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question was referred to the twelve judges, who certified that under the circumstances of the case they saw no reason to doubt of the jurisdiction of the court martial.

It is true that that trial was had on the application of the party accused, who having been dismissed from the service during his absence from England, thought it was due to his reputation, upon his return, to demand an investigation of his conduct, to relieve himself from the disgrace. But I do not perceive that this circumstance can affect the principle of the decision; for if the court martial had no jurisdiction, it is very clear that the consent of the accused could not confer it. It is, however, for the reasons already given, unnecessary to decide on this point.

In this case there can be no doubt, I think, that the court martial have jurisdiction, and that they may legally proceed in the trial on the charges stated in the return. The petitioner, therefore, must be remanded to the custody of Captain Morris.

Art. VII.—A READING ON DAMAGES IN ACTIONS EX DELICTO.

By damages is here meant a compensation, recompense, or satisfaction, given by a jury to the plaintiff, for an injury received by him from the defendant. Co. Lit. 257; 1 Lil. Ab. 381; 2 Bl. Com. 442.

It is said by elementary writers and by compilers, that circumstances, which do not affect the act complained of, may be given in evidence to mitigate damages; and also that circumstances, which form no part of the actionable matter of a suit, may be given in evidence to aggravate damages. These are not the precise terms used in the books, but this is the precise doctrine advanced.

The proper meaning, it is apprehended, of the phrases, 'in mitigation of damages,' and 'in aggravation of damages,' is often palpably mistaken. When evidence is given for the purpose of showing that the *injury received* is greater or smaller than it would appear to be if such evidence were not introduced, it may properly be said to be received in aggravation or mitigation of damages; and in no other instance. And

it is the purpose of this examination to show that neither on principle, nor by the preponderance of authority, can damages be estimated by any other standard than the actual injury received—that the extent of the injury is the legal measure of damages. Like most other positions, however, this has its exceptions; and they should be here noticed.

In the first place, the defendant, by pleading only the general issue, may deprive himself of the right to give matter of justification in evidence; and according to some decisions, by pleading in justification matter which he fails to prove, he deprives himself of the right to give evidence that the injury done by him is less than it appears to be from the plaintiff's evidence and from legal presumptions.

In these instances, the evidence is held not to be pertinent to the issue. It is excluded, therefore, by reason of the defendant's fault; and its exclusion does not affect the *principle* on which damages are to be assessed. That principle, as ordinarily applied, is controlled or modified in its application, by other legal principles of equal importance.

In the second place, the plaintiff may not be allowed to recover to the amount of the injury sustained by him, because he elects one of two or more concurrent remedies, which, by legal rules, does not admit of the assessment of damages to that amount. This again is the fault of the party, and not of the law. Thus if goods are tortiously taken and carried away, and sold by the wrong-doer, the owner may bring trover, and recover the value of the goods; or trespass, and recover not only the value, but the unavoidable additional damage he has directly suffered; or he may wave the tort and bring assumpsit for money had and received. If he adopt the latter course, he can recover only the money for which the defendant sold the goods; and if it be less than their value, his loss is not compensated; for a recovery in assumpsit is a bar to a future action of trover or trespass. Cowp. 419, *Lindon* v. *Hooper;* 6 D. & E. 695, *Parker* v. *Norton;* 2 Ld. Raym. 1216, *Lamine* v. *Dorrell;* 5 B. & A. 765, *Laugher* v. *Brefitt.*

Again, in certain forms of action, as trover, detinue, &c. the law has settled a rule of damages, which cannot now be disturbed, although it may not, in most cases, give the plaintiff a full compensation for his injury. In trover, the value of the property at the time of conversion is the settled measure of damages, with the addition, in some courts, of interest on that

amount, to the time of judgment rendered. Evidence that the defendant supposed the goods were his own, or that he had no ill intentions, was never offered to reduce damages; nor evidence of his wantonness and malice, to enhance them. Only one circumstance is permitted to vary the rule and reduce the damages below the value of the goods, to wit: restoration, which shows the amount of the injury sustained by the defendant. Bul. N. P. 32; 6 Serg. & Rawle, 300, *Jacoby* v. *Lausatt;* 4 Pick. 466, *Kennedy* v. *Whitwell;* 14 Johns. Rep. 128, 273; 2 Caines' Cases in Error, 200; 4 Greenleaf, 274, *Rogers* v. *Crombie;* 1 Nott & M'Cord, 221, 237, 334.

Once more. In an action of debt for the escape of a prisoner in execution, the jury must give the full original debt, &c. though the prisoner be unable to pay any part of it; and interest is not recoverable, though he may have absconded beyond the reach of process, carrying a large fortune with him. This is no part of the common law of England. It is of statute origin there, though a part of the common law here. Great injustice sometimes happens under this rule of law, and it is hoped that the distinction, in this anomalous instance, between debt and trespass upon the case, will speedily be abolished by legislative interposition. See 2 Bl. Rep. 1048, *Hawkins* v. *Plomer;* 2 D. & E. 126, *Bonafous* v. *Walker;* 2 Chit. Rep. 454, *Robertson* v. *Taylor;* 2 Johns. Rep. 454, *Rawson* v. *Dole;* 7 Mass. Rep. 377, *Porter* v. *Sayward;* 2 Mason, 486, *Steere* v. *Field;* 1 N. Hamp. R. 85, *Gerrish* v. *Edson;* 3 Yeates 17; 4 ib. 47, *Shewell* v. *Fell.*

Except these, and perhaps some other examples, not now recollected, it is believed that the measure of damages is, as before stated, the extent of the injury suffered. How then are the books to be understood, which assert that the motives and intentions of the defendant, his malice or want of malice, the amount of his property, the provocation given him by the plaintiff, &c. &c. may be shown in aggravation or mitigation of damages?

It may be well to inquire what the law regards as the injury which a plaintiff receives from the defendant. In some instances, this injury, as we have seen, is the mere loss of property estimated at its value. In others, as will be seen hereafter, the insult and indignity accompanying the act, form a main part of the injury itself. Mental and bodily suffering

often constitute an important item of damages, because they are regarded as part of the injury inflicted, although no pecuniary loss attends them. For mere mental suffering, however, it seems that damages are not recoverable, unless the act which causes it be wilful. If the act be not wilfully done, the mental suffering arising from it seems to be regarded as no part of the actionable injury. See 2 Car. & Payne, 292, *Flemington* v. *Smithers*. In many other cases, the law does not regard as ground of damage those effects of the defendant's act, which cannot be *certainly* traced to it. Contingent, possible, and even probable damages, are not regarded. 1 M'Cord, 489, 585; 1 Paine's Rep. 122. 'The law,' says Mr. Hammond, 'in deciding what injuries shall entitle the suffering party to redress, has contrived certain rules that are best adapted to further the general interests of society; and though such rules are chosen as best serve the end of public utility, it is impossible for them to prevent all particular inconveniences. A case therefore of peculiar hardship and distress may sometimes arise, that considered apart and by itself is an injury well deserving of recompense, but which not being comprehended within the limits of the aforesaid regulations, it will require a violation of them to compensate.' Hammond's Nisi Prius, 43, 44, *(American edition.)* These remarks are as applicable to many particular effects of the defendant's actionable conduct, as to instances of his injurious conduct which is not actionable. See 1 Campb. 58, *Boyce* v. *Bayliffe;* 8 East, 1, *Vicars* v. *Wilcocks;* Hammond's N. P. 258, 259; Stark. on Slander, 167, *& seq.;* 4 Greenleaf, 234, *Waterhouse* v. *Gibson;* 19 Johns. Rep. 223, *Butler* v. *Kent;* 1 Chit. Pl. 388.

