A TREATISE

ON THE

LAW OF EVIDENCE.

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Quorsum enim sacræ leges inventæ et sancitæ fuere, nisi ut ex ipsarum justitia unicuique jus suum tribuatur? — MUSCARDUS EX ULPIAN.

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ADVERTISEMENT TO THE FIFTH EDITION.

This edition was prepared for the press by the lamented Author, and is given to the Profession as left by him at his death. Whether he had completed its preparation is not known, but the additional notes were left in the finished and perfect state which characterized all his works, and give reason to believe that his labors were done. The additions are not numerous, but they possess a peculiar interest, as being the last contributions of the Author to that science which his labors through life had done so much to illustrate.

Boston, January, 1854.

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PART IV.

Of the Evidence requisite in certain particular Actions and Issues at Common Law.

§ 253. 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;[1] and this whether it be to his person or estate.[2] Damages are never given in real

[1] Co. Lit. 257 *a*; 2 Bl. Comm. 438; Rockwood *v.* Allen, 7 Mass. 256, per Sedgwick, J.; Bussy *v.* Donaldson, 4 Dall. 207, per Shippen, C. J.; 3 Amer. Jur. 257.

[2] Since the first edition of this volume, Mr. Sedgwick has given to the profession a valuable treatise on the Law of Damages, in which he denies the soundness of the general rule here stated; and lays down the broad proposition that, "wherever the elements of fraud, malice, gross negligence, or oppression mingle in the controversy, the law, instead of adhering to the system, or even the language of compensation, adopts a wholly different rule. It permits the jury to give what it terms punitory, vindictive, or exemplary damages; in other words, blends together the interest of society and of the aggrieved individual, and gives damages *not only to recompense the sufferer, but to punish the offender.*" Sedgwick on Damages, p. 39. However this view may appear to be justified by the general language of some judges, and by remarks gratuitously made in delivering judgment on other questions, it does not seem supported to that extent by any *express decision on the point*, and is deemed at variance not only with adjudged cases, but with settled principles of law. This will be apparent from an examination of the authorities on which the learned author relies.

In the first case cited, in support of his position, that of Huckle *v.* Money, 2 Wils. 205, which was an action to try the legality of an arrest under a general warrant issued by the Secretary of State, the jury found a verdict for £300, which the defendant moved the court to set aside as excessive. But the motion was denied, on the ground that the damages were properly left at large to the jury; with instructions that they were not bound to any certain rule, but were at liberty to consider all the circumstances of oppression and arbitrary power by which the great constitutional right of the plaintiff was violated, in this attempt to destroy the liberty of the kingdom. All which the jury were thus permitted to consider were circumstances going in aggravation of the injury itself which the plaintiff had received, and so were admissible under the rule as stated in §§ 266, 272, of the text. The case of Tullidge *v.* Wade, 3 Wils. 18, was of the same class. It was trespass for breaking and entering the plaintiff's house and debauching his daughter; and the jury were instructed to take into consideration the plaintiff's loss of her service, and the expenses of her confinement in his house. The verdict, which was for £50, was complained of as excessive; but the court thought otherwise, "*the plaintiff having received the insult in his own house*, where he had civilly received the defendant, and permitted him to make his addresses to his daughter." And it was observed by Bathurst, J., that, "in actions of this nature, and of assaults, *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." It thus appears that in this case the damages were limited to the extent of the *injury received by the plaintiff*; and that the remark of Wilmot, C. J., relied on by the learned author, was altogether *gratis dictum*. In Doe *v.* Filliter, 13 M. & W. 47, which was trespass for mesne profits, the only question was whether in estimating the costs of the ejectment, as part of the plaintiff's damages, the plaintiff was confined to the costs taxed, or might be allowed the costs as between attorney and client. The remark of Pollock, C. B., respecting what are *called* "vindictive damages," though wholly gratuitous, is explained by himself to mean only that the jury may "take *all the circumstances* into their consideration," namely, the circumstances of *the injury inflicted*, so far as they affected the plaintiff. The like may be observed of what Mr. Justice Washington said in Walker *v.* Smith, 1 Wash. C. C. R. 152; which was an action against the plaintiff's factor, to recover the balance due to the plaintiff for goods which the factor had sold without taking collateral security, in violation of orders, the purchaser proving insolvent, and partial payment only having been obtained. The question was, whether the jury might assess damages in their discretion, for less than the plaintiff's actual loss, taking into consideration all the favorable circumstances on the defendant's part; or whether they were bound to give the plaintiff the precise sum which he had lost by the violation of his orders. And the judge

actions; but only in personal and mixed actions. In some of the American States, the jury are authorized by statutes to

instructed them that the latter was the sole measure of damages; remarking, passingly, that in suits for vindictive damages the jury acted without control, because there was no legal rule by which to measure them. His meaning apparently was, that in actions "sounding in damages," the court had *no control* over the sound discretion of the jury; but that where the damages were susceptible of a fixed and certain rule the jury were bound by the instructions of the court. The case of Tillotson *v.* Cheetham, 3 Johns. 56, is also relied upon. This was case for libel; in which the jury were instructed by Kent, C. J., "that the charge contained in the libel was calculated not only to *injure the feelings* of the plaintiff, but to *destroy all confidence in him* as a public officer; and in his opinion demanded from the jury exemplary damages, as well *on account of the nature of the offence charged* against the plaintiff, as for the *protection of his character as a public officer*, which he stated as a strong circumstance for the increase of damages"; adding, "that he did not accede to the doctrine that the jury ought not to punish the defendant, in a civil suit, for the pernicious effects which a publication of this kind was calculated to produce in society." Here the grounds of damages positively stated to the jury were expressly limited to the degree of *injury to the plaintiff*, either in his feelings or in his character as a public officer. The rest is mere negation. The jury were not instructed to consider any other circumstances than those which affected the plaintiff himself; though *these*, they were told, demanded exemplary damages. In this view, all damages, in actions, *ex delicto*, may be said to be *exemplary*, as having a tendency to deter others from committing the like injuries. These instructions, therefore, were in accordance with the rule already stated. In support of them, the Chief Justice relies on Huckle *v.* Money, and Tullidge *v.* Wade. He also refers to Pritchard *v.* Papillon, 3 Harg. St. Tr. 1071; 10 Howell, St. Tr. 319, 370, S. C., which was essentially a controversy between the crown and the people, before "the infamous Jeffries"; who told the jury that "the government is a thing that is infinitely concerned in the case that makes it so *popular* a cause"; and pressed them, with disgraceful zeal, to find large damages for that reason, and for their compliance in finding £10,000, which was the amount of the *ad damnum*, he praised them as men of sense, to be greatly commended for it. The ruling of that judge, in favor of the crown, will hardly be relied upon at this day as good authority. But in Tillotson *v.* Cheetham, the learned Chief Justice, in saying that the actual pecuniary damages in actions for tort are never the sole rule of assessment, probably meant no more than this, that the jury were at liberty to consider all the damages accruing to the plaintiff from the wrong done, without being confined to those which are susceptible of arithmetical computation. The remark of Spencer, J., beyond this was extrajudicial. In Woert *v.* Jenkins, 14 Johns. 352, which was trespass for beating the plaintiff's horse to death, with circumstances of great barbarity, the jury were told that they "had a right to give *smart-money*; by which nothing more seems to have been meant, than that they might take into consideration the circumstances of the cruel act, as enhancing the injury to the plaintiff by the laceration of his feelings. In the Boston Manufacturing Company *v.* Fiske, 2 Mason, R. 119, the only question was whether in case for infringing a patent, the plaintiff might recover, as part of his actual damage, the fees paid to his counsel for vindicating his right in that action. The observations of the learned judge, quoted by Mr. Sedgwick, were made with reference to the practice in admiralty, in cases of marine torts and prize where a broader discretion is exercised than in courts of common law, the court frequently settling in one suit all the equities between the parties in regard to the subject-matter. The next case adduced is that of Whipple *v* Walpole, 10 New Hamp. R. 130, which was a case against the town of Walpole to recover damages for an injury arising from the defective state of a bridge, which the defendants had grossly neglected to keep in repair. The bridge had broken down while the plaintiff's stage-coach was passing over, in consequence of which his horses were destroyed. The jury were instructed, "that for ordinary neglect the plaintiff could not recover exemplary damages; but that such damages might be allowed in the discretion of the jury, in case they believe there had been gross negligence on the part of the defendants." The question seems in fact to have been, whether the jury were confined to the value of the horses, or might take into consideration all the circumstances of the injury. The sole question before the court in bank was, whether the above instruction was correct; and they held that it was. The

assess, in real actions, the damages, which by the common law are given in an action of trespass for mesne profits; but this only converts the real into a mixed action.

remark that the jury might give "damages *beyond the actual injury sustained*, for the sake of the example," though gratuitous and uncalled for, seems qualified by the subsequent observation, that the jury, in cases of gross negligence, "were not bound to be *very exact* in estimating the amount of damages"; and probably the learned judges meant to say no more than that in such cases the court would not control the discretion of the jury, but would leave them at liberty to consider all the circumstances of the injury, and award such damages as they thought proper. See, to the same effect, Kendall *v.* Stone, 2 Sandf. S. C. R. 269; Tifft *v.* Culver, 3 Hill, 180. In Linsley *v.* Bushnell, 15 Conn. R. 225, which was a case for an injury to the plaintiff's person, occasioned by an obstruction left in the highway by the wanton negligence of the defendant, the question was, whether the jury, in the estimation of damages, were restricted to the loss of the plaintiff's time, and the expenses of his cure, &c., or might also allow, as part of his damages, the necessary trouble and expenses incurred in the prosecution of his remedy by action. And the court held that these latter were fair subjects for their consideration. "The circumstances of aggravation or mitigation," said the court; "the bodily pain; the mental anguish; the injury to the plaintiff's business and means of livelihood, past and prospective; all these and many other circumstances may be taken into consideration by the jury, in guiding their discretion in assessing damages for a wanton personal injury. But these are not all that go to make up the amount of damage sustained. The bill of the surgeon, and other pecuniary charges, to which the plaintiff has been necessarily subjected by the misconduct of the defendant, are equally proper subjects of consideration." And it is in express reference to the propriety of allowing the trouble and expense of the remedy, that the observation respecting vindictive damages, or smart-money, quoted by Mr. Sedgwick, seems to have been made. For the learned judge immediately cites, in support of his remark, certain authorities, which will hereafter be mentioned, not one of which warrants the broad doctrine which is now under consideration; and he concludes by quoting from one of them with emphasis, the admission, that "where an important right is in question, in an action of trespass, the court have given damages to *indemnify the party for the expense of establishing it.*" This is conceived to be the extent to which the law goes, in civil actions for damages, beyond the circumstances of the transaction.

The learned author further observes, that the doctrine he lays down has been fully adopted by the Supreme Court of the United States; and cites Tracy *v.* Swartwout, 10 Peters, R. 80. That was an action of trover against a collector of the revenue, for certain casks of syrup of sugar-cane, which the importer had offered to enter and bond at the rate of fifteen per cent *ad valorem*, but the collector, acting in good faith, required bond for a duty of three cents per pound. The importer refusing to do this, the goods remained in the hands of the defendant for a long time, waiting the decision of the Secretary of the Treasury; who being of opinion that the lighter duty was the legal one, they were accordingly delivered up to the importer at that rate of duty; but in the mean time had become deteriorated by growing acid. The judge of the Circuit Court instructed the jury, that the circumstances of the dispute ought not to subject the collector to more than nominal damages; to which exceptions were taken. The sole question on this subject was, whether the plaintiff was entitled to the damages he had *actually sustained;* and the Supreme Court held that he was so entitled. It was in reference to this question only that the terms *exemplary* and *compensatory* damages were used; the question whether, in any case, damages could be given by way of punishment alone, not appearing to have crossed the minds either of the judges or the counsel.

The last case cited by the author is that of The Amiable Nancy, 3 Wheat. 546, which was a libel for a marine tort, brought by neutrals against the owners of an American privateer for illegally capturing their vessel as a prize, and for plundering the goods on board. The question was, whether the *owners* of the privateer, not having in any respect participated in the wrong, were liable for any damages beyond the prime cost or value of the property lost, and in case of injury, for the diminution in its value, with interest thereon; and the court held, that they were not; and accordingly rejected the claim for all such damages as rested in mere discretion. To what extent the immediate wrongdoers might have been

§ 254. All damages must be *the result* of the injury complained of; whether it consists in the withholding of a legal right, or the

liable, was a question not before the court; yet it is to be noted, that in the passing allusion which the learned judge makes to their liability, he merely says that, in a suit against them, it *might* be proper to go yet further, in the shape of exemplary damages, but does not say that it *would* be; for his attention was not necessarily drawn to that point.

The case also of Grable *v.* Margrave, 3 Scam. 372, has been elsewhere adduced in support of the rule now controverted. It was an action upon the case, for seduction of the plaintiff's daughter; in which the judge permitted the plaintiff to offer evidence both of his own poverty and of the pecuniary ability of the defendant; to which ruling the defendant took exception. And the court held the ruling right; observing, that the father was entitled to recover not only for the loss of service, and the actual expenses, but for the dishonor and disgrace *cast upon him and his family*, and for the loss of the society and comfort of his daughter. Clearly this decision was in perfect consonance with the doctrine in the text, § 269; but the remark of the learned judge who delivered the opinion of the court, that, "in vindictive actions, the jury are always permitted to give damages, for the double purpose of setting an example, and of punishing the wrongdoer," was uncalled for by the case in judgment, and therefore cannot be imputed to the court. In Cook *v.* Ellis, 6 Hill (N. Y.) R. 466, the question seems to have been between *actual* and *exemplary* damages, in the popular sense of those words. It was an action of trespass, for an assault and battery. The defendant had already been indicted and fined $250 for the act; and he insisted that this was a bar to all further claim of the plaintiff, "beyond *actual* damages"; but the judge told the jury, that "these proceedings did not prevent them from giving *exemplary* damages, if they chose; though the fine and payment were proper to be considered, in fixing the amount to be allowed the plaintiff." The judgment is reported in a *per curiam* opinion; but it appears that the motion of the defendant for a new trial was denied; and the court are reported as saying, among other things, that "smart-money allowed by a jury, and a fine imposed at the suit of the people, depend on the same principle. Both are penal, and intended to deter others from the commission of the like crime. The former, however, becomes incidentally *compensatory for damages*, and at the same time *answers the purposes* of punishment." From this and other expressions, it may well be inferred, that by *actual* damages the court meant those which were susceptible of computation; and that by *exemplary* damages, or smart-money, they intended those damages which were given to the plaintiff for the circumstances of aggravation attending the injury *he had received*, and going to enhance its amount, but which were left to the discretion of the jury, not being susceptible of any other rule. But *as a decision*, the case extends no further than this, that in an action for trespass to the person, the payment of a fine, upon a criminal conviction for the same offence, cannot go in mitigation of the damages to which the plaintiff is entitled. The case of Johnson *v.* Woodman, 4 Scam. 495, sometimes also cited, is still less to the point. It was trover for a horse, bailed to the defendant for agistment, and used by him without leave, but under circumstances entitling the plaintiff to no more than nominal damages. And the jury having found for the defendant, the court refused to disturb the verdict. To these may be added the case of McNamara *v.* King, 2 Gilm. 432.

