justification.[2] Although the evidence fails to prove the justification when the truth of the words is pleaded both for justification and in mitigation, he is still entitled to have such evidence as has been adduced tending to establish the truth, considered by the jury for the purpose of mitigation.[3]

Evidence in mitigation generally.— The defendant is always entitled to show, under proper pleading, the particular circumstances under which the alleged defamatory matter was published, for the purpose of showing the nature and character of the publication,[4] as well as the occasion and motive of it.[5] Evidence for this purpose to disprove malice, by showing facts and circumstances which induced the defendant to believe the charge true when he made it, must be such as would reasonably induce in the mind of a person of ordinary intelligence a belief in the truth of the charge, and it must also appear that the defendant was thereby induced to believe in its truth.[6] Therefore, it should appear that at the time the defendant made the charge he knew of the facts upon which he relies for mitigation, and he should aver that such facts induced a belief in the truth of the

[1] Bennett v. Matthews, 64 Barb. 410; Bush v. Prosser, 11 N. Y. 347; McKyring v. Ball, 16 id. 297; Stiles v. Comstock, 9 How. Pr. 48; Heaton v. Wright, 10 id. 79; Bisbey v. Shaw, 12 N. Y. 67; Dolevin v. Wilder, 7 Robt. 319; Van Benschoten v. Yaple, 13 How. Pr. 97; Wachter v. Quenzer, 29 N. Y. 547; Willover v. Hill, supra.

[2] Id.; Graham v. Stone, 6 How. Pr. 15; Brown v. Orvis, id. 376; Follett v. Jewett, 1 Am. L. Reg. 600; 11 N. Y. Leg. Obs. 193.

[3] Bisbey v. Shaw, supra; Spooner v. Keeler, 51 N. Y. 529; Kinyon v. Palmer, 18 Iowa, 377; Kennedy v. Holborn, 16 Wis. 457; Distin v. Rose, 69 N. Y. 127.

[4] Jeffras v. McKillop, 2 Hun, 351.

[5] Larned v. Buffinton, 3 Mass. 546; Abrams v. Smith, 8 Blackf. 95; Root v. King, 7 Cow. 613; Lewis v. Walter, 4 B. & Ald. 605; Haynes v. Leland, 29 Me. 233; Haines v. Welling, 7 Ohio, 253.

[6] Dolevin v. Wilder, 7 Robt. 319; 34 How. Pr. 488.

charge at the time he made it; or they should be of such a character as to raise a reasonable presumption of such belief.[1] Merely believing the charge to be true, however sincere the belief may be, will not excuse either slander or libel;[2] but a belief reasonably induced by facts which the law permits to be proved as likely to produce it will mitigate the damages. There is considerable contrariety of decision as to the facts which may be shown in mitigation for having a tendency to create an honest belief of the truth of the imputation. The matter relied upon for mitigation must be such as by the well established principles of law may be proved for that purpose.[3] The defendant may show that he was drunk when he uttered the words, as such proof may tend to rebut malice.[4] But where it appeared that he repeated the charge both when drunk and when sober, on public and private occasions, his being drunk at the particular time alleged is no reason for abating the damages.[5] He may show he was insane.[6] He may also prove that the publication was confidential.[7] Evidence that the defendant was in the habit of talking much about persons and things, and that what he said was not regarded by the community as worthy of notice, and seldom occasioned remark, is not admissible in mitigation.[8] Where by statute the imputation of a want of chastity against a female is made actionable *per se*, the repetition of it is not wholly excused by a protest at the time of disbelief, or by showing that those who heard the slander did not believe it to be true. Such conduct is actionable, and the question of the extent of responsibility is one for the jury, and not to be solved by any presumption of harmlessness.[9] An imputation of perjury in a certain bill in chancery cannot be extenuated by proof that at the time of the publication the defendant supposed and believed that the plaintiff had sworn to it, when in fact it had been

[1] Id.; Hatfield v. Lasher, 81 N. Y. 246; Reynolds v. Tucker, 6 Ohio St. 516; Whitney v. Janesville Gazette, 5 Biss. 330; Swift v. Dickerman, 31 Conn. 285; Bush v. Prosser, 11 N. Y. 347; Willover v. Hill, 72 id. 36.

[2] Sans v. Joerris, 14 Wis. 663.

[3] Graham v. Stone, 6 How. Pr. 15.

[4] Howell v. Howell, 10 Ired. 84.

[5] Id.

[6] Yeates v. Reed, 4 Blackf. 463.

[7] Jeffras v. McKillop, 2 Hun, 351.

[8] How v. Perry, 15 Pick. 506.

[9] Burt v. McBain, 29 Mich. 260; Markham v. Russell, 12 Allen, 573.

sworn to by another person.[1] A retraction of the slander made so promptly as to become a part of the *res gestæ*, and freed from all suspicion that it was made by the defendant more for his own protection than for reparation to the victim of his calumny, is admissible in mitigation.[2] A subsequent retraction may be proved in mitigation; but for this purpose it should contain a full and unqualified withdrawal of the charge, unaccompanied with other offensive or libelous matter, and thus evince the intention of making some atonement for the injury done. Allowing such evidence properly gives the defendant a *locus pœnitentiæ*, and he should have the benefit of it when he evinces an honest endeavor to make atonement to as great an extent as is within his power. But hesitation, lurking insinuation, an attempted perversion of the plain import of the language used in the libelous article, or the substitution of one calumny for another, only aggravate the original offense, and show a consciousness of the wrong done without the manliness or magnanimity to repair it.[3] A retraction of a libelous article published after a suit has been brought for the libel, it is held in Michigan, cannot be considered in mitigation.[4]

A defendant may show, for the purpose of rebutting malice and reduction of damages, that the words were spoken in anger, if the anger was induced by plaintiff immediately before the publication.[5] Evidence of a previous publication by the plaintiff will not be received in mitigation on the ground of provocation, unless not only the connection between the publications be manifest, but also that the provocation is so recent as to induce a fair presumption that the injury complained of was inflicted during the continuance of the feelings and passion excited by the provocation.[6] A distinct and independent libel

[1] Owen v. McKean, 14 Ill. 459.

[2] Id.

[3] Hotchkiss v. Oliphant, 2 Hill, 510.

[4] Evening News Asso. v. Tryon, 42 Mich. 549. See Shirley v. Keathy, 4 Cold. 29.

[5] Janch v. Janch, 50 Ind. 135.

[6] Maynard v. Beardsley, 7 Wend. 560; May v. Brown, 3 B. & C. 113; Goodbread v. Ledbetter, 1 Dev. & Bat. L. 12; Child v. Homer, 13 Pick. 503. There can be no set-off of one libel against another; but in estimating the damages, the jury may fairly consider the conduct of the plaintiff, and the degree of respect which he himself has shown for the feelings of others. Folkard's Starkie, § 722; per Blackburn, J., in

published by the defendant is no mitigation. But, as just stated, if the publication by the plaintiff was so recent as to afford a reasonable presumption that the libel by the defendant was published under the influence of the passions excited by it, or where it is explanatory of the meaning of or the occasion of writing of the libel complained of, it may be given in evidence for that purpose. To render such evidence admissible, however, it is necessary that the article complained of should on its face refer, and profess to be a reply, to the libel published by the plaintiff; that such appear to be its nature and purpose on a comparison of the publications.[1]

The libels themselves ought to be strictly proved and identified as the cause,[2] and that the plaintiff's publication came to the defendant's knowledge before he published the libel complained of.[3] The jury is to determine whether the language used by the defendant was used because of the plaintiff's abuse,

Kelly v. Sherlock, L. R. 1 Q. B. 698; Seely v. Cole, Wright (Ohio), 681. There can be no counterclaim in an action for defamation. Fellerman v. Dolan, 7 Abb. Pr. 395, note; Richardson v. Northrup, 56 Barb. 105. See MacDougall v. Maguire, 35 Cal. 274.

[1] Child v. Homer, 13 Pick. 503; Gould v. Weed, 12 Wend. 12; May v. Brown, 3 B. & C. 113. See Underhill v. Taylor, 2 Barb. 348; Hotchkiss v. Lathrop, 1 John. 286; Bourland v. Eidson, 8 Gratt. 27. In Richardson v. Northrup, 56 Barb. 105, it was held that the defendant should be allowed to prove any circumstances which, at the time the words charged were spoken, were calculated to irritate and excite the defendant, and provoke him to the utterance of the words complained of; but that it was no answer to the plaintiff's claim of damages for slander that he has said or done anything, whether actionable or not, for the purpose of reducing the damages, unless such act or declaration actually excited the defendant to use the words charged. The defendant, it was also held, might prove a series of provocations on the part of the plaintiff, commencing long anterior to the speaking of the words charged, provided they were continued from time to time down to and at the time the actionable words were spoken. In such a case each successive repetition of the provocation must necessarily become more annoying and exciting; and though there be no motive or spirit of revenge on the part of the defendant, the excitement of such repetition of the provocation becomes more intense and unbearable, and presents a much stronger case of mitigation than when the actionable words are spoken upon the first provocation. Sheffill v. Van Deusen, 15 Gray, 485; Porter v. Henderson, 11 Mich. 20; Lister v. Wright, 2 Hill, 320.

[2] Tarpley v. Blabey, 2 Bing. N. C. 437.

[3] Watts v. Fraser, 7 A. & E. 223.

and they may consider for this purpose the declarations of the defendant.[1] Where the defamatory publication is shown to have resulted immediately from a provocation given by the plaintiff in a defamatory charge against the defendant, only nominal damages in general should be given.[2] If the words complained of were spoken in the presence of the plaintiff, his reply may be proved by the defendant.[3] But a subsequent publication cannot be given in evidence to determine whether a publication is libelous or not.[4] If the evidence show that the defamatory words were spoken immediately after the trial of a law suit between the parties, and that they were occasioned by it, it will be competent for the defendant to show the facts and circumstances occurring on, and the conduct of the parties during, the trial. And if the words were spoken in the heat of passion thus excited, that will go in mitigation.[5]

The defendant may mitigate damages by showing the plaintiff to be a common libeler; but it must be shown in the same way as general reputation is proved; publications of the plaintiff cannot be resorted to for that purpose.[6]

It is competent for the defendant, under the general issue, to show that the charge was occasioned by the misconduct of the plaintiff, either in attempting to commit the crime, or in leading the defendant to believe him guilty.[7] But acts and declarations of third persons are inadmissible to show provocation.[8] Facts in the conduct of the plaintiff, calculated to create a belief that the charge is true, are doubtless provable in mitigation, where under the pleadings the defendant is allowed to give evidence tending to show, for this purpose, that the charge is true.[9] 'Evidence of the moral or intellectual character of a person in whose hearing or to whose understanding the slan-

[1] Botelar v. Bell, 1 Mo. 173.

[2] Pugh v. McCarty, 40 Ga. 444; Davis v. Griffith, 4 Gill & J. 342. See Hackett v. Brown, 2 Heisk. 264; Ransone v. Christian, 56 Ga. 351.

[3] Bradley v. Gardner, 10 Cal. 371.

[4] Usher v. Severance, 20 Me. 9.

[5] Powers v. Presgroves, 38 Miss. 227.

[6] Maynard v. Beardsley, 7 Wend. 560.

[7] West v. Walker, 2 Swan, 32. See Edgar v. Newell, 24 U. C. Q. B. 215; McCampbell v. Thornburg, 3 Head, 109.

[8] Underhill v. Taylor, 2 Barb. 348.

[9] Reynolds v. Tucker, 6 Ohio St. 516; Hatfield v. Lasher, 81 N. Y. 246.

derous words were spoken, is immaterial on the question of damages.[1]

In an action against husband and wife for words spoken by the wife, proof is not admissible, in mitigation, that the husband endeavored to prevent the circulation of the slander.[2] It has been held that the wrong of a publication of rumors in a newspaper may be mitigated by proof that such rumors existed.[3] So, that a defendant may show that he copied the statement complained of as libelous from another newspaper.[4] But in another case it was held that the defendant should not be permitted to show that the charge was copied from another newspaper from the proprietor of which damages had been recovered; though the defendant might prove that he had stricken out many parts of the article which reflected on the plaintiff.[5]

In actions for libel the defendant is entitled to read the entire article in which is contained the alleged libel.[6] But distinct or separate libels not declared on cannot be introduced in evidence and relied on either by the plaintiff or defendant to show malice and aggravate damages, or to mitigate damages.[7]

Where exemplary damages are sought for libel, the defendant may prove in Michigan any circumstances tending to show that he acted in good faith and with all proper precautions, and had good cause to believe that the statement complained of was true.[8] Where it appears that the libel was published with no intent to injure the person libeled, and that all proper precautions were observed in publishing it, the recovery of damages will be limited to the actual injury.[9] If the alleged libelous

[1] Sheffill v. Van Deusen, 15 Gray, 485.

[2] Yeates v. Reed, 4 Blackf. 463.

[3] Skinner v. Powers, 1 Wend. 451.

[4] Saunders v. Mills, 6 Bing. 213.

[5] Creevy v. Carr, 7 C. & P. 64.

[6] Graves v. Waller, 19 Conn. 90, 94.

[7] Fisher v. Patterson, 14 Ohio, 418.

[8] Scripps v. Foster, 41 Mich. 742.

[9] Evening News Asso. v. Tryon, 42 Mich. 549; Scripps v. Reilly, 38 id. 23. In Detroit Daily Post Co. v. McArthur, 16 Mich. 451, Campbell, J., said: "It is not easy to lay down very definite rules for discriminating damages in those cases where they depend upon the sound discretion of a jury. And yet it is necessary to prevent the jury, as far as may be, from acting upon improper theories of what should be regarded in estimating the elements which go to make up the injury to be redressed. When their

article is one of a series relating to a matter of public concern, the defendant may introduce them all to show good faith on

attention has been carefully directed, their conclusions must be accepted, unless so perverse or mistaken as to be entirely inconsistent with justice.

"The law favors the freedom of the press, so long as it does not interfere with private reputation, or other rights entitled to protection. And, inasmuch as the newspaper press is one of the necessities of civilization, the conditions under which it is required to be conducted should not be unreasonable or vexatious. But the reading public are not entitled to discussions in print upon the character or doings of private persons, except as developed in legal tribunals or voluntarily subjected to public scrutiny. And, since an injurious statement inserted in a popular journal does more harm to the person slandered than can possibly be wrought by any other species of publicity, the care required of such journals must be such as to reduce the risk of having such libels creep into their columns, to the lowest degree which reasonable foresight can assure.

"The danger and the precautions necessary to prevent it are directly connected with the business itself; and all who voluntarily assume the responsibility must exercise it under similar conditions. It is the right of the citizen to be secure against all unlawful assaults; and no distinction can be reasonable which allows the care required in the conduct of any avocation, attended by risks to third persons, to be varied by the private or corporate character of its conductors. Any injury which is avoidable by the perpetrator, or in other words, any injury which is not in some degree accidental, entitles the injured party to redress. And any damage to person or reputation is recoverable, to such extent as in the opinion of the jury, not led away by passion or prejudice, the nature of the injury will warrant.

"But in all cases where an act is done which, from its very nature, must be expected to result in mischief, or where there is negligence so great as to indicate a reckless disregard of the rights or safety of others, a new element of damages is allowed to be considered. A serious wrong which is the natural and direct result of voluntary action, necessarily indicates a voluntary wrongdoer, for the law rigidly holds all persons to the presumption that they intend such results as are to be expected from their conduct whenever those results arrive. Where the wrong done consists in a libel — which can never be accidental — the publishing is always imputed to a wrong motive, and that motive is called malicious. And in the absence of any testimony showing the origin and circumstances of the publication, it stands before the jury as a voluntary wrong, until palliated or excused, while the actual motive may be shown to qualify it. . . .

"In all libel cases . . injury to the feelings is a proper element to be considered, in addition to the damage to reputation and other attendant grievances. And on the same principle, anything having a tendency to reduce the extent of the voluntary wrong, is to be considered in mitigation by the jury. The injury to the feelings is only allowed to be considered in those torts which

his part.[1] All papers referred to in a libel may be admitted for the purpose of explanation and interpretation.[2] A defendant in an action for libel or slander cannot mitigate damages by proving his own bad character,[3] or poverty.[4] Nor is it any mitigation that he spoke the words in apparent good humor.[5]

In some early cases of slander, both in England and in this country, it has been held that giving the name of the author at the time of speaking the defamatory words was a full excuse, or at least a mitigation of the wrong.[6] Later authorities quali-

consist of some voluntary act, or very gross neglect, and practically depends very closely on the degree of fault evinced by all the circumstances. . . .

"There is no doubt of the duty of every publisher to see at all hazards that no libel appears in his paper. Every publisher is, therefore, liable, not only for the estimated damage to credit and reputation, and such special damages as may appear, but also for such damages on account of injured feeling as must unavoidably be inferred from such a libel, published in a paper of such a position and circulation. But no further damages than these should be given, if he has taken such precautions as he reasonably could to prevent such an abuse of his columns. When it appears that the mischief has been done in spite of precautions, he ought to have all allowance in his favor which such carefulness would justify, in mitigation of that portion of the damages which is awarded on account of injured feelings.

"The employment of competent editors, the supervision by proper persons of all that is to be inserted, and the establishment and habitual enforcement of such rules as would probably exclude improper items, would reduce the blameworthiness of a publisher to a minimum, for any libel inserted without his privity or approval, and should confine his liability to such damages as include no redress for wounded feeling, beyond what is inevitable from the nature of the libel. And no amount of express malice in his employé should aggravate damages against him, when he has thus purged himself from active blame."