Can then the injury, which the law regards as actionable, be *compensated* and *satisfied* by the recovery of a sum confessedly smaller than the injury? Or in other words (in *appearance* less absurd) can circumstances, which *do not affect the degree of legal injury sustained,* be given in evidence to mitigate or aggravate damages?

Before the direct authorities on this point are examined, it may be proper to inquire into a few unquestioned principles.

It is well settled that in actions of trespass *vi et armis,* it is wholly immaterial to the support of the action *quo animo* the trespass was committed. However accidental the injury, or however strongly it may have been against the defendant's

wishes; or even if he was a lunatic, *non compos mentis*, or an infant under seven years of age, (and so not *doli capax* in legal presumption) yet he is liable to an action in this form, and to pay *some* damages. Whenever, by an act which he could have avoided, and which cannot be justified in law, a person inflicts an immediate injury by force, he is legally amenable to the party injured. Hob. 134, *Weaver* v. *Ward;* T. Jon. 205, *Dickinson* v. *Watson;* T. Ray. 421, 467, *Bessey & Olliot's case;* Aleyn, 35, *Gilbert* v. *Stone;* Sty. 72, S. C. 1 Stra. 596, *Underwood* v. *Hewson;* Onslow's Nisi Prius, 14; 2 Hen. & Munf. 423, *Taylor* v. *Rainbow;* Bac. Ab. Infancy and Age, H.; 1 Hale P. C. 15, 16; 1 Dallas, 184, 185, per M'Kean, C. J.

Aliter, in case of an unavoidable injury. Sty. 65, *Smith* v. *Stone;* 4 Mod. 405, *Gibbons* v. *Pepper;* 2 Salk. 638, S. C.; 3 Wils. 411, per De Grey, C. J.; Hammond's N. P. 67, 68.

There are also divers instances of actions of trespass upon the case, in which the defendant is liable for an injury caused by his carelesness or inattention, though his motives are unimpeachable.

Is the plaintiff's injury any less severe, are his expense and loss any less on account of the defendant's want of malice? Are they any greater, even if his malice be felonious? Why then should smaller damages be given where malice is wanting, than where it exists? If this is allowable, what becomes of the doctrine every where advanced, that in trespass *quo animo* is not a subject of inquiry?

In criminal prosecutions the public are concerned, and the law is entirely different. An assault and battery, that cannot be justified nor excused in a civil suit, is not always punishable *criminaliter*. *Actus non facit reum, nisi mens sit rea.* Co. Lit. 247; Wilmot, 263; 3 Inst. 4, 5, 6; 4 Bl. Com. c. 2. Hence accidental injuries, and those committed by lunatics, &c. and infants of a very tender age, are not subject to the animadversion of criminal law. The object of punishment is the prevention of offences; not to gratify the public resentment, but to preserve the public peace. And any provocation, which directly tends to cause a quarrel, is properly shown to the court, for the purpose of mitigating punishment. Any thing which might well be pleaded in a civil suit, in justification of a battery, may be proved on the general issue, in a criminal prosecution, and will secure an acquittal.

All this is right upon legal principles, and not only consistent with the true ends of punishment, but is also directly in furtherance of them. He who beats another, under the impulse of high provocation, does not prove himself to be so dangerous a member of the community, as he who does it wantonly, and without excitement from insult. The public is less injured and is in less danger, and the defendant less criminal, in the one case than in the other. And no principle of criminal law is more sound or more important than this, that punishment is to be proportioned to crimes. Accordingly, almost every offence not capital, was, in former days, left to be punished at the discretion of the court, according to the circumstances. Many are so punished at this day.

But in civil actions, very little discretion, (theoretically at least) is left to the jury. Damages are, indeed, in most cases of tort, to be measured by circumstances. When however the circumstances are ascertained, a 'compensation and satisfaction,' so far as money can be a compensation, are to be awarded to the plaintiff. 'The remedy is to be commensurate to the injury sustained.' 7 Mass. Rep. 256, per Sedgwick, J. 'The compensation should be equivalent to the injury. There may be some occasional departures from this principle, but I think it will be found safest to adhere to it in all cases proper for a legal indemnification in the shape of damages.' 4 Dallas, 207, per Shippen, C. J.

There would seem to be no reason why a plaintiff should receive greater damages from a defendant who has intentionally injured him, than from one who has injured him accidentally, his loss being the same in both cases. It better accords, indeed, with our natural feelings, that the defendant should suffer more in the one case than in the other; but points of mere sensibility and mere casuistry are not allowed to operate in judicial tribunals; and if they were so allowed, still it would be difficult to show that a plaintiff ought to receive a compensation beyond his injury. It would be no less difficult, either on principles of law or ethics, to prove that a defendant ought to pay more than the plaintiff ought to receive. It is impracticable to make moral duties and legal obligations, or moral and legal liabilities, coextensive.

The same principles will apply to the mitigation of damages. If the law awards damages for an injury, it would seem absurd (even without resorting to the definition of damages) to say

that they shall be for a part only of the injury. Were this the law, we might reasonably expect to find some rule of proportion fixed; as that, in case of accidental injury, the aggressor and sufferer should divide the loss, according to the Mosaic institute, and the law of some of the continental nations of Europe. Exodus, xxi. 35; Abbott on Shipping, Part III. c. 8, s. 12. On the first entrance of this doctrine into the temple of the common law, it was driven thence forever. 3 East, 18, *Kent* v. *Elstob.*

As was suggested before, the phrase, 'facts given in evidence in aggravation or mitigation of damages,' is improper, unless the facts aggravate or mitigate the injury itself. And it will be found on examination, that in nearly all the cases where this phraseology is adopted, the true meaning is, that the evidence is admissible for the purpose of showing the extent of the injury in question.

It is said in 1 Chit. Pl. 377, (2d ed.) that 'the intent of the wrong-doer is immaterial in point of law, *though it may enhance the damages.*' Reference is made to previous pages, 129, 130, in support of this assertion. But nothing is found in those pages which bears upon the point of damages. The assertion concerning damages is not sustained by the cases referred to.