From this examination of the authorities, adduced in support of the position, that, in the cases alluded to, damages may be given purely by way of punishment, irrespective of the degree and circumstances of injury to the plaintiff, it is manifest that it has not the countenance of any express decision upon the point, though it has the apparent support of several *obiter dicta*, and may seem justified by the terms "exemplary damages," "vindictive damages," "smart-money," and the like, not unfrequently used by judges, but seldom defined. But taken in the connection in which these terms have been used, they seem to be intended to designate in general those damages only which are incapable of any fixed rule, and lie in the discretion of the jury; such as damages for mental anguish, or personal indignity and disgrace, &c., and these, so far only as the sufferer is himself affected. If more than this was intended, how is the party to be protected from a double punishment? For after the jury shall have considered the injury *to the public*, in assessing damages for an aggravated assault, or for obtaining goods by false pretences, or the like, the wrongdoers are still liable to indictment and fine as well as imprisonment, for the same offence. See Warren *v.* Austin, 4 Cush. 273.

This view of the true meaning of those

breach of a duty legally due to the plaintiff. Those which *necessarily* result are termed *general damages*, being shown under the

terms was taken by Smith, J., in Churchill *v.* Watson, 5 Day, R. 144. It was trespass *de bonis asportatis*, committed with malice, and with circumstances of peculiar aggravation, to prevent the plaintiff from completing a contract for building a vessel. And the question was, whether the jury were confined to the value of the property taken, and presumptive damages for the force only; or whether they might consider all the aggravating circumstances attending the trespass, and the plaintiff's actual damage sustained by it. The court held the latter. The learned judge remarked, that, "in actions founded in tort, the first object of a 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 one item; there may be others, and in this case I think there were others." He then mentions the interruption and delay which occurred in building the vessel, as of the class of damages to which he alludes, and adds that he shall not attempt to draw the line between consequences which may properly influence a jury in assessing damages, and those which are so far remote and *dependent upon other causes*, that they *cannot* be taken into consideration. "In addition," he observes, "to the *actual* damage," (meaning doubtless, from the connection, the direct pecuniary damage above alluded to,) "which the party sustains in actions founded in *tort*, the jury are at liberty to give a further sum, which is sometimes called *vindictive*, sometimes *exemplary*, and at other times *presumptive* damages. These, from their nature, cannot be governed by any precise rule, but are assessed by the jury, upon a *view of all the circumstances attending the transaction*." He afterwards says: "Indeed I know of no such thing as *presumptive* damages for *force*. It is a wrong, for which the law presumes damages, and the amount will depend on the *nature, extent, and enormity of the wrong*; but force partakes not of the nature of right or wrong, in such a manner that the law can raise any presumption." A similar view of the rule of damages in *torts* had previously been taken by the court in Edwards *v.* Beach, 3 Day, R. 447, which was trespass for destroying a tavern-keeper's sign; the plaintiff claiming damages *commensurate with the injury*, and the defendant resisting all but the value of the sign. So, in Denison *v.* Hyde, 6 Conn. 508, which was trespass for carrying away the plaintiff's vessel, the rule was held to be, that, in tort, "not only the direct damage, but the probable or inevitable damages, and *those which result from the aggravating circumstances attending the act*, are proper to be estimated by the jury." So, in Trent *v.* Barber, 7 Conn. R. 274, which was trespass, the defendant having broken open the plaintiff's chest, containing her wearing apparel, and used language, in relation to the contents of it, that wounded her feelings, it was held, that these circumstances were proper to be considered by the jury, as *aggravating the injury*, and so increasing the damages. In Merrills *v.* The Tariff Manuf. Co. 10 Conn. R. 384, which was an action on the case, the court referred to the malice, wantonness, and spirit of revenge and ill-will, with which the act was done, and observed, that "these circumstances of aggravation may, with great propriety, be considered in fixing the *remuneration to which the plaintiff is entitled*." The same view of the true meaning and limit of the term "*vindictive damages*" was taken by Lord Abinger, C. B., in Brewer *v.* Dew, 11 M. & W. 625, which was trespass for groundlessly seizing and taking the plaintiff's goods, *per quod* he was annoyed and injured in his business, and believed to be insolvent, and certain lodgers left his house, &c. The defendant pleaded the bankruptcy of the plaintiff in bar of the action; to which the plaintiff demurred; thus raising the question, whether the damages passed to the assignees. And the Lord Chief Baron said: "The substantial ground on which this case is to be decided is this, — whether, on this declaration as it stands, the judge could give *vindictive* damages *for the seizing and taking* of the goods *beyond their value*. For the *breaking and entering* it is admitted they might give damages beyond the amount of the actual injury" (evidently meaning, beyond the injury to the *property*). "Now I think that under this declaration the plaintiff might give evidence to show that the entering and the seizure of goods were made under a false and unfounded pretence of a legal claim, and that *thereby the plaintiff was greatly annoyed and disturbed* in carrying on his business, and was believed to be insolvent, and that *in consequence*, his lodgers left him. Might not the jury then give vindictive damages *for such an injury, beyond the mere value of the goods?*" Here it is plain, that by "vindictive damages" the learned judge intended only the damages *which the plaintiff had sustained*, beyond the value of his goods; and not those, if any, for any supposed injury to the public at large.

ad damnum, or general allegation of damages, at the end of the declaration; for the defendant must be presumed to be aware

Such also was plainly the sense in which Mr. Justice Story used this term in Whittemore *v.* Cutter, 1 Gall. 483. "By the terms 'actual damage,'" said he, "in the statute (referring to the patent act), are meant such damages as the plaintiffs can actually prove, and have in *fact* sustained, as contradistinguished to mere imaginary or exemplary damages, which, in personal torts, are sometimes given. In mere personal torts, as assaults and batteries, defamation of character, &c., the law has, in proper cases, allowed the party to recover not merely for any actual injury, but for the *mental anxiety*, the *public degradation* and *wounded sensibility*, which honorable men *feel at violations of the sacredness of their persons and characters.*" It seems superfluous to state at large the peculiar cases in which a similar rule has been laid down. It was emphatically but briefly stated by Williams, C. J., in Bateman *v.* Goodyear, 12 Conn. R. 580, which was trespass for an aggravated forcible entry, in these words: "What then is the principle upon which damages are given in an action of trespass? The *party is to be indemnified* for what he has actually suffered; and then all those circumstances *which give character to the transaction* are to be weighed and considered." He cites the above case of Churchill *v.* Watson, and refers to Bracegirdle *v.* Orford, 2 M. & S. 77, where the circumstances of the entry into the plaintiff's house, namely, upon a false charge of concealment of stolen goods, to the injury of her reputation, were held proper for the consideration of the jury; Le Blanc, J., remarking, "that it is always the practice to give in evidence the circumstances which accompany and *give a character to the trespass.*" The party is to be *indemnified*; nothing more. But every circumstance of the transaction *tending to his injury* is to be considered. At this limit the jury are to stop; — a limit carefully marked by the court in Coppin *v.* Braithwaite, 8 Jur. 875. They may weigh every fact which goes to his injury, whether in *mind*, *body*, or *estate*; but are not at liberty to consider facts which do not relate to the injury itself, nor to its consequences to the plaintiff. In other words, they cannot go beyond the issue; which is the guilt of the defendant, and the damage it did to the plaintiff; for this only did the defendant come prepared to meet. Such plainly was the principle of the decision in the cases already cited; as it also was in Hall *v.* Conn. R. Steamboat Co., 13 Conn. R. 320, which was case for an inhuman injury to a passenger; in Southard *v.* Rexford, 6 Cowen, R. 264, which was for breach of a promise of marriage; in Major *v.* Pulliam, 3 Dana, R. 592, which was trespass *quare clausum fregit*; and in Rockwood *v.* Allen, 7 Mass. 254, which was case for the default of the sheriff's deputy. In all these cases there were circumstances of misconduct and gross demerit on the part of the defendant, richly deserving punishment in the shape of a pecuniary *mulct*, and fairly affording a case for damages on that ground alone; yet in none of them do the court intimate to the jury that they may assess damages for the plaintiff to any amount more than commensurate with the injury which he sustained. See also Matthews *v.* Bliss, 22 Pick. 48.

The most approved text-writers, also, justify this rule of damages. Thus Blackstone, 2 Bl. Comm. 438, defines *damages* as the money "given to a man by a jury, as *a compensation or satisfaction for some injury sustained*; as for a battery, for imprisonment, for slander, or for trespass." Hammond, Law of Nisi Prius, p. 33, limits the remedy, by an action of trespass, to the recovery of "*a compensation for the injury sustained.*" Id. pp. 43 - 48. And it is worthy of remark, that Ch. Baron Comyns, in treating expressly of damages, nowhere intimates a power to assess them beyond this. 3 Com. Dig. Damages, E. The same opinion was entertained by Ld. Denman, who observed, that "the principle on which actions are maintainable is not the punishment of guilty persons, but compensation to innocent sufferers." Filliter *v.* Phippard, 12 Jur. 202, 204; 11 Ad. & El. 356, N. S. Dr. Rutherforth, also, defines "damages" with equal strictness. "By damage, we understand every loss or diminution of *what is a man's own* occasioned by the fault of another." 1 Ruthf. Inst. b. 1, ch. 17, § 1, p. 385 (Phil. ed.), 1799. He follows Grot. De Jur. Bel. lib. 2, cap. 17, § ii. This chapter of Rutherforth is a precise and luminous statement of the principles on which damages ought to be computed; but nowhere countenances the position of Mr. Sedgwick. In the only passage which he has cited, as looking that way, viz. a paragraph in § xiv. p. 400, the author is speaking of the rule of reparation where there is no malice; and in stating the degree of fault, he thinks that the grossest faults may well deserve punishment; but he does not *there* intimate *how* the punishment should be inflicted. The whole passage is as follows: "The obligation to make reparation for damages

of the necessary consequences of his conduct, and therefore cannot be taken by surprise in the proof of them. Some damages done by our means is not confined to those actions only which are criminal enough to subject us to punishment. Though there is no degree of malice in an action by which another is injured, yet it may arise from some faulty neglect or imprudence in him who does it, or is the occasion of its being done; and when any person has suffered damage, for want of his taking such care as he ought to have taken, the same law which obliged him, as far as he was able, to avoid doing harm to any man, cannot but oblige him, when he has neglected this duty, to undo, as well as he can, what harm he has been the occasion of; that is, to make amends for the damage which another has sustained through his neglect.

"Those faults which consist in neglect are sometimes divided into three degrees; a great fault, which is such a neglect as all men may well be supposed and ought to guard against; a small fault, which is such a neglect as discreet and diligent men are not usually guilty of; and the smallest fault, which is such a neglect as the most exact and most prudent take care to avoid.

"Indeed, in many instances of gross faults, it is so difficult to distinguish between the mere neglect and a malicious design, that, besides the demand of reparation for damages done, some punishment may reasonably be inflicted upon the person so offending.

"Sometimes, and especially in what may seem faults of the lower degrees, the damage which arises from our supposed neglect will be found upon inquiry to have rather been owing to the neglect of the person who suffers it; and then we are not only clear from all guilt that may subject us to punishment, but from all blame that might oblige us to make reparation." See Sedgwick on Damages, p. 488, note.

On the contrary, Dr. Rutherforth, a little farther onward, in the same book, ch. 18, expressly denies the right of the party injured to anything more than compensation for the damages he has sustained. He says: "As the heirs of the criminal have no claim to such goods as he loses in the way of punishment, so neither has the injured person any, considered merely as the injured person. He has indeed a right to so much of the criminal's goods as will make him amends for the damage which he has suffered; but no reason can be given why he should have a right to more; unless some positive law has given him such a right. The ends which justify punishment will by no means extend his claim any further than this. The criminal, by suffering in his goods, may be discouraged or prevented from offending again; but a design to discourage or prevent him from offending again can be no ground for that person whom he has injured by offending once to claim property in the goods which he is deprived of. The ends of punishment may be answered by taking the criminal's goods from him; but these ends do not require that the property which he loses should be vested in the person whom he has injured." See 1 Rutherforth's Institutes, b. 1, ch. 18, § xiv. p. 434.

It was solely upon this ground of compensation to the plaintiff for the injury to his feelings by the very insulting conduct of the defendant, that the verdict was held good in Merest *v.* Harvey, 5 Taunt. 442. Ld. Kenyon has sometimes been quoted as having said, that though a plaintiff may not have sustained an injury by adultery, to a given amount, yet that large damages, for the sake of public example, should be given. And this supposed opinion of his was alluded to in the case of Markham *v.* Fawcett. But Mr. Erskine, who was for *the plaintiff* in that action, protested that "he never said any such thing." "He said that every plaintiff had a right to recover damages *up to the extent of the injury he had received;* and that public example stood in the way of showing *favor* to an adulterer, by reducing the damages *below* the sum which the jury would otherwise consider as the lowest *compensation for the wrong.*" 2 Erskine's Speeches, p. 9. The general rule, as thus limited, was recognized in Gunter *v.* Astor, 4 J. B. Moore, p. 12, where the defendants, who were rival manufacturers in the same trade with the plaintiff, had invited his company of servants to a dinner, got them intoxicated, and induced them to sign an agreement to leave the plaintiff's service and enter their own, which they did. The action was in case for conspiracy; and Ld. C. J. Dallas "left it to the jury to give damages *commensurate with the injury the plaintiff had sustained.*" A new trial was moved for, on the ground, that as the plaintiff's men worked by the piece only, and not by a contract on time, the plaintiff was entitled to damages only for the half-day they spent at the dinner; whereas the jury had given £1,600, being the proved value of two years' profits. But the motion was denied, on the ground that the plaintiff was entitled to recover damages for the loss he actually sustained by their leaving him at

are always presumed to follow from the violation of any right or duty implied by law; and therefore the law will in such cases

that critical period, of which the jury were the proper and exclusive judges. Here was a case of gross fraud and aggravated wrong, particularly dangerous in a manufacturing community; and yet no one pretended that the plaintiff had a right to greater damages than he had himself sustained, however deserving the defendants might be of a heavy pecuniary *mulct*, by way of example. A subsequent case, parallel to this in its principles, is that of Williams *v.* Currie, 1 M. G. & S. 841; in which, though a case of aggravated and annoying trespass, the jury were restricted, in their award of damages, to *a fair compensation for the injury sustained.* See also Scare *v.* Lyons, 2 Stark. R. 317, which was trespass for breaking the plaintiff's close and poisoning his fowls; where the jury were cautioned to guard their feelings against the impression likely to have been made by the defendant's conduct.

The rule of damages, as limited by the extent of the injury to the plaintiff, was the same in the Roman civil law. See 1 Domat's Civil Law, pp. 426, 427, book 3, tit. 5, § 2, n. 8, and notes; Wood's Institute of the Civil Law, book 3, ch. 7, pp. 258–264, and the places there cited.

The broad doctrine stated by Mr. Sedgwick finds more countenance from the bench of Pennsylvania than in any other quarter; and yet even there it can hardly be said to have been *adjudged* to be the law, as may be seen by the cases decided. The earliest, usually referred to, is Sommer *v.* Wilt, 4 S. & R. 19, which was an action on the case to recover damages for the malicious abuse of legal process, in which the jury found for the plaintiff, assessing damages at $ 9,500. The case came before the court in bank, on a motion to set aside the verdict, on the ground that the damages were excessive; but the motion was refused for the express reason that "all the facts and circumstances" of the case "were fairly submitted to the jury, to draw their own conclusion"; and that "there were circumstances from which the jury might have inferred malice, and evidence which satisfied them that *the ruin of the plaintiff* was occasioned by an act of oppression, and many *aggravating circumstances* of useless severity." This case, therefore, is in strict accordance with the rule as we have stated it, the damages being referred to the extent of the wrong done to the plaintiff. When, therefore, the learned judge, in the course of his judgment, remarked, that the standard of damages in actions of that nature "was not even a matter of mere compensation to the party, but an example to deter others," the remark was not called for by the question before him, but was entirely extrajudicial. This case was cited and its principle approved, in Kuhn *v.* North, 10 S. & R. 399, 411; in which the court granted a new trial because of excessive damages, in an action against the sheriff, where he honestly intended to perform his duty, and the jury were plainly mistaken.