[1] Scripps v. Foster, supra. In Bailey v. Kalamazoo Pub. Co. 40 Mich. 257, Campbell, C. J., said: "The public are interested in knowing the character of candidates for congress; and while no one can lawfully destroy the reputation of a candidate by falsehood, yet if an honest mistake is made (as in misnaming an offense of which the plaintiff has been guilty) in an honest attempt to enlighten the public, it must reduce the damages to a minimum, if the fault is not serious, and there should be no unreasonable responsibility where there is no actual malice." See Smith v. Scott, 2 C. & K. 580.

[2] Nash v. Benedict, 25 Wend. 645; Gould v. Weed, 12 id. 12.

[3] Hastings v. Stetson, 130 Mass. 76.

[4] Meyers v. Malcolm, 6 Hill, 292; Palmer v. Haskin, 28 Barb. 90.

[5] Weaver v. Hendrick, 30 Mo. 502.

[6] Earl of Northampton's Case, 12 Coke, 132; Davis v. Lewis, 7 T. R.

fied the doctrine,[1] requiring either that there be a just reason for the repetition, or that the defendant repeat the charge as he heard it, and refer to the person from whom he heard it as the author, and that the repetition be without any intention to injure or defame the person to whom the charge refers.[2] A man who wantonly or inconsiderately repeats a defamatory tale fabricated by another, is certainly liable to answer in damages for assisting in the propagation of the slander; but he is not answerable in the same degree as the author of the slander, unless it should appear he was actuated by malice, and an intention to defame.[3] In some cases it was required that the person named as author be responsible and within the state, so that he could be sued for the slander.[4] The later cases in England and in several of the states hold that proof that when the words were spoken the author was named, is of itself no defense.[5] In Sans v. Joerris,[6] Dixon, C. J., said: "The doctrine extrajudicially announced in the fourth resolution of the Earl of Northampton's Case,[7] that the repetition of slander, if the name of the inventor be given at the time, is not actionable, has never been extended to libel; and even in regard to oral

17; Hawkes v. Carter, 1 Law Reporter (London), 192; Bennett v. Bennett, 6 C. & P. 588; Binns v. McCorkle, 2 P. A. Brown (Pa.), 79; Hersh v. Ringwalt, 3 Yeates, 508; Kennedy v. Gregory, 1 Binn. 85; Morris v. Duane, id. 90; Cook v. Barkley, 1 Penn. (N. J.) 169; Smith v. Stewart, 5 Pa. St. 372; Kelley v. Dillon, 5 Ind. 426; Trabue v. Mays, 3 Dana, 138; Robinson v. Harvey, 5 T. B. Mon. 519; Parker v. McQueen, 8 B. Mon. 16; Miller v. Kerr, 2 McCord, 285; Church v. Bridgman, 6 Mo. 190. See Folkard's Starkie on S. & L. § 317.

[1] McPherson v. Daniels, 10 B. & C. 263; Lewis v. Walter, 4 B. & Ald. 605.

[2] Cummerford v. McAvoy, 15 Ill. 311; Church v. Bridgman, supra; Haynes v. Leland, 29 Me. 233; Abrams v. Smith, 8 Blackf. 95; Jones v. Chapman, 5 id. 88; Johnston v. Lance, 7 Ired. 448; Skinner v. Grant, 12 Vt. 456; Inman v. Foster, 8 Wend. 602.

[3] Easterwood v. Quin, 2 Brev. 64; 3 Am. Dec. 700.

[4] Scott v. Peebles, 10 Miss. 546; Trabue v. Mays, 3 Dana, 138; Johnston v. Lance, supra; Larkins v. Tartar, 3 Sneed, 681.

[5] McGregor v. Thwaites, 3 B. & C. 24; Bennett v. Bennett, 6 C. & P. 588; Tidman v. Ainslie, 10 Exch. 63; Chevalier v. Brush, Anthon's Law Stud. 186; Mapes v. Weeks, 4 Wend. 659; Inman v. Foster, 8 id. 602; Hotchkiss v. Oliphant, 2 Hill, 510; Austin v. Hanchet, 2 Root, 148; Treat v. Browning, 4 Conn. 408; Sans v. Joerris, 14 Wis. 663; Haines v. Welling, 7 Ohio, 253.

[6] 14 Wis. 667.

[7] 12 Coke, 134.

slander has met with disapprobation, and may be considered as virtually overruled.[1] Whether this doctrine is placed on the ground that the person who needlessly publishes or repeats a previously invented slander, gives it the credit which is due to himself, or, as was said by Chief Justice Best in De Crespigny v. Wellesley,[2] that it is every man's moral duty, if he hear anything injurious to the character of his neighbor, which he does not know to be true, and which does not concern the public or the administration of justice, to lock it up forever in his own breast; or, on the general rule in this world, said to be applicable to nations as well as individuals, that every person should attend to his own affairs, it is, in my judgment, equally sound law, which the security of reputation, the happiness of families, and the peace and good order of society demand shall be rigidly enforced in all cases." [3]

[1] Citing Bennett v. Bennett, 6 C. & P. 588; Lewis v. Walter, 4 B. & Ald. 605; Crane v. Douglass, 2 Blackf. 195; McPherson v. Daniels, 10 B. & C. 263. See also Hotchkiss v. Oliphant, 2 Hill, 510.

[2] 5 Bing. 393.

[3] Tidman v. Ainslie, 10 Exch. 63, note.

CHAPTER XXV.

MALICIOUS PROSECUTION.

The nature of the wrong — Elements of damage — Evidence in mitigation.

THE NATURE OF THE WRONG.— The wrong denoted by this title is of the same nature as libel and slander. It involves among other elements of injury the defamation of the accused. This is so when a criminal charge is maliciously preferred without reasonable or probable cause; and the right of action accrues when the prosecution has terminated in the acquittal or discharge of the accused.[1] Where the charge is acted upon, the arrest of the accused, holding him to bail or imprisoning him, and the incidental loss of time, and the expense of a defense, are among the natural and proximate consequences.[2]

In many cases the injury to reputation is the most serious consequence of the wrong. An accusation made under the forms of law, on the pretense of bringing a guilty man to justice, is made in the most imposing and impressive manner, and may inflict a deeper injury upon the reputation of the party accused than the same words would uttered under any other circumstances.[3] This wrong, however, does not consist entirely in the malicious prosecution of groundless criminal proceedings; though the element of defamation is mostly confined to them. The malicious prosecution, without probable cause, of civil proceedings, involving arrest, attachment, sequestration, or other interference with person or property, or which is the cause of any special grievance or injury, will, according to the general current of authority, give a right of action.[4] The same has been held of proceedings to have a

[1] Cooley on Torts, 180-190.

[2] Saville v. Roberts, 1 Lord Raym. 374; Sonneborn v. Stewart, 2 Woods, 599; Lavender v. Hudgens, 32 Ark. 763; Garvey v. Wayson, 42 Md. 178.

[3] Rockwell v. Brown, 36 N. Y. 209.

[4] Wengert v. Beashore, 2 N. J. L. 232; Henderson v. Jackson, 9 Abb. Pr. N. S. 393; Herman v. Brookerhoff, 8 Watts, 240; Tancred v. Leyland, 16 Q. B. 669; Donnell v. Jones, 13 Ala. 490; 17 id. 689; McKellar v. Couch, 34 id. 336; Stewart v. Cole, 46 id. 646; Collins v. Hayte, 50 Ill. 353; Lawrence v. Hagerman, 56 id. 68; Watkins v. Baird, 6 Mass. 506;

person declared insane or bankrupt, without probable cause;[1] and in cases of malicious abuse of legal process.[2] Whether an action may be maintained for maliciously, and without reasonable or probable cause, prosecuting a civil action, not involving any arrest of the person or seizure of property, is not settled.[3] On principle it is difficult to deny the right of action where the taxable costs are not a full compensation for the trouble and expense of defending the groundless action. In the words of Lord Campbell,[4] "To put into force the process of the law, maliciously and without any reasonable or probable cause, is

Hayden v. Shed, 11 id. 500; Lindsay v. Larned, 17 id. 190; Weaver v. Page, 6 Cal. 681; Pierce v. Thompson, 6 Pick. 193; Barhans v. Sanford, 19 Wend. 417; Besson v. Southard, 10 N. Y. 236; Churchill v. Siggers, 3 El. & Bl. 937; Austin v. Debnam, 3 B. & C. 139; Sinclair v. Eldred, 4 Taunt. 7; Farley v. Danks, 4 El. & Bl. 493; Spaids v. Barrett, 57 Ill. 289; Nelson v. Danielson, 82 id. 545; Tomlinson v. Warner, 9 Ohio, 103; Fortman v. Rottier, 8 Ohio St. 548; Burkhart v. Jennings, 2 W. Va. 242; Savage v. Brewer, 16 Pick. 453; De Medina v. Grove, 10 Q. B. 168; Preston v. Cooper, 1 Dill. 589; Robinson v. Kellum, 6 Cal. 399; Cox v. Taylor, 10 B. Mon. 17; Walser v. Thies, 56 Mo. 89; Holliday v. Sterling, 62 id. 321; Williams v. Hunter, 3 Hawks, 545; McCullough v. Grishobber, 4 W. & S. 201; Spengler v. Davy, 15 Gratt. 381; Wood v. Weir, 5 B. Mon. 544; Fullenwider v. McWilliams, 7 Bush, 389; Closson v. Staples, 42 Vt. 209; Hoyt v. Macon, 2 Colo. 113; Williams v. Hunter, 14 Am. Dec. 599, note.

[1] Sonneborn v. Stewart, 2 Woods, 599; 98 U. S. 187; Brown v. Chapman, 1 W. Bl. 427; Chapman v. Pickersgill, 2 Wils. 145; Lockenour v. Sides, 57 Md. 360.

[2] Churchill v. Siggers, 3 El. & B. 929; Savage v. Brewer, 16 Pick. 453; Barnett v. Reed, 51 Pa. St. 190; Jennings v. Florence, 2 C. B. N. S. 467; Austin v. Debnam, 3 B. & C. 139; Krug v. Ward, 77 Ill. 603; Grainger v. Hill, 4 Bing. N. C. 212; Elsee v. Smith, 1 D. & R. 97. Actions for such malicious wrongs have been held not properly for malicious prosecutions, but actions on the case, in which both a *scienter* and a *per quod* must be laid and proved. Frierson v. Hewitt, 2 Hill (S. C.), 499.

[3] Compare Mayer v. Walter, 64 Pa. St. 283; McNamee v. Minke, 49 Md. 122; Byne v. Moore, 5 Taunt. 187; Gregory v. Derby, 8 C. & P. 749; Clarke v. Postan, 6 id. 423; Closson v. Staples, 42 Vt. 244; Woods v. Finnell, 13 Bush, 628; Whipple v. Fuller, 11 Conn. 581; Lawyer v. Loomis, 3 Thomp. & C. 393; Newfield v. Copperman, 15 Abb. N. S. 360; Berry v. Adamson, 6 B. & C. 528; Wanzer v. Wyckoff, 9 Hun, 178; Cardival v. Smith, 109 Mass. 158; Allgor v. Stillwell, 6 N. J. L. 166; Woodmansee v. Logan, 2 id. 93; 1 Am. Lead. Cas. 200–224; Cooley on Torts, 188, 189; Hoyt v. Macon, 2 Colo. 113; Lockenour v. Sides, 57 Ind. 360.

[4] Churchill v. Siggers, 3 El. & Bl. 929.

wrongful; and if thereby another is prejudiced in property or person, there is that conjunction of injury and loss which is the foundation of an action on the case." The expenses and trouble of defending such an action are proper elements of damage, and why should they alone not be considered sufficient to maintain the action? Where the claim which is the subject of the action is not only false, but the action is prompted alone by malice and without any probable cause, the defendant's right of recovery for the expenses incurred and damages sustained should be as fully recognized as if his property had been attached, or his body taken charge of by the plaintiff.[1]

[1] Woods v. Finnell, 13 Bush, 628. In Closson v. Staples, 42 Vt. 209, Wilson, J., said: "In England before the statute of Marlbridge, no costs were recoverable in civil actions. It seems that before the statutes, entitling the defendant in civil actions to costs, if the suit terminated in his favor, he might support an action at common law against the plaintiff, if the proceeding was malicious or without probable cause. Co. Litt. 161; 3 Lev. 210; Hob. 266; 3 Chitty Black. 125.

"But in England since the statutes which give costs to the defendant in all actions in case of a nonsuit or verdict against the plaintiff, and in other stages of the cause, it seems that no action can be maintained in respect of a civil suit maliciously instituted, except in some cases under legislative provisions, and perhaps excepting cases where the defendant failed to obtain the ordinary costs owing to the insolvency of a third party in whose name the suit was prosecuted. It is said that these statutes give costs to successful defendants by way of damages against the plaintiff *pro falso clamore*. It is said by Judge Swift in his digest, vol. I, p. 492: 'It is well settled that at common law no action will lie against one for bringing a civil suit, however malicious and unfounded, unless the body of the party is arrested and imprisoned or holden to bail; in all other cases the costs the party recovers are supposed to be an adequate compensation for the damages he sustains.' There does not appear to be any conflict in the authorities that where there is anything done maliciously, besides commencing and prosecuting a malicious or vexatious action, a suit for the damages sustained by such act may be maintained. It is upon this ground that an action is sustainable for a malicious arrest, or holding to bail for too large a sum, and for maliciously suing out and levying a writ of *fieri facias*. 1 Lev. 275; 2 Wils. 305. Upon the same principle it has been held that an action may be maintained where the property of a party has been attached upon mesne process. Hob. 205, 266; Gifford v. Woodgate, 11 East, 296; Wills v. Noyes, 12 Pick. 324. It is said in some of the cases that where the process in the malicious and unfounded suit is by attachment, an action will lie for the damage the party sustains, because in such case no cost is allowed which can be

compensation for the personal injury. But we think the fundamental principle and analogies of the common law, as laid down by the text-writers and early decisions of the English courts, do not make the manner in which service of the process was made essential to maintain the action. The common law declares that for every injury there is a remedy. . . . Waterer v. Freeman, Hob. 205; 2 Selw. N. P. 1054; Elsee v. Smith, 2 Chitty Eng. Eccl. 304; Cotterell v. Jones, 7 Eng. L. & Eq. 475; Whipple v. Fuller, 11 Conn. 581.

"In general it is of no special importance to the defendant whether the process is by attachment or summons; but the undue vexation, costs and expenses, in defending a malicious and unfounded suit, accrue after the process is served and entered in court. The damages sustained by the defendant in defending such suit can be no less where the process is by summons than where it is by arrest of the body, or attachment of property. They are, for the most part, for counsel and witness fees, for time and expenses in preparing the suit and attending court, and such other damages as are the direct consequence to the defendant by reason of having been compelled to defend a suit maliciously prosecuted by the plaintiff, without probable cause. Service of the process by arresting the body or attaching property might be made under circumstances by which the damages occasioned by the suit would be enhanced, but such mode of service is not essential to maintain an action for damage where damage is sustained in the suit complained of after it is entered in court. . . . The principle of the common law, recognized by the English courts before the statutes allowing costs to defendants, and which gave a remedy for injuries sustained by reason of suits which were malicious and without probable cause, is, and ought to be, operative still, and we think it affords a remedy in all cases where the taxation of costs is not an adequate compensation for the damage sustained. Our statute provides that no writ of summons or attachment, requiring any person to appear and answer before any court in this state, shall be issued unless there be sufficient security given to the defendant that the plaintiff shall prosecute his writ to effect, 'and shall answer all damages if judgment be rendered against him.' The above quoted words, '*and shall answer all damages if judgment be rendered against him*,' have reference solely to the taxable costs established by law, and without any regard to the manner in which the suit is commenced, whether by attachment or summons. And the power of the court, at any time during the pendency of the action, to order additional or better bail to be entered to the defendant for costs, and to compel the plaintiff to become nonsuit for neglect to comply with such order, has reference to, and is limited by, the taxable costs which the defendant is entitled to recover if judgment be recovered in his favor. Our statute, by which the prevailing party recovers certain costs incurred in the prosecution or defense of a civil action, stands upon the ground that certain claims and rights in respect to matters in issue are asserted, that in the adjudication of which, a civil action, when brought and prosecuted in good faith, is a claim of right, and in order to place the administration of the law upon

ELEMENTS OF DAMAGE.—These are thus classified by Holt, Ch. J., in Saville v. Roberts:[1] 1. Damages to a man's fame,

reasonable grounds in respect to the rights asserted and recoverable costs, the expenses of litigating the claims of the parties, over and above certain items of costs which the statute allows the prevailing party to recover, should be borne by the respective parties by whom such expenses are incurred, without regard to the result of the suit. But the system of taxing costs under our statute, except in a very few cases, was enacted with reference to suits brought and prosecuted in good faith. In suits so brought and prosecuted, the defendant may be subjected, or he may subject himself, to expenses not recoverable, even if the suit terminates in his favor; but of this he has no ground to complain, when the suit is brought and prosecuted in good faith, because it is the ordinary and natural consequence of a uniform and well regulated system, to which all parties in civil actions are required to conform. But where the action is brought and prosecuted maliciously and without reasonable or probable cause, the plaintiff asserts no claim in respect to which he had any right to invoke the aid of the law. In such case, the plaintiff, by an abuse of legal process, unjustly subjects the defendant to damages which are not fully compensated by the costs he recovers. The plaintiff in such a case has no legal or equitable right to claim that the rule of law, which allows a suit to be brought and prosecuted in good faith, without liability of the plaintiff to pay the defendant damages, except by way and to the extent of taxable costs only, if judgment be rendered in his favor, should extend to a case where the suit was maliciously prosecuted without probable cause. But when the damages, sustained by the defendant in defending a suit maliciously prosecuted without reasonable or probable cause, exceed the costs obtained by him, he has, and of right should have, a remedy by action on the case.