There are actions of trespass upon the case, which cannot be supported without proof of evil intentions. In slander, falsehood and malice must concur, or the action cannot be maintained. And is laid down by numerous writers, that words not set forth in the declaration may be proved *in aggravation of damages.* But no case warrants this doctrine. The decisions cited to this point only show, that words not in themselves actionable, and even actionable words not laid in the count, and though uttered after action brought, may be given in evidence to evince the temper by which the defendant was actuated in speaking the words complained of. Peake's Rep. 22, *Charlter* v. *Barrett;* ib. 125, *Mead* v. *Daubigny;* ib. 166, *Lee v. Huson;* 3 Esp. Rep. 133, *Cook v. Field;* 1 Campb. 49, *n. Rustell* v. *Macquister;* 2 Campb. 72, *Finnerty* v. *Tipper;* 3 Pick. 376, *Bodwell* v. *Swan.*

As malice is an essential ingredient of slander, without proof of which (for falsehood is proof, in the absence of evidence *aliunde*) the action cannot be sustained, it is often proper, if not necessary, for the plaintiff to give evidence, positive and

explicit, that the defendant was malicious in uttering the words sued for; and not rest merely on the implication arising from the falsehood. Such evidence was admitted in the cases above cited, and in divers other cases; not to 'aggravate damages,' but to support the plaintiff's case. It would seem absurd to suppose damages might be enhanced by proof of words which are no legal ground of damage. Equally absurd and more mischievous would it seem, to suppose other actionable words, and even spoken after the suit was commenced, might be allowed in evidence for such purpose. This would be in effect to make the defendant twice liable for the same words once uttered; first, when given in evidence to enhance damages for other words, and again, in an action for the words themselves. Accordingly, it was formerly held that words in themselves actionable should not be proved to show the speaker's temper in uttering other words. But the rule since adopted would seem to be correct, if the object is, as the cases prove it to be, not to aggravate damages, but to substantiate malice. That such is the object of the proof is stated in Buller's Nisi Prius, 7, and by Lord Ellenborough, in *Stuart* v. *Lovell*, 2 Stark. Rep. 85, (American ed.) See also Stark. on Slander, 397, *& seq.* 2 Phillips' Evid. 107.

In actions for words not in themselves actionable, it can hardly be conceived that any thing can properly be shown in aggravation of damages. No damage is implied in such cases; and unless special damage is averred, the declaration is bad in any stage of the cause; unless it is proved, the plaintiff must become nonsuit, or have a verdict against him. Now when the same specific special damage, which is alleged, is the only ground of the action, all legal analogy seems to require that the evidence should be confined to the gravamen thus specially laid. And such is the rule of law in this class of cases. March on Slander, 73; Bul. N. P. 7; 1 Saund. 243, *b*, *note* (5); 10 Johns. Rep. 281, *Herrick* v. *Lapham;* 3 Yeates, 508, *Hersh* v. *Ringwalt;* 2 Phillipps' Evid. 108; 1 Chit. Pl. 389.

The plaintiff, in an action of slander, may give his character and standing in evidence, to increase damages; and the defendant may give the plaintiff's character, &c. in evidence to diminish them. 2 Ld. Raym. 831, *Brown* v. *Gibbons;* 3 Johns. Rep. 56, *Tillotson* v. *Cheetham;* 3 Mass. Rep. 546, *Larned* v. *Buffinton;* 6 ib. 518, per Parsons, C. J.; Holt's N. P. Rep. 307, *Williams* v. *Callender;* 2 Cowen, 811, *Paddock*

v. *Salisbury;* 14 Serg. & Rawle, 359, *M'Almont* v. *M'Clelland;* 2 Stark. Ev. 369, 877, *& seq.*

In both these cases, however, the evidence is received for the purpose of ascertaining *the degree of injury suffered.* 'The worth of a man's general reputation may entitle him to large damages for an attempt to injure it, which he ought not to obtain, if his character is of little or no estimation in society.' Per Parsons, C. J. *ubi sup.* 'A person of disparaged fame is not entitled to the same measure of damages with one whose character is unblemished; and it is competent to show that by evidence.' Per Lord Ellenborough, 1 M. & S. 286.

So in other actions, the character and standing of the parties may be shown, on the same principle, to affect the damages, by proportioning them to the injury. 2 Wils. 206, *Huckle* v. *Money;* 3 Hargrave's State Trials, 1071, *Pritchard* v. *Papillon.*

On the same ground, it has been held that in an action for words, the defendant may give in evidence that *at the time of uttering them* the plaintiff was generally suspected to be guilty of the charge alleged, and that *his friends had ceased to associate with him.* 2 Campb. 251, *Earl of Leicester* v. *Walter;* 1 M. & S. 284, —— v. *Moor;* 2 Phillips' Evid. 109; 1 ib. 140, (2d ed.) Whatever may be thought respecting the propriety of these decisions, it is most manifest that they proceeded entirely on the ground of proportioning damages to the injury.

Case for malicious prosecution or vexatious suit is another action of which the intention of the defendant is the gist. Malice and want of probable cause must concur, or the plaintiff cannot maintain the action. Here, therefore, as in actions of slander, an inquiry into motives and intentions goes to the action itself, and not to the amount of damages. 1 D. & E. 545; Gilb. Cas. 185, *Jones* v. *Givin;* 10 Mod. 148, 214, S. C.; Hammond's Nisi Prius, 272, 273; Co. Lit. 161, *a, note* (297) *Day's ed.*

So in a suit for falsely representing another as worthy of credit, in consequence of which a third person is injured by trusting him, fraud and deceit in the defendant are the gist of the action, and must be proved in order to warrant the recovery of damages. 2 East, 92, *Haycraft* v. *Creasy;* 8 Johns. Rep. 23, *Young v. Covell;* 12 East, 638, *note* by Mr. Day.

So in England, New York, and New Hampshire, an action will not lie against the inspectors of an election, for refusing

the vote of a qualified voter, unless malice is proved. 1 East, 563, *n. Drewe* v. *Coulton;* 2 Stark. Rep. 506, *Cullen* v. *Morris;* 11 Johns. Rep. 114, *Jenkins* v. *Waldron;* 1 New Hamp. Rep. 88, *Wheeler* v. *Patterson. Aliter*, in Massachusetts. 11 Mass. Rep. 350, *Lincoln* v. *Hapgood.*

In actions of *crim. con.* the situation and character of the parties may be shown in evidence to enhance or diminish damages. But this evidence clearly applies to the *degree of injury* sustained, and is not allowed for the purpose of aggravating or mitigating damages, in the *loose acception* of the terms. Lord Kenyon twice ruled that proof of the husband's openly living in adultery, was a ground of nonsuit in an action of this kind brought by him. Lord Alvanley, however, held that it went only in mitigation of damages, in the *proper meaning* of the terms; and his is considered the better opinion. 4 Esp. Rep. 16, *Wyndham* v. *Wycombe;* ib. 237, *Bromley* v. *Wallace;* 12 Mod. 232, *Coot* v. *Berty;* Bul. N. P. 27, 296; 1 Phil. Ev. 139, 140; 2 ib. 155; Hammond's N. P. 258; 1 Selw. N. P. 18, (1st ed.); 2 Nott & M'Cord, 267, *Torre* v. *Summers.*

The same rule of evidence is applied, and for the same purpose, in actions for the seduction of a daughter or servant. 2 Phil. Ev. 159, *& seq.;* 2 Stark. Ev. 371; 3 ib. 1310; Peake's Evid. 334, (2d ed.)