(Of a similar character was the observation of Mr. Justice Grier, in the late case of Stimpson *v.* The Rail Roads, 1 Wallace, 164, 170. It was an action on the case for violation of the plaintiff's patent-right; and the question was, whether the plaintiff's actual costs out of pocket in prosecuting the suit might be included by the jury in their estimation of damages. The learned judge, in delivering his opinion in the negative, incidentally said: "It is a well-settled doctrine of the common law, though somewhat disputed of late (10 Law Reporter, 49), that a jury, in actions of trespass or tort, may inflict exemplary or vindictive damages, upon a defendant, having in view the enormity of the defendant's conduct, rather than compensation to the plaintiff." This remark was clearly gratuitous, it being irrelevant to the point in judgment.)

The strongest case in favor of giving damages to the plaintiff beyond what he has sustained is that of McBride *v.* McLaughlin, 5 Watts, 375, which was trespass against a judgment-creditor, for a wilful and malicious abuse of process, in the levy of his execution against two joint debtors, "under circumstances of peculiar injustice and oppression." It appeared that the oppression was in fact meditated not against the present plaintiff, but against the other debtor, to whom the property taken was supposed to belong; and that the present plaintiff had been joined in the judgment by mistake; and it was set aside as to him. The question was, whether the defendant's malice and misconduct in the transaction could be taken into the estimation of damages, inasmuch as it was not intended against the plaintiff. The judge ruled that it might; and his ruling was sustained by the court in bank. There was no discovery of error or mistake by the creditor, and consequent apology, during the oppressive transaction; but the whole was carried out to its final consummation, in the most insolent and cruel manner. The case, therefore, falls within

award *nominal* damages, if none greater are proved.[1] But where the damages, though the *natural* consequences of the act com-

our rule, that the jury may consider all the circumstances affecting the plaintiff, either in mind, body, or estate, and award him damages to the extent of the injury done *to him* in either of those respects. Surely, if A spits in B's face, on 'Change, it does not diminish the disgrace, nor, of course, the extent of the injury, for him afterwards to say that he mistook B for C. The crowd that saw the indignity may never come to the knowledge of this fact, nor does it lessen the pain inflicted upon his feelings at the time. In both cases, as in all others, the evidence is confined to the principal fact, with all its attending circumstances, stamping its character, and affecting the party injured. In the case we have just cited, however, the learned judge does seem to place the decision of the court on the ground that, in certain offences against morals which would otherwise pass without reprehension, "the providence of the *courts*" permits the private remedy to become an instrument of public correction. We say *seems* to place it; for he also uses expressions which equally indicate a reliance upon the rule which confines the jury to the evidence affecting the plaintiff alone. Such, for example, is the concluding sentence of his judgment: "The defendant was guilty of *wilful oppression*, and he is properly punished for *it*." Oppression of whom? Clearly the plaintiff, and no other. Our limits will not permit an extended examination of all that fell from the court on this occasion; but with the profound respect we sincerely entertain for that learned bench, we may be allowed to question the accuracy of the assertion, that, in an action for seduction of a daughter, the loss of service is the only legal ground of damages to the plaintiff. It is true, it was stated by Ld. Ellenborough, in 1809, to be difficult to perceive the legal propriety of extending the rule beyond that; yet he confessed the practice of so extending it had become inveterate; and accordingly he instructed the jury also to consider the injury to the plaintiff's parental feelings; and the rule has for many years been well settled, that in this, as in other wrongs, the wounded feelings, the loss of comfort, and the dishonor of the plaintiff, resulting from the act of the defendant, form a legal ground of damages, as part of the transaction complained of. The grounds of the action for seduction were recently examined in England, in Grinnel *v.* Wells, 7 M. & G. 1033, and the damages explicitly admitted to be given as *compensation*; not limited, however, to the actual expenditure of the plaintiff's money, but given according to all the circumstances of aggravation in the particular case. These are consequences of the defendant's wrongful act, done to the plaintiff, to his injury; and it is for these, and not for the outrage to the public, that damages are given. See *post*, § 579, and cases there cited. Andrews *v.* Askey, 8 C. & P. 7. The case of Benson *v.* Frederick, 3 Burr. 1845, cited in McBride *v.* McLaughlin, was not a case of damages given for the sake of example. It was an action against a colonel, for ordering a private to be whipped out of spite to his major, who had given the man a furlough. The jury gave him £150; and the court refused to set aside the verdict for excessiveness of damages, because the man, "though not much hurt, indeed, was *scandalized and disgraced* by such a punishment."

It is worthy of remark, that in Wynn *v.* Allard, 5 Watts & Serg. 524, which was trespass for a collision of vehicles on the road, the same learned court of Pennsylvania very properly held, that the drunkenness of the defendant was admissible in evidence, to determine the question of negligence, where the proof was doubtful; but "not to inflame the damages." Why not, if it was "an offence against morals"? For it certainly must have been deemed such an offence. And in Rose *v.* Story, 1 Barr, R. 190, 197, in trespass *de bonis asportatis*, where the jury had been allowed, in addition to the value of the property, to give such further damages as "*under all the circumstances of the case*, as argued by the counsel, they might think the plaintiff entitled to demand"; the same court held the instruction wrong, as giving the jury "discretionary power without stint or limit, highly dangerous to the rights of the defendant," and "leaving them without any rule whatever."

The subject of vindictive damages has recently been before several other American tribunals. In the Circuit Court of the United States, in Taylor *v.* Carpenter, 10 Law Reporter, 35, 188; 2 Woodb. & Minot, 1, 21; which was case for counterfeiting the plaintiff's marks on goods of the defendant, in which Sprague, J., had instructed the jury to give exemplary damages, for the sake of public example; the

[1] Whittemore *v.* Cutter, 1 Gall. 443, per Story, J. And see Sedgwick on Damages, Ch. II.

plained of, are *not* the *necessary* result of it, they are termed *special damages*; which the law does not imply; and, therefore,

verdict was allowed to stand, as it appeared that the jury had not given more damages than, upon computation, the plaintiff had actually sustained. But Woodbury, J., in giving judgment, referred to the doctrine as stated in the text of this work, and in 3 Am. Jur. 287 – 308, without disapprobation; and Sprague, J., with great candor declared, that he had become satisfied that his ruling upon this point, at the trial, was wrong. And it is worthy of note, that in a similar case, namely, an action on the case for counterfeiting the plaintiff's trademarks, recently determined in England, it was held, that the proper rule of damages was the actual injury sustained by the plaintiff; and it was observed by Coltman, J., that it would not have been at all unreasonable for the jury to have found damages to the amount of the profit made by the defendant upon the transaction in question. But there was no intimation that it was in any view of the case lawful to go further. Rodgers *v.* Nowill, 11 Jur. 1039. So, in a later case, which was trespass against two, one of whom had acted from bad motives, and the other had not, it was held that the damages ought not to be assessed with reference to the act and motives of the most guilty or the most innocent, but *according to the whole injury which the plaintiff had sustained* from the joint trespass. Clark *v.* Newsam, 1 Exch. R. 131. In the Supreme Court of New York, in Whitney *v.* Hitchcock (see 10 Law Rep. 189, since reported in 4 Denio, 461), which was case, by a father, for an atrocious assault and battery upon his young daughter, the question directly in judgment was, whether, in the case of a wrong punishable criminally, by indictment, the plaintiff, in a civil action for the wrong, was entitled to recover greater damages than he could prove himself to have sustained; and the court, having before it such of the foregoing discussions as were published in the Law Rep. Vol. 9, pp. 529 – 542, decided that he was not. The point was also incidentally ruled in the same manner by Cushing, J., in Meads *v.* Cushing, in the court of Common Pleas in Boston. See 10 Law Rep. 238. In Austin *v.* Wilson, 4 Cush. 273, which was an action on the case for a libel, the judge in the court below instructed the jury that this was not a case in which exemplary or punitive damages could be given; to which the plaintiff took exception. The opinion of the Supreme Judicial Court on this point was delivered by Metcalf, J., in the following terms: "We are of opinion that the jury were rightly instructed that the damages, in this case, must be limited to a compensation for the injury received. Whether exemplary, vindictive, or punitive damages — that is, damages beyond a compensation or satisfaction for the plaintiff's injury — can ever be legally awarded, as an example to deter others from committing a similar injury, or as a punishment of the defendant for his malignity, or wanton violation of social duty, in committing the injury which is the subject of the suit, is a question upon which we are not now required nor disposed to express an opinion. The arguments and the authorities on both sides of the question are to be found in 2 Greenl. on Ev., tit. Damages, and Sedgwick on Damages, 39 *et seq.* If such damages are ever recoverable, we are clearly of opinion that they cannot be recovered in an action for an injury which is also punishable by indictment; as libel, and assault and battery. If they could be, the defendant might be punished twice for the same act. We decide the present case on this single ground. See Thorley *v.* Lord Kerry, 4 Taunt. 355: Whitney *v.* Hitchcock, 4 Denio, 461; Taylor *v.* Carpenter, 2 Woodb. & Min. 122."

The obscurity in which this subject has been involved has arisen chiefly from the want of accuracy and care in the use of terms, and from a reliance on casual expressions and *obiter dicta* of judges, as deliberate expositions of the law, instead of looking only to the point in judgment. In most of the cases in which the terms "vindictive damages," "exemplary damages," and "smart-money" have been employed, they will be found to refer to the *circumstances* which *actually accompanied* the wrongful act, and were *part* of the *res gestæ*, and which, therefore, though not of themselves alone constituting a substantive ground of action, were proper subjects for the consideration of the jury, because injurious to the plaintiff. When the language used by judges in this connection is laid out of the case, as it ought to be, the position, that criminal punishment may be inflicted in a civil action, by giving to the plaintiff a compensation for an injury he never received, and which he does not ask for, will prove to have little countenance from any judicial decision. The contrary is better supported, both by the principle of many decisions, and by the analogies of the law. [See Chubb *v.* Gsell, 34 Penn. 114.] [* It is held by a majority of the court in Taylor *v.* Church, 8 N. Y. 460, an action for libel, that instructions to

in order to prevent a surprise upon the defendant, they must be particularly specified in the declaration, or the plaintiff will not be permitted to give evidence of them at the trial.[1] But where the special damage is properly alleged, and is the natural consequence of the wrongful act, the jury may infer it from the principal fact. Thus, where the injury consisted in firing guns so near the plaintiff's decoy pond as to frighten away the wild fowls, or prevent them from coming there; or, in maliciously firing cannon at the natives on the coast of Africa, whereby they were prevented from coming to trade with the plaintiff; these consequences were held to be well inferred from the wrongful act.[2]

§ 255. In trials at common law, the jury are the proper judges of damages; and where there is no certain measure of damages, the court, ordinarily, will not disturb their verdict, unless on grounds of prejudice, passion, or corruption in the jury.[3] If they

the jury that if they were satisfied that the defendant was influenced by *actual* malice, or a deliberate intention to injure the plaintiff, they may give, in addition to a full compensation, "such further damages as are suited to the aggravated character which the act assumes, and as are necessary as an example to deter from the doing of such injuries," were correct. And the principle is said to be well established in English and American courts, that the jury may give damages, "not only to recompense the sufferer, but to punish the offender." In Hunt *v.* Bennett, 19 N. Y. 174, where the court below charged the jury that "the plaintiff was not only entitled to recover to the full extent of the injury done him, but a jury might go further, and, if the circumstances of the case warranted it, increase the amount of damages as a punishment to the slanderer," the counsel for the defendant was stopped by the court and informed that the question had been settled against him in that court in unreported cases, the last of which (Keezeler *v.* Thompson) was decided in December, 1857. The whole court concurred in deeming the question at rest. In Hopkins *v.* Atlantic & St. Lawrence Railw., 36 N. H. 9, an action by the husband for an injury to the wife through the negligence of the company, it was held that the jury may give exemplary damages, in their discretion, where the injury was caused by the gross negligence of the company in the management of their trains.]

[1] 1 Chitty on Plead. 328, 346, 347 (4th edit.); Baker *v.* Green, 4 Bing. 317; Pindar *v.* Wadsworth, 2 East, 154; Armstrong *v.* Percy, 5 Wend. 538, 539, per Marcy, J.; 2 Stark. on Slander, 55–58 [62–66,] by Wendell; Dickinson *v.* Boyle, 17 Pick. 78. In an action for breach of a special agreement respecting the assignment of a certain lease and fixtures, under the allegation that the plaintiff "had been necessarily put to great expenses," he was permitted to give evidence of charges which he had become liable to pay an attorney, and a value for work done in respect to the premises in question, though the charges were not paid until after the action was commenced. Richardson *v.* Chassen, 34 Leg. Obs. 383. [In an action of tort against a corporation for a personal injury by their locomotive engine, the plaintiff's occupation and means of earning support are not admissible in evidence to increase the damages if not specially averred in the declaration. Baldwin *v.* Western R. R. Corp., 4 Gray, 333. Whether such evidence would be admissible in any form of declaration, *quære*. Ibid. In an action by a father for the seduction of his daughter, damages to the plaintiff's feelings may be recovered, though not specially alleged in the declaration. Phillips *v.* Hoyle, 4 Gray, 571.]

[2] Carrington *v.* Taylor, 11 East, 571; Keeble *v.* Hickeringill, Id. 574, n.; 11 Mod. 74, 130; 3 Salk. 9; Holt, 14, 17, 19, S. C.; Tarleton *v.* McGawley, Peake's Cas. 205.

[3] Gilbert *v.* Birkinsham, Lofft, R. 771, Cowp. 230; Day *v.* Holloway, 1 Jur. 794; Kendall *v.* Stone, 2 Sandf. S. C. R. 269; [or unless it evinces partiality, or a mistake in principle. Treanor *v.* 9 Cush. 228.]

are unable to agree, and the plaintiff has evidently sustained some damages, the court will permit him to take a verdict for a nominal sum.[1] Generally, in actions upon contract, where the plaintiff fails in proving the amount due, or the precise quantity, he can recover only the lowest sum indicated by the evidence. Thus, where delivery of a bank-note was proved, but its denomination was not shown, the jury were rightly instructed to presume it to be of the lowest denomination in circulation.[2] So, in *assumpsit* by a liquor merchant, where the delivery of several hampers of full bottles was proved, but their contents were not shown, the jury were directed to presume that they contained porter, that being the cheapest liquor in which the plaintiff dealt.[3]

§ 256. The damage to be recovered must always be the *natural and proximate consequence* of the act complained of. This rule is laid down in regard to special damage; but it applies to all damage.[4] Thus, where the defendant had libelled a performer at a place of public entertainment, in consequence of which she refused to sing, and the plaintiff alleged that by reason thereof the receipts of his house were diminished, this consequence was held too remote to furnish ground for a claim of damages.[5] So, where

[1] Feize *v.* Thompson, 1 Taunt. 121; [Bond *v.* Hilton, 2 Jones, Law (N. C.), 149; Owen *v.* O'Rielly, 20 Miss. (5 Bennett) 603.]

[2] Lawton *v.* Sweeney, 8 Jur. 964.

[3] Clunnes *v.* Pezzy, 1 Campb. 8.