"It is apparent from our statute regulating the taxation of costs, that the costs allowed the successful defendant, where the suit is brought and prosecuted in good faith, were not intended or supposed to be an adequate compensation for all damages he might sustain and should recover by reason of defending a suit which was brought and prosecuted maliciously and without probable cause. It would be inconsistent with our system of jurisprudence in the legitimate use of legal process, to allow in all cases such costs as would cover all damages the defendant might sustain by defending a suit, without regard to the motive which influenced the plaintiff in commencing and prosecuting it. And it is quite obvious, I think, that a provision by law, by which the court would have discretionary power to tax and and allow the defendant to recover, in a malicious and unfounded suit, such costs by way of damages sustained in the defense of the suit as in their judgment he was entitled to, could not be made without infringing the rights of the plaintiff in such action, because he would have the right of trial by jury of the question whether, in the prosecution of the suit in which such costs were to be taxed, malice and want of probable cause concurred, and this question cannot be tried in that original suit."

[1] 1 Ld. Raym. 374.

as if the matter whereof he is accused be scandalous. 2. Where a man is put in danger to lose his life or limb or liberty. 3. Damage to a man's property, as where he is forced to spend money in necessary charges to acquit himself of the crime. 4. Any special damage. The injury to reputation must be estimated, and reparation made for it, on the same considerations which govern in actions for slander or libel.[1] Bodily and mental suffering may be taken into account, and the latter where there is no physical injury or pain.[2] So the jury may take into consideration the indignity.[3] If a man be falsely and maliciously indicted of a crime which is a scandal to him and hurts his fame, an action lies, although the indictment be insufficient, or an *ignoramus* be found;[4] for though no expense may be incurred, the mischief of the slander has been effected.[5]

The damages for malicious prosecution may consist in the personal labor and trouble imposed on the plaintiff in procuring his acquittal or his discharge, and the pain and anxiety of mind naturally occasioned by the pendency of a criminal charge. The plaintiff may prove in aggravation of damages the length of imprisonment, his expenses, situation and circumstances.[6] Where a female was falsely and maliciously prosecuted for perjury, and suffered in her health in consequence, and was rendered insane, an increased recovery on that account was sustained.[7] The plaintiff may recover not only for an unlawful arrest and imprisonment and the expenses of his defense, but also for the injury to his fame and reputation, occasioned by the false accusation.[8] And a recovery in the action for malicious prosecution by the plaintiff is a bar to a subsequent action of slander for the accusation, uttered for the purpose of having the arrest made, and on the occasion when it was made.[9] The jury are to determine the amount of damages when the essential facts for the maintenance of the action have been established, and they may take into consideration the expense

[1] Sheldon v. Carpenter, 4 N. Y. 578.

[2] Parkhurst v. Mastellar, 57 Iowa, 474; Rowlands v. Samuel, 11 Q. B. 39.

[3] McWilliams v. Hoban, 42 Md. 56.

[4] Saville v. Roberts, supra.

[5] Id.

[6] Folkard's Starkie, § 651.

[7] Plath v. Braunsdorff, 40 Wis. 107.

[8] Sheldon v. Carpenter, 4 N. Y. 579; Faynan v. Knox, 40 N. Y. Super. Ct. 41.

[9] Sheldon v. Carpenter, supra.

to which the plaintiff has been subjected, his trouble and anxiety, and the ignominy of being arraigned at the bar of justice as an offender against the laws;[1] they are to take into consideration the circumstances of the case, and to award such damages as will not only compensate the plaintiff for the wrong and indignity he has suffered in consequence of the defendant's wrongful act, but they may also award exemplary or punitive damages as a punishment to the defendant for such act.[2]

The plaintiff, when he has been prosecuted maliciously and without probable cause for a crime, may recover for the expenses he has been put to, as well as for the annoyance he had undergone, and for the injury to his feelings.[3] The plaintiff is entitled to recover not only the costs and expenses attending the defense of the groundless suit, without reference to taxable costs, including counsel fees,[4] but also consequential damages which naturally and proximately result therefrom. In an early California case, a suit was brought on a paid bill of exchange, and property attached and held for four months, when it was released by the giving of a bond. The jury gave a verdict, in an action for a malicious prosecution of that suit and suing out that attachment, for $15,000, which was sustained. The court say: "In cases of this nature, there is no settled rule as to the amount to be recovered. The jury are not confined to the actual pecuniary loss sustained by the plaintiff, but may take into consideration the character and position of the parties, and all the circumstances attending the transaction. In such cases, we cannot disturb a verdict, unless it clearly appears that injustice has been done."[5] In an English case,[6] a judgment creditor who had recovered judgment for £115, £100 of which were afterwards paid, caused the debtor to be taken on execution for the full amount, and this being found to have been done maliciously and without probable cause, and special damages being alleged in the plaintiff being prevented from attending to his

[1] Tompson v. Massey, 3 Greenlf. 305; Faynan v. Knox, 40 N. Y. Super. Ct. 41.

[2] McWilliams v. Hoban, 42 Md. 56; Weaver v. Page, 6 Cal. 681.

[3] Rowlands v. Samuel, 11 Q. B. 39.

[4] Closson v. Staples, 42 Vt. 209; Woods v. Finnell, 13 Bush, 628; Smith v. Smith, 20 Hun, 559, note.

[5] Weaver v. Page, 6 Cal. 681.

[6] Churchill v. Siggers, 3 El. & Bl. 929.

business, injured in his credit and character, and incurring expense in procuring his liberation by a judge's order, he was held, on demurrer, entitled to judgment.[1]

In an Iowa case, a party holding a lease of a mine for a specified time was ejected therefrom by a judgment, afterwards reversed, in an action of forcible entry and detainer, maliciously instituted. In an action for this malicious proceeding, it was held that the measure of damages was the reasonable value of the use of the premises for the time the plaintiff had been kept out of possession, and for any permanent injury to his leasehold interest sustained by reason of the mine caving or otherwise getting out of repair through the failure of the defendant to use ordinary care during the time he held possession.[2] In an action for maliciously, and without probable cause, procuring a party, who was a merchant, to be adjudged a bankrupt, under which adjudication, before the proceeding was dismissed, he was deprived of his entire stock of goods, and his store shut up for about thirteen months, the jury were instructed that the plaintiff was entitled to recover the actual damage to his goods, for the breaking up of his business, and the destruction of his credit. "The value of his own time," say the court, "is also a fair charge, as he has been obliged to give his attention to the proceedings instituted against him, and has not been able to pursue any business." It was also held that his expenses for lawyers' fees in following up and setting aside the proceedings in bankruptcy are also a fair item of charge to be allowed.[3] In Krug v. Ward[4] it was held that evidence of the payment of an attorney's fee, and expenses of defending the groundless suit, was admissible, though the former was paid by another for the plaintiff. But in assessing the damages the expenses of prosecuting the action for malicious prosecution are not deemed the natural and proximate consequence of the wrong complained of, and cannot be taken into consideration.[5]

[1] Lawrence v. Hagerman, 56 Ill. 68.

[2] Moffatt v. Fisher, 47 Iowa, 473.

[3] Sonneborn v. Stewart, 2 Woods, 599, reversed as to allowance of attorney's fees and on other points, 98 U. S. 187; Fullenwider v. McWilliams, 7 Bush, 389.

[4] 77 Ill. 603.

[5] Stewart v. Sonneborn, 98 U. S. 197; Good v. Mylin, 8 Pa. St. 51;

For this wrong the injured party is entitled to adequate compensation covering all the elements of the particular injury. Therefore the jury, in determining the amount, will consider the nature of the prosecution, and its natural effect on reputation, credit and private feelings; the incidental consequences of arrest, holding to bail, or of interference with property; the consequential loss of time, and any other loss, as the expense of defending. Malice is of the gist of the action, and the damages for other than pecuniary items may be greatly increased or diminished by the evidence on that subject. Where there is actual and express malice, exemplary damages may be recovered.[1]

EVIDENCE IN MITIGATION.— The plaintiff is required to show that the defendant was actuated by malice, and that the prosecution was without probable cause.[2] The absence of probable cause does not raise a legal presumption of malice, but the jury may infer malice as matter of fact from the want of probable cause.[3] The want of probable cause, however, cannot be inferred from malice.[4] The important inquiry, therefore, in such cases is whether there was probable cause; which is such a state of facts in the mind of the prosecutor as would lead a man of ordinary caution and prudence to believe, or to entertain an honest and strong suspicion, that the facts essential to the prosecution exist.[5] Probable cause does not depend on the

Alexander v. Herr, 11 id. 537; Stopp v. Smith, 71 id. 285; Hicks v. Foster, 13 Barb. 663.

[1] McWilliams v. Hoban, 42 Md. 56; Sonneborn v. Stewart, 2 Woods, 599; Wanzer v. Bright, 52 Ill. 35; Parkhurst v. Mastellar, 57 Iowa, 474.

[2] Townshend on S. & L. § 431.

[3] Levy v. Brannan, 39 Cal. 485; Harkruder v. Moore, 44 id. 144; Mowry v. Whipple, 8 R. I. 360; Straus v. Young, 36 Md. 246; Lawyer v. Loomis, 3 Thomp. & C. 393; Carson v. Edgworth, 43 Mich. 241; Heath v. Heape, 1 H. & N. 478; Wanzer v. Wyckoff, 9 Hun, 178; Wheeler v. Nesbitt, 24 How. U. S. 544; Humphries v. Parker, 52 Me. 505; Sutton v. Johnson, 1 T. R. 493; Pullen v. Glidden, 68 Me. 562; Harpham v. Whitney, 77 Ill. 32.

[4] Id.; Brown v. Smith, 83 Ill. 291.

[5] Bacon v. Towne, 4 Cush. 238; Carl v. Ayers, 53 N. Y. 17; Foshay v. Ferguson, 2 Denio, 617; Harpham v. Whitney, 77 Ill. 42; Scanlan v. Cowley, 2 Hilt. 489; Heyne v. Blair, 62 N. Y. 22; Lacey v. Mitchell, 23 Ind. 67; Rice v. Ponder, 7 Ired. 390; Fitzgibbon v. Brown, 43 Me. 169; Ash v. Marlow, 20 Ohio, 119; Barron v. Mason, 31 Vt. 197.

actual state of the case, in point of fact, but upon the honest and reasonable belief of the party commencing the prosecution.[1]

If it appear that there was probable cause, that is a complete defense. But if the evidence tending to show it fail in that object, to the extent that it affords ground for belief that the party prosecuted was guilty, it tends to rebut malice, and may mitigate exemplary damages, or those which might otherwise be awarded based solely on malice.[2] Facts within his own knowledge, and facts communicated to him by others, and even rumors or reports in the neighborhood, have been allowed to be proved.[3] While proof that the defendant acted upon the advice of counsel, learned in the law, given after a full and fair statement of all the known facts, will be a full defense, because when so advised that the cause is sufficient for his exoneration, it will be deemed probable cause,[4] yet advice from any other person will not have the same effect;[5] but the fact that advice is given by a magistrate or by police officers, may be admitted to show the circumstances under which the prosecution was instituted and to mitigate damages.[6]

According to the better authorities, the defendant may prove the general bad reputation of the plaintiff, both to rebut the proof of want of probable cause and in mitigation of damages. The same facts which would raise a strong suspicion in the mind of a cautious and reasonable man against a person of notoriously bad character for honesty and integrity, would make a slighter impression if they tended to throw a charge of

[1] James v. Phelps, 11 A. & E. 483; Heslop v. Chapman, 23 L. J. Q. B. N. S. 49; Hall v. Suydam, 6 Barb. 83.

[2] Bacon v. Towne, supra; Bell v. Pearcy, 5 Ired. 83.

[3] Pullen v. Glidden, 68 Me. 562; Carl v. Ayers, 53 N. Y. 14; Bacon v. Towne, supra; Carpenter v. Sheldon, 5 Sandf. 77; Hitchcock v. North, 5 Rob. (La.) 328; Lamb v. Gulland, 44 Cal. 609; Thomas v. Russell, 9 Exch, 764; Lister v. Perryman, L. R. 5 Exch. 365; Heyne v. Blair, 62 N. Y. 19; Miller v. Milligan, 48 Barb. 30; Foshay v. Ferguson, 2 Denio, 617; Gallaway v. Burr, 32 Mich. 332; Wyatt v. White, 5 H. & N. 371.

[4] Ravenga v. Mackintosh, 2 B. & C. 693; Stanton v. Hart, 27 Mich. 539; Wicker v. Hotchkiss, 62 Ill. 107; Laird v. Taylor, 66 Barb. 143; Pullen v. Glidden, 68 Me. 566.

[5] Stanton v. Hart, 27 Mich. 539; Burgett v. Burgett, 43 Ind. 78; Murphy v. Larson, 77 Ill. 172; Beal v. Robeson, 8 Ired. 276.

[6] Hirsch v. Feeney, 83 Ill. 550; White v. Tucker, 16 Ohio St. 468.

guilt upon a man of good reputation.[1] The fact that the plaintiff might, in the criminal proceeding against him, have shortened his imprisonment by availing himself of his preliminary examination, need not be considered as a ground for re-

[1] Bacon v. Towne, 4 Cush. 217, 240; Rodriguez v. Tadmire, 2 Esp. 721; Fitzgibbon v. Brown, 43 Me. 169; Israel v. Brooks, 23 Ill. 575. See Blizzard v. Hays, 46 Ind. 166; Oliver v. Pate, 43 id. 132; Scott v. Fletcher, 1 Overt. 488; Bostick v. Rutherford, 4 Hawks, 83. In Pullen v. Glidden, 68 Me. 563, Barrows, J., said: "The discrepancy in the decisions has arisen from a neglect to make the proper discrimination between the issue presented by the plea of not guilty in an action for malicious prosecution and that which arises on the same plea in actions of libel and slander. The similarity in the injuries complained of in these classes of suits has led to a confusion in the decisions touching the pleadings and the evidence applicable to them. With something of a general likeness there are important differences in the contentions liable to arise upon a plea of the general issue in suits for malicious prosecution and those for slander, verbal or written, and sufficient care has not been taken in reporting the cases to designate the purpose for which the evidence was offered and the state of the pleadings. For instance, in slander, the speaking of actionable words raises the implication of malice in law, which is all that is necessary for the maintenance of the suit, though malice in fact may be proved to enhance the damage. True v. Plumley, 36 Me. 466; Jellison v. Goodwin, 43 Me. 287. Hence common reputation and other evidence not amounting to a justification, though tending to negative malice in fact, was not admitted for that purpose in Taylor v. Robinson, 29 Me. 323, though why it should not be competent upon the question of damages is perhaps not altogether clear. See East v. Chapman, 2 Car. & P. 570.

"But as we have already seen, in actions for malicious prosecution where the question for the jury is whether the defendant, upon all the information he had, whether it was true or false, acted as a cautious, reasonable man not influenced by malice would act, the general reputation of the plaintiff is a proper subject of inquiry upon the question of probable cause. And since malice in fact may be inferred from the want of probable cause, it follows that it is pertinent also upon the question of malice.

"Here, however, the precise question is whether evidence of common repute in the neighborhood that the plaintiff was guilty of the particular offense for which he was prosecuted was rightly received. Judge Redfield, in Baron v. Mason, 31 Vt. 201, says, emphatically, that such evidence ought to be regarded as one proof, though no sufficient one in itself, of probable cause. We think he was right. Not only the facts which the defendant knew, but the information he had received, in fine, the circumstances under which he acted, even his own consultations with counsel learned in the law, if he took advice of such, are competent evidence upon these questions of probable cause and malice in fact. A man who claims an investi-

ducing damages, unless there is affirmative proof that his motive in waiving examination and exposing himself to continued imprisonment was to enhance damages.[1]

gation, according to law, of the charge he makes against another stands upon a different footing from him who indulges his tongue in slanderous babble which can result in nothing but mischief. This last must make his charges good by establishing their truth. But the first, whose doings may, in some contingencies, be serviceable to the community, is not responsible for his mistakes, if he acts with reasonable caution and an honest purpose. While the prevalence of reports that a man had committed an offense would be no sufficient cause in itself for proceeding against him, it cannot be said that their existence would not lend a force even in the mind of a cautious and candid person to any criminatory facts or information which they would not have as against one against whom the neighboring public did not believe to be guilty. It is one of the great possible variety of facts and circumstances that may have a bearing upon the question whether the defendant was acting 'prudently, wisely and in good faith.'"

[1] King v. Colvin, 11 R. I. 582.

CHAPTER XXVI.

PERSONAL INJURY.*

Physical and mental pain — Loss of time, injury to business, diminished working capacity — Expenses for surgical and medical aid and nursing — The entire damages to be recovered in one action,—prospective damages — A husband's and a parent's action — Exemplary damages — Evidence in mitigation — Province of the jury, and instructions to them — False imprisonment.