There is one class of cases in which there seems to be no pretence, on any known principle, to give evidence of malice, &c. to enhance, or of provocation, &c. to reduce, damages: Namely, when a master or husband sues for loss of service occasioned by the beating, &c. of his servant or wife. The loss of service is here the gist of the action; though trespass *vi et armis* is the proper form, as is proved by the Register and the ancient and modern adjudications. Yelv. 90, *note;* Clayt. 133, *Linley* v. *Baxter;* Keilw. 180, *b;* 7 Mod. 238, *Hallet* v. *Lawton;* Cunningham's Rep. 38, S. C.; 2 M. & S. 436, *Ditcham* v. *Bond.* (A recent decision in Maine, denying that trespass will lie in these cases, cannot be regarded as having overturned the settled law on this point; especially as that decision seems to have been made upon very slight research. 5 Greenleaf, 446, *Clough* v. *Tenney.*)(*a*) Surely the plaintiff's loss in these cases can be neither greater nor smaller by reason of the malice of the defendant, or of the provocation

(*a*) See U. S. Law Intelligencer, Vol. ii. p. 52, *& seq.*

given to him by the servant or wife. In *Edmondson* v. *Machell*, 2 D. & E. 4, damages were given, in a case of this kind, beyond the plaintiff's actual loss; and a new trial would doubtless have been granted, had not the plaintiff engaged to pay those damages to the servant, and the servant engaged not to bring an action for her own personal injury. 3 Stark. Ev. 1453.

In actions against infants under seven years of age, lunatics, and persons *non compotes mentis*, evidence of malice cannot be given to enhance damages, nor for any other purpose; for the defendants are incapable of malice. Can damages be diminished by proof, (which arises from showing the age, derangement, &c. of the defendants,) that the act complained of was not malicious? There is no adjudged case to this effect. These persons are liable for their torts. They are asserted to be, in this particular, on the same ground with persons of full age and sound mind. But if they are answerable to pay less for the same illegal act than a sane adult, there is a distinction in fact, which the law every where explicitly negatives. A plaintiff's injury from a trespass is neither more nor less from an infant's or lunatic's hand, than from any other person's of equal strength. His 'compensation' of course ought not to be increased nor lessened by circumstances which affect only the defendant. Otherwise *quo animo* becomes a material inquiry.

In actions of slander, the extreme youth or partial mental alienation of the defendant may doubtless be shown for the purpose of convincing a jury that the plaintiff has suffered but *little injury*. For the injury is greater or less, according to the credit likely to be given to the speaker, or his probable influence on others' minds. See 9 Mass. Rep. 228, *Dickinson* v. *Barber*.

Where an authority or license is given to any one by law, and he abuses or exceeds it, he is a trespasser *ab initio*. *Aliter*, where the authority is given by the party injured by its abuse or excess. Perk. s. 190, 191; Lane, 90, *Gibson's case;* 8 Co. 146, *The Six Carpenters' case;* Yelv. 96, *Bagshaw* v. *Gaward;* Noy, 119, S. C.; 10 Johns. Rep. 254, *Sackrider* v. *M'Donald*. But if the license is exceeded by mistake, or misapprehension only, are damages to be mitigated on that ground? The act, which was lawful in its inception, is as much a trespass after the authority, under which it was done,

is exceeded, as if it had been unlawful at first. The legality of the inchoate act cannot, however, be shown in evidence, in order to confine damages to the amount of the injury caused by the mere excess or abuse. If such were the law, there would be an actionable trespass, for which no damages would be recoverable. A solitary case, which seems to involve this absurdity, will be noticed hereafter.

In an action for seducing a daughter or servant, the gravamen is stated in two different forms. Sometimes the gist of the action is the breach and entry of the plaintiff's house, and the seduction matter of aggravation only. Sometimes the loss of service is the gist of the action, the declaration stating an assault, &c. upon the daughter or servant, *per quod servitium amisit.* In the first form of declaring, the breach and entry of the house must be proved, or the plaintiff cannot maintain the action. And in both forms of declaring, proof must be made of the service rendered to the plaintiff by the person seduced; else in the first, nothing can be given in damages beyond the injury caused by the unlawful breach, &c. of the house; and in the second, the plaintiff must become nonsuit. 2 D. & E. 166, *Bennett* v. *Alcott;* 3 Bur. 1878, *Postlethwaite* v. *Parkes;* 5 East, 45, *Dean* v. *Peele;* 6 Esp. Rep. 32, *Mann* v. *Barrett;* 7 Barn. & Cres. 387, *Harper* v. *Luffkin;* 1 Wend. 447, *Millar* v. *Thompson;* 2 Phil. Ev. 158; 3 Stark. Ev. 1451 *& seq.*

It is an old doctrine, to which the pleadings must now conform, that a parent, &c. cannot maintain an action for the seduction of a daughter, &c. unless there is a loss of her service. If this were *res integra,* the courts might probably sustain such action for the loss of comfort, honor, and prospects. Indeed, the *form* of action, as at present established, is little more than a fiction; and damages are not in fact confined, though they are in form, to the compensation of the mere *legal* injury. The loss of service is not the measure of damages. Here then is an instance, in which the rule of damages does not formally comport with the principle on which they are to be assessed in other cases. The reasons of the anomaly, however, approve themselves to the best moral sentiments. The real gravamen is made the rule of damages, while the legal gravamen is retained on the record. It is in effect an alteration of the law of actions. 3 Esp. R. 120, *Bedford* v. *M'Kowl;* Coxe's (N. J.) Rep. 77, *Caryell* v. *Colbaugh;* ib. 79, *Stout*

v. *Prall.* Lord Ellenborough has remarked, however, that it is 'necessary to watch that this anomaly should not be carried farther, and that the original scope of the action should not be entirely lost sight of.' 3 Campb. 520, *Dodd* v. *Norris.*

The departure, in this instance, from the common principle, is not great, when the first form of declaring, above noticed, is adopted. For it is a common learning, that in actions of trespass, evidence may be given, to enhance damages, of acts which would not alone constitute a cause of action; provided they are immediately connected with the actionable trespass, or immediately follow it. Trials per Pais, 438, (7th ed.) 2 Salk. 642, *Newman* v. *Smith;* 1 Show. 179, *Clayton* v. *Coatsworth;* 2 M. & S. 77, *Bracegirdle* v. *Orford.* This point is well discussed in Hammond's Nisi Prius, p. 43 *& seq.* And the principle is merely this, that an injury is greater, when accompanied with violence and terror, or with contumelious or menacing language, &c. &c. though such violence or language, &c. alone would not be actionable. 5 Taunt. 442, *Merest* v. *Harvey;* 3 Day, 450; 6 Conn. Rep. 520. In practice, it must be admitted that the line is often extremely shadowy. It is much to be desired that this line may be more distinctly raised.

In various cases, where no misapprehension or mistake existed, but where the defendant acted wittingly and wilfully, the courts have held, in conformity to the doctrine so often before mentioned, that the actual loss sustained by the plaintiff is the true rule of damages. Thus, whether an escape of a debtor be negligent or voluntary on the part of the officer, the real loss of the plaintiff (in an action of trespass upon the case) is the measure of the verdict. If the prisoner were wholly unable to pay, nominal damages only can be legally given. And in such a case, the plaintiff would be nonsuit, were it not for the controlling operation of another rule, to wit: that where the law has been violated, the defendant cannot justify, and the plaintiff is therefore entitled to a verdict. Thus, if one man puts his foot upon his neighbor's land, without his permission, actual or implied, he is legally a trespasser. Something must be recovered, if a suit is brought. See 2 Greenleaf, 91, *Varrill* v. *Heald;* 2 Wils. 325, *Russell* v. *Palmer;* ib. 295, *Ravenscroft* v. *Eyles;* 6 Pick. 468, *Brooks* v. *Hoyt;* 3 Stark. Ev. 1341, and cases there cited.