[4] See Sedgwick on Damages, ch. iii.; [*Post*, § 261; Marble *v.* Worcester, 4 Gray, 395; Miller *v.* Butler, 6 Cush. 71; Watson *v.* The Ambergate Railway Co., 3 Eng. Law and Eq. 497.]

[5] Ashley *v.* Harrison, 1 Esp. R. 48; 2 Stark. on Slander, pp. 64, 65. And see Armstrong *v.* Percy, 5 Wend. 538, 539, per Marcy, J.; Crain *v.* Petrie, 6 Hill (N. Y.) R. 522; Downer *v.* Madison Co. Bank, Id. 648. ["The rule has not been uniform or very clearly settled as to the right of a party to claim a loss of profits as a part of the damages for breach of a special contract. But we think there is a distinction by which all questions of this sort can be easily tested. If the profits are such as would have accrued and grown out of the contract itself, as the direct and immediate results of its fulfilment, then they would form a just and proper item of damages to be recovered against the delinquent party upon a breach of the agreement. These are part and parcel of the contract itself, and must have been in the contemplation of the parties when the agreement was entered into. But if they are such as would have been realized by the party from other independent and collateral undertakings, although entered into in consequence and on the faith of the principal contract, then they are too uncertain and remote to be taken into consideration as a part of the damages occasioned by the breach of the contract."* By Bigelow, J., in Fox *v.* Harding, 7 Cush. 522; Masterton *v.* Brooklyn, 7 Hill, 61; Chapin *v.* Norton, 6 McLean, 500.] [* In Hadley *v.* Baxendale, 9 Exch. 341, a leading case in England, the rule was laid down as follows by Alderson, B: "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 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." In this case the plaintiffs, the owners of a flour-mill, sent a broken iron shaft to an office of the defendants, who were common carriers, to be conveyed by them; and the defendants' clerk, who attended at the office, was told that the mill was stopped, that the shaft must be

the defendant asserted that the plaintiff had cut his master's cordage, and the plaintiff alleged that his master, believing the assertion, had thereupon dismissed him from his service; it was held, that the discharge was not a ground of action, since it was not the natural consequence of the words spoken.[1] So, also, it has been held that, in *assumpsit* for breach of a promise to marry, evidence of seduction is not admissible, in aggravation of damages.[2] And in trespass *quare clausum fregit*, for destroying the plaintiff's fences, it was held that the measure of damages was the cost of repairing the fences, and not the injury resulting to the subsequent year's crop from the defect in the fences, long after the plaintiff had knowledge of the fact.[3]

§ 257. In cases of contract, if the parties themselves have

delivered immediately, and that a special entry, if necessary, must be made to hasten its delivery; and the delivery of the broken shaft to the consignee to whom it had been sent by the plaintiffs, as a pattern by which to make a new shaft, was delayed for an unreasonable time; in consequence of which the plaintiffs did not receive the new shaft until after the time they ought to have received it, and they were consequently unable to work their mill from want of the new shaft, and thereby incurred a loss of profits. Held, under the circumstances, such loss could not be recovered in an action against the defendants as common carriers. Recognizing Hadley *v.* Baxendale as the leading authority, it was held in the Queen's Bench, Smeed *v.* Ford, 5 Jur. (N. S.) 291, where the plaintiff, a farmer, contracted with defendant, an agent for the sale of thrashing machines, for the purchase of a thrashing machine, to be delivered on the 14th of August, and defendant was aware of the particular purpose for which it was ordered, and the machine was not delivered on that day, and plaintiff, being led by the promises of defendant to expect that it would be delivered from day to day, abstained from hiring it elsewhere, that plaintiff was entitled to recover, in an action against defendant, for loss sustained by injury to his wheat by a fall of rain, and for expenses incurred in carting the wheat and thatching it, and for the cost of kiln-drying it, but not for loss by a fall in the market-price of wheat.]

[1] Vickars *v.* Wilcocks, 8 East, 1. This case, however, is said to have been doubted, 8 Jur. 876, per Parke, B. See also 1 Smith's Leading Cases, pp. 203 – 304, and cases there cited; 1 Stark on Slander, p. 205.

[2] Weaver *v.* Bachert, 2 Barr, R. 230. And see Hay *v.* Graham, 8 W. & S. 27. [Loss of time and expenses incurred in preparations for marriage are grounds of damage directly incidental to a breach of promise of marriage; but they are strictly incidental, and are not grounds of special damage. Smith *v.* Sherman, 4 Cush. 414.]

[3] Loker *v.* Damon, 16 Pick. 284. [A person who puts a libel in circulation is liable to all the natural and probable consequences of so putting it in circulation. Miller *v.* Butler, 6 Cush. 71. Where a horse drawing a vehicle, and driven with due care, becomes frightened and excited by the striking of the vehicle against a defect in the highway, frees himself from the control of his driver, turns, and, at the distance of fifty rods from the defect, knocks down a person on foot in the highway, and using reasonable care, the city or town obliged by law to keep the highway in repair is not responsible for the injury so occasioned, though no other cause intervene between the defect and the injury. Marble *v.* Worcester, 4 Gray, 395. A prize was offered for the best plan and model of a certain machine, the plans and models intended for the competition to be sent by a certain day. The plaintiff sent a plan and model by a railway company, which by negligence did not deliver the plan, &c., until after the appointed day. In such a case, the proper measure of damages would seem to be the value of the labor and materials in making the plan and model, and not the chance of obtaining the prize, this being too remote a ground for damages. Watson *v.* The Ambergate, &c. Railway Co., 3 Eng. Law and Eq. 497.]

liquidated the damages, the jury are bound to find the amount thus agreed. But whether the sum stipulated to be paid upon breach of the agreement is to be taken as liquidated damages, or only as a penalty, will depend upon the intent of the parties, to be ascertained by a just interpretation of the contract. And here it is to be observed, that the policy of the law does not regard penalties or forfeitures with favor; and that equity relieves against them. And therefore, because, by treating the sum as a mere penalty, the case is open to relief in equity, according to the actual damages, the sum will generally be so considered; and the burden of proof will be on him who claims it as liquidated damages, to show that it was intended as such by the parties.[1] This intent is to be ascertained from the whole tenor and subject of that agreement; the mere use of the *words* "penalty," "forfeiture," or "liquidated damages," not being regarded as at all decisive of the question, if the instrument discloses, upon the whole, a different intent.[2]

§ 258. The *cases* in which the sum has been *treated as a penalty* will be found to arrange themselves into five classes, furnishing certain *rules* by which the *intention* of the parties is *ascertained*. (1.) Where the parties, in the agreement, have *expressly declared* the sum to be intended as a forfeiture, or penalty, and no other intent is to be collected from the instrument.[3] (2.) Where it was *doubtful* whether it was intended as a penalty, or not; and a certain damage, or debt, less than the penalty, is made payable, on the face of the instrument.[4] (3.) Where the agreement was evidently made for the attainment of another object, to which the sum specified is *wholly collateral*. This rule

[1] Tayloe *v.* Sandiford, 7 Wheat. 17, per Marshall, C. J. Mr. Evans seems to have been of the contrary opinion. 2 Poth. Obl. 71, 82, 86, by Evans. Wherever there is an agreement to do a certain thing under a penalty, the obligee may either sue in debt for the penalty, in which case he cannot recover more than the penalty and interest, but may upon a hearing in equity recover less; or, he may sue in covenant, upon the agreement, for the breach thereof, disregarding the penalty; in which case he may generally recover more, if he has suffered more. Harrison *v.* Wright, 13 East, 342; Bird *v.* Randall, 1 Doug. 373; Winter *v.* Trimmer, 1 Bl. Rep. 395; Astley *v.* Weldon, 2 B. & P. 346. If the sum is claimed as liquidated damages, it must be sued for in debt, or *indebitatus assumpsit*. Davies *v.* Penton, 6 B. & C. 221; Bank of Columbia *v.* Patterson, 7 Cranch, 303.

[2] Davies *v.* Penton, 6 B. & C. 224, per Littledale, J.; Kimble *v.* Ferren, 6 Bing. 141; 2 Story on Eq. § 1318.

[3] Astley *v.* Weldon, 2 B. & P. 346, 350; Smith *v.* Dickinson, Id. 630; Tayloe *v.* Sandiford, 7 Wheat. 14; Wilbeam *v.* Ashton, 1 Campb. 78; Orr *v.* Churchill, 1 H. Bl. 227; Stearns *v.* Barrett, 1 Pick. 451; Denn *v.* Cumming, 3 Johns. Cas. 297; Brown *v.* Bellows, 4 Pick. 179.

[4] Astley *v.* Weldon, 2 B. & P. 350, per Ld. Eldon. And see the observations of Best, C. J., in Crisdee *v.* Bolton, 3 C. & P. 240.

has been applied, where the principal agreement was, not to trade on a certain coast;[1] to let the plaintiff have the use of a certain building;[2] or, of certain rooms;[3] and not to sell brandy, within certain limits;[4] but the difference between these and some other cases, which have been regarded as liquidated damages, is not very clear. (4.) Where the agreement contains *several matters of different degrees of importance*, and yet the sum named is payable for the breach of any, even the least. Thus, where the agreement was, to play at Covent Garden, and conform to *all* the rules of the establishment, and to pay one thousand pounds for *any* breach of them, as liquidated damages, and not as a penalty, it was still held as a penalty only.[5] (5.) Where the contract is *not under seal*, and the *damages are capable of being certainly known* and estimated; and this, though the parties have expressly declared the sum to be as liquidated damages.[6]

§ 259. On the other hand, it will be inferred that the parties intended the sum as *liquidated damages*, (1.) Where the *damages* are uncertain, and are *not capable of being ascertained* by any satisfactory and known rule; whether the uncertainty lies in the nature of the subject itself, or in the particular circumstances of the case. This rule has been applied, where the agreement was to pay a certain sum for each week's neglect to repair a building;[7] for each year's neglect to remove a lime-kiln;[8] for not marrying the plaintiff;[9] for running a stage on a certain road, in violation of contract;[10] for breach of a contract not to trade, or practise, within certain limits;[11] and for not resigning an office,

[1] Perkins *v.* Lyman, 11 Mass. 76.
[2] Merrill *v.* Merrill, 15 Mass. 488.
[3] Sloman *v.* Walter, 1 Bro. Ch. C. 418.
[4] Hardy *v.* Martin, 1 Bro. Ch. 419.
[5] Kemble *v.* Farren, 6 Bing. 141; Boys *v.* Ancell, 5 Bing. (N. C.) 390; 7 Scott, 364; Carrington *v.* Laing, 6 Bing. 242. [* But see Lampman *v.* Cochran, 16 N. Y. 275, as to the rule when all the conditions are to be performed simultaneously. Also 21 N. Y. 253.] There are, however, some cases in which it has been said that, where the parties expressly declare that the sum is to be taken as liquidated damages, it shall be so taken. See Hasbrouck *v.* Tappen, 15 Johns. 200; Slosson *v.* Beale, 7 Johns. 72; Reilly *v.* Jones, 1 Bing. 302; Goldsworthy *v.* Strutt, 35 Leg. Obs. 540. But this rule, it is conceived, ought to be applied only where the meaning is not otherwise discoverable; since it runs counter to the general policy of the law of equity, and to the statutes which provide for relief against forfeitures and penalties in the courts of common law.
[6] Pinkerton *v.* Caslon, 2 B. & Ald. 704; Davies *v.* Penton, 6 B. & C. 216; Randall *v.* Everest, 1 M. & Malk. 41; Barton *v.* Glover, 1 Holt, Cas. 43; Spencer *v.* Tilden, 5 Cow. 144; Graham *v.* Bickham, 4 Dall. 150.
[7] Fletcher *v.* Dyche, 2 T. R. 32.
[8] Huband *v.* Grattan, 1 Alcock & Napier, R. 389.
[9] Lowe *v.* Peers, 3 Burr. 2125; Cock *v.* Richards, 10 Ves. 429.
[10] Leighton *v.* Wales, 3 M. & W. 545; Pierce *v.* Fuller, 8 Mass. 223.
[11] Noble *v.* Bates, 7 Cow. 309; Smith *v.* Smith, 4 Wend. 468; Crisdee *v.* Bolton, 3 C. & P. 240. In this case, the sum was declared by the parties to be liquidated damages. Goldsworthy *v.* Strutt, 35 Leg. Obs. 540.

agreeably to a previous stipulation.[1] (2.) Where, from the nature of the case, and the tenor of the agreement, it is apparent that the damages have already been the subject of actual and fair calculation and adjustment between the parties.[2] Of this sort are agreements to pay an additional rent for every acre of land which the lessee should plough up;[3] not to permit a stone weir to be enlarged, "under the penalty of double the yearly rent, to be recovered by distress or otherwise";[4] to convey land, or, instead thereof, to pay a certain sum;[5] to pay a higher rent, if the lessee should cease to reside on the premises;[6] that a security should become void, if put in suit before the time limited in a letter of license granted to the debtor;[7] and to pay a sum of money in goods at an agreed price.[8]

§ 260. In the proof of damages, the plaintiff is *not confined to the precise number, sum, or value* laid in the declaration; nor is he bound to prove the breach of a contract to the full extent alleged. Thus, though he cannot recover greater damages than he has laid in the *ad damnum* at the conclusion of his declaration, yet the jury may find damages for the value of goods tortiously taken, beyond the value alleged in the body of the count.[9] So, under a count for a total loss of property insured, it is sufficient to prove an average or partial loss.[10] And in covenant, or *assumpsit*, proof of part of the breach alleged is sufficient to entitle the plaintiff to recover.[11]

§ 261. The *measure of damages* will, ordinarily, be ascertained by reference to the rule already stated; namely, the natural and proximate consequences of the act complained of. Thus the

[1] Legh *v.* Lewis, cited 2 Poth. Obl. 85, by Evans.

[2] See observations of Best, C. J., in Crisdee *v.* Bolton, 3 C. & P. 240; 2 Story on Eq. Jurisp. § 1318; Leland *v.* Stone, 10 Mass. 459, 462.

[3] Rolfe *v.* Peterson, 6 Bro. P. C. 436; Birch *v.* Stephenson, 3 Taunt. 473; Farrant *v.* Olmius, 3 B. & Ald. 692; Jones *v.* Green, 3 Y. & J. 298; Aylet *v.* Dodd, 2 Atk. 238; Woodward *v.* Giles, 2 Vern. 119.

[4] Gerrard *v.* O'Reilly, 2 Connor & Lawson, 165.

[5] Slosson *v.* Beale, 7 Johns. 72. And see Hasbrouck *v.* Tappen, 15 Johns. 200; Reilly *v.* Jones, 1 Bing. 302; Knapp *v.* Maltby, 13 Wend. 507; Tingley *v.* Cutler, 7 Conn. 291; Mead *v.* Wheeler, 13 N. Hamp. R. 351.

[6] Ponsonby *v.* Adams, 6 Bro. P. C. 41[1].

[7] White *v.* Dingley, 4 Mass. 433. And see Wafer *v.* Mocato, 9 Mod. 113.

[8] Brooks *v.* Hubbard, 3 Conn. 58. If the agreed price is unconscionable, the court will not adopt it as the rule of damages. Cutler *v.* How, 8 Mass. 237; Cutler *v.* Johnson, Id. 266; Baxter *v.* Wales, 12 Mass. 365.

[9] Hutchins *v.* Adams, 3 Greenl. 174; Pratt *v.* Thomas, 1 Ware, R. 147; The Jonge Bastiaan, 5 Rob. 322.