The law aims to afford full redress for personal injuries as well as for all others. The sufferer is entitled to compensation from the person by whose fault the injury occurred for the pain resulting from the corporal hurt so long as it produces pain; for mental suffering, naturally resulting from the injury or wrong, whether such suffering be apprehension and anxiety from its depressing effect, or induced by its alarming character; for wounded sensibility or affection, and for sense of wrong and insult by reason of the malice of the wrongdoer and the incidents of the infliction; for impaired health and working capacity, mutilation or disfigurement; for the expenses of nursing and care, and for all other detrimental effects which naturally and proximately ensue.

Physical and mental pain.— An injury to the person necessarily causes pain; it is a direct effect; and whether the pain is only momentary or continues for a long period, it is a direct consequence of the injury. In the absence of any supervening fault of the injured party having the effect to retard or prevent a cure, he is entitled to compensation from the person who wrongfully inflicted the injury, for all the pain suffered from the moment of the injury to complete cure. Money is an inadequate recompense for pain; but as the law can afford no other redress, it aids the sufferer to obtain this in such measure as a jury, dispassionately considering all the circumstances, will

* This subject received some attention under the head of Carriers of Passengers, ante, pp. 258-281. See also Vol. I, pp. 227-230.

allow.[1] Whether the injury is the result of negligence or direct personal violence, the resulting pain is an element of damage to be compensated. In other words, it is an element of compensatory damages.[2]

The jury is allowed to consider the case with all its facts, and to take into account for the purpose of compensation, not only the physical pain, but also such mental suffering as the jury are satisfied must have been experienced as the natural result of the wrong done or injury inflicted.[3] When bodily pain is caused, mental follows as a necessary consequence, especially when the former is so severe as to create apprehension and anxiety.[4] The manner of committing the injury, or its very nature, may be such that compensation should be given largely,

[1] Verrill v. Minot, 31 Me. 299; Penn. R. R. Co. v. Allen, 53 Pa. St. 276; Slater v. Sherman, 5 Bush, 206; Elliott v. Van Buren, 33 Mich. 49; Ransom v. New York, etc. R. R. Co. 15 N. Y. 415; Curtiss v. Rochester, etc. R. R. Co. 20 Barb. 282; Chicago v. Langlass, 66 Ill. 361; Scott v. Hamilton, 71 id. 85; McLaughlin v. Corry, 77 Pa. St. 109; Lucas v. Flinn, 35 Iowa, 9; Oliver v. North Pacific Trans. Co. 3 Oreg. 84; Tefft v. Wilcox, 6 Kans. 46; Welch v. Ware, 32 Mich. 77; Beardsley v. Swann, 4 McLean, 333; Pierce v. Millay, 44 Ill. 189; Swarthout v. New Jersey S. B. Co. 46 Barb. 222; Johnson v. Wells, 6 Nev. 225.

[2] Id.

[3] Seger v. Burkhamsted, 22 Conn. 290; Masters v. Warren, 27 id. 293; Lawrence v. Housatonic R. R. Co. 29 id. 390; Fenelon v. Butts, 53 Wis. 344; Craker v. Chicago, etc. R. R. Co. 36 id. 657; Mason v. Inhabitants of Ellsworth, 32 Me. 271; Prentiss v. Shaw, 56 id. 427; Wadsworth v. Treat, 43 id. 163; Goddard v. Grand T. R'y Co. 57 id. 202; Wyman v. Leavitt, 71 id. 229; Giblin v. McIntyre, 2 Utah, 384 (affirmed by supreme court of U. S.); Hanson v. Fowle, 1 Sawyer, 539, 546; Fairchild v. California Stage Co. 13 Cal. 599; Smith v. Holcomb, 99 Mass. 552; Canning v. Williamstown, 1 Cush. 451; Wright v. Compton, 53 Ind. 337; West v. Forrest, 22 Mo. 344; Ferguson v. Davis Co. 57 Iowa, 601; Mouldowney v. Illinois, etc. R. R. Co. 36 Iowa, 462; McKinley v. Chicago, etc. R. R. Co. 44 id. 314; Blake v. Midland R'y Co. 18 Q. B. 110; South & North A. R. R. Co. v. McLendon, 63 Ala. 266; Taber v. Hutson, 5 Ind. 322; Nossaman v. Rickert, 18 id. 350; Ford v. Jones, 62 Barb. 484; Smith v. Pittsburgh, etc. R. R. Co. 23 Ohio St. 10; Indianapolis, etc. R. R. Co. v. Stables, 62 Ill. 313; McMahon v. Northern C. R. R. Co. 39 Md. 438; Elkhart v. Ritter, 66 Ind. 136; Indianapolis v. Gaston, 58 id. 224; Porter v. Hannibal, etc. R. R. Co. 71 Mo. 66; 36 Am. R. 454; McMillan v. Union P. B. W. 6 Mo. App. 434; Morris v. Chicago, etc. R. R. Co. 45 Iowa, 29; Quigley v. Central P. R. R. Co. 11 Nev. 350; Hamilton v. Third Avenue R. R. Co. 53 N. Y. 28. See Joch v. Dankwards, 85 Ill. 331; Johnson v. Wells, 6 Nev. 225.

[4] Wyman v. Leavitt, supra.

and perhaps principally, for injury to the feelings. This is the case where the personal wrong is a shock to the moral sensibilities, or tends to vex, disgrace or humiliate the injured party.[1] The injury may be greatly enhanced by the motive of the wrongdoer; and the sense of justice of jurors will always incline them to fix a higher rate of compensation whenever the injury was wantonly or maliciously committed. Damages for pain not being measurable by a money standard are in some degree retributive; every circumstance which increases the turpitude of the wrongdoer's conduct adds to the injury, and correspondingly to the injured party's right to compensation.[2] Personal injury may cause disfigurement, mutilation, or permanently impaired health. When it does there is an element of mental pain for which there is no cure. When a healthy person is thus made permanently an invalid; deprived largely of his capacity to enjoy life; suddenly transformed from a mental state of cheerfulness and hope, to another of melancholy by day, and unrest and bad dreams by night, is he not entitled to some compensation for this physical and psychical alteration in

[1] Craker v. Chicago, etc. R'y Co. 36 Wis. 657; Fay v. Swan, 44 Mich. 544; Ford v. Jones, 62 Barb. 484; Smith v. Holcomb, 99 Mass. 552; Wadsworth v. Treat, 43 Me. 163; Welch v. Ware, 32 Mich. 84; Elliott v. Van Buren, 33 id. 49; Kepler v. Hyer, 48 Ind. 499. In Bovee v. Danville, 53 Vt. 190, the question was whether among other damages for a personal injury resulting from a defect in a highway, the plaintiff, a mother, was entitled to recover for injury to her feelings occasioned by the loss of a child by miscarriage. Ross, J., said: "Any injured feelings following the miscarriage, not part of the pain naturally attending it, are too remote to be considered an element of damage. If the plaintiff lamented the loss of her offspring, such grief involves too much an element of sentiment to be left to the conjecture and caprice of a jury. If, like Rachel, she wept for her children and would not be comforted, a question of continuing damage is presented too delicate to be weighed by any scales which the law has yet invented." Is this sense of loss more delicate than that of injury by disfigurement or maiming? In Smith v. Overby, 30 Ga. 241, action was brought against a physician for want of skill and care in a parturition case by which injury was inflicted on the mother and the life of the child unnecessarily destroyed. A new trial was granted because the jury were deemed to have been misled by the charge so as to overlook this latter element of the injury.

[2] Id.; Sampson v. Henry, 11 Pick. 379; Ransom v. N. Y. etc. R. R. Co. 15 N. Y. 415.

himself?[1] But in such cases, the loss or decrease of capacity to pursue one's calling and earn money is universally accepted as a proper subject of compensation. This feature of the injury will be presently considered.

In an action for personal violence it is no defense that the blows of the defendant aggravated a disease known to the plaintiff to which he was subject, and that he gave the defendant no caution in relation to it.[2] The general rule in tort is that the party who commits a trespass or other wrongful act is liable for all the direct injury resulting from such act, although such resulting injury could not have been contemplated as the probable result of the act done.[3] The plaintiff may show spe-

[1] Walker v. Erie Railway Co. 63 Barb. 260; The Oriflamme, 3 Sawyer, 397, 404; Stewart v. Ripon, 38 Wis. 584.

[2] Coleman v. New York, etc. R. R. Co. 106 Mass. 160.

[3] Per Taylor, J., in Brown v. Chicago, etc. R. R. Co. 54 Wis. 354, citing 1 Sedgw. Meas. Dam. 130, note; Eden v. Luyster, 60 N. Y. 252; Hill v. Winsor, 118 Mass. 251; Lane v. Atlantic Works, 111 id. 136; Keenan v. Cavanaugh, 44 Vt. 268; Little v. Boston, etc. R. R. Co. 66 Me. 239; Collard v. South Eastern R'y Co. 7 H. & N. 79; Hart v. Western R. R. Co. 13 Met. 99, 104; Wellington v. Downer Kerosene Oil Co. 104 Mass. 64; Metallic Compression C. Co. v. Fitchburg R. R. Co. 109 id. 277; Salisbury v. Herchenroder, 106 id. 458; Perley v. Eastern R. R. Co. 98 id. 414; Kellogg v. Chicago, etc. R'y Co. 26 Wis. 223; Patten v. Chicago, etc. R'y Co. 32 id. 524; S. C. 36 id. 413; Williams v. Vanderbilt, 28 N. Y. 217; Ward v. Vanderbilt, 34 How. Pr. 144; Bowas v. Pioneer Tow Line, 2 Sawyer, 21. See also Vol. I, p. 19; Sharp v. Powell, L. R. 7 C. P. 258; Putnam v. Broadway, etc. R. R. Co. 55 N. Y. 108; McGrew v. Stone, 53 Pa. St. 436; Servatius v. Pichel, 34 Wis. 299; Hughes v. McDonough, 43 N. J. L. 461. In Stewart v. Ripon, 38 Wis. 591, Lyon, J., said: "The public streets and sidewalks in a city are not constructed and maintained for the sole use of healthy and robust people, but for the use of the infirm, the sick and the decrepit, as well. They may lawfully be traveled by every citizen without regard to age, sex or physical condition. If the city negligently permits such streets or sidewalks to remain out of repair, and any person (who is himself free from negligence) is injured thereby, the city is liable for the injury. It is chargeable with knowledge that people of different bodily conditions travel its streets, and that among these are the weak, the decrepit, and those with organic predisposition to disease. It is reasonable to expect that in certain cases, if an injury happen to one of the latter class, his full recovery therefrom may be retarded or prevented by such predisposition or tendency to disease. In the present case the defendant is chargeable with knowledge that persons with a constitutional tendency to

cific direct effects of the injury without specially alleging them; as that he was thereby made subject to fits.[1] If they were a part of the result of the injury, the plaintiff may recover for such damage, without specially alleging it, as well as the pain and disability which followed.[2] The obviously probable effects of the injury may be given in evidence, though not laid in the declaration.[3]

Mental suffering alone, unconnected with any other injury to the person, will not support an action; it is only when some act is done which will constitute a cause of action that injury to feelings can be considered.[4] This is not a cause of action but an aggravation of damages when it naturally ensues from the act complained of. In Massachusetts a town is liable in damages for an injury to person resulting from a defect in a highway; but an action cannot be maintained on account of a risk or peril merely which has caused fright and mental suffering.[5] The court say in such a case, "though the bodily injury may have been very small, yet if it was a ground of action, within the statute, and caused mental suffering, that suffering was a part of the injury for which he was entitled to damages."[6] It was also held in an action on the case for simple negligence in

scrofula (a very large class in any community) constantly travel its streets and sidewalks, and that such tendency to that disease might greatly aggravate a bodily injury. Hence it had reasonable grounds to expect that if one of that class were injured by reason of the admitted defect in the sidewalk, the disease might develop, and greatly retard and perhaps prevent a cure, as in this case. If these views are correct, it necessarily follows that the negligence of the defendant was the proximate cause of the whole injury for which the plaintiff recovered damages." See Oliver v. La Valle, 36 Wis. 592.

A patient is not entitled to recover against a physician or surgeon for pain caused by the sickness or injury the latter is called to treat; but only for such additional pain as results from his want of skill or negligence. Wagner v. Colder.

A surgeon assumes to exercise the ordinary care and skill of his profession, and he is liable for injuries resulting from his failure to do so; yet if the patient neglects to obey his reasonable instructions and thereby contributed to the injury complained of, such patient cannot recover for such injury. Geiselman v. Scott, 25 Ohio St. 86.

[1] Tyson v. Booth, 100 Mass. 258.

[2] Id.

[3] Avery v. Ray, 1 Mass. 12.

[4] Indianapolis, etc. R. R. Co. v. Stables, 62 Ill. 313.

[5] Canning v. Williamstown, 1 Cush. 451.

[6] Id.

blasting out a ledge within the located limits of a railroad, whereby rocks were thrown upon the plaintiff's land and buildings, the plaintiff's mental anxiety in relation to his own personal safety or that of his child is not, in the absence of personal injury, an element of damage.[1] "If the law were otherwise," said Virgin, J., "it would seem that not only every passenger on a train that was personally injured, but every one that was frightened by a collision, or by trains leaving the track, could maintain an action against the company."[2]

Loss of time, injury to business, diminished working capacity.— These heads of injury are similar, and represent recoverable elements of damage where the facts of the case show that they exist. They represent in part, and often chiefly, the pecuniary loss from personal injury. To the extent that it disables the injured party to pursue his accustomed employment or business, it deprives him of pecuniary benefits which he would otherwise have realized. If he was under employment at fixed wages or salary, the amount of loss during a reasonable term of engagement, or the temporary duration of such disability, may be readily determined.[3] Where the injured party was not so employed, but was conducting a business, the extent and nature of it may be shown, and in many cases, as when professional men and other laborers have an established patronage, the antecedent pecuniary results of their labors. These facts are not shown as affording a measure of damages, but to aid the jury in estimating a fair and just compensation for being prevented by the injury from engaging in or prosecuting such business or work.[4]

[1] Wyman v. Leavitt, 71 Me. 227; 36 Am. R. 303.

[2] Id. In the note to this case in 36 Am. R. 306, the learned reporter says, "there can be no doubt that mental suffering forms a proper element of damage in actions for intentional and wilful wrong, and in actions of negligence resulting in bodily injury; but whether it forms an independent ground of action, disconnected from these facts, is more doubtful." His note, however, does not afford an instance in which it was the ground of action. In all of the cases stated there was a legal cause of action independent of injury to feelings.

[3] McIntyre v. N. Y. C. R. R. Co. 37 N. Y. 287; Grant v. Brooklyn, 41 Barb. 381. See Masterton v. Mt. Vernon, 58 N. Y. 395.

[4] Nebraska City v. Campbell, 2 Black, 590; Atchison v. King, 9 Kans. 550; Nones v. Northouse, 46 Vt. 587; Caldwell v. Murphy, 1

Under the rule that all damages which are not the necessary and proximate result of the act complained of are special and must be specially alleged, it is probably necessary to state any particular facts in the condition of the plaintiff which would afford a more precise measure or evidence of his loss, than his general ability to earn money.[1] In a Connecticut case,[2] under the general allegation that in consequence of the injury the plaintiff was "prevented from attending to his ordinary business," it was held that evidence that he was at the time of the injury earning $100 a month in carting and sawing timber was inadmissible. In another case,[3] it was held that under a like averment the plaintiff could not show any special employment requiring some special skill and training.[4] This case and Baldwin v. Western R. R. Co. would seem to be in conflict with the numerous cases which hold that the injured party may show the nature and extent of the business he had been accustomed to do.[5] In Luck v. Ripon[6] objection was made to proof of damage for injury to a woman in consequence of which she was unable to pursue her business of midwife, on two grounds: first, that the complaint failed to set out what the particular business of the plaintiff was; and second, she was not qualified to practice "physic and surgery" so as to recover compensation for

Duer, 232; Ballou v. Farnum, 11 Allen, 73; Wilson v. Young, 31 Wis. 574; Howes v. Ashfield, 99 Mass. 540; Tefft v. Wilcox, 6 Kans. 46; Lincoln v. Saratoga, etc. R. R. Co. 23 Wend. 425; Ransom v. New York, etc. R. R. Co. 15 N. Y. 415; Hill v. Winsor, 118 Mass. 251; Morse v. Auburn, etc. R. R. Co. 10 Barb. 621; Indianapolis v. Gaston, 58 Ind. 224; Morris v. Chicago, etc. R. R. Co. 45 Iowa, 29; Clifford v. Dam, 44 N. Y. Super. Ct. 391; New Jersey Express Co. v. Nichols, 33 N. J. L. 434; Tomlinson v. Derby, 43 Conn. 562; Baldwin v. Western R. R. Co. 4 Gray, 333; Jacques v. Bridgeport Horse R. R. Co. 41 Conn. 61; Walker v. Erie R. R. Co. 63 Barb. 260; Rockwell v. Third Avenue R. R. Co. 64 Barb. 438; affirmed, 53 N. Y. 625; Wade v. Leroy, 20 How. U. S. 34; Potter v. Metropolitan R'y Co. 28 L. T. N. S. 735; Ingram v. Lawson, 6 Bing. N. C. 212; Ripon v. Bittel, 30 Wis. 614, 617; Goodno v. Oshkosh, 28 id. 300.