It is said by Lord Holt, (1 Salk. 11,) that 'in trespass the

grievousness or *consequence of the battery* is not the ground of the action, but *the measure of the damages.*' In *Boulter* v. *Clark*, Bul. N. P. 16, Chief Baron Parker refused to receive evidence that the plaintiff and defendant fought together by consent, and held that the plaintiff was entitled to a verdict for the injury done him. The same doctrine is asserted in *Matthew* v. *Ollerton*, Comb. 218; Hammond's N. P. 145, *note (q)*. In *Weaver* v. *Ward*, Hob. 134, the court overruled a plea by the defendant that he, *per infortunium et contra voluntatem suam*, hurt and wounded the plaintiff; and decided that although it might be a defence against a charge of felony, 'yet in trespass, which tends only to give *damages according to the hurt or loss*, it is not so.'

In the case before C. B. Parker, it would seem that the evidence was offered to prove the defendant not guilty, on the ground that *volenti non fit injuria.* But for whatever purpose offered, the judge would not have refused to receive it, if he had supposed it admissible for the purpose only of mitigating damages. Yet an instance can hardly be found, in which a defendant was better entitled, on popular grounds, to a mild verdict. It is true that in *Weaver* v. *Ward*, *per infortunium* was pleaded in bar, and was clearly no justification nor excuse. But it does not appear that either counsel or court thought of reducing damages, because the trespass was involuntary. They were declared to be recoverable 'according to the hurt or loss.' It would not have been proper in that case to offer evidence in mitigation, because the facts, on which it must have been contended that damages should be mitigated, were confessed by the demurrer to the bar. But being confessed, if the court had held that damages ought to be less than a 'compensation,' they would not have used language which negatives any such conclusion.

In *Watson* v. *Christie*, 2 B. & P. 224, Lord Eldon ruled at *nisi prius*, that on the general issue in an action for an assault and battery, the defendant could not give evidence that the beating was inflicted by way of correcting the plaintiff's misconduct on board a ship of which the defendant was master. His Lordship directed the jury to inquire what injury the plaintiff had sustained in consequence of the beating, and to give damages to the extent of the evil suffered. He told them that if they gave damages beyond a compensation *for the injury actually sustained*, they would give too much; but that if

they gave less, they would not give enough; and that they *could not lessen the damages on account of the circumstances under which the beating was given.* The full court 'were of opinion that his lordship's direction was perfectly right,' and thus overturned the case of *Bingham* v. *Garnault*, Bul. N. P. 17.

This decision seems to have been made on the true principle which it has been the object of the preceding remarks to present to the reader. The legal reason for excluding evidence of the circumstances under which the beating was inflicted, on the trial of the general issue, is, that matter of justification must be pleaded, or it cannot be shown *as a defence* to the action. Such is the established law. Co. Lit. 282, *b;* Clayt. 24, *Rigg's case;* Trials per Pais, 441, 446; 3 Stark. Ev. 1460. The court however went further, and held that evidence of the circumstances, though they might have supported a justification, could not be allowed to diminish the damages below the extent of the injury actually received by the plaintiff. Evidence of the circumstances of an assault, the rise and progress of the quarrel, the provocation given by the plaintiff, &c. almost unavoidably appear in the course of a trial upon any issue of fact which may be framed. But if the defendant is proved guilty on the general issue, or fails to establish a justification, the true measure of damages seems, on principle, to be 'the consequence of the battery,' as Lord Holt expresses it; or, in the words of Lord Eldon, 'the extent of the evil suffered.'

So there are decisions that if the defendant, in an action of slander, pleads the truth in justification, and fails to support his plea, he shall not be allowed to give evidence against the plaintiff's character, in mitigation of damages. There is no little confusion and contradiction on this point; but the weight both of reason and authority seems to be, that *general character*, but *not particular facts*, may be shown in mitigation of damages, even after a failure to support a plea that the words were true. Such evidence directly tends to prove the *extent of the injury* sustained by the slanderous words. See 2 Stark. Ev. 369, 878, and cases, English and American, there collected. Stark. on Slander, c. xxvii.

In an action for an assault and battery, however, the evidence of the circumstances under which the beating was given, whether offered on the trial of the general issue, or after a

failure to support a justification pleaded, does not necessarily show the extent of the injury suffered. And in a case, like that of *Watson* v. *Christie*, where the law gives an authority to the master of a vessel to correct the crew, if that authority is exceeded and abused, the master becomes a trespasser *ab initio*, and liable for *all* the suffering he inflicts. On his failing to support a justification, therefore, (if he should plead one) by reason of his excess, evidence of the plaintiff's misconduct would not tend to mitigate damages, because it would not affect the measure of his injury. This view of the matter was not taken in the case of *Sampson* v. *Smith*, 15 Mass. Rep. 365. In that case, where a master of a vessel was sued for flogging one of the crew, and failed in his justification, a new trial was granted because the judge expressed a doubt to the jury whether any punishment was justifiable *at the time* when the battery was inflicted; as that doubt might have induced the jury to increase the damages. 'It would be reasonable,' said the judge who gave the opinion of the court, 'to give greater damages, when the personal violence was wholly without excuse or justification, than when the offence consisted only in exceeding the bounds of moderation in punishing, where a right to punish existed.' Now if the excess, above what the defendant might rightfully have done, were the only legal injury received by the plaintiff, there would be nothing to object to this decision, on the score of proportioning damages to the hurt or loss. It is submitted, however, with great deference, that in the case of a trespasser *ab initio*, even the acts, which were within his authority, subject him to damages, if he superadd acts unauthorized.

It has already been mentioned that the indignity and insult accompanying an act sometimes constitute the main part of the legal injury. It may be added, that such accompaniments very often aggravate an injury which would still be serious without them. 'The circumstances of time and place, when and where the insult is given, require different damages; as it is a greater insult to be beaten upon the Royal Exchange, than in a private room.' Per Bathurst, J. 3 Wils. 19. And as a plaintiff's damages are not confined to his mere pecuniary loss, in actions of trespass, slander, &c., because that loss is not the whole of his legal injury; a jury may award damages according to the circumstances of insult which give a character to the injury. For, as before shown, acts, which alone constitute