[10] Gardiner *v.* Croasdale, 2 Burr. 904; 1 W. Bl. 198, S. C.; Nicholson *v.* Croft, 2 Burr. 1188, per Ld. Mansfield.

[11] 1 Chitty on Pl. 297; Sayer, Law of Dam. p. 45; Van Rensselaer *v.* Platner, 2 Johns. 18.

drawers and indorsers of *bills of exchange*, upon the dishonor thereof, are ordinarily liable to the holder for the principal sum and the common mercantile damages, such as interest, expenses, re-exchange, &c., consequent upon the dishonor of the bill. For, having engaged that the bill shall be paid at the proper time and place, the holder is entitled to expect the money there; and if it is not paid accordingly, he is entitled to re-draw on them for such a sum as, at the market rate of exchange at the place, would put him in funds to the amount of the dishonored bill, and interest, with the necessary incidental expenses.[1] Upon a *contract to deliver goods*, the general rule of damages for non-delivery is the market value of the goods at the time and place of the promised delivery, if no money has yet been paid by the vendee;[2] but if the vendee has already paid the price in advance, he may recover the highest price of such goods in the same place, at any time between the stipulated day of delivery and the time of trial.[3] If, in the latter case, the market price is lower at the stipulated time of de-

[1] Story on Bills, §§ 399, 400; 3 Kent, Comm. 115, 116.

[2] Gainsford *v.* Carroll, 2 B. & C. 624; Boorman *v.* Nash, 9 B. & C. 145; Shaw *v.* Nudd, 8 Pick. 9; Swift *v.* Barnes, 16 Pick. 194, 196; Shepherd *v.* Hampton, 3 Wheat. 200, 204; Douglas *v.* McAllister, 3 Cranch, 298; Chitty on Contr. 352, n. (2), by Perkins; Dey *v.* Dox, 9 Wend. 129; [Bank of Montgomery *v.* Reese, 26 Penn. State R. (2 Casey) 143.]

[3] Clark *v.* Pinney, 7 Cow. 681; Chitty on Contr. 352, n. (2), by Perkins. But in *Massachusetts* the damages are restricted to the value at the agreed time of delivery. Kennedy *v.* Whitwell, 4 Pick. 466; Sargent *v.* Franklin Ins. Co., 8 Pick. 90. [*Also in Pennsylvania, White *v.* Tompkins, 52 Penn. St.] In an action for breach of contract for the sale of goods, it has been held that the measure of damages is not merely the amount of difference between the contract price and the price at which the goods could have been bought at the moment when the contract was broken, but likewise a compensation for such profit as might have been made by the purchaser, had the contract been duly performed. Dunlop *v.* Higgins, 12 Jur. 295; 1 H. L. Ca. 381. [The measure of damages in the case of a breach of a contract to deliver goods at a specified time is the difference between the contract price and the market price at the time of the breach of the contract, or the price for which the vendee had sold; but the purchaser cannot recover, as special damage, the loss of anticipated profits to be made by his vendees. Peterson *v.* Ayre, 24 Eng. Law & Eq. 382; see Waters *v.* Towers, 20 Ib. 410. In an action for the price of goods, it is not competent for the plaintiff to show their value for a specific purpose, but only their market value at the time and place of delivery. Bouton *v.* Reed, 13 Gray, 530.] But where the contract was for the sale of real estate, which the vendor was unable to perform, for want of a good title in himself, a distinction has been taken between the cases of good and bad faith in the vendor; it being held, that where no fraud appears on his part, but all has been *bona fide*, the plaintiff can recover only the money paid and interest, or his actual damages out of pocket; but that, if the vendor is chargeable with *mala fides*, the plaintiff may recover for the loss of his bargain; namely, the actual value of the land, at the time when it ought to have been conveyed. Flureau *v.* Thornhill, 2 W. Bl. 1078; Bitner *v.* Brough, 1 Jones, 127. *Ideo quære.* [Barbour *v.* Nichols, 3 Rhode Isl. 87. A carrier who at first wrongfully refuses to deliver, but afterwards delivers goods consigned to a manufacturer, is not liable for consequential damages arising from delay to the consignee's works caused by such refusal, or for a loss of profits from the same cause; but he is liable for the expense of sending to the carrier's office a second time for the goods. Waite *v.* Gilbert, 10 Cush. 177.]

livery than at the date of the contract, the measure of damages is the money advanced, with interest.[1] So, upon a *contract to replace stock*, the measure of damages is the price or value on the day when it ought to have been replaced, or at the time of trial, at the option of the plaintiff. But if afterwards, and while the stock was rising, the defendant offered to replace it, the plaintiff cannot recover more than the price on the day of tender.[2] In an action for a breach of warranty upon the sale of goods, the measure of damages is the difference of value between the article in a sound and in an unsound state, without regard to the price given.[3] And generally, in other cases of special contract, where one party agrees to do a certain thing, or to perform specific services, for a stipulated sum of money, as, for example, to perform a piece of mechanical work for an agreed price, or to occupy a tenement for a certain time at a specified rent, and deserts the undertaking before it is completed, or is turned away and forbidden to proceed by the other party, the measure of damages is not the entire contract-price, but a just recompense for the actual injury which the party has sustained.[4] And in all cases of breach of such specific contracts, it is to be observed, that, if the party injured can protect himself from damages at a trifling expense, or by any reasonable exertions, he is bound so to do. He can charge the delinquent party only for such damages as, by reasonable endeavors and expense, he could not prevent.[5]

[1] Clark *v.* Pinney, 7 Cow. 681; Chitty on Contr. 352, n. (2), by Perkins; Bush *v.* Canfield, 2 Conn. 485; [Barnard *v.* Conger, 6 McLean, 497; Halseys *v.* Hurd, Ib. 102; Dana *v.* Fiedler, 2 Kernan (N. Y.) 40; Clark *v.* Dales, 20 Barb. 42.]

[2] Shepard *v.* Johnson, 2 East, 211; McArthur *v.* Ld. Seaforth, 2 Taunt. 257; Harrison *v.* Harrison, 1 C. & P. 412. But in *Massachusetts* the rule is confined to the price at the agreed day of transfer, and is not extended to any subsequent period. Gray *v.* Portland Bank, 3 Mass. 390. [Where a corporation refuses to give to an owner of shares therein certificates of such shares on demand, or to recognize him as the owner thereof, and sells the shares to a third person, it is liable to pay the owner the value of the shares at the time of his demand, and interest thereon from the time of the demand. Wyman *v.* American Powder Co., 8 Cush. 168.]

[3] Cotters *v.* Keever, 4 Barr. 168; [*Post*, § 262; Moulton *v.* Scruton, 39 Maine (4 Heath), 287; Forman *v.* Miller, 5 McLean, 218.]

[4] Clark *v.* Marsiglia, 1 Denio, R. 317, Wilson *v.* Martin, Id. 602; Spencer *v.* Halsted, Id. 606. [Where there is a special contract to do a piece of work, as to build a dam, and the person agreeing to do the work builds a dam, in good faith and with an honest intention of fulfilling the contract, though not according to the contract, the damages are found by deducting from the contract-price so much as the dam built is worth less than the dam contracted for. Gleason *v.* Smith, 9 Cush. 486. Where there is a deficiency in the work, the measure of damages is the amount required to be paid to complete the work according to the contract. Ibid. Snow *v.* Ware, 13 Met. 42; Wade *v.* Haycock, 25 Penn. State R. (1 Casey) 382.]

[5] Miller *v.* The Mariner's Church, 7 Greenl. 67. So, in trespass. Loker *v.* Damon, 17 Pick. 284. See, *contra*, Heaney *v.* Heeney, 2 Denio, R. 625.

§ 261 *a*. A distinction, however, has been taken between contracts for specific work by the piece, and the like, and *contracts for the hire* of clerks, agents, laborers, and domestic servants for a year or shorter *determinate period;* and it is held in the latter class of cases that, if the person so employed is improperly dismissed before the term of service is expired, he is entitled to recover for the whole term; unless the defendant, on whom the burden of proof lies, can show, either that the plaintiff was actually engaged in other profitable service during the term, or that such employment was offered to him and rejected.[1] The same principle has also

[1] Costigan *v.* M. & H. Railroad Co., 2 Denio, R. 609. In this case, which was for a full year's salary, where the plaintiff had been improperly dismissed after two months' service, the law was thus stated by Beardsley, J.: "As a general principle, nothing is better settled than that upon these facts the plaintiff is entitled to recover full pay for the entire year. He was ready during the whole time to perform his agreement, and was in no respect in fault. The contract was in full force in favor of the plaintiff, although it had been broken by the defendants. In general, in such cases, the plaintiff has a right to full pay. The rule has been applied to contracts for the hire of clerks, agents, and laborers, for a year or a shorter time, as also to the hire of domestic servants, where the contract may usually be determined by a month's notice, or on payment of a month's wages. The authorities are full and decisive upon this subject. (Chitty on Contr. 5th Am. edit. 575 – 581; 1 Chit. Gen. Pr. 72 – 83; Browne on Actions at Law, 181 – 185, 504, 505; Beeston *v.* Collyer, 4 Bing. 309; Fawcett *v.* Cash, 5 Barn. & Ad. 904; Williams *v.* Byrne, 7 Ad. & El. 177; French *v.* Brookes, 6 Bing. 354; Gandell *v.* Pontigny, 4 Campb. 375; Robinson *v.* Hindman, 3 Esp. 235; Smith *v.* Kingsford, 3 Scott, 279; Smith *v.* Hayward, 7 Ad. & El. 544.) The rule of damages against the employer for the breach of a contract to perform mechanical work by the piece is different. (See Clark *v.* Marsiglia, 1 Denio, 317.) In no case which I have been able to find, and we were referred to none of that character, has it ever been held, or even urged by counsel, that the amount agreed to be paid should be reduced, upon the supposition that the person dismissed might have found other employment for the whole or some part of the unexpired term during which he had engaged to serve the defendant. And yet this objection might be taken in every such case, and in most of them the presumption would be much more forcible than in the case at bar. The entire novelty of such a defence affords a very strong, if not a decisive argument against its solidity. (The Duke of Newcastle *v.* Clarke, 8 Taunt. 602.) Nor do I find any case in which it was proved that other employment was offered to the plaintiff after his dismissal, and that his recovery was defeated or diminished because he refused to accept of such proffered employment.

"It has, however, been held, and rightly so, as I think, that where a seaman, hired for the outward and return voyage, was improperly dismissed by the captain before the service was completed, a recovery of wages by the seaman for the whole time was proper, deducting what he had otherwise received for his services after his dismissal and during the time for which his employer was bound to make payment. (Abbott on Shipp. 4th Am. ed. 442, 443; Hoyt *v.* Wildfire, 3 Johns. 518; Ward *v.* Ames, 9 Id. 138; Emerson *v.* Howland, 1 Mason, 22, 51.)

"And upon the same principle, where a merchant engages to furnish a given quantity of freight for a ship, for a particular voyage, and fails to do so, he must pay dead freight, to the amount so agreed by him, deducting whatever may have been received from other persons for freight taken in lieu of that which the merchant had stipulated to furnish. (Abbott, 277, 278; Puller *v.* Staniforth, 11 East, 232; Puller *v.* Halliday, 12 Id. 494; Kleine *v.* Catara, 2 Gall. 66, 73.) Upon this principle, as I understand, the case of Shannon *v.* Comstock, 21 Wend. 457, was decided. The defendants there engaged to pay the plaintiffs fifty-five dollars for the transportation of a certain number of horses on the canal from Whitehall to Albany, but failed to comply with their agreement. An action was thereupon brought to recover the fifty-five dollars, and, the contract and its violation having been shown, 'the defendants offered to prove that the dam-

been applied in suits for the recovery of dead freight, where the quantity agreed to be put on board by the shipper has not been furnished.[1]

ages sustained by the plaintiffs did not exceed five dollars.' What facts were offered to be given in evidence in order to establish this result, cannot be collected with absolute certainty from the report of the case, but it does not appear that any objection was made to the form of the offer, and the report shows that *the evidence was objected to and excluded.* I infer, then, that the offer of the defendants was to show by competent evidence that the plaintiffs took other freight on board their boat instead of their horses, so that their loss, by the violation of this contract, was but small. Upon the ground already stated, that loss was the amount the plaintiffs were in law and justice entitled to recover. So this court held, and, as the evidence had been rejected in the court below, the judgment was reversed. The views of the Chancellor, as stated in the case of Taylor *v.* Read, 4 Paige, 571, are to the same effect, and the propriety of the rule seems to me too apparent to admit of doubt.

"In these cases it appeared, or was offered to be shown, that the plaintiffs had in fact performed services for others, and for which they had been paid, in lieu of those they had bound themselves to perform for their defendants, and which the latter had refused to receive. In Heckscher *v.* McCrea, 24 Wend. 304, the court went a step further. That case arose in the Superior Court of the city of New York, where McCrea was plaintiff. It was an action for dead freight which the plaintiff claimed under a special contract with the defendants. They had agreed with the plaintiff to furnish a given number of tons of freight, at a certain price, for a return cargo from China to New York, in the plaintiff's ship. A part of the freight was furnished by the defendants, as agreed, but they fell short about one hundred and thirty tons. The agents for the defendants at Canton, where the ship then was, having no more freight to put on board for the defendants, offered to supply the deficiency, from the goods of other persons in their hands, which the agents were authorized to ship to the United States; such shipment to be made at a reduced, although the then current rate, but with an express agreement that receiving this freight on such reduced terms should not interfere with the original agreement between the parties to this suit. This offer was declined, and to the extent of this deficiency the ship came home empty. The action was to recover for this deficient freight. The court held that the plaintiff should have taken the freight offered, although at a rate below what the defendants had agreed to pay; that so far it would have relieved the defendants without doing injury to the plaintiff, and by which about two thirds of the amount now claimed might have been saved.

"In all the cases I have cited, the facts on which the delinquent party sought to bring the amount to be recovered below the sum agreed to be paid were proved or offered to be proved on the trial. Nothing was left to inference or presumption, and it was virtually conceded that the *onus* of the defence rested on the defendant. They are also cases in which the plaintiffs had either earned and received money from others, during the time when they must have been employed in fulfilling their contract with the defendants, or in which they might have earned it in a business of the same character and description with that which they had engaged with the defendants to perform.

"The principles established by the cases referred to seem to me just, and, although I have found no case in which they have been applied to such an engagement as that between these parties, still I should have no hesitation, where the facts would allow it to be done, to apply them to such a case as this.

"But, first of all, the defence set up should be proved by the one who sets it up. He seeks to be benefited by a particular matter of fact, and he should therefore prove the matter alleged by him. The

[1] Abbott on Shipp. by Shee, pp. 242–245; Sedgwick on Damages, p. 377; Heckscher *v.* McCrea, 24 Wend. 304; Shannon *v.* Comstock, 21 Wend. 457. [Where goods are wrongfully taken from a vessel by the shipper before she has broken ground on the voyage, the ship-owner is not entitled to the stipulated freight, as such, but to an indemnity for the breach of the contract. And if the vessel is a general ship, and the goods removed form only part of her cargo, and the ship-owner is bound by contracts with other shippers to perform the proposed voyage, and does perform it, the measure of damages is the stipulated freight, less the substituted freight actually made, or which might have been made by reasonable diligence. Bailey *v.* Damon, 3 Gray, 92.]