[1] Fuller v. Bowker, 11 Mich. 204.

[2] Tomlinson v. Derby, 43 Conn. 562.

[3] Taylor v. Monroe, id. 36.

[4] Citing 2 Greenlf. Ev. § 254; 1 Chitty's Pl. (4th ed.) 328, 346; Bristol Manuf'g Co. v. Gridley, 28 Conn. 201; Squier v. Gould, 14 Wend. 159; Baldwin v. Western R. R. Co. 4 Gray, 333.

[5] See ante, p. 316, note 4.

[6] 52 Wis. 196.

her services, as such, under a statute of Wisconsin. Taylor, J., speaking for the whole court, said of the first objection: "When the complaint states facts showing that the injury has been such as to render it impossible for the injured party to pursue his ordinary business, and damages are claimed for loss of time in such business, the plaintiff should be permitted to show upon the trial what his business is, and what damages he has suffered by reason of inability to pursue the same. Ordinarily the business of the plaintiff will be known to the defendant, and he will not be surprised at the introduction of evidence upon that subject. If, however, the defendant has no knowledge of such business, and desires to be informed thereof in order to be prepared for trial, he must move to make the complaint more definite and certain in that particular. He will not be justified in lying by until the trial, and then claiming that he is unable to meet that issue for want of notice." Of the second objection he said: "Without discussing the question whether a female who practices the business of a midwife is practicing "physic or surgery" within the meaning of said section, it is sufficient answer to the objection, . . . *first*, that in this action the plaintiff is not seeking to recover any compensation for her services as a midwife; and *second*, that the statute does not make it unlawful to practice either physic or surgery without having a diploma. In pursuing her business as a midwife, the plaintiff was violating no law of this state, but was pursuing a lawful and laudable business. If she earned and received money for her services, she had a perfect right to such money. If her injuries deprived her of the income she derived from such lawful employment, there does not seem to be any more reason for saying she has not been damaged by her injury to the extent she has been deprived of such income, than there would be for saying that she had not been damaged if she had been deprived of an income as a teacher, artist, seamstress, or in any other lawful employment. The income of most men and women, whether professional or otherwise, does not depend in any great measure on the fact that they can enforce payment for services rendered by an action at law, but rather upon that sense of justice, which, in most men, is more potent than the constraints of the law, that the laborer

is worthy of his hire. It does not follow by any means that a man will not have any income in the pursuit of a lawful employment because he cannot enforce his claim to compensation for services by an action at law."

In such actions where there is claimed to be a permanent disability or decrease of mental or physical capacity for work, evidence should be given which will enable the jury to determine whether the injury is permanent, the health and condition of the plaintiff before the injury, as compared with his health consequent upon the injury; or how far and for what time it is calculated to have a disabling effect.[1]

[1] McMahon v. Northern C. R. R. Co. 39 Md. 438; Ballou v. Farnum, 11 Allen, 73; Lincoln v. Saratoga, etc. R. R. Co. 23 Wend. 425; Tefft v. Wilcox, 6 Kans. 46; Kansas P. R. R. Co. v. Painter, 9 Kans. 620; New Jersey Exp. Co. v. Nichols, 33 N. J. L. 434; Tomlinson v. Derby, 43 Conn. 562; Luck v. Ripon, 52 Wis. 196; Jacques v. Bridgeport Horse R. R. Co. 41 Conn. 61; Cleveland, etc. R. R. Co. v. Sutherland, 19 Ohio St. 151; George v. Haverhill, 110 Mass. 506. In Jacques v. Bridgeport Horse R. R. Co. supra, the suit was brought to recover damages for an injury received in consequence of the defendants' railroad track being out of repair. The plaintiff was a practicing physician, and was permitted to show the value of his practice, and its loss by the disability caused by the injury. On the trial these questions were asked on the cross examination of the plaintiff, and held erroneously excluded: "When you were absent in 1864 and 1865, was it not claimed that you were guilty of malpractice in your profession?" And "was your practice in 1864 and 1865 substantially the same as at the time of your injury?" The defendant also introduced a witness who was asked "what was the reputation of Dr. Jacques, as a physician, in 1871 [the year in which his injury occurred], and thereafter up to the time when he stopped business, as to the lawfulness or unlawfulness of his practice?" This question was also excluded by the trial court. On a motion for a new trial, on exception to these rulings, the supreme court held this language: "As the plaintiff sought to recover damages on account of being disabled from practicing his profession, his reputation, as to the lawfulness or unlawfulness of his practice, became a proper subject of inquiry. The value of that practice must have depended largely upon that reputation. If his practice was unlawful, no matter how lucrative it might have been, the loss of it would lay no foundation for the recovery of damages. The questions put to the plaintiff, and also the other witness, may not have been the best mode which could have been adopted for reaching the truth; still we think the questions should not have been excluded. The plaintiff's claim in effect put his professional reputation in issue and made these questions proper. The answers to them would tend to throw light upon the subject which the defendants had a right, under the circumstances, to investigate." This ruling is open to objec-

The recovery for loss of time or decreased capacity for work will depend on the nature of the business or calling of the injured party, or the pecuniary value of the loss of his time, or of the loss of his capacity.[1] A minor son owing service to his father cannot recover for loss of time or inability to labor or earn money during the period of his minority.[2] So a married woman cannot recover for a similar loss, because her husband is entitled to her services.[3] What amount shall be allowed is left to the sound discretion of the jury; but it should be sufficient to compensate for the injury.[4] If the plaintiff was engaged at wages at the time of the injury, and his employer continued to pay them during the period of disability, there can be no recovery for loss of wages.[5]

EXPENSES FOR SURGICAL AND MEDICAL AID AND NURSING.—Such expenses, when necessary and reasonably incurred, are part of the injury, and may be recovered under proper pleadings.[6] Such damages are generally treated as special, because

tion. The injured party would not lose his right to compensation for being prevented by his injury from pursuing his practice, merely because it was "claimed" or reported that his practice was unlawful. Reputation is not proof that in fact one's practice is unlawful, nor was it legitimate proof to controvert the plaintiff's evidence of the amount that practice had yielded.

In Baldwin v. Western R. R. Co. 4 Gray, 335, it was held that testimony that the person who was driving the carriage in which the plaintiff rode at the time of the accident, by common reputation, was a careless driver, was rightly rejected. It might have been competent for the defendant to show that he was in fact unskilful and careless in the management of a horse. But evidence on this point must come from those who can testify to the fact from their own knowledge. It cannot be proved by reputation.

[1] Chicago v. Elzeman, 71 Ill. 131; McLaughlin v. Corry, 77 Pa. St. 109; Hammond v. Mukwa, 40 Wis. 36; Hall v. Fond du Lac, 42 id. 274; Indianapolis v. Gaston, 58 Ind. 224; Penn. R. R. Co. v. Dale, 76 Pa. St. 47; Morris v. Chicago, etc. R. R. Co. 45 Iowa, 29; Chicago v. Jones, 66 Ill. 349; Chicago v. Langlass, id. 361; Nichols v. Brunswick, 3 Cliff. 81; Lombard v. Chicago, 4 Biss. 460; Gale v. N. Y. etc. R. R. Co. 13 Hun, 1; Howes v. Ashfield, 99 Mass. 540.

[2] Stewart v. Ripon, 38 Wis. 584; Jordan v. Bowen, 46 N. Y. Super. Ct. 355.

[3] Filer v. N. Y. C. R. R. Co. 49 N. Y. 47; Minick v. Troy, 19 Hun, 253. See Brooks v. Schwerin, 54 N. Y. 343.

[4] Id.

[5] Drinkwater v. Dinsmore, 80 N. Y. 390.

[6] Gale v. New York, etc. R. R. Co. 13 Hun, 1; Sheehan v. Edgar, 58 N.

they do not necessarily result from all personal injuries; but in case of severe bodily injury the assistance of physicians is so obviously necessary as to be provable under a general allegation of damages.[1] Where such expenses have been incurred by the injured party, so that he is liable therefor, he is entitled to recover for them, though they have not been paid,[2] or though they have been voluntarily paid by another.[3] And it has been held in Indiana, that wherever it is proper in such a case to prove the services of a physician or surgeon, the fair value of such services is the rule, even though they may have been rendered gratuitously.[4] This ruling has been questioned,[5] and is questioned for carrying the allowance for compensation beyond the actual injury.[6] A married woman cannot recover,

Y. 631; Beardsley v. Swann, 4 McLean, 333; Missouri, etc. R. R. Co. v. Weaver, 16 Kans. 456; Forbes v. Loftin, 50 Ala. 396; Klein v. Thompson, 19 Ohio St. 569; Morse v. Auburn, etc. R. R. Co. 10 Barb. 621; Chicago v. Jones, 66 Ill. 349; Chicago v. Langlass, id. 361; Chicago v. O'Brennan, 65 id. 160; Peoria Bridge Asso. v. Loomis, 20 id. 235; The Canadian, 1 Brown, Adm. 11; Indianapolis, etc. R. R. Co. v. Birney, 71 Ill. 391.

[1] Folsom v. Underhill, 36 Vt. 581.

[2] Gries v. Zeck, 24 Ohio St. 329.

[3] Klein v. Thompson, 19 Ohio St. 569.

[4] Indianapolis v. Gaston, 58 Ind. 227.

[5] 2 Thompson on Neg. 1258.

[6] In Drinkwater v. Dinsmore, 80 N. Y. 390, Earl, J., delivering the opinion of the court, on the point that the injured party was entitled to nothing for loss of wages where they were paid to him during his disability, referred to the exclusion of evidence offered for the purpose of mitigation, where money had been received on an accident insurance by reason of the injury in question, and of the receipt of money on other insurance in cases of suit for wrongful destruction or conversion of property. He said: "In such cases proof of the insurance actually paid would not tend to show that the damage claimed was not actually occasioned by the wrongdoer; but it would simply show that compensation had been received by the injured party, in whole or in part, from some other party,— not that the wrongdoer had made satisfaction, which alone could give him a defense.

"Here the proof was offered, not in mitigation or satisfaction of any damage actually done the plaintiff, but to show that he did not suffer the damage claimed, to wit, the loss of wages. Before the plaintiff could recover for the loss of wages, he was bound to show that he lost the wages in consequence of the injuries, and how much they were. The defendant had the right to show that he lost no wages, or that they were not as much as he claimed. He had the right to show, if he could, that for some particular reason the plaintiff would not have earned any wages if he had not been injured, or that he was under

in an action for personal injury, the physician's and nurse's bills as items of damage, because she is not liable for them.[1] In an action by a minor who has no father or guardian, for a personal injury, he may recover, as part of his damages, bills for medical attendance during any illness resulting from such injury.[2]

THE ENTIRE DAMAGES TO BE RECOVERED IN ONE ACTION,—PROSPECTIVE DAMAGES.— A personal injury from a single wrongful act or negligence is an entirety, and affords ground for only one action. In that action recovery may be had for all damages suffered up to the time of the trial, and for all which are shown to be reasonably certain or probable to be suffered in the future. Such prospective damages may include compensation for pain, disability and expenses.[3] For this reason it is important in cases of serious injury to determine the permanence of any disability or reduction of working capacity, or impairing effect upon health resulting therefrom. Besides giving compensation for future pain and the anticipated expense of treatment and nursing, it appearing that they are reasonably certain

such a contract with his employer that his wages went on without service, or that his employer paid his wages from mere benevolence. In either case, upon such showing, the plaintiff could not claim that the defendant's wrong caused him to lose his wages, and the loss of wages could form no part of his damage. So the expense of nursing may be recovered as an item of damage, if properly incurred. But the defendant may show that no such expense was incurred, as that the plaintiff was nursed by a sister of charity. So the doctor's bill may in such a case be recovered. But plaintiff must show what he paid the doctor, or was bound to pay, The defendant may show that the plaintiff was doctored at a charity hospital, or at the expense of the town or county, or gratuitously. In such case the doctor's bill could not be an element of his damage."

[1] Moody v. Osgood, 50 Barb. 628.

[2] Forbes v. Loftin, 50 Ala. 396.

[3] Elkhart v. Ritter, 66 Ind. 136; Indianapolis v. Gaston, 58 id. 224; Drinkwater v. Dinsmore, 10 Hun, 250; Tefft v. Wilcox, 6 Kans. 46; Howell v. Goodrich, 69 Ill. 556; Matteson v. N. Y. C. R. R. Co. 62 Barb. 364; Beckwith v. N. Y. C. R. R. Co. 64 id. 299; Stewart v. Ripon, 38 Wis. 584; McLaughlin v. Corry, 77 Pa. St. 109; Barbour County v. Horn, 48 Ala. 566; Goodno v. Oshkosh, 28 Wis. 300; Murray v. Hudson River R. R. Co. 47 Barb. 196; Walker v. Erie R'y Co. 63 Barb. 260; Curtis v. Rochester, etc. R. R. Co. 18 N. Y. 542; Ransom v. N. Y. etc. R. R. Co. 15 id. 415; Wiesenberg v. Appleton, 26 Wis. 56; Vol. I, pp. 193–197.

to occur, the pecuniary loss in respect of the diminution of ability to earn money is to be considered by the jury. The material inquiries on this subject will be, what is a pecuniary equivalent for this loss per year, and how long will it continue? The answer to them must be chiefly found in the nature of the injury, the age and general health of the injured party, and his antecedent earning capacity as indicated by his qualification and the character of his business or calling. In respect to years to come the recovery will be like payment in advance, and the amount should be reduced to its present worth.[1] In a Texas case the trial court instructed the jury on the estimate of damages for the difference between the ability of the party injured before the injury, and his ability afterwards to earn wages, to find no greater sum than, put at interest, would produce annually a sum equal to the difference between what the plaintiff could earn before and what he can now earn in consequence of the injury. On appeal this instruction was deemed objectionable. Bonner, J., said: "If compensation for lessened ability to labor be assumed as the true measure of damages, then it would seem that it should not be such sum as would bring an annual interest corresponding with the annual value of this lessened ability, leaving the principal sum still belonging to the estate of plaintiff after his death, although he had then become wholly incapacitated for labor; but would be an amount which would purchase an annuity equal to this interest, during the probable life of the plaintiff, calculated upon a reliable basis of the average duration of human life." [2]

A HUSBAND'S OR A PARENT'S ACTION.— The action in such cases is mostly for the pecuniary loss. A husband is entitled to the services and society of his wife, and he is bound to take care of and provide for her, in sickness as well as in health.[3] Therefore any wrongful injury to her, by which he is deprived of her services or society, is a legal injury to him; and this injury is enhanced if he has been obliged to incur

[1] Fulsome v. Concord, 46 Vt. 135.

[2] Houston, etc. R. R. Co. v. Willie, 53 Tex. 318; S. C. 37 Am. Rep. 756; McDonald v. Chicago, etc. R. R. Co. 26 Iowa, 124.

[3] Grant v. Green, 41 Iowa, 88.

expenses for her cure.[1] In one case he was held entitled to recover the sum paid by him for necessary labor and services substituted for the ordinary service of the wife, and for his own services in attending upon her.[2] So far as the husband suffers loss in being deprived of his wife's services, and in being put to expense by her illness, the loss is pecuniary; but he is also entitled to her society. The wrong may entitle the husband to substantial compensation, though the parties are in such circumstances that the wife is not accustomed or desired to do physical labor.[3] He is not entitled to recover for the pain and suffering of his injured wife; she must sue with her husband for such elements of the injury.[4] Nor can he recover for his

[1] Fuller v. Naugatuck R. R. Co. 21 Conn. 557; Barnes v. Martin, 15 Wis. 240; Kavanaugh v. Janesville, 24 Wis. 618; Filer v. N. Y. C. R. R. Co. 49 N. Y. 47; Barnes v. Hurd, 11 Mass. 59; McKinney v. Western Stage Co. 4 Iowa, 420; Rogers v. Smith, 17 Ind. 323; Mowry v. Cheney, 43 Iowa, 609; Mewhirter v. Hatten, 42 Iowa, 288; Tuttle v. C. R. I. & P. R. R. Co. id. 518; Smith v. St. Joseph, 55 Mo. 456; Berger v. Jacobs, 21 Mich. 215; Matteson v. New York C. R. R. Co. 35 N. Y. 487; Eden v. Lexington, etc. R. R. Co. 14 B. Monroe, 204; Philippi v. Wolff, 14 Abb. N. S. 196.

[2] Lindsey v. Danville, 46 Vt. 144.

[3] Cooley on Torts, 226.

[4] Hyatt v. Adams, 16 Mich. 180; Michigan Cent. R. R. Co. v. Coleman, 28 id. 440; Brooks v. Schwerin, 54 N. Y. 343; Filer v. N. Y. Cent. R. R. Co. 49 N. Y. 47; Hunter v. Ogden, 31 U. C. Q. B. 132; Ruder v. Purdy, 41 Ill. 279. In Minick v. Troy, 19 Hun, 253, it was held that in an action by a married woman, she might recover for such loss of service as she sustained herself, and towards herself. On this point, Boches, J., said: "Here, in effect, the jury were instructed that they should not allow such consequential damages as might result to the plaintiff's husband from her inability to labor. In this case, unlike Brooks v. Schwerin, 54 N. Y. 343, the plaintiff was engaged in no separate business or employment; still there remained to her many duties, privileges and services, *personal to herself*, which were proper subjects for the consideration of the jury, in connection with the suffering endured, in determining the damages to be awarded to her."