no cause of action, aggravate the actionable injury with which they are immediately connected. There is a want of precision, however, in the language of the books on this subject. It not unfrequently is said that malicious intentions aggravate damages; that the jury may consider and give damages for the malicious intentions of the defendant. It will be found, on examination, that this is true only when these intentions induce conduct which the law regards as part at least of the injury sustained by the plaintiff, and for which he is entitled to a 'satisfaction.' In such cases, therefore, the evidence is received for the purpose of showing the extent of the injury itself, and the jury are warranted, by the principle so often mentioned as the only correct one, in enhancing damages in consequence of the malicious actionable conduct of the defendant. In the marginal abstract of *Sears* v. *Lyons*, 2 Stark. Rep. 282, it is said the jury may consider the malicious *intention* of the defendant, and give increased damages on account of such intention. That was an action for throwing poisoned barley upon the plaintiff's premises in order to poison his poultry. Abbott, J. instructed the jury that they 'might consider not only the mere pecuniary damage sustained by the plaintiff, but also the *intention* with which the act had been done, whether for *insult or injury;* that they were not confined to the mere damage resulting from throwing poisoned barley on the plaintiff's land, but might consider also the *object* with which it was thrown.' The spirit of this direction is clearly nothing more than is contained in other cases, viz: that indignity and insult aggravate the accompanying injury; not that the injury, aside from the insult, is greater on account of the plaintiff's malice. The principle of the marginal abstract, rather than of the judge's direction, is copied into Mr. Phillipps's Evidence, vol. II. p. 136. In 3 Stark. Ev. 1450, this case and others are cited to support a less inaccurate position, to wit: that 'a jury may award damages in respect of the malicious *conduct* of the defendant, and the degree of *insult* with which the trespass has been attended.' See 1 Bay, 6, *Genay* v. *Norris;* 14 Johns. Rep. 352, *Woert* v. *Jenkins*.

In *Cook* v. *Maxwell*, 2 Stark. Rep. 164, which was an action for false imprisonment, evidence was offered that the defendant *had been apprised* that the steps he was taking against the defendant were illegal; but Bayley, J. rejected it, saying, 'this could make no difference as to the damages, since the

question was not whether the defendant had acted advisedly, but whether he had acted illegally.' Mansfield, C. J. in delivering the opinion of the court of exchequer chamber in *Thorley* v. *Kerry*, 4 Taunt. 375, declared that an action for a libel was 'not maintainable upon the ground of malignity, but for the damage sustained.' This dictum, though not precisely phrased, seems to mean nothing more nor less than is contained in Mr. Starkie's assertion, that 'malice is not the criterion and measure of damages.' Stark. on Slander, 410.

In *Bennett* v. *Hyde*, 6 Conn. Rep. 24, it was held as settled law in Connecticut, that in an action of slander, evidence may be given, in aggravation of damages, that the defendant has a large amount of property. But this is put by Hosmer, C. J. expressly on the ground, that *the injury is enhanced* by being committed by a wealthy man; that 'the declarations of a man of fortune concerning the character of another, inflict a deeper wound than the same declarations made by a man of small estate.' The *application* of the principle, in this instance, may very well be questioned, without any denial of the principle itself. Mr. Starkie says it has been said that in actions for malicious prosecution, evidence of the defendant's property may be shown to aggravate damages; but he denies that it can be done on any other principle than that of proving the extent of the evil inflicted. Stark. on Sland. 402; see also 7 Pick. 86. There can be no pretence that damages are to be assessed according to the defendant's ability to pay. This notion is expressly rejected by C. J. Hosmer, and also by the court of New Jersey. See Coxe's Rep. 78, 80. Lord Mansfield mentions with approbation a verdict of heavy damages, for a gross injury, against a defendant who had no property except an income of fifty pounds *per annum*. Lofft, 774. See also 5 Price, 645, per Richards, C. B.

Against the doctrine so often above stated as the only sound one, there may be found a few decisions and dicta that ought not to be passed without notice.

Parker, C. J. in *Lincoln* v. *Hapgood*, 11 Mass. R. 357, says, if a voter is *maliciously* refused his right of voting, he ought to recover greater damages than if the refusal proceeded from mistake or ignorance only; and this is inserted in Bigelow's Digest, as an adjudged point in the law of damages. On inspecting the case, however, it will be found that the dictum of the judge was wholly gratuitous, and therefore is not an

authority, though entitled to great respect. The principles and remarks heretofore suggested, and the cases already cited, are submitted as deserving of consideration, before that dictum is received as conclusive proof of the law on the point in debate. Even on the *point adjudged* in *Lincoln* v. *Hapgood*, it has been seen that other courts have come to a different conclusion.

In *Sledge* v. *Pope*, 2 Hayw. (N. C.) Rep. 402, previous threats were held to have been rightly received in evidence to enhance damages, in an action of assault and battery. If the defendant were terrified by those threats, though they were not actionable, it might be contended *by counsel*, that they aggravated the injury subsequently inflicted in execution of them. But this would hardly receive the sanction of a court. No case has gone this length. Nothing further than *accompanying* acts, and effects *immediately connected* with the matter actionable *per se*, has been allowed to form an item in the estimate of damages given for a trespass. It was not, however, on this ground that previous threats were held admissible in the case of *Sledge* v. *Pope;* but because provocation given by the defendant may be shown in *mitigation* of damages, it was supposed to follow that such threats might be shown in *aggravation*. This reason will be found to fail, when it is recollected that only *accompanying* provocation is allowed to mitigate damages, as will presently be seen.

It is frequently said that a jury may give vindictive damages, exemplary damages, smart money, &c. See Coxe's (N. J.) Rep. *ubi sup.;* 2 Bay, 416, *Chalenor* v. *Vaughn;* 14 Johns. Rep. 352, *Woert* v. *Jenkins*.

These phrases, it is believed, are often misunderstood. If they mean that it is allowable for a jury to give damages beyond the amount of what the law regards as *actionable injury to the plaintiff*, by way of gratifying his resentment, or *punishing* the defendant for the purpose of public example, it is submitted that they are not true; that there is nothing punitive in civil actions. Damages are given as a satisfaction for an injury received by the plaintiff, not by the public. The term *vindictive*, when applied to damages given by a jury, is unfortunate, and liable to strange misapprehension. It is submitted that it means nothing more, when truly understood, than this, viz. that damages may be given for insult, contumely, and abuse, not in themselves actionable, when they

accompany an actionable injury. And that in any other sense, such damages are unknown and unwarranted by the common law.

Public offences are punished by indictment, fine, imprisonment, &c. A verdict against a defendant, in a civil suit, is no bar to a criminal prosecution for the same act; and so *e converso*. Is then a defendant to be punished twice; once in damages beyond the plaintiff's injury, for the public benefit; and again by fine or corporal punishment, for the same purpose? A doctrine that would lead to consequences which appear so preposterous and unjust, would certainly require for its support the most clear and unquestionable authority.

It must be confessed that there is authority on this point which is highly respectable, and entitled to great deference. In *Tillotson* v. *Cheetham*, 3 Johns. Rep. 56, the court of New York held, upon argument and advisement, that in an action for a libel, the jury might enhance damages on account of the pernicious effect which the publication was calculated to produce in society. Spencer, J. said, 'in vindictive actions, such as for libels, defamation, assault and battery, false imprisonment, and a variety of others, it is always given in charge to the jury, that they are to inflict damages for example's sake, and by way of punishing the defendant.' At the trial, Kent, C. J. told the jury 'that he did not accede to the doctrine that they ought not to punish the defendant in a civil action, for the pernicious effect which a publication was calculated to produce in society.' And on giving his opinion on the motion for a new trial, he said, it was the true and salutary doctrine that the evil example of libels was a consideration for increasing the damages. In connexion with this remark, he also asserted that the public character of the plaintiff was properly to be considered as an aggravation of damages; and it seems to have been to this last point that he cited 2 Wils. 206; for it has no tendency to support the first. That was an action for false imprisonment upon an arrest under a general warrant issued by Lord Halifax, in violation of *Magna Charta;* and though the defendant was in custody only six hours, and was well treated during that time, yet the court refused to set aside a verdict for £300 damages; saying the jury had done right in giving exemplary damages for a most daring attack upon the liberty of the subject. Lord Chief Justice Pratt very correctly said, that the state, degree, quality &c. of the

defendant and also of the plaintiff ought to be considered by a jury in giving damages in actions of tort; and he eloquently vindicated the right of the subject to the enjoyment of his constitutional liberties, not estimating his damages for a lawless infringement of those liberties, at the instance of 'a magistrate over all the king's subjects,' by the mere term of his confinement. Surely there is nothing in this case, which is not strictly within the principle of giving damages according to the evil suffered by the plaintiff.