§ 262. In *assumpsit* upon the *warranty of goods*, the measure of damages is the difference between the value of the goods at the time of sale, if the warranty were true, and the actual value in point of fact.[1] If goods are warranted as fit for the particular purpose which they are asked for, the purchaser is entitled to recover what they would have been worth to him had they been so.[2] If they have been received back by the vendor, the plaintiff may recover the whole price he paid for them; otherwise, he may resell them, and recover the difference between the price he paid and the price received.[3] And if, not having discovered the unsoundness or defects of the goods, he sells them with similar warranty, and is sued thereon, he may recover the costs of that suit, as part of the damages he has sustained by breach of the warranty made to himself, if he gave seasonable notice of the suit to the original vendor.[4]

§ 263. In *debt on bond*, interest, beyond the penalty, may be

rule requires him to prove an affirmative fact, whereas the opposite rule would call upon the plaintiff to prove a negative, and therefore the proof should come from the defendant. He is the wrongdoer, and presumptions between him and the person wronged should be made in favor of the latter. For this reason, therefore, the *onus* must in all such cases be upon the defendant.

"Had it been shown, in the case at bar, that the plaintiff, after his dismissal, had engaged in other business, that might very well have reduced the amount which the defendants ought otherwise to pay. For this the cases I have referred to would furnish sufficient authority. But here it appears that the plaintiff was not occupied during any part of the time from the period of dismissal to the close of the year.

"Again, had it been shown on the trial that employment of the same general nature and description with that which the contract between these parties contemplated had been offered to the plaintiff, and had been refused by him, that might have furnished a ground for reducing the recovery below the stipulated amount. It should have been business of the same character and description, and to be carried on in the same region. The defendants had agreed to employ the plaintiff in superintending a railroad from Albany to Schenectady, and they cannot insist that he should, in order to relieve their pockets, take up the business of a farmer or a merchant. Nor could they require him to leave his home and place of residence to engage in business of the same character with that in which he had been employed by the defendants."

[1] Caswell *v.* Coare, 1 Taunt, 566; Fielder *v* Starkin, 1 H. Bl. 17; Curtis *v.* Hannay, 3 Esp. 83; Buchanan *v.* Parnshaw, 2 T. R. 745; Egleston *v.* Macauly, 1 McCord, 379; Armstrong *v* Percy, 5 Wend. 539; [Tuttle *v.* Brown, 4 Gray, 460; Reggio *v.* Braggiotti, 7 Cush. 166; Goodwin *v.* Morse, 9 Met. 278; Cothers *v.* Keever, 4 Barr, 168. The measure of damages is the same in an action for a deceit in the sale. Stiles *v.* White, 11 Met. 356; Tuttle *v.* Brown, 4 Gray, 460; Clare *v.* Maynard, 7 Car. & P. 743.]

[2] Bridge *v.* Wain, 1 Stark. R. 504. [* The defendant sold the plaintiff a quantity of cabbage seed, and warranted the same to be Bristol cabbage seed, and that such seed would produce Bristol cabbages. In an action for a breach of the warranty it was held, that the measure of damages was the value of a crop of Bristol cabbages, such as ordinarily would have been produced that year, deducting the expense of raising the crop and also the value of the crop actually raised from the seed sold. Passinger *v.* Thorburn, 34 N. Y. 634.]

[3] Caswell *v.* Coare, 1 Taunt. 566; Buchanan *v.* Parnshaw, 3 T. R. 745; Woodward *v.* Thacher, 3 Am. Law Jour. 228, N. S.

[4] Lewis *v.* Peake, 7 Taunt. 153; Armstrong *v.* Percy, 5 Wend. 535. [He may recover his taxable costs, Coolidge *v.* Brigham, 5 Met. 72; but not counsel fees, Reggio *v.* Braggiotti, 7 Cush. 166.]

recovered as damages.[1] If the damages actually sustained are greater than the penalty and interest, the only remedy is by an action of covenant, which may be maintained where the condition discloses an agreement to perform any specific act; in which case, if it be other than the payment of money, the jury may, ordinarily, award the damages actually sustained, without regard to the amount of the penalty.

§ 264. In an action of *covenant* upon any of the *covenants of title* in a deed of conveyance, except the covenant of warranty, the ordinary measure of damages is the consideration-money, or the proper proportion of it, with interest.[2] But for breach of the *covenant of warranty*, though in some of the United States the same rule prevails as in covenants of title, yet, in others, the course is to award damages to the value of the land at the time of eviction. In the former States, the courts regard the modern covenant of warranty as a substitute for the old real covenant, upon which, in a writ of *warrantia chartæ*, or upon voucher, the value of the other lands to be recovered was computed as it existed at the time when the warranty was made; and accordingly they retain the same measure of compensation for the breach of the modern covenant. But in the latter States, the courts view the covenant as in the nature of a personal covenant of indemnification, in which, as in all other cases, the party is entitled to the full value of that which he has lost, to be computed as it existed at the time of the breach.[3]

§ 265. In general, as we have already seen, damages are esti-

[1] Lonsdale *v.* Church, 2 T. R. 388; Wilde *v.* Clarkson, 6 T. R. 303; McClure *v.* Dunkin, 1 East, 436; Francis *v.* Wilson, Ry. & M. 105; Harris *v.* Clap, 1 Mass. 308; Pitts *v.* Tilden, 2 Mass. 118; Warner *v.* Thurlo, 15 Mass. 154.

[2] 4 Kent, Comm. 474, 475; Dimmick *v.* Lockwood, 10 Wend. 142.

[3] The consideration-money and interest is adopted as the measure of damages in *New York;* Statts *v.* Ten Eyck, 3 Caines, R. 111; Pitcher *v.* Livingston, 4 Johns. 1; Bennett *v.* Jenkins, 13 Johns. 50; — and in *Pennsylvania;* Bender *v.* Fromberger, 4 Dall. 441; — and in *Virginia;* Stout *v.* Jackson, 2 Rand. 132; — and in *North Carolina;* Cox *v.* Strode, 2 Bibb, 272; Phillips *v.* Smith, 1 N. Car. Law Repos. 475; Wilson *v.* Forbes, 2 Dev. R. 30; — and in *South Carolina;* Henning *v.* Withers, 2 S. Car. Rep. 584; Ware *v.* Weathnall, 2 McCord, 413; — and in *Ohio;* Backus *v.* McCoy, 3 Ohio R. 211, 221; — and in *Kentucky;* Hanson *v.* Buckner, Dana, 253; — and in *Missouri;* Tapley *v.* Lebeaume, 1 Mis. R. 552; Martin *v.* Long, 3 Mis. R. 391; — and in *Illinois;* Buckmaster *v.* Grundy, 1 Scam. 310. In *Indiana*, the question has been raised, without being decided. Blackwell *v.* Justices of Lawrence Co., 2 Blackf. 147.

The value of the land at the time of eviction has been adopted as the measure of damages in *Massachusetts;* Gore *v.* Brazier, 3 Mass. 523; Caswell *v.* Wendell, 4 Mass. 108; Bigelow *v.* Jones, Id. 512; Chapel *v.* Bull, 17 Mass. 213; — and in *Maine;* Swett *v.* Patrick, 3 Fairf. 1; — and, in *Connecticut;* Sterling *v.* Peet, 14 Conn. 245; — and in *Vermont;* Drury *v.* Strong, D. Chipm. R. 110; Park *v.* Bates, 12 Verm. 481; — and in *Louisiana;* Bissell *v.* Erwin, 13 Louis. R. 143. See also 4 Kent, Comm. 474, 475; Rawle on Covenants of Title, pp. 263 - 280.

mated by the *actual injury* which the party has received. But to this rule there are some *exceptions*. For, if the plaintiff has concurrent remedies, such as trespass and trover, he may elect one which, by legal rules, does not admit of the assessment of damages to the extent of the injury. Thus, if he elects to sue in trover, he can ordinarily recover no more than the value of the property, with interest; whereas, if he should bring trespass, he may recover not only the value of the goods, but the additional damages occasioned by the unlawful taking. And if he waives the tort, and brings *assumpsit* for money had and received, he can recover only what the goods were actually sold for by the defendant, though it were less than their real value.[1] So, if the plaintiff sue in debt for the escape of a debtor in execution, he will recover the whole amount of the judgment and costs, if he recovers at all, though the debtor were insolvent; whereas, if he sue in trespass on the case, he will recover only his actual damages.[2]

§ 266. It is frequently said, that, in actions *ex delicto*, evidence is admissible in *aggravation*, or in *mitigation*, *of damages*.[3] But this, it is conceived, means nothing more than that evidence is admissible of facts and circumstances which go in aggravation or in mitigation of the *injury itself*. The circumstances, thus proved, ought to be those only which belong to the act complained of. The plaintiff is not justly entitled to receive compensation beyond the extent of his injury, nor ought the defendant to pay to the plaintiff more than the plaintiff is entitled to receive.[4] Thus, in tres

[1] See 3 Amer. Jurist, p. 288; Lindon *v.* Hooper, Cowp. 419; Parker *v.* Norton, 6 T. R. 695; Lamaine *v.* Dorrell, 2 Ld. Raym. 1216; Laugher *v.* Brefitt, 5 B. & Ald. 762; Bull. N. P. 32; Jacoby *v.* Lausatt, 6 S. & R. 300; Pierce *v.* Benjamin, 17 Pick. 356, 361; Barnes *v.* Bartlett, 15 Pick. 78; Otis *v.* Gibbs, MS., cited 15 Pick. 207; Whitwell *v.* Kennedy, 4 Pick. 466; Johnson *v.* Summer, 1 Met. 172; Rogers *v.* Crombie, 4 Greenl. 274; [*Ante*, § 117, and note; Bartlett *v.* Bramhall, 3 Gray, 260; Shaw *v.* Becket, 7 Cush. 442.]

[2] Bonafous *v.* Walker, 2 T. R. 126; Porter *v.* Sayward, 7 Mass. 377; 3 Am. Jur. 289. [In an action for taking insufficient bail, the measure of damages is the injury actually sustained by the judgment creditor; and evidence is competent of the pecuniary condition of the debtor three months before he was liable to be taken in execution. Danforth *v.* Pratt, 9 Cush. 318; 9 Met. 564.]

[3] What is here said on the subject of evidence in aggravation or mitigation of damages is chiefly drawn from a masterly discussion of this subject by Mr. Justice Metcalf, in 3 Amer. Jur. pp. 287–313.

[4] "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 one case than in the other; but points of mere sensibility and mere casuistry are not allowable 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 plain-

pass on the case for an escape, the actual loss sustained by the plaintiff is the measure of damages, whether the escape were voluntary or negligent; and in cases of voluntary trespass, the innocent intentions of the party cannot avail to reduce the damages below the amount of the injury he has inflicted.

§ 267. *Injuries to the person*, or to the *reputation*, consist in the pain inflicted, whether bodily or mental, and in the expenses and loss of property which they occasion. The jury, therefore, in the estimation of damages, are to consider not only the direct expenses incurred by the plaintiff, but the loss of his time, his bodily sufferings, and, if the injury was wilful, his mental agony also;[1] the injury to his reputation, the circumstances of indignity and contumely under which the wrong was done, and the consequent public disgrace to the plaintiff, together with any other circumstances belonging to the wrongful act, and tending to the plaintiff's discomfort.[2] And, on the other hand, they are to consider any circumstances of recent and immediate misconduct on the part of the plaintiff, in respect to the same transaction, tending to diminish the degree of injury which, on the whole, is fairly to be attributed to the defendant.[3] Thus, if the plaintiff himself provoked the assault complained of, by words or acts so recent as to consti-

tiff ought to receive. It is impracticable to make moral duties and legal obligations, or moral and legal liabilities, coextensive. The same principle 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." 3 Amer. Jur. 292, 293.

[1] If the act were not wilfully done, it seems that the mere mental suffering resulting from it forms no part of the actionable injury. Flemington *v.* Smithers, 2 C. & P. 292. And see Canning *v.* Williamstown, 1 Cush. 451. [Where an action is brought under a statute (9 & 10 Vict. c. 93), by the personal representatives of a deceased person, to recover damages for his death, the damages must be confined to injuries of which a pecuniary estimate can be made, and they do not include the mental suffering caused to the survivors by his death. Blake *v.* Midland R. Co., 10 Eng. Law & Eq. 437.] [* In an action to recover damages for a personal injury, the plaintiff may introduce evidence to show the kind and amount of mental and physical labor which he was accustomed to do before receiving the injury, as compared with that which he has been able to do since, for the purpose of aiding the jury to determine what compensation he should receive for his loss of mental and physical capacity. Ballou *v.* Farnum, 11 Allen, 73. See, on this subject, Wade *v.* Leroy, 20 How. 43; Nebraska City *v.* Campbell, 2 Black, 590.]

[2] Coppin *v.* Braithwaite, 8 Jur. 875.

[3] This principle is freely applied in actions on the case for negligence, where the rule is, that, though there may have been negligence on the part of the plaintiff, yet, unless he might, by the exercise of ordinary care, have avoided the consequence of the defendant's negligence, he is entitled to recover; but if, by ordinary care, he might have avoided them, he is the author of his own wrong. Bridge *v.* Grand Junction Railway Co., 3 M. & W. 244, per Parke, B.; Butterfield *v.* Forrester, 11 East, 60; Holding *v.* Liverpool Gas Co., 10 Jur. 883; Kennard *v.* Burton, 12 Shepl. 39; New Haven Steamboat Co. *v.* Vanderbilt, 16 Conn. 420. See §§ 220, 230. This rule was ably and fully discussed and explained by Redfield, J., in Robinson *v.* Cone, S. C. Verm. Feb. Term, 1850. See 3 Am. Law Journ. 313, N. S.

tute part of the *res gestæ*;[1] or if the injury were an arrest without warrant, and he were shown to be justly suspected of felony;[2] or, in an action for seduction, if it appear that the crime was facilitated by the improper conduct or connivance of the husband or father;[3] these circumstances may well be considered as reducing the real amount of the plaintiff's claim of damages.[4]

§ 268. It seems, therefore, that, in the proof of damages, both parties must be confined to the *principal transaction* complained of, and to its *attendant circumstances* and natural *results*; for these alone are put in issue. But where the act complained of was done in the execution of a contract with the State, for a work of public benefit, as, for example, the taking of stone and gravel from the plaintiff's land, to build a lock on a public canal, which the defendant had undertaken to construct, the defendant is entitled to stand in the same position as the State would, in the estimation of damages, and to set off, against the direct value of the materials taken, any general and incidental benefit resulting to the owner of the land from the work to which they were applied.[5]

§ 268 *a*. The *natural results* of a wrongful act are understood to include all the damage to the plaintiff of which such act was the efficient cause, though in point of time the damage did not occur until some time after the act done. Thus, in trespass, *quare clausum fregit*, where the defendant had broken and dug away the bank of a river in the plaintiff's close, the jury were properly directed to assess the damages occurring three weeks afterwards by a flood, which rushed in at the breach, and carried away the soil.[6] So, where the trespass consisted in pulling down the plaintiff's fence, whereby his cattle escaped and were lost; it was held that the defendant was liable for the value of the

[1] Lee *v.* Woolsey, 19 Johns. 329; Fraser *v.* Berkley, 2 M. & Rob. 3; Avery *v.* Ray, 1 Mass. 12.

[2] Chinn *v.* Morris, Ry. & M. 24; Simpson *v.* McCaffrey, 13 Ohio R. 508.

[3] See, *supra*, tit., ADULTERY, § 51.

[4] [A person guilty of a wilful assault and battery cannot show that, from the intemperate habits of the other party, the injury was more aggravated than it would have been upon a person of temperate habits. 11 Cush. 364.]

[5] May *v.* Kornhaus, 9 Watts & Serg. 121.