By the effect of certain statutes, married women have in some states the right to sue alone for the damages for personal injury, so far as they are themselves affected. Chicago, etc. R. R. Co. v. Dunn, 52 Ill. 260; Hayner v. Smith, 63 id. 430; Hennies v. Vogel, 66 Ill. 401; Pancoast v. Bumell, 32 Iowa, 394; Musselman v. Gallagher, id. 383. See Gibson v. Gibson, 43 Wis. 23, 29.

The damages recoverable for her injuries, in a joint action, belong to the husband when recovered, and he may release them. Southworth v.

own mental distress on account of his wife's suffering.[1] His action will not abate by his death.[2] The parent's action for injury to his child is for loss of services, and expenses of the illness and cure.[3]

In England the weight of authority is to the effect that in an action by a parent for injuries to his minor child under his care, the gravamen of the action is the loss of service; as incidental to which he may recover the expense of nursing and healing the child. But if the child be of such tender years as to be incapable of rendering any service whatever, there can be no recovery even for the expenses.[4] But in this country a more liberal rule has been adopted; and the best considered cases hold that inasmuch as it is a duty enjoined by the law of the land as well as by the laws of nature, upon the parent, to care for and heal his injured minor child, he who wilfully or negligently occasioned the injury should be held responsible for the expenses incurred, without reference to the capacity of the child to render service to the parent.[5] Wounded feelings of the parent cannot be taken into consideration,[6] nor can exem-

Packard, 7 Mass. 95; Ballard v. Russell, 33 Me. 196; Shaddock v. Clifton, 22 Wis. 114.

Under statutes providing in effect that any person receiving any bodily injury, through any defect in or want of repair of a highway, may have a right of action against the town, a husband has not been permitted to maintain a separate action for any consequences of an injury to his wife. The action is given only to the party injured, and husband and wife must join to recover for injuries to her. Harwood v. Lowell, 4 Cush. 310; Starbrid v. Frankfort, 35 Me. 89. In Sanford v. Augusta, 32 Me. 536, it was held that in order to give the statute the beneficial effect for which it was designed, the jury might allow in such joint action, compensation for loss of time from the injury to the wife, and the reasonable expenses incurred to obtain a cure.

[1] Hyatt v. Adams, 16 Mich. 180; Fillebrown v. Hoar, 124 Mass. 580.

[2] Hyatt v. Adams, supra; Eden v. Lexington, etc. R. R. Co. 14 B. Mon. 204; Green v. Hudson R. R. Co. 28 Barb. 9. See Long v. Morrison, 14 Ind. 598.

[3] Dennis v. Clark, 2 Cush. 347; Durden v. Barnett, 7 Ala. 169; Cartanos v. Ritter, 3 Duer, 370; Whitney v. Hitchcock, 4 Denio, 461; Hall v. Hollander, 7 Dowl. & Ry. 133; Magee v. Holland, 27 N. J. L. 86; Karr v. Parks, 44 Cal. 46.

[4] Add. on Torts, 902.

[5] Sykes v. Lawler, 49 Cal. 237, 238.

[6] Cowden v. Wright, 24 Wend. 429; Penn. R. Co. v. Kelly, 31 Pa. St. 372. But see Trimble v. Spiller, 7 T. B. Mon. 394, and Magee v. Holland, supra.

plary damages be recovered.[1] The parent's action is thus restricted on the ground that the child has a right of action, and may recover full damages, except such as are thus allowed to be recovered by the parent.[2]

For abduction of a minor child the parent may recover for reasonable expenses incurred in pursuit of the abducted child, though no evidence be given that the abduction was malicious.[3]

EXEMPLARY DAMAGES.— Where the action is brought by one who suffered the injury in his own person, exemplary damages may be allowed, where the doctrine of such damages prevails, if the wrong was done wantonly or with malice. There is much conflict of decision as to the allowance of such damages,

[1] In Whitney v. Hitchcock, supra, it was held in trespass for assault and battery upon the child or servant of the plaintiff, that the damage was the actual loss which the plaintiff had sustained; that exemplary damages could not be given, though the assault be of an indecent character and under circumstances of great aggravation.

[2] Id. The case of Karr v. Parks, 44 Cal. 46, is thus stated in the opinion of the court: "It appears from the evidence, that the daughter of plaintiff, between ten and eleven years of age, was attacked and gored by the defendant's cow. A wound was inflicted upon her face, which destroyed the sight of the right eye and lachrymal duct, and tore the lower lid from its attachment at the inner corner of the eye. She was immediately placed in the care of a surgeon, under whose treatment the wound healed; but there remained an eversion of the lower eyelid, which was an unseemly disfigurement of the face. The larger portion of the expense for which the plaintiff sought to recover was incurred in the endeavor to remove this disfigurement. For this purpose the child was taken to San Francisco and two surgical operations were performed — the first being an entire failure, and the other partially successful. The amount of the verdict found by the jury renders it certain that the expenses attending these operations entered largely into their estimate of damages. . . . There was evidence tending to show that the restoration of the eyelid to its normal condition would add to the child's comfort by affording protection to the eye. But the discomfort was the unavoidable result of the injury received, for which the child could recover compensation in her own suit, as she could for the immediate pain and suffering caused by the wound. There would be practically no limit to the liability of the defendant, if the father could pursue at pleasure a series of expensive surgical operations, for the purpose of removing every trace of the injury and charge the defendant with the entire cost."

[3] Rice v. Nickerson, 9 Allen, 478.

and the reader is referred to the chapter on that subject.[1] In actions for assault and battery, where a battery is proved and there is no justification or palliation, the plaintiff has a right to a fair compensation for the injury actually sustained, and this compensation, as we have seen, should include a remuneration for pain, bodily and mental, loss of time from any disability and the expenses of cure. The mental pain which will be considered for compensation is not only that which results from the corporal hurt, but also the insulting or humiliating incidents of the wrong as perpetrated.[2] The jury will be instructed to consider the entire transaction. The circumstances which would induce the allowance of punitory damages in one jurisdiction will elsewhere be generally considered as aggravations to enhance damages for compensation. Where there are such aggravations it is generally held admissible to show the wealth and social position of the parties to affect damages therefor.[3] Any facts may be shown to enhance damages which tend to show actual malice. The plaintiff may show previous threats, and for this purpose it is immaterial whether the plaintiff knew of them before the assault or not.[4]

Evidence in mitigation.— The poverty of either party or the number and ages of his children can have no relevancy to or effect upon his right to receive or his duty to make compensation.[5]

In actions for assault and battery, matters of provocation cannot be admitted in mitigation unless they happen at the time of the assault, or immediately preceding it, so as to form part of the transaction.[6] The provocation, to entitle it to be

[1] Vol. I, ch. IX.

[2] Sampson v. Henry, 11 Pick. 379.

[3] Id. 743, 744; Dailey v. Houston, 58 Mo. 361; Rowe v. Moses, 9 Rich. 423. See McKenzie v. Allen, 3 Strobh. 546; Ruder v. Purdy, 41 Ill. 279.

[4] Bartram v. Stone, 31 Conn. 159; Treat v. Barber, 7 Conn. 279.

[5] Pennsylvania Co. v. Roy, 102 U. S. 451; La Salle v. Thorndike, 7 Ill. App. 282; Pittsburg, etc. R. R. Co. v. Powers, 74 Ill. 341; Moody v. Osgood, 50 Barb. 628; S. C. 60 id. 644; Shea v. Potrere, etc. R. R. Co. 44 Cal. 415; Kansas, etc. R. R. Co. v. Painter, 9 Kans. 621; McKenzie v. Allen, 3 Strobh. 546. See Gaither v. Blowers, 11 Md. 536; Winters v. Hannibal, etc. R. R. Co. 39 Mo. 468.

[6] Willis v. Forest, 2 Duer, 310; Stetlar v. Nellis, 42 How. Pr. 163; 60 Barb. 524; Corning v. Corning, 6 N. Y. 97; Chambers v. Porter, 5 Cold. 273; Avery v. Ray, 1 Mass. 12.

given in evidence in mitigation, must be so recent and immediate as to induce a presumption that the violence done was committed under the immediate influence of the feelings and passions excited by it.[1] The defendant may show that the plaintiff immediately before charged him with a crime.[2] And no inquiry can be permitted into the truth or falsity of the charge.[3]

The bad character of the plaintiff cannot be proved in mitigation unless it in some way contributed to a provocation,[4] or is in issue upon the question of damages.[5] Where a female plaintiff, in an action for assault and battery, makes proof in aggravation of damages that the defendant took indecent liberties with her person and attempted to have sexual intercourse with her, it was held that her character for chastity was in issue on the question of damages, and that it was competent to disparage it by proving specific acts of lewdness and immorality.[6]

[1] Lee v. Woolsey, 19 John. 319.

[2] Bartram v. Stone, 31 Conn. 159.

[3] Id. See Bull v. Gould, 34 Ind. 552; Marker v. Miller, 9 Md. 338.

[4] McKenzie v. Allen, 3 Strobh. 546.

[5] Ford v. Jones, 62 Barb. 484; Verry v. Watkins, 7 C. & P. 308.

[6] Ford v. Jones, supra. In this case Potter, J., said: "The rulings of the court upon the evidence . . . raises directly the much vexed question whether, when a person's character for chastity is in issue, it is competent to disparage it by proving specific facts of immorality. The question is raised here, because the plaintiff's character for chastity is directly in issue upon the question of damages. It is directly a question of chastity and not of reputation. The material question in such a case is on the willingness or reluctance of the plaintiff to the act complained of. And the court has ruled that her character for chastity could be attacked only by proof of general reputation. I am satisfied that is wrong.

"In the first place, there is the *a priori* argument, that it is the fact of chastity, and not the *reputation* of that fact, upon which the violence of the shock to the injured party's feelings depends; that the reputation does not accord with the fact, and, as a means of proof, is therefore inferior to that by specific acts. This argument has never been answered, except by a reason of inconvenience, merely; that the plaintiff cannot be expected to come prepared to disprove specific acts; a reason which is summarily disposed of by Justice Cowen in the case of The People v. Abbott, 19 Wend. 192, 197, by the statement that 'such reason would go to show that every circumstance in a chain must be shown by reputation instead of ocular proof.'

"In the next place, I am entirely satisfied that the weight of authority is the same way. In this state there is the opinion of Justice Cowen in The People v. Abbot, supra, *obiter dictum* upon this point, it is true; but as an opinion, most

The injured party cannot recover damages which result from his own acts or want of care. He is required to observe proper precautions against increasing the injury, and to reasonably

able and exhaustive; besides, the cases of Bracy v. Kibbe, 31 Barb. 276, and Hogan v. Cregan, 6 Robt. 150, support the same view, while to the contrary there is only the case of The People v. Jackson, 3 Park. Cr. Rep. 391, which must be deemed to be overruled by the two cases above cited. And proof of specific acts has always been admitted under the seduction and abduction statutes, to show that the prosecutrix was not of 'previously chaste character.' See Carpenter v. The People, 8 Barb. 603; Crozier v. The People, 1 Park. Cr. R. 453; Safford v. The People, id. 474; People v. Kenyon, 5 id. 286; 26 N. Y. 203; People v. McArdle, 5 Park. Cr. R. 180. As the fact of a chaste character is as much at issue in this case as in those, they must be considered authorities. The shock to the plaintiff's feelings, it is natural to suppose, is proportioned to the sacred regard she entertained for her personal virtue; and the damages she would be entitled to recover ought to be regulated by the nature and extent of the injury received. Unless a distinction is permitted by the admission of evidence to this point, the lascivious wanton is put upon an equality with her of personal chastity and virtue, in her action for damages. Assault and battery is an action in which vindictive damages are allowed, depending upon the aggravation. How is this aggravation to be measured but by the degree of suffering? And how is the suffering to the feelings to be measured but by the moral sensibilities? Does the chaste and pure suffer no more, in this respect, than the prostitute? The rule would otherwise be unjust.

"In other states, the cases upon this point of the admission of evidence are conflicting. Iowa and California holding the evidence of specific acts to be admissible; and those of New Hampshire, North Carolina and Arkansas the reverse. See Reed v. Williams, 5 Sneed, 580. A *dictum* to the same effect has also been uttered by the supreme court of Ohio, and a *semble* by that of Georgia. See 5 Sneed, 580; Smith v. Melburn, 17 Iowa, 30; People v. Benson, 6 Cal. 221; State v. Knapp, 45 N. H. 148; State v. Jefferson, 6 Ired. 305; McCombs v. State, 8 Ohio St. 645; Camp v. State, 3 Ga. 417; Pleasants v. State, 15 Ark. 624.

"The authority of the English courts must also be held to be in favor of admitting the evidence of specific acts. The earlier cases of Rex v. Hodgson, Russ. & Ry. C. C. 211, and Rex v. Clarke, 2 Stark. 241, which presented much difficulty to Justice Cowen in his opinion in The People v. Abbot, have been doubted, and practically overruled by the later cases of Rex v. Barker, 3 Car. & P. 589; Verry v. Watkins, 7 id. 308; Reg. v. Robins, 2 M. & Rob. 512; Reg. v. Martin, 6 C. & P. 562; Reg. v. Tissington, 1 Cox C. C. 48; and Reg. v. Mercer, 6 Jur. 243. And in Carpenter v. Wall, 11 A. & E. 803, the reasoning of the court is to the same effect.

"Besides, in analogous cases, specific acts may be shown; as in passing counterfeit money, on the question of scienter (1 Phil. Ev. 179, 7th ed.); and in an action for breach

exert himself to obtain a cure. Such part of the damages he sustains as the defendant can show has resulted from the plaintiff's fault will be deducted from his recovery.[1]

PROVINCE OF THE JURY, AND INSTRUCTIONS TO THEM.— There being no legal measure of damages for pain and suffering, the amount which a jury may award in an action for personal injury is peculiarly within their discretion. They should exercise a calm and dispassionate judgment in view of all the facts established by the evidence, under the instructions of the court. The parties are entitled to the judgment of the jury, and it is not within the province of the court to decide on the amount of damages.[2] Courts will not set aside verdicts either on the ground that the damages are excessive or inadequate, unless it is apparent that the jury acted under some bias, prejudice or improper influence, or have made some mistake of fact or law.[3]

of promise of marriage, acts pointing to lightness of character may be shown. Willard v. Stone, 7 Cowen, 23; Johnson v. Caulkins, 1 John. Cas. 116.

"I take it that where character is directly in issue, specific acts may be proved; but where the issue is collateral, as upon the credibility of a witness, the proof must be confined to general reputation.

"In the absence of authority, I think, upon principle, the evidence ought not to have been excluded. Facts and circumstances ought to be permitted, in evidence, which go to regulate the amount of the verdict, so as to arrive at a just result. It is, in my opinion, manifestly unjust that facts should be withholden from a jury which would and ought to lessen the damages. While it may be proper for a jury to take into consideration, and give damages for, suffering in mind, and which they may justly estimate by necessary inference from facts calculated to produce such suffering, I think the evidence of such suffering, which is of the party's own making, should either be excluded, or, if admitted, the party responsible should be permitted to show, by specific facts, those matters which would rebut such pretended suffering. The probabilities of assent or of non-resistance are a legitimate inference from the fact of former promiscuous intercourse, or former particular acts of lewdness." See ante, p. 679.

[1] Vol. I, pp. 237, 238; Geiselman v. Scott, 25 Ohio St. 86; Nashville, etc. R. R. Co. v. Smith, 6 Heisk. 174; Gould v. McKenna, 86 Pa. St. 297.

[2] Kimball v. Bath, 38 Me. 219; McKinley v. Chicago, etc. R. R. Co. 44 Iowa, 822; Butler v. Bangor, 67 Me. 385; Jacobs v. Bangor, 16 id. 187; Shartle v. Minneapolis, 17 Minn. 308; Wightman v. Providence, 1 Cliff. 530; Chicago v. Smith, 48 Ill. 107; Gale v. New York, etc. R. R. Co. 13 Hun, 1; Weisenberg v. Appleton, 26 Wis. 56; Vol. I, p. 810.

[3] Id.; Coleman v. Southwick, 9 John. 45.

It is the duty of the court to determine whether the jury may consider the question of allowing exemplary damages, and when it is submitted the jury may allow such damages or not according to their judgment of the case.[1] It will be error if the court withhold that question from the jury in a case proper for such damages,[2] and a verdict which includes them in a case where only compensation should be given will be set aside.[3] It is matter of law to determine the elements of damage. On the trial the evidence should not be permitted to embrace any elements not proper to be considered; but incidentally on the trial of proper questions, irrelevant matters sometimes creep in. By instructions the court should, as far as practicable, eliminate them, and direct the jury to those elements on which their estimate should be made. It is error to submit such cases with the general instruction that the jury may find such damages as in their judgment, from the evidence in the cause, the plaintiff ought to recover; thus giving the jury free scope to give such damages as, according to their individual notions of right and wrong, they might think the plaintiff ought to have, unguided by any legal rule as to the elements.[4] In a late Connecticut case,[5] Loomis, J., said: "The parties made no requests in relation to the damages. And it may not be perfectly clear that we ought to grant a new trial on account of the charge as given on this subject. It was, however, somewhat objectionable as not giving the jury any rule at all on the subject, except 'their own sense of right and justice,' and that, too, in a case where sympathy for the plaintiff would naturally produce a powerful effect. There was danger that the jury might take the charge as meaning that their power over the damages was practically unlimited by any other rule."