The next case cited by C. J. Kent, is *Tullidge* v. *Wade*, 3 Wils. 18, where Wilmot, C. J. is reported to have said that actions for seduction of a daughter, '*are brought for example's sake.*' This is one of the earliest reported cases of that nature, and it has before been seen what the real gravamen *now* is, in the action for seduction, though the loss of service is still the legal gravamen. And upon a very careful search, it has not been found that in a single English case, subsequent to *Tullidge* v. *Wade*, has any intimation been given by the court that damages are to be enhanced for example's sake, or by way of *punishing* the defendant, or satisfying the public justice. The damages are given, not only for the loss of service and expenses consequent upon the seduction, but also for the dishonor and disgrace cast upon the plaintiff and his family by such an injury. And so it is laid down by the most approved writers, without any intimation that the defendant's evil example, or the public morals are to be taken into the account. 3 Stark. Ev. 1309; Ham. N. P. 262; 2 Phil. Ev. 157, 160. In the cases before cited from the New Jersey Reports, the evil example of the defendant's conduct is indeed spoken of as a cause of increased damages.

The only other case referred to by Kent, C. J., in support of his position that evil example is a consideration for enhancing damages, is *Pritchard* v. *Papillon*, 3 Hargrave's State Trials, 1071. That was an action for a malicious and causeless arrest of the plaintiff, while publicly acting in his office of Lord Mayor of London. It is to be remembered that malice and want of probable cause were necessary to support this action. The Lord Chief Justice told the jury that the *malicious design* must govern them in estimating damages; that in cases of persons of great quality and honor, it was not easy to prove *their particular damage;* that the malice of the design was not against Sir W. Pritchard as such a particular man,

but against the Lord Mayor; that they were to give damages to the plaintiff, not as Sir W. P. but as Lord Mayor. In all this, there is nothing incompatible with acknowledged principles. It is the same doctrine which all the cases recognise, and which was fully vindicated in the case of the general warrant, in 2 Wils. 206. But the Lord Chief Justice went still further, and told the jury that the government of the city, and the honor of the king, whose substitute the Lord Mayor was, were concerned; which put a weight upon their inquiry into damages; and that the severity of their verdict would deter all people from entering into clans and cabals to make disturbances and affront the government. A verdict was returned for £10,000 damages; whereupon his lordship complimented the jury as 'men of some sense.' This case does indeed go the length of sanctioning punishment for evil example, in a civil action. It was however regarded as a *political* case by the judge who tried it, and that judge was Sir George Jefferies. It can hardly therefore be considered as an authority for any doctrine which impugns established principles, or which rests alone on his lordship's decision. On any legal question, supposed by Sir G. Jefferies to affect 'the honor of the king,' or to be connected with an 'affront to the government,' the courts of modern times would not feel themselves imperatively bound by his decisions.

It is worthy of notice, in this connexion, that in delivering the opinion of the court of exchequer chamber, in an action for a libel, Sir James Mansfield remarked, so late as 1812, that it was curious to observe in the arguments both of judges and counsel, in almost all the cases, that they had adverted to the question whether the publication tended to a breach of the peace. 'But that,' he added, 'is wholly irrelevant, and is no ground for recovering damages.' 4 Taunt. 365. So in *Elliot* v. *Nicklin*, 5 Price, 646, Garrow, B. wholly 'disclaimed the principle which would hold that civil actions should be considered as *media* of punishment, where they are founded on moral offences.'

In *mitigation* of damages, it is submitted that nothing is legally admissible in evidence, which does not tend to show that the *injury* is less than *prima facie* it would seem.

In the case of *Bussey* v. *Donaldson*, 4 Dallas, 207, which was an action against the owner of a ship for running down the ship of the plaintiff, Smith, J. thought that as there was only

a very slight carelesness, barely sufficient to render the defendant liable, the jury had a discretion to assess a smaller sum in damages than the plaintiff's actual loss. Some lurking of a similar notion may be discerned in the opinion given by Mr. Justice Shippen, in the previous case of *Purviance* v. *Angus*, 1 Dallas, 180. But in *Bussey* v. *Donaldson*, he and Brackenridge, J. wholly repudiated it, as did M'Kean, C. J. in the former case.

In actions for words, both spoken and written, much loose language may be found in the reports, which tends, it is believed, to produce erroneous notions respecting the law of damages. Thus it is not unfrequently said, that evidence is admissible 'in extenuation of malice and in mitigation of damages,' that the defendant heard the story which he repeated, or that the libel which he published was previously printed by another person. Now it is manifest that although there MAY BE *less malice* in repeating than in originating a slander, yet it by no means follows that there is *less injury* to the plaintiff from the repetition, than from the first utterance. On the contrary, the chief, if not the only injury, may proceed from the repetition. This depends upon the time, place, and circumstances of the repeating of the words, and upon the character of the speaker. There MAY, however, be equal or greater malice in the retailer, than in the author of a slanderous report. But if the notion of *punishment* be discarded, it is immaterial what is the degree of malice; the sole question is, what is the extent of the injury? If there be what Mr. Starkie calls 'a residuum of malice' sufficient to sustain the action, the defendant, it is believed, is responsible for all the injury he has caused; and is no further liable, though his malice may be of the most atrocious nature. It may doubtless sometimes happen that the injury will be somewhat proportioned to the malice of the attack. And on the other hand, the injury not unfrequently will be almost inversely as the malice; the temper manifested by the speaker counteracting the intended effect of his words.

If evidence is at all admissible, that the defendant heard the story from another before he propagated it, or that the libel was previously published in another paper, it is (with great submission) admissible only for the purpose of showing that the *injury sustained* by the plaintiff is less than it would have been from an original uttering or publication; and not for the

purpose of 'extenuating malice.' It would seem, however, on principle, that such evidence ought not to be admitted for any purpose. For the only allowable purpose, viz. that of showing the real extent of the plaintiff's injury, it is exceedingly loose and unsatisfactory, and is liable to gross abuse. See Holt's N. P. R. 533, *Mills* v. *Spencer;* 4 Conn. Rep. 408, *Treat* v. *Browning;* 2 Stark. Ev. 880, and cases cited in the American editor's *note;* Stark. on Slander, 410.