[6] Dickinson *v.* Boyle, 17 Pick. 78. See, *supra*, §§ 55, 56. In an action of *assumpsit*, for the breach of an agreement, whereby "the plaintiff has been unnecessarily *put* to great expenses," it was held competent for the plaintiff, under this allegation, to prove and recover for the amount of bills which he had become legally liable to pay, though he had not yet paid them. Richardson *v.* Chassen, 34 Legal Obs. 883; 11 Jur. 890. And see Dixon *v.* Bell, 1 Stark. R. 387. But in trespass for seizing the plaintiff's goods under color of a judgment, by means whereof he was forced to pay large costs in setting aside the judgment, it was held, that these costs were not recoverable. Holloway *v.* Turner, 9 Jur. 160; 6 Ad. & El. 928, N. S. So, counsel fees have been rejected. Young *v.* Tustin, 4 Blackf. 277.

cattle, as the natural consequence of the trespass.[1] And it is further to be observed, that the proof of actual damages may extend to all facts which occur and grow out of the injury, even up to the day of the verdict; excepting those facts which not only happened since the commencement of the depending suit, but do of themselves furnish sufficient cause for a new action.[2] Upon this general principle it is that interest is computed up to the time of the verdict, in an action for the non-payment of a sum of money. And, on the like principle, in actions of trespass and actions on the case, the jury are sometimes instructed, in their estimate of damages, to include the plaintiff's extra trouble and expenses in prosecuting his suit.[3]

§ 268 *b*. The damages may also, in a certain sense, be *prospective* beyond the time of trial. Thus, in trespass for breaking the plaintiff's leg, it was held proper to show the probable future condition of the limb; but not the consequences of a hypothetical second fracture.[4] So, in an action by the members of a commercial firm for a libel concerning their trade, it was held that the jury might estimate the damages likely to result to their trade as the probable consequences of the slander.[5]

§ 269. The *character* of the parties is immaterial; except in actions for slander, seduction,[6] or the like, where it is necessarily involved in the nature of the action. It is no matter how bad a man the defendant is, if the plaintiff's injury is not on that account the greater; nor how good he is, if that circumstance enhanced the wrong. Nor are damages to be assessed merely according to the defendant's *ability to pay;* for whether the payment of the amount due to the plaintiff, as compensation for the

[1] Damron *v.* Roach, 4 Humph. 134.

[2] Wilcox *v.* Plummer, 4 Pet. 172, 182; 3 Com. Dig. 343, tit. Damages, D. See *infra*, § 273. Sedgwick on Damages, pp. 106–108. Johnson *v.* Perry, 2 Humph. 572.

[3] Linsley *v.* Bushnell, 15 Conn. 225, 236; Allen *v.* Blunt, 2 Woodb. & M. 121; Wilt *v.* Vickers, 8 Watts, 227, 235; Rogers *v.* Fales, 5 Barr, 159. See, *contra*, Good *v.* Mylin, 8 Barr, 51, overruling the last two cases.

[4] Lincoln *v.* Saratoga Railroad Co., 23 Wend. 425; Johnson *v.* Perry, 2 Humph. 572; [Curtis *v.* Rochester and S. R. R. Co., 20 Barb. 282. In Whitney *v.* Clarendon, 18 Verm. 252, it was held that a recovery in an action of trespass on the case, brought by the father to recover damages sustained by himself in consequence of personal injuries to his son, is a bar to a second action by the father to recover for damages sustained in consequence of the same injury, notwithstanding the recovery in the first action was limited to damages which accrued prior to the commencement of that suit, and the second action is brought expressly to recover for loss of service and other damages sustained subsequent to that time.] [* Hopkins *v.* Atlantic & St. Lawrence Railw., 36 N. H. 9; 2 Redfield on Railways, 220.]

[5] Gregory *v.* Williams, 1 C. & K. 568. And see Ingram *v.* Lawson, 9 C. & P. 139, 140, per Maule, J.; 8 Scott, 471, 477, S. C. per Bosanquet, J.; Hodsall *v.* Stallbrass, 9 C. & P. 63.

[6] See *infra*, § 274.

injury, will or will not be convenient to the defendant, does not at all affect the question as to the extent of the injury done, which is the only question to be determined. The jury are to inquire, not what the defendant can pay, but what the plaintiff ought to receive.[1] But so far as the defendant's *rank and influence* in society, and *therefore* the *extent of the injury*, are increased by his wealth, evidence of the fact is pertinent to the issue.[2]

§ 270. Whether evidence of *intention* is admissible, to affect the amount of damages, will, in like manner, depend on its materiality to the issue. In actions of trespass *vi et armis*, the secret intention of the defendant is wholly immaterial. For if the act was voluntarily done, that is, if it might have been avoided, the party is liable to pay some damages, even though he be an infant, under seven years of age, or a lunatic, and therefore legally incapable of any bad intention.[3] And where an authority or license is given by law, and the party exceeds or abuses it, though without intending so to do, yet he is trespasser *ab initio;* and damages are to be given for all that he has done, though some part of it, had he done nothing more, might have been lawful.[4] His secret intention, whether good or evil, cannot vary the amount of injury to the plaintiff. So it is, if one set his foot upon his neighbor's land, without his license or permission; or if he injure him beyond or even contrary to his intention, if it might have been avoided.[5] And where, to an action of trespass, a plea of *per infortunium* was pleaded in bar, it was held bad, on demurrer, the court declaring that damages were recoverable "according to the hurt or loss."[6] In all such cases of voluntary act, the intent is immaterial, the

[1] See Lofft, R. 774, Ld. Mansfield's allusion to Berkeley *v.* Wilford. See also Stout *v.* Sprall, Coxe, N. J. Rep. 80; Coryell *v.* Colbaugh, Id. 77, 78; 6 Conn. R. 27; *supra*, § 265. [How far the plaintiff's occupation and means of earning support are admissible to increase the damages in an action for an injury to the person under any form of declaration, *quære*. Baldwin *v.* Western R. R. Corp. 4 Gray, 334.]

[2] Bennett *v.* Hyde, 6 Conn. R. 24, 27; Shute *v.* Barrett, 7 Pick. 86, per Parker, C. J. See, *supra*, § 89; *infra*, §§ 424, 579; Grabe *v.* Margrave, 3 Scam. 372; Reed *v.* Davis, 4 Pick. 216; McNamara *v.* King, 2 Gilm. 432; McAlmont *v.* McClelland, 14 S. & R. 359; Larned *v.* Buffington, 3 Mass. 546.

[3] Weaver *v.* Ward, Hob. 134; Bessey *v.* Olliot, T. Raym. 467; Gilbert *v.* Stone, Aleyn, 35; Sty. 72, S. C.; Sikes *v.* Johnson, 16 Mass. 289; Bingham on Infancy, pp. 110, 111; 3 Com. Dig. 627, tit. Enfant, D. 4; Macpherson on Infants, p. 481; Shelford on Lunatics, p. 407; Stock on Non Compotes Mentis, p. 76; 3 Am. Jur. 291, 297.

[4] Six Carpenters' case, 8 Co. 146; Bagshaw *v.* Gaward, Yelv. 96; Sackrider *v.* McDonald, 10 Johns. 253, 256; 3 Am. Jur. 297, 298; Kerbey *v.* Denby, 1 M. & W. 336.

[5] Russell *v.* Palmer, 2 Wils. 325; Varill *v.* Heald, 2 Greenl. 92, per Mellen, C. J.; Brooks *v.* Hoyt, 6 Pick. 468; Bacon's Elements, p. 31; 2 East, 104, per Ld. Kenyon.

[6] Weaver *v.* Ward, Hob. 134.

only question being, whether the act was injurious, and to what extent.[1]

§ 271. In certain other actions, such as case for a *malicious prosecution*,[2] or for *false representations* of another person's credit in order to induce one to trust him,[3] or for *slander*, the *intention* of the defendant is of the gist of the action, and must therefore be shown to be malicious; not to affect the amount of damages, but to entitle the plaintiff to recover any damages whatever. Thus, in an action for a libel, either party may give evidence to prove or disprove the existence of a malicious intent, even though such evidence consist of other libellous writings; but if they contain matter actionable in itself, the jury must be cautioned not to increase the damages on account of them.[4]

§ 272. But where an evil *intent* has *manifested itself* in *acts* and circumstances accompanying the principal transaction, they constitute part of the injury, and, if properly alleged, may be proved, like any other facts material to the issue. Thus in trespass for taking goods, besides proof of their value, the inconvenience and injury occasioned to the plaintiff by taking them away, under the particular circumstances of the case, and the abusive language and conduct of the defendant at the time,[5] are admissible in evidence to the jury, who may give damages accordingly. And evidence of improper language or conduct of the defendant is also admissible, under proper allegations, in an action of trespass on the case, or of trespass *quare clausum fregit*, as constituting part of the injury.[6] And, generally, whenever the wrongful

[1] Underwood *v.* Hewson, 1 Stra. 596; 1 Chitty on Plead. 120; Weaver *v.* Ward, Hob. 134; Taylor *v.* Rainbow, 2 Hen. & Munf. 423; Wakeman *v.* Robinson, 1 Bing. 213. The rule is, that, under the general issue, any evidence is admissible which tends to show that the accident resulted entirely from a superior agency; for then it was no trespass; but that any defence which admits that the trespass complained of was the act of the defendant must be specially pleaded. Hall *v.* Fearnley, 3 Ad. & El. 919, N. S.

[2] 1 Chitty on Pl. 405 (7th edit.); Sutton *v.* Johnstone, 1 T. R. 493, 545; 3 Am. Jur. 295; Stone *v.* Crocker, 24 Pick. 81, 83; Grant *v.* Duel, 3 Rob. (Louis.) R. 17.

[3] Vernon *v.* Keyes, 12 East, 632, 636; Young *v.* Covell, 8 Johns. 23.

[4] Pearson *v.* Lemaitre, 5 M. & G. 700; 7 Jur. 748.

[5] Churchill *v.* Watson, 5 Day, 140; Tilden *v.* Metcalf, 2 Day, 259; Johnson *v.* Courts, 3 Har. & McHen. 510; Ratliff *v.* Huntley, 5 Ired. 545; Wilkins *v.* Gilmore, 2 Humph. 140; Huxley *v.* Berg, 1 Stark. R. 98; Curtis *v.* Hoyt, 19 Conn. 154, 170; Huntley *v.* Bacon, 15 Conn. 267, 273.

[6] Bracegirdle *v.* Orford, 2 M. & S. 77; Coppin *v.* Braithwaite, 8 Jur. 875; Cox *v.* Dougdale, 12 Price, 708, 718; Merest *v.* Harvey, 5 Taunt. 442. In this case, Gibbs, C. J., expressed himself in these terms: "I wish to know, in a case where a man disregards every principle which actuates the conduct of gentlemen, what is to restrain him except large damages? To be sure, one can hardly conceive worse conduct than this. What would be said to a person in a low situation of life, who should behave himself in this manner? I do not know upon what principle we can grant a

act of the defendant was accompanied by aggravating circumstances of indignity and insult, whether in the time, place, or manner, though they may not form a separate ground of action, yet being properly alleged, they may be given in evidence, to show the whole extent and degree of the injury.[1] Thus, in an action upon an agreement to carry the plaintiff to a certain place, assigning a breach in causing him to be disembarked at an intermediate place, in a disgraceful manner and with contemptuous usage and insulting language, whereby he sustained damage; it was held that the allegation was proper, and that evidence of such circumstances was rightly received.[2] So, also, where to an action of trespass for false imprisonment the defendant pleaded, by way of justification, that the plaintiff had committed a felony, but abandoned the plea at the trial, and exonerated the plaintiff from the charge, it was held that the jury might lawfully consider the putting of such a plea on the record as persisting in the charge, and estimate the damages accordingly.[3] So, where in an assault and battery the defendant avowed an intent to kill the plaintiff.[4] And, on the other hand, the defendant may show any other circumstances of the transaction, in mitigation of the injury done by his trespass. Thus, where the defendant shot the plaintiff's dog soon after he had been worrying the defendant's sheep, this fact, and the habits of the animal, were held admissible in evidence for the defendant in the estimation of damages.[5] And in trespass *de bonis asportatis* he may show that the goods did not belong to the plaintiff, and that they have gone to the use of the owner;[6] or that, belonging to the plaintiff, they have lawfully gone to his use.[7] So, where the defendant had seized and de-

rule in this case, unless we were to lay it down that the jury are not justified in giving more than the absolute pecuniary damage that the plaintiff may sustain. Suppose a gentleman has a paved walk in his paddock, before his window, and that a man intrudes and walks up and down before the window of his house, and looks in while the owner is at dinner, is the trespasser to be permitted to say, 'Here is a half-penny for you, which is the full extent of all the mischiefs I have done'? Would that be a compensation? I cannot say that it would be." 5 Taunt. 443. In trespass for entering the plaintiff's house, evidence may be given of keeping the plaintiff out, for that is a consequence of the wrongful entry. Sampson *v.* Coy, 15 Mass. 493. So, in trespass for destroying a mill-dam, damages may be recovered for the interruption of the use of the mill. White *v.* Moseley, 8 Pick. 356.

[1] Sears *v.* Lyons, 2 Stark. R. 282 [317]; 3 Am. Jur. 303, 312; 3 Wils. 19, per Bathurst, J.; Woert *v.* Jenkins, 14 Johns. 352; Pratt *v.* Ayler, 4 H. & J. 448; Jennings *v.* Maddox, 8 B. Monr. 432; Duncan *v.* Stalcup, 1 Dev. & Bat. 440.

[2] Coppin *v.* Braithwaite, 8 Jur. 875. And see Keene *v.* Lizardi, 8 Louis. 33.

[3] Warwick *v.* Foulkes, 12 M. & W. 507.

[4] Pratt *v.* Ayler, 4 H. & J. 448.

[5] Wells *v.* Head, 4 C. & P. 568.

[6] Squire *v.* Hollenbeck, 9 Pick. 551. And see Pierce *v.* Benjamin, 14 Pick. 361.

[7] Kaley *v.* Shed, 10 Met. 317. See, *infra*, §§ 276, 635 *a*; Anthony *v.* Gibbert, 4 Blackf. 348.

stroyed the plaintiff's game-cocks, under a warrant to search for gaming implements, it was held, that the jury might consider, in mitigation of the injury, the good motives of the defendant, and his belief that he was acting in the due execution of legal process; in which case the measure of damages was the actual value of the animals, as articles of merchandise.[1]

§ 273. It may here also be remarked, that if the defendant, while he is an actual trespasser in the plaintiff's house or close, commit any *other acts of trespass* against the person of the plaintiff, his wife, children, or servants, these acts and their consequences may be alleged and proved in an action of trespass *quare clausum fregit*, as matter in aggravation of the injury.[2] It is on this ground that the plaintiff, in an action of trespass for breaking and entering his house, has been permitted to allege and recover full damages for the debauching of his daughter and servant. It makes no difference that the plaintiff may have a separate action for these additional wrongs, provided it be an action of trespass, or of trespass on the case; and not a remedy in another form. If he sues in trespass, and alleges the debauching of his servant in aggravation, the breach and entry of the house, being the principal fact complained of, must be proved, or the action will not be maintained.[3] And so it is in regard to any other consequential damages alleged in an action of trespass; for wherever the principal trespass, namely, the entry into the house or close, is justified, it is an answer to the whole declaration.[4]

§ 274. But, though the plaintiff may generally show all the circumstances of the trespass tending in aggravation of the injury, it does not therefore follow, that the *defendant may*, in all cases, show them in mitigation; for he may *preclude himself* by his mode of defence, as well as the plaintiff may, as we have already seen, by his election of remedy. Thus, it is a sound rule in pleading,

[1] Coolidge *v.* Choate, 9 Law Rep. 205; 11 Met. 79. See also Reed *v.* Bias, 8 Watts & Serg. 189; Conard *v.* Pacific Ins. Co., 6 Pet. 262, 282.