False imprisonment.— The injury of being illegally restrained of one's liberty is akin to that suffered from assault and bat-

[1] Myers v. San Francisco, 42 Cal. 315; Owen v. Brockschmidt, 54 Mo. 289.

[2] Bass v. Chicago, etc. R. R. Co. 39 Wis. 636.

[3] Chicago v. Langlass, 52 Ill. 256; Chicago v. Kelley, 69 id. 475; Decatur v. Fisher, 53 id. 407; Keightlinger v. Egan, 65 id. 235; Chicago, etc. R. R. Co. v. McKittrick, 78 id. 619; Nashville, etc. R. R. Co. v. Smith, 6 Heisk. 174; Goodno v. Oshkosh, 28 Wis. 304.

[4] Keightlinger v. Egan, supra.

[5] Wilson v. Granby, 47 Conn. 47.

tery.[1] The injured party, in such cases, even though the act complained of be done without malice, is entitled to recover the expenses reasonably incurred to procure discharge from the restraint, for loss of time, interruption of his business, and the suffering, bodily and mental, which the wrong may have occasioned.[2] The filthy condition of the jail in which the plaintiff was confined, or any other discomfort or deprivation, may be shown to enhance compensatory damages for mental anguish and discomfort.[3] The plaintiff may recover for loss of work not only up to the time of the suit, but also for the time lost after the suit, if by the arrest he failed to get the work he otherwise would have obtained.[4] Where a master of a vessel unjustifiably imprisoned a seaman until his effects on board were lost or sold, it was held that the damages should not be vindictive unless the motives of the master were bad; but compensation should usually be made for the time of the imprisonment, the value of the articles lost or sold, and interest on the amount, and passage home.[5]

The arrest being unlawful, it is not necessary to prove malice;[6] and probable cause is only material in mitigation of damages.[7] A declaration which alleges that the imprisonment was by means of threats and violence and without any reasonable cause, and unlawful, states the ingredients of malice, and is broad enough to support a charge on that basis.[8] And in such cases, when there is no possible way of measuring damages with any certainty, the sound discretion of the jury under all the circumstances is the only measure practicable.[9]

If the defendant was actuated in causing the arrest by actual

[1] Cooley on Torts, 169; Comer v. Knowles, 19 Kans. 440, 441.

[2] Parsons v. Harper, 16 Gratt. 64; Fenelon v. Butts, 53 Wis. 344; Stewart v. Maddox, 63 Ind. 51; Jay v. Almy, 1 Woodb. & M. 262; Bonesteel v. Bonesteel, 30 Wis. 511; Blythe v. Tompkins, 2 Abb. Pr. 468; Abrahams v. Cooper, 81 Pa. St. 232.

[3] Fenelon v. Butts, supra; Kindred v. Stitt, 51 Ill. 401; Abrahams v. Cooper, 81 Pa. St. 232.

[4] Thompson v. Ellsworth, 39 Mich. 719.

[5] Jay v. Almy, 1 Woodb. & M. 262.

[6] Chismon v. Carney, 33 Ark. 316; Painter v. Ives, 4 Neb. 122.

[7] Norman v. Manciette, 1 Sawyer, 484; Sleight v. Ogle, 4 E. D. Smith, 445; Brown v. Chadsey, 39 Barb. 253.

[8] Brushaber v. Stegemann, 22 Mich. 266, 270.

[9] Id. See Josselyn v. McAllister, 22 Mich. 300.

malice, damages will be aggravated on account of the malice.[1] But the absence of malice, and proof of good faith, will be no justification of an unlawful imprisonment, nor exempt the wrongdoer from the payment of actual damages.[2] Exemplary damages should not be allowed against an officer who makes or causes an illegal arrest, unless he acts in bad faith, or is guilty of some oppression or misconduct.[3] But where an officer is guilty of bad faith, or one not an officer sets the law in motion and causes an arrest on process, in bad faith, the jury will be warranted in allowing liberal damages.[4] So far as damages depend on malice and would be enhanced by it, they will be reduced by proof which negatives malice. Evidence of good faith is therefore generally admissible in mitigation; but this mitigation will be limited to the damages it tends to controvert.[5]

[1] Parsons v. Harper, 16 Gratt. 64; Parsons v. Lloyd, 3 Wils. 341; S. C. 2 W. Bl. 845; Turner v. Telgate, 1 Lev. 95; Barker v. Braham, 3 Wils. 368; Codrington v. Lloyd, 8 A. & El. 449; Curry v. Pringle, 11 John. 444; Gold v. Bissell, 1 Wend. 210; Fellows v. Goodman, 49 Mo. 62; Warwick v. Foulkes, 12 M. & W. 507; Josselyn v. McAllister, 22 Mich. 300.

[2] Painter v. Ives, 4 Neb. 122; Comer v. Knowles, 17 Kans. 440, 441; Newton v. Locklin, 77 Ill. 103; Carey v. Sheets, 60 Ind. 17; Van Deusen v. Newcomer, 40 Mich. 90; McCall v. McDowell, Deady, 233. A person was convicted before a justice of two distinct offenses, and committed to the house of correction under two warrants, one legal and the other illegal, and held under both warrants during the whole period of his imprisonment; held, his imprisonment was lawful, and that if the justice was liable at all for issuing the illegal warrant, he was liable only for nominal damages. Doherty v. Munson, 127 Mass. 495.

[3] Hamlin v. Spaulding, 27 Wis. 360; La Roe v. Roeser, 8 Mich. 537; McCall v. McDowell, Deady, 233; Dinsman v. Wilke, 12 How. 405.

[4] Marsh v. Smith, 49 Ill. 399; Fellows v. Goodman, 49 Mo. 62.

[5] Brown v. Chadsey, 39 Barb. 262; Fenelon v. Butts, 53 Wis. 344. In Brown v. Chadsey, supra, Emott, J., said: "In an action for false imprisonment, the gist of the action is an unlawful detention. Malice in the defendant will be inferred, so far at least as to sustain the action; and the only bearing of evidence to show or disprove malice is upon the question of damages. So, also, probable cause, or reasonable grounds of suspicion, against the party arrested, afford no justification of an arrest or imprisonment which is without authority of law."

In Comer v. Knowles, 17 Kans. 441, Valentine, J., said: "Malice and wilfulness are not essential elements of false imprisonment; and in this the action of false imprisonment differs from that of libel, slander, malicious prosecution, and perhaps some others. It is true,

however, that malice and wilfulness may belong to any particular case of false imprisonment; but when they do so belong to such particular case, they belong to it as a portion of the *special* facts of that case, for which special or exemplary damages may be awarded, and do not belong to the case as a portion of the general and essential facts of the case for which general damages may be awarded. In the present case I should think that the plaintiff below did not claim that the defendant below acted wilfully or maliciously, and did not claim that he, the plaintiff, had any right to recover enhanced damages on account of any wilfulness or malice. If I am correct in this, the court below did not err in excluding the defendant's evidence. For all that such evidence tended to prove was, that the defendant acted honestly and in good faith in temporarily depriving the plaintiff of his liberty. Such evidence did not tend to prove that the defendant acted legally; and it could not be introduced for the purpose of diminishing the general and actual damages which the plaintiff sustained. Now, if the plaintiff had claimed enhanced damages, or, in other words, exemplary damages, on account of any wilfulness or malice on the part of the defendant, then said evidence would have been admissible in mitigation of such damages, and the court below in that case could not rightfully have excluded the evidence."

CHAPTER XXVII.

SEDUCTION.

The technical not the real gist of the action — Who may maintain it — Evidence for plaintiff, and damages recoverable — Evidence for defendant, and what may be considered in mitigation — Criminal conversation.

THE TECHNICAL NOT THE REAL GIST OF THE ACTION.— At common law this action rests on the relation of master and servant, and proceeds in form for loss of service. Trespass *vi et armis* is deemed the proper action where the servant resides with the master or parent; case may also be brought where the injury is not committed with force, or where the servant is only constructively in the master's service.[1] Slight evidence will establish sufficiently the relation, and the extent of the loss of service is not the measure of damages. The allegations and proof on these points are almost an unmeaning formula — an obeisance to a shadow of the past — to reach the actual grievance. The action in reality is to afford redress for the injury done to the parent or other near relative or person standing *in loco parentis*, for the dishonor and degradation suffered by the family in consequence of the seduction.[2] And large damages, which the court will seldom relieve against,[3] are recoverable, both for recompense to the plaintiff and punishment to the defendant. Caton, J., said: "Technically, the ground of recovery is the loss of the services of the daughter, and the rule of the books seems to be that the father must prove some service, in order to entitle him to maintain the action. This is nominally the ground on which the plaintiff's right of action rests, while, practically, the right to recover rests on far higher

[1] Briggs v. Evans, 5 Ired. L. 16; Parker v. Meek, 3 Sneed, 29; Mercer v. Walmsley, 5 Har. & J. 27; Magninay v. Saudek, 5 Sneed, 146; Sutton v. Huffman, 32 N. J. L. 58; Greenwood v. Greenwood, 28 Md. 369; Bartley v. Richtmyer, 4 N. Y. 38; Cooley on Torts, 232, 233; Emery v. Gowen, 4 Greenlf. 33; Clough v. Tenney, 5 id. 446.

[2] Coon v. Moffitt, 3 N. J. L. (*583), 169; Badgley v. Decker, 44 Barb. 577; Holliday v. Parker, 23 Hun, 72, 73.

[3] Bennett v. Beam, 42 Mich. 346; Sargent v. ———, 5 Cow. 106.

grounds, that is, the relation of parent and child, or guardian and ward, or husband and wife, as well as that of master and servant; and it seems almost beneath the dignity of the law to resort to a sort of subterfuge to give the father a right of action which is widely different from that for which he is really allowed to recover damages. But the law may still require proof of service, or at least the right to service when the child is a minor; but this, as well as any other fact, may be proved by circumstances sufficient in themselves to satisfy the jury that the party seduced did actually render service to the plaintiff, and the most trivial service has always been held sufficient."[1] Even in England, where stricter proof of service is required, Blackburn, J., said: "In effect, the damages are given to the plaintiff as standing in the relation of parent; and the action has at present no reference to the relation of master and servant, beyond the mere technical point on which the action is founded."[2] This is according to the general current of authority.[3] While the courts adhere so far to the original distinctive character of the action as to require proof that the seduced female was in the service of the plaintiff at the time of the seduction, they do not require very strict proof; very slight evidence of loss of service suffices in favor of one standing *in loco parentis*, and affected by the graver consequences of the seduction.[4] The actual loss sustained by the plaintiff, through the diminished ability of his daughter, relative or ward, to yield him personal service, as well as the servile position of the supposed servant herself in the family of her protector, is ordinarily little more than a mere fiction. It is one of those cases in which an action devised for one purpose has been found to serve a different one, by the aid of the discretion which

[1] Doyle v. Jessup, 29 Ill. 462; Badgley v. Decker, 44 Barb. 589; Martin v. Payne, 9 John. 387; Hewit v. Prime, 21 Wend. 79; White v. Nellis, 31 Barb. 279; Kennedy v. Shea, 110 Mass. 147; Herring v. Jester, 2 Houst. 66.

[2] Terry v. Hutchinson, L. R. 3 Q. B. 602.

[3] Ellington v. Ellington, 47 Miss. 329; Patterson v. Thompson, 24 Ark. 55; Keller v. Donnelly, 5 Md. 211; Paterson v. Wilcox, 20 U. C. C. P. 385; Phillips v. Hoyle, 4 Gray, 568; White v. Martland, 71 Ill. 250.

[4] Davidson v. Goodall, 18 N. H. 427; Hewit v. Prime, 21 Wend. 79; Maunder v. Venn, 1 Wood. & M. 323; Clark v. Fitch, 2 Wend. 459; Gray v. Durland, 51 N. Y. 424.

courts have assumed in instructing the jury, and the readiness of the jury to render substantial justice by their verdict, where the forms of law imposed by the instructions of the court admit of their doing so.[1]

WHO MAY MAINTAIN THE ACTION.— The person seduced, whether a minor or of full age, cannot maintain an action for her own seduction; she, being a partaker in the offense, cannot, it is said, come into court to obtain satisfaction for a supposed injury to which she consented.[2] The only mode in which the action has ever been maintained, except in pursuance of some statute,[3] has been by bringing it in the name of some person having a right to the services of the person seduced; and in that action damages are recoverable, not only for actual loss of service, but for a sum sufficient to punish the seducer.[4]

The father has a right to the services of his minor daughter; and he may maintain the action without proof of actual service, and though the daughter were at service away from home, if he had not divested himself of the right to recall her to his service.[5] He will not be deprived of his remedy though death result from the pregnancy following the seduction.[6]

A mother, in case of the father's death, has the same right to the services of her child as the father would have if living;[7]

[1] Davidson v. Goodall, supra.

[2] Paul v. Frazier, 3 Mass. 71; Woodward v. Anderson, 9 Bush, 624; Hamilton v. Lomax, 26 Barb. 615; Smith v. Richards, 29 Conn. 232, 240. See Fidler v. McKinley, 21 Ill. 308.

[3] Provision has been made by statutes in Michigan, Indiana, California, Alabama, Iowa, and perhaps other states, for actions by the female seduced, in which she is permitted to recover such damages as juries will allow her. See 4 Am. Rep. 406.

[4] Hamilton v. Lomax, supra.

[5] Martin v. Payne, 9 John. 387; Nickleson v. Stryker, 10 id. 115; Bartley v. Richtmyer, 4 N. Y. 38; Mulvehall v. Millward, 11 id. 343; Dain v. Wycoff, 7 id. 191; Kennedy v. Shea, 110 Mass. 147; Hewit v. Prime, 21 Wend. 79; Greenwood v. Greenwood, 28 Md. 369; Boyd v. Byrd, 8 Blackf. 113; Keller v. Donnelly, 5 Md. 211; Kendrick v. McCrary, 11 Ga. 603; Vassel v. Cole, 10 Mo. 634; White v. Martland, 71 Ill. 250; Mohry v. Hoffman, 86 Pa. St. 38.

[6] Ingerson v. Miller, 47 Barb. 47.

[7] Gray v. Durland, 50 Barb. 100; S. C. 50 N. Y. 424; Furman v. Van Sise, 56 id. 435; Dedham v. Natick, 16 Mass. 135; Blanchard v. Ilsley, 120 id. 487; Matthewson v. Perry, 37 Conn. 435; Damon v. Moore, 5 Lans. 454; Keller v. Donnelly, 5 Md. 211; Villipique v. Shuler, 3 Strobh. 462.

and may sue for her seduction. There are, however, some adverse decisions.[1]

A father loses the right to his daughter's service when she arrives of age; but if afterwards she still continues to reside with him, and is to some extent in his service, he may sue for her seduction, happening during the time of such service.[2] The mere relation of parent and child will not give a right of action for the seduction of an unmarried female, but the relation of master and servant, either actual or constructive, must exist. She must be under his actual or constructive control and dominion. If such a relation exists, it matters not to the cause of action whether the plaintiff be the parent, or merely stands in the relation of parent. An uncle, an aunt, a stepfather, a brother, or one having no relationship or affinity to the injured female, can sustain the action.[3] It is not necessary

[1] South v. Denneston, 2 Watts, 474; Bartley v. Richtmyer, 4 N. Y. 38. In Badgley v. Decker, 44 Barb. 577, it was held that at common law the mother could not maintain an action for the seduction of the daughter while the father was living. But since the recent statutes of that state respecting married women, where a husband has abandoned his wife and family, and resides in another state, the wife, owning a house and being engaged in the business of keeping boarders, on her sole and separate account, may sue alone for the seduction of her daughter, over twenty-one years of age, who resides with and performs service for her about the house.

In George v. Van Horn, 9 Barb. 523, it was held that an action cannot be maintained by a mother, after the death of her husband, for seduction of their daughter in his life-time, when the daughter at the time of the seduction was over twenty-one years of age, and was residing with her brother at his residence, and taking charge of his family. The court also held that the executors and administrators of a deceased father or mother cannot maintain this action for the seduction of his daughter in his life-time. As well might the action lie, say the court, for criminal conversation with his wife. They cannot represent his aggravated feelings, and the personal disgrace heaped upon him by such events. These causes of action are purely personal, and like assaults, libel and slander, die with the person. Logan v. Murray, 6 S. & R. 175. See Holliday v. Parker, 23 Hun, 71; Noice v. Brown, 39 N. T. L. 569; Coon v. Moffitt, 3 N. J. L. 436.

[2] Nickleson v. Stryker, 10 John. 115; Briggs v. Evans, 5 Ired. 21; Millar v. Thompson, 1 Wend. 447; Lee v. Hodges, 13 Gratt. 726; Sutton v. Huffman, 32 N. J. L. 58; Wilhoit v. Hancock, 5 Bush, 567; Bartley v. Richtmyer, 2 Barb. 182; Dain v. Wycoff, 7 N. Y. 191; Patterson v. Thompson, 24 Ark. 55; George v. Van Horn, 9 Barb. 523.