Evidence that the plaintiff has libelled the defendant has been said to be admissible in mitigation of damages, in an action for a libel. 2 Campb. 72, *Finnerty* v. *Tipper;* 2 Stark. Ev. 877, & *note* (1). If the plaintiff is proved to be a *common libeller*, it is easy to see that his injury from a libel on himself is entitled to little consideration, because his character, being necessarily infamous, can suffer but little from a libellous attack. But it is not so readily perceived why a single libel by the plaintiff on the defendant should reduce his damages, when he sues for a libel on himself by the defendant. The law of set-off does not extend to such a case. And the last decision which has been seen, on this point, leaves a serious doubt on the question whether evidence of the plaintiff's having published a libel on the defendant is at all admissible. It was however decided that, at the furthest, such evidence could be received only in case of a libel concerning the *same matter.* 3 Barn. & Cres. 113, *May* v. *King.* If even in this restricted manner, the evidence is admissible in mitigation of damages, it must clearly be only on the ground of *provocation;* not for the purpose of showing the extent of the plaintiff's injury, but to show that the plaintiff, through his own misconduct, is not entitled to compensation for his actual injury. In other cases, however, (as will shortly be seen) provocation is allowed to be proved in mitigation of damages only when the injury *immediately* follows it, 'before the blood has time to cool;' which certainly does not hold in the case of publishing a libel.

On this doctrine of mitigating damages in consequence of provocation given by the defendant to the plaintiff, only one English case has been found. If there are more, they have eluded a laborious search. In 12 Vin. Ab. 159, it is said that in an action for slander, in the case of *Dennis* v. *Pawling*, Price, B. allowed provocation given before the speaking of the words, to be shown in mitigation of damages.

If a battery is inflicted in self-defence, it is justifiable; and no

damages can be recovered, if the pleading is correctly conducted. The plaintiff, though he has suffered, (it may be grievously,) is entitled to no redress, because he brought the evil upon himself by his own misconduct. So, it seems, if the plaintiff *provoke* the defendant by insult and abuse, and a battery or actionable words immediately ensue, the provocation, though it does not justify the defendant's acts or words, may be shown in mitigation of damages; for the plaintiff was in fault, and should bear a part of the injury which his misconduct induced. But after the blood has time to cool, if the defendant assault or slander the plaintiff, he is not regarded as a subject for clemency on account of the provocation given him. 1 Mass. Rep. 12, *Avery* v. *Ray;* 2 Root, 252, *Guernsey* v. *Morse;* 19 Johns. Rep. 319, *Lee* v. *Woolsey.*

So in an action for false imprisonment, a reasonable cause of suspicion that the plaintiff had committed a felony may be shown in mitigation of damages. Ryan & Moody, 424, *Chinn* v. *Morris.* Where a party is placed in suspicious circumstances, the law regards it as his fault or his misfortune, and very properly casts a part at least of the ill consequences upon himself. See 1 Phil. Ev. 140, (2d ed.); 2 Stark. Rep. 143, *Wallace* v. *Jarman.*

So in an action for seduction of a wife or daughter, evidence may be given in mitigation of damages, which shows that the consequence resulted in part from the improper, negligent and imprudent conduct of the plaintiff himself. 3 Stark. Ev. 1310; 2 Phil. Ev. 155.

In actions for assault and battery, the courts have some times seemed to be influenced by the rules of *criminal* law, and to have compared a civil action to an indictment for homicide, where sudden passion reduces the crime from murder to manslaughter. It is believed that this is by no means the correct view of the matter. If provocation can, on principle, be allowed to reduce damages below the actual injury received, it would seem to be only on the ground that the defendant has been culpably instrumental in bringing the mischief on himself. In this view of the doctrine, no principle, perhaps, is violated; one principle (as in divers other instances) is held to control or modify another.

It might be more satisfactory, perhaps, to minds accustomed to bring all questions to the rigid test of elementary principles, if the decisions had proceeded no further than this, viz. that

provocation shall be received as an *excuse for the insult and abuse* accompanying an injury, and which would not *in themselves* be actionable, though they ordinarily *aggravate the injury* which they accompany. The case of *Tomlinson* v. *Booth*, 2 Root, 32, illustrates the meaning here intended. That was an action of trespass for shooting the plaintiff's horse on a military parade. The defendant, who was member of a company of infantry, was allowed to show in mitigation of damages, that the plaintiff, who was a member of a company of cavalry, had violated orders and crowded on the infantry in different parts of the parade in their manœuvring, *at the time* when the horse was shot; but not at a previous manœuvring.

The value of the horse would seem, in this case, to be the least that a jury would give, even after allowing for the provocation. But if no provocation had been given, the plaintiff (as has been seen heretofore) would be entitled to what is called vindictive damages; that is, to damages for the violence, and for the insult given him on a public parade. It would seem very proper, and at variance with no principle, that the plaintiff should be limited in his damages to the value of his horse; the aggravating circumstances, which ordinarily would entitle him to vindictive damages, having been brought upon him by his own arrogance and misbehavior. One mere insult, which is not *per se* actionable, may well be offset against another.

The decisions, however, carry the effect of provocation further.

It is not to be denied that writers on natural law, and the civilians, mention rules for the estimate of damages, which depend much on the supposed moral desert of the parties. A kind of moral balance is struck, and damages adjusted accordingly. Domat says *the prudence of the judge* is to determine questions of damages; 'he joining to the light, which the principles of law and equity may give him, a prudent discernment of the circumstances, and of the regard that ought to be had to them; whether it be for *lessening* the damages that are to be adjudged, by cutting off pretensions for distant losses, and upon other considerations, if there be ground for it; as in the cases where *no bad design*, nor any fault, can be imputed to the person who is bound to make good the damages; or for *increasing* the damages which are to be given *in consideration of the intention to hurt*, if there was any.' Book iii. title v. sect. iii. 13. See also Heineccius Elem. Juris Civ. secundum

ordinem Institutionum, Lib. iv. tit. iii. Ibid. Pandectarum, Part ii. lib. ix. tit. ii. Pufendorf, Book iii. chap. i. Hutcheson's Moral Philosophy, Book ii. chap. 15.

It was probably this 'prudence of the judge,' joined to the light of a supposed natural equity, and operating according to the theory of the civil law, which produced the decree for fifty dollars damages, in the case of *Roberts* v. *Dallas*, Bee's Rep. 239. That case was in the instance court of admiralty, which is governed by the civil law, the laws of Oleron, and the customs of the admiralty, &c. The suit was for an assault and battery and false imprisonment of a seaman by the master of a vessel. The actor (plaintiff) had been mutinous on board the ship, and the master, though accompanied by a strong guard, struck him on the breast with a drawn sword, and sent him ashore under the guard. He was afterwards tried by a court martial and sentenced to receive a hundred lashes for mutiny; but the punishment was withheld at the master's request, who brought him again on board the vessel, put him in irons, and kept him for sometime on prisoner's allowance.

The judge awarded the sum abovementioned as damages to the seaman, though the blow with the sword and the confinement in irons were wholly unjustifiable. The master, having voluntarily received him on board, had no right to confine him. 'I am of opinion,' said the judge, 'that this misconduct of the captain is considerably *mitigated by the former conduct of Roberts, and by the remission of a hundred lashes awarded by the court martial, which was obtained at the captain's entreaty.*' It is certain that such a cause for mitigating damages cannot be found in the *common law.* See 2 Stark. Rep. 454, *Rhodes* v. *Leach.*