[2] Bennett *v.* Alcott, 2 T. R. 166; Shafer *v.* Smith, 7 H. & J. 68.

[3] Bennett *v.* Alcott, 2 T. R. 166; Ream *v.* Rank, 3 S. & R. 215; 2 Stark. Ev. 813; 3 Am. Jur. 298; Dean *v.* Peale, 5 East, 45; Woodward *v.* Walton, 2 New R. 476; 1 Smith's Leading Cases [219], (Am. edit.) notes. See 43 Law Lib. 328, 330. Any other consequential damage to the plaintiff may be alleged and proved as matter of aggravation. 1 Chitty on Plead. 347, 348; Anderson *v.* Buckton, 1 Stra. 192; Heminway *v.* Saxton, 3 Mass. 222; Sampson *v.* Coy, 15 Mass. 493. But the proof must be restricted to damages resulting to the plaintiff alone, and not to another, nor to himself jointly with another. Edmonson *v.* Machell, 2 T. R. 4. See *supra*, § 268.

[4] Taylor *v.* Cole, 3 T. R. 292; 1 H. Bl. 555; Bennett *v.* Alcott, 2 T. R. 166; Monprivatt *v.* Smith, 2 Campb. 175; Phillips *v.* Howgate, 5 B. & Ald. 220; Ropes *v.* Barker, 4 Pick. 239.

that matter which goes in complete justification of the charge must be specially pleaded, in order that the plaintiff may be prepared to meet it; and cannot be given in evidence under the general issue, for this would be a surprise upon him.[1] If, therefore, the defendant pleads the general issue, this is notice to the plaintiff that he has nothing to offer in evidence which amounts to a justification of the charge; and hence no evidence of matter which goes in justification will be received, even in mitigation of damages. Thus, in trespass for an assault and battery, where the defendant, under the general issue offered to prove that the beating was inflicted by way of correcting the misconduct of the plaintiff, who was a seaman on board the ship of which the defendant was master, the evidence was held inadmissible; and the jury were instructed, that they could neither increase the damages beyond a compensation for the injury actually sustained, nor lessen them on account of the circumstances under which the beating was given.[2] And in trespass by an apprentice against his master, for an assault and battery, the defendant cannot, under this issue, give evidence of an admission by the plaintiff, that his master had beaten him for misconduct.[3] So, in an action of slander, the defendant cannot, under the general issue, give the truth of the words in evidence, even in mitigation of damages;[4] nor can he, for this purpose, show that the plaintiff has for a long time been hostile to him, and has proclaimed that he did not wish to live with him on terms of peace.[5]

§ 275. In actions of *slander*, it is well settled that the plaintiff's *general character* is involved in the issue; and that therefore evidence, showing it to be good or bad, and consequently of much or little value, may be offered on either side to affect the amount of damages.[6] But whether the defendant will be permitted, under

[1] Co. Lit. 282 *b*, 283 *a*; 1 Chitty on Plead. 415; Trials per Pais, p. 403 (6th edit.); 3 Amer. Jur. 301; Watson *v.* Christie, 2 B. & P. 224, and note (a).

[2] Watson *v.* Christie, 2 B. & P. 224; Bull. N. P. 16; 1 Salk. 11, per Holt, C. J.

[3] Pujolas *v.* Holland, 1 Longf. & Towns. 177.

[4] Underwood *v.* Parkes, 2 Stra. 1200; Mullett *v.* Hulton, 4 Esp. 248; 1 Chitty on Plead. 433; Shepard *v.* Merrill, 13 Johns. 475. Nor can the plaintiff prove the speaking of other slanderous words, in aggravation of the damages; though he may offer such evidence, in proof that the words charged were spoken maliciously. See 3 Am. Jur. 293, 294; 2 Stark. on Slander, pp. 48–51 [54–57], Wendell's edit.

[5] Andrews *v.* Bartholomew, 2 Met. 509.

[6] 2 Stark on Slander, pp. 77–86 [88–97], by Wendell; 3 Am. Jur. 294, 295; Wolcott *v.* Hall, 6 Mass. 514, 518. If the declaration states that the plaintiff had never been suspected to be guilty of the crime imputed to him, the defendant, under the general issue, may show that he was so suspected, and that in consequence of such suspicions his relatives and ac-

the general issue, to prove *general suspicions*, and *common reports* of the guilt of the plaintiff, in mitigation of damages, is not universally agreed.[1] It seems, however, that, where the evidence goes to prove, that the defendant did not act wantonly and under the influence of actual malice, or is offered solely to show the real character and degree of the malice, which the law implies from the falsity of the charge, all intention of proving the truth being expressly disclaimed, it may be admitted, and of course be considered by the jury.[2] Evidence of any *misconduct of the plaintiff*, giving rise to the charge, such as an *attempt* by him to *commit the crime*,[3] or *opprobrious language* addressed by him to the defendant, either verbally or in writing, contemporaneously with the charge complained of, or tending to explain its meaning, may also be shown in mitigation of damages.[4] So, if, through the misconduct of the plaintiff, the defendant was led to believe that the charge was true, and to plead in justification accordingly, this may be shown to reduce the damages.[5] And if the charge was made under a *mistake*, upon discovering of which the defendant forthwith retracted it in a public and proper manner, and by way of atonement, this also may be shown in evidence, for the same purpose.[6] So, the extreme youth or partial insanity of the defendant may be shown, to convince the jury that the plaintiff has suffered but little injury.[7]

quaintance had ceased to visit him. Earl of Leicester *v.* Walter, 2 Campb. 251. [* It is held in Burnett *v.* Simpkins, 24 Ill. 264, that the previous bad conduct of the woman may be shown in evidence in mitigation of damages for breach of promise of marriage.]

[1] In *England*, and in *Connecticut*, *Pennsylvania*, *Maryland*, *Kentucky*, and *South Carolina*, such evidence is admissible. In *Massachusetts*, *New York*, and *Virginia*, it is not. See 2 Stark. on Slander, p. 84, note (1), by Wendell; Wolcott *v.* Hall, 6 Mass. 514; Alderman *v.* French, 1 Pick. 1; Bodwell *v.* Swan, 3 Pick. 376; Root *v.* King, 7 Cowen, 613; Matson *v.* Buck, 5 Cowen, 499; McAlexander *v.* Harris, 5 Munf. 465. See also Boies *v.* McAllister, 3 Fairf. 310; Rigden *v.* Wolcott, 6 G. & J. 413.

[2] 2 Stark. on Slander, p. 88, note (1), by Wendell; Root *v.* King, 7 Cowen, 613; Gilman *v.* Lowell, 8 Wend. 582; Mapes *v.* Weeks, 4 Wend. 659, 662.

[3] Anon. cited arg. 2 Campb. 254; 2 Stark on Slander, p. 83, note (1), by Wendell.

[4] Hotchkiss *v.* Lathrop, 1 Johns. 286; May *v.* Brown, 3 B. & C. 113; Wakley *v.* Johnson, Ry. & M. 422; Child *v.* Homer, 13 Pick. 503; Larned *v.* Buffington, 3 Mass. 553; Watts *v.* Frazer, 7 Ad. & El. 223; Beardsley *v.* Maynard, 4 Wend. 336; 7 Wend. 560; Gould *v.* Weed, 12 Wend. 12; Davis *v.* Griffith, 4 G. & J. 342.

[5] Larned *v.* Buffington, 3 Mass. 546. But see Alderman *v.* French, 1 Pick. 1, 19. The fact of the defendant's taking depositions to prove the truth of the words, and afterwards declining to justify them, is inadmissible in evidence for the plaintiff, to enhance the damages. Boswell *v.* Osgood, 3 Pick. 379. See also Bradley *v.* Heath, 12 Pick. 163.

[6] Larned *v.* Buffington, 3 Mass. 546, as qualified in 1 Pick. 19; Mapes *v.* Weeks, 4 Wend. 663; Hotchkiss *v.* Oliphant, 2 Hill (N. Y.), R. 515; 2 Stark. on Slander, p. 95, note, by Wendell; O'Shaughnessy *v.* Haydn, 2 Fox & Sm. 329.

[7] Dickinson *v.* Barber, 9 Mass. 225, 228; 3 Am. Jur. 297. But the defendant will not be permitted to offer, in mitigation

§ 276. In *trover*, the value of the property at the time of the conversion, if it has not been restored and accepted by the plaintiff, with interest on that amount, is ordinarily the measure of damages.[1] It has been further held, that the jury may, in their discretion, find the value at a subsequent time. Thus, in trover for East India Company's warrants for cotton, where the value at the time of the conversion was six pence the pound, but it afterwards rose to upwards of ten pence, the jury were left at liberty to find the latter price as the value; for though the plaintiff might with money have replaced the goods at the former price, yet he might not have been in funds for that purpose.[2] And in England, the plaintiff is permitted to recover any special damage which he may allege and be able to prove as the result of the wrongful act of the defendant. Thus, under a count in trover for the conversion of tools, by means whereof the plaintiff was prevented from working at his trade of a carpenter, and was greatly impoverished, they being the implements of his trade; it was held that the special damage directly flowing from the detention of his tools was recoverable.[3] But in the United States, upon consideration of the rule, it has been held safer to adhere to the value at the time of the conversion, with interest. But if the defendant has enhanced the value of the goods by his labor, as, for example, if he has taken logs, and converted them into boards, the plaintiff is permitted to recover the enhanced value, namely, the value of the boards, and is not confined to the value of the material, either at the place of taking, or of manufacture.[4] Where the subject is a written security, the damages are usually assessed to the amount of the principal and interest due upon it.[5] If the plaintiff has himself recovered the property, or it has been restored to him and accepted, the actual injury occasioned by the conversion, including the expenses of the recovery, will form the measure of damages;[6] and if the property in whole or in part has been applied to the payment of the plaintiff's debt or otherwise to his use, this may be considered

of damages, any evidence impeaching his own character for veracity. Howe *v.* Perry, 15 Pick. 506.

[1] 3 Campb. 477, per Ld. Ellenborough; Pierce *v.* Benjamin, 14 Pick. 356, 361; Parks *v.* Boston, 15 Pick. 198, 206, 207; Stone *v.* Codman, Id. 297, 300; Greenfield Bank *v.* Leavitt, 17 Pick. 1; Hepburn *v.* Sewell, 5 H. & J. 212. See Sedgwick on Damages, ch. xix.

[2] Greening *v.* Wilkinson, 1 C. & P. 625.

[3] Bodley *v.* Reynolds, 10 Jur. 310. See also Davis *v.* Oswell, 7 C. & P. 804.

[4] Greenfield Bank *v.* Leavitt, 17 Pick. 3; Baker *v.* Wheeler, 8 Wend. 505; [Rice *v.* Hollenbeck, 19 Barb. 664.]

[5] Mercer *v.* Jones, 3 Campb. 477.

[6] Greenfield Bank *v.* Leavitt, 17 Pick. 3; Hepburn *v.* Sewell, 5 H. & J. 12.

by the jury as diminishing the injury and consequently the damages.[1]

§ 277. In all actions for a *joint tort*, against *several defendants*, the jury are to assess damages against all the defendants jointly, according to the amount which, in their judgment, the most culpable of the defendants ought to pay.[2] And if several damages are assessed, the plaintiff may elect which sum he pleases, and enter judgment *de melioribus damnis*, against them all.[3] But if several trespasses are charged in the declaration, and the defendants plead severally, and are found severally guilty of *distinct trespasses*, the damages ought to be severed and assessed for each trespass against him who committed it.[4]

§ 278. The averment of *alia enormia*, at the end of a declaration in trespass, seems to have been designed to enable the plaintiff to give evidence of circumstances belonging to the transaction which were not in themselves actionable, and which could not conveniently be put upon the record. And it has frequently been said that, under this averment, things may be proved which could not be put upon the record because of their indecency; and that, therefore, in trespass for breaking and entering the plaintiff's house, he might, under this averment, prove that the defendant, whilst there, debauched his daughter. When this doctrine was first advanced, it was generally understood that no action would lie for this latter injury, unless as an aggravation of the former; and hence, the judges may have been led to find a special reason for admitting this evidence. But since it is well settled, and has become the ordinary course, to sue specially for this injury to a

[1] Pierce *v.* Benjamin, 14 Pick. 356, 361; Kaley *v.* Shed, 10 Met. 317. [In an action of trover, if the defendant at the time of the conversion had a lien on the goods to a certain amount, the rule of damages is the value of the goods, deducting the amount of the lien and adding interest on the balance. Fowler *v.* Gilman, 13 Met. 267.]

[2] Brown *v.* Allen, 4 Esp. 158; Lowfield *v.* Bancroft, 2 Stra. 910; Bull. N. P. 15; Austen *v.* Willward, Cro. El. 860; Heydon's case, 11 Co. 5; Onslow *v.* Orchard, 1 Stra. 422; Smithson *v.* Garth, 3 Lev. 324; 3 Com. Dig. 348, tit. Damages, E. 6; Elliot *v.* Allen, 1 M. G. & S. 18. [In an action of trover against two, one of whom is defaulted, and the other found guilty by the jury, there is but one assessment of damages, and the judgment is joint. Gerrish *v.* Cummings, 4 Cush. 391; Gardner *v.* Field, 1 Gray, 151.]

[3] Heydon's case, 11 Co. 5; Headley *v.* Mildmay, 1 Roll. R. 395, pl. 17; 7 Vin. Abr. 303, pl. 5, S. C.; Johns *v.* Dodsworth, Cro. Car. 192; Doune *v.* Estevin de Darby, 44 E. 3, 7; F. N. B. [107] E.; Walsh *v.* Bishop, Cro. Car. 243; Rodney *v.* Strode, Carth. 19; 2 Tidd's Pr. 896, (9th edit.); Halsey *v.* Woodruff, 9 Pick. 455.

[4] Propr's of Kennebec Purchase *v.* Bolton, 4 Mass. 419. Where an injury was done by two dogs jointly, who belonged to several owners, it was held that each owner was liable only for the mischief done by his own dog. Buddington *v.* Shearer, 20 Pick. 477; Russell *v.* Tomlinson, 2 Conn. R. 206.

daughter and servant, as well as for criminal conversation with a wife, and to allege the main facts upon the record, no reason is perceived for retaining this anomaly in practice. There is no injury, however indecent in its circumstances, but may be substantially stated with decency on the record; the law permitting and even requiring parties, as well as witnesses, to state in general terms and with indirectness, those things which cannot otherwise be expressed with decency; and to this extent, at least, every party is entitled, by the settled rules of pleading, as well as by the reason of the thing, to be informed of that which is to be proved against him. The circumstances and necessary results of the defendant's wrongful act may be shown without this averment; and as to those consequences which, though natural, did not necessarily follow, they must, as we have seen,[1] be specially alleged.[2]

[1] See *supra*, § 253.

[2] See the observations of Mr. Peake, Evid. p. 505, by Norris; Mr. Phillips, 2 Phil. Evid. 180; Id. p. 136 (2d Am. ed.); and Mr. Starkie, 2 Stark. Evid. 815; 1 Chitty on Pl. 412 (7th ed.); Chitty's Precedents, p. 716, note (k); Bull. N. P. 89; Lowden *v.* Goodrick, Peake's Cas. 46; Pettit *v.* Addington, Id. 62.