[3] Furman v. Van Sise, 56 N. Y. 441; Clark v. Fitch, 2 Wend. 459; Martin v. Payne, 9 John. 387; Millar

that the arrangement by which the relation of master and servant is established should have any permanent binding force between the parties to it. If it exist in fact, and the immediate parties are acting under it at the time of the seduction, however imperfect its obligation may be, the defendant, who by his wrongful act has interrupted it, cannot set up that it was liable to be revoked at any time without the assent of the master.[1]

EVIDENCE FOR PLAINTIFF, AND DAMAGES RECOVERABLE.— The rule as to damages is the same whether the daughter be a minor or of full age; the plaintiff is not limited in his recovery to mere compensatory damages. He may recover exemplary damages when he is so connected with her as to be capable of receiving injury through her dishonor.[2] In estimating the injury, the jury may take into consideration, besides the loss of services, and the disbursements for medical treatment, and other necessary expenses, the wounded feelings and affections of the parent, the wrong done to him in his domestic and social relations, the stain and dishonor brought upon his family, and the grief and affliction suffered in consequence of it, and give damages accordingly.[3] If the action is brought by any other person than a parent, standing in the relation of parent, it will be governed by the same principles and rules of evidence; and

v. Thompson, 1 Wend. 447; Davidson v. Goodall, 18 N. H. 423; Ball v. Bruce, 21 Ill. 161; Roberts v. Connelly, 14 Ala. 235; Bartley v. Richtmyer, 4 N. Y. 38; Mulvehall v. Millward, 11 id. 343; Dain v. Wycoff, 18 id. 45; Fernsler v. Moyer, 3 W. & S. 416; Coon v. Moffitt, 3 N. J. L. 436; Manvell v. Thomson, 2 C. & P. 303; Edmunson v. Machell, 2 T. R. 4; Irwin v. Dearman, 11 East, 23; Ingersoll v. Jones, 5 Barb. 661; Bracey v. Kibbe, 31 Barb. 273; Knight v. Wilcox, 15 Barb. 279; Paterson v. Wilcox, 20 U. C. C. P. 385; Magninay v. Saudek, 5 Sneed, 146.

[1] Lipe v. Eisenlerd, 32 N. Y. 229, 234; Gray v. Durland, 51 id. 424.

[2] Lipe v. Eisenlerd, 32 N. Y. 229; Damon v. Moore, 5 Lans. 454; Badgley v. Decker, 44 Barb. 577; Wilson v. Sproul, 3 Penn. & W. 49; Hornketh v. Barr, 8 S. & R. 36; Knight v. Wilcox, 18 Barb. 212.

[3] Herring v. Jester, 2 Houst. 66; Taylor v. Shelkett, 66 Ind. 297; Fox v. Stevens, 13 Minn. 272; Paterson v. Wilcox, 20 U. C. C. P. 385; Wilson v. Sproul, 3 Penn. 49; Hornketh v. Barr, 8 S. & R. 36; Coon v. Moffitt, 3 N. J. L. 436; Pruitt v. Cox, 21 Ind. 15; Phillips v. Hoyle, 4 Gray, 568; Hatch v. Fuller, 131 Mass. 574; Felkner v. Scarlet, 29 Ind. 154; White v. Martland, 71 Ill. 250; Kendrick v. McCrary, 11 Ga. 603; Blagge v. Ilsley, 127 Mass. 198.

the court and jury at the trial will make the proper discrimination as respects the quantum of damages.[1]

As the action is not maintainable on the mere relation of parent and child, there must be some proof of loss of service, or other loss, resulting from the seduction. Proof of sexual intercourse, or even of seduction, will not sustain the action.[2] The plaintiff must show that there resulted therefrom some direct injury to his rights as master.[3] It will be assumed that there is a loss of service if pregnancy follows, or sickness, or the communication of any disease.[4] So if the sense of shame and wrongdoing diminish her ability to render service.[5]

Pregnancy and the birth of a child are not essential. It is sufficient if there be illness of the daughter, resulting from the seduction, and a consequent inability, or reduced ability, to labor; or if there be expenses necessitated by the same cause.[6]

[1] Magninay v. Saudek, 5 Sneed, 146.

[2] Delvee v. Boardman, 20 Iowa, 446; Hill v. Wilson, 8 Blackf. 123.

[3] White v. Nellis, 31 N. Y. 405.

[4] Anderson v. Ryan, 8 Ill. 583; Leucker v. Steileu, 89 id. 545; Hewit v. Prime, 21 Wend. 79; Hogan v. Cregan, 6 Robt. 138.

[5] In Blagge v. Ilsley, 127 Mass. 191, Colt, J., said: "There was evidence from several witnesses, including the plaintiff and the daughter, that the latter appeared strong and well before the alleged seduction, and that afterwards she became nervous and excitable, and did not appear to be herself. Upon this part of the case the jury were told that the plaintiff might recover, if they were satisfied that, as the immediate result of the criminal act, the health of the daughter failed, and there was a consequent loss of ability to render service; and it must have been found by the jury that the proximate effect of the seduction was an incapacity to work. "In the opinion of a majority of the court, it cannot be declared, as matter of law, that this instruction was erroneous, or that the evidence did not justify the finding. The decline in the daughter's health and spirits directly followed the wrong charged. The daughter was herself a witness, and there was opportunity for the jury to judge of her physical strength and temperament, her natural delicacy and sensibility to the injury alleged. It cannot be laid down as a matter of law, that loss of health would not be the natural, probable and direct consequence of the defendant's act, although that act was followed by no sexual disease and no pregnancy. Shame, humiliation and mental distress, affecting the sensibilities of the victim and her capacity for faithful service, may well be a probable and natural consequence of the wrong, wholly without regard to the fear of abandonment or exposure."

[6] Night v. Wilcox, 18 Barb. 212; White v. Nellis, 31 id. 279; Abraham

It is not important to the right of action that the loss should result from the seduction in any particular way. It will be enough if a loss has been occasioned which is a legal, natural and direct consequence of the wrong.[1] Where the illness of the daughter, following seduction, was not the consequence of the seduction, but of the publication of her shame, it will not be deemed a proximate result of the wrong.[2]

It is competent to show the circumstances under which the female was seduced, and the means used for corrupting her mind,—the promises, flattery or deception employed.[3] An exception has been made of promises of marriage, by some courts, because the damages for the breach of it belongs to the daughter seduced.[4] When such evidence is admitted, the jury should be cautioned to give no damages for breach of the marriage promise.[5] It may be proved in what manner and on what terms the defendant visited her, the family and her relations.[6] Evidence, in a father's action, of a promise of marriage is not admissible as a ground of damage.[7] Nor can he recover compensation for the support and maintenance of the illegitimate child.[8] But where the seduced may sue in her own name, she may allege and prove both the promise of marriage and seduction, with a view to damages for the double wrong.[9] The plaintiff may show his relationship to the seduced, and

v. Kidney, 104 Mass. 222; Stiles v. Tilford, 10 Wend. 339; Blagge v. Ilsley, supra.

[1] Night v. Wilcox, 15 Barb. 279.

[2] Night v. Wilcox, 14 N. Y. 413.

[3] Bracey v. Kibbe, 31 Barb. 273; Phelin v. Kenderdine, 20 Pa. St. 354; White v. Campbell, 13 Gratt. 573; Fox v. Stevens, 13 Minn. 272; Kahn v. Freytag, 2 Robt. 678; Parker v. Monteith, 7 Or. 277.

[4] Foster v. Scofield, 1 John. 297; Clark v. Fitch, 2 Wend. 459; Gillett v. Mead, 7 id. 193; Whitney v. Elmer, 60 Barb. 250; Brownell v. McEwen, 5 Denio, 367; Kip v. Berdan, 20 N. J. L. 239.

[5] Phelin v. Kenderdine, 20 Pa. St. 354.

[6] Herring v. Jester, 2 Houst. 66; Parker v. Monteith, supra; Davidson v. Goodall, 18 N. H. 423; Brownell v. McEwan, 5 Denio, 367.

[7] Robinson v. Burton, 5 Harr. 335; Gillett v. Mead, 7 Wend. 193; Whitney v. Elmer, 60 Barb. 250; Odell v. Stephens, 12 Ind. 384; Herring v. Jester, 2 Houst. 66; Kip v. Berdan, 20 N. J. L. 239; Hines v. Sinclair, 23 Vt. 108.

[8] Hitchman v. Whitney, 9 Harr. 512; Sargent v. ———, 5 Cow. 106.

[9] Ante, p. 316; Lee v. Hefley, 21 Ind. 98.

the situation of the family.[1] He may show also that the defendant aggravated his wrongdoing by producing an abortion.[2] There is some conflict of decision on the question of proving the character and social standing of the plaintiff; but it is believed that where he sustains such relation to the seduced as to suffer injury to his feelings through her dishonor, it is, according to the weight of authority, competent for him to show, to affect damages, the character and social standing of his own family, and the defendant's pecuniary circumstances.[3]

EVIDENCE FOR DEFENDANT, AND WHAT MAY BE CONSIDERED IN MITIGATION.— The bad moral character of the plaintiff, and his character for chastity, it is held in New York, cannot be proved in reduction of damages. Comstock, J., speaking for the court, said: "It is true that, in actions of this kind, compensation is given for injured sensibilities of the parent, and that a pecuniary value is placed upon the society and attentions of a virtuous daughter. But to justify evidence of bad reputation in general, or in a particular respect, it must first be shown that the sensibilities of such a parent are less acute, and that the society and affections of a virtuous daughter are to him less valuable than to other men. This cannot be affirmed, in fact, and there is no such presumption in law."[4] The defendant will not be permitted to show that the plaintiff is devoid of natural sensibilities.[5] In Delaware it has been held that the defendant may show the plaintiff's dissolute habits, though not his general reputation in respect to virtue;[6] and in Tennessee, that it may be shown by general reputation that the plaintiff is a person of profligate principles and dissolute habits, but evidence of particular acts should not be received.[7] It is no defense

[1] Wilson v. Sproul, 3 Penn. & W. 49.

[2] White v. Martland, 71 Ill. 250; Klopfer v. Bromme, 26 Wis. 372.

[3] McAuley v. Birkhead, 13 Ired. 28; Grable v. Margrave, 4 Ill. 372; Herring v. Jester, 2 Houst. 66; White v. Martland, 71 Ill. 250; Clem v. Holmes, 33 Gratt. 722; 36 Am. R. 793; Parker v. Monteith, 7 Oreg. 277. See Haynes v. Sinclair, 23 Vt. 108.

[4] Dain v. Wyckoff, 18 N. Y. 47.

[5] Grider v. Dent, 22 Mo. 490.

[6] Robinson v. Burton, 5 Harr. 335.

[7] Reed v. Williams, 5 Sneed, 580; Thompson v. Clendening, 1 Head, 287.

to the parent's action that the daughter consented willingly to the seduction; for her consent will not deprive such plaintiff of his action.[1]

It is presumed, in the absence of evidence to the contrary, that she was a virtuous girl at the time of the seduction, and was a comfort and help to her parents, if living at home.[2] But the general character of the female seduced is in issue on the question of damages. It may be impeached by general evidence.[3] And specific acts of lewdness and immorality may, in some of the states, be shown.[4] But in others, the evidence to impeach her character for chastity must be confined to general reputation.[5] Previous chastity is not essential to the cause of action, but antecedent misconduct may have much influence on the question of damages.[6]

The consent or connivance of the parent, or one suing in the character of master, to the seduction, will be a bar to the action. And conduct, not amounting to consent or connivance, but only to negligence, or want of ordinary prudence, may be shown as tending to mitigate damages.[7] In such action, it has been ruled that a marriage between the seducer and the seduced, and his acquittal on an indictment for the seduction, may be proved for the same purpose.[8] In Illinois and elsewhere it has

[1] McAuley v. Birkhead, 13 Ired. 28.

[2] People v. Brewer, 27 Mich. 137.

[3] Reed v. Williams, 5 Sneed, 580; Robinson v. Burton, 5 Harr. 335; Smith v. Milburn, 17 Iowa, 30; Lea v. Henderson, 1 Cold. 146; Bamfield v. Massey, 1 Camp. 461; Dodd v. Norris, 3 id. 519. See Wallace v. Clark, 2 Overt. 93.

[4] White v. Martland, 71 Ill. 250; Love v. Masoner, 6 Baxter, 24; Very v. Watkins, 7 C. & P. 308; Hogan v. Cregan, 6 Robt. 138; Kahn v. Freytag, 2 id. 678. See Ford v. Jones, 62 Barb. 484.

[5] Shattuck v. Myers, 13 Ind. 46; Hoffman v. Kermerer, 44 Pa. St. 452; Smith v. Yaryan, 69 Ind. 445; Doyle v. Jessup, 29 Ill. 460.

[6] Smith v. Milburn, supra. See Lea v. Henderson, 1 Cold. 146, where it was held that the fact that another person had had intercourse with the person seduced before her alleged seduction by the defendant, this being unknown to the defendant or to the public, at the time of the seduction, is not to be considered by the jury in mitigation.

[7] Travis v. Barger, 24 Barb. 614; Richards v. Fouts, 11 Ired. 466; Graham v. Smith, 1 Edm. Sel. Cas. (N. Y.) 267; Sherwood v. Tetman, 55 Pa. St. 77; Parker v. Elliott, 6 Munf. 587; Smith v. Masten, 15 Wend. 270.

[8] Eichar v. Kistler, 14 Pa. St. 282.

been held that an offer of marriage made by the defendant after the seduction cannot be considered in mitigation.[1]

Criminal conversation.— The husband's injury by this wrong consists in his mental suffering from the dishonor of the marriage bed, and the loss of the affections of his wife and the comfort of her society, as well as the pecuniary injury from loss of her services. The extent of the actual injury will of course depend on their prior relations, and the practical consequences between them of her defection.

In this class of cases an actual marriage must be proved,[2] and the gravamen of the action is that the defendant has committed adultery with the wife.[3] The right of action is not affected if the wrong was committed by force.[4]

The amount of damages is left to the discretion of the jury, and the same considerations prevail in their assessment as when they are awarded in favor of a plaintiff who can feel the dishonor of other seductions. And courts will seldom set aside the verdict for excess.[5] And there are other and peculiar considerations which will enter into the account.[6]

[1] White v. Martland, 71 Ill. 250; Ingersoll v. Jones, 5 Barb. 661.

[2] Hutchins v. Kimmell, 31 Mich. 126.

[3] Wood v. Mathews, 47 Iowa, 409.

[4] Egbert v. Greenwalt, 44 Mich. 245.

[5] Torre v. Summers, 2 Nott & McC. 367; Johnston v. Disbrow, 47 Mich. 59; Wilford v. Berkeley, 1 Burr. 609; Duberley v. Gunning, 4 T. R. 657.

[6] The action lies in this case for the injury done to the husband in alienating his wife's affections, destroying the comfort had from her company, and raising children for him to support and provide for; and as the injury is great, so the damages given are commonly very considerable. But they are properly increased or diminished by the particular circumstances of each case. The rank and quality of the plaintiff; the condition of the defendant, his being a friend, relative, or dependent of the plaintiff; or being a man of substance; proof of the plaintiff and his wife having lived comfortably together before her acquaintance with the defendant, and her having always borne a good character till then; and proof of a settlement or provision for the children of the marriage, are all proper circumstances of aggravation. Buller's N. P. 27; Mayne on Dam. (Wood's ed.) 664.

The extent of the injury in any case must depend in a great measure upon the previous relations of the parties. If these were cordial and affectionate, and such as are expected to exist when a suitable marriage has been formed, under a proper sense of the obligations and responsibilities that belong to it, the

Evidence in mitigation will be received which tends to show that the plaintiff has in fact suffered less injury than would otherwise be a probable inference from the act proved. It is proper to show unhappy relations between him and his wife, or that he was wanting in affection for her,[1] or that there was but slight intercourse between them;[2] that he was unkind in his treatment of her, or guilty of infidelities,[3] or negligently suffered her to encounter temptation.[4] The loss to the plaintiff may be greatly mitigated by showing that the wife was a woman of bad character at the time of the alleged wrong. It may be shown that there had been improper familiarities between her and other men;[5] that she was wanting in chastity before her marriage,[6] or had committed adultery afterwards;[7] and the fact that the defendant was solicited by her will also go in mitigation.[8]

wrong of the seducer who succeeds in withdrawing the wife's affections from her husband, and induces her to live with him a life of shame, it is impossible adequately to measure. If, on the other hand, the husband was a 'libertine, and has brought shame upon his family by his own notorious misconduct, and if the wife, after the destruction of her affection by his own abuse and misconduct, has finally surrendered her own honor, it is difficult to understand what claim he can have to legal consideration. And between these extreme cases there may be numerous others differing so widely in their facts, that, while it may be wise to give a right of action in all, yet the measure of redress must be left largely to the discretion of the proper legal tribunal, which shall be at liberty to award much or little according as they find that much or little has been lost by the complaining party. Cooley on Torts, 224.

[1] Bromley v. Wallace, 4 Esp. 237.

[2] Calcraft v. Harborough, 4 C. & P. 499.

[3] Norton v. Warner, 9 Conn. 172; Bromley v. Wallace, supra.

[4] Calcraft v. Harborough, supra; Duberley v. Gunning, 4 T. R. 657; Van Vacter v. McKillip, 7 Blackf. 598; Bunnell v. Greathead, 49 Barb. 106; Pierce v. Pierce, 3 Pick. 299.

[5] Norton v. Warner, supra.

[6] Conway v. Nicol, 34 Iowa, 533.

[7] Winter v. Henn, 4 C. & P. 494.

[8] Elsam v. Faucett, 2 Esp. 562.

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