A TREATISE

ON THE

LAW OF EVIDENCE.

BY

SIMON GREENLEAF, LL. D.,

ROYALL PROFESSOR OF LAW IN HARVARD UNIVERSITY.

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

VOLUME II.

BOSTON:
CHARLES C. LITTLE & JAMES BROWN.
LONDON:
A. MAXWELL & SON, 32, BELL YARD, LINCOLN'S INN.

M DCCC XLVI.

BOSTON:
PRESS OF THURSTON, TORRY, AND CO.
Harvard University Buildings.

CONTENTS.

DAMAGES.

§ 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. Damages are never given in real actions; but only in personal and mixed actions. In some of the American States, the Jury are authorized by statutes, to 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.

§ 254. All damages must be *the result* of the injury complained of; whether it consist in the withholding of a legal right, or the breach of a duty legally due to the plaintiff. Those which *necessarily* result, are termed *general damages*, being shown under the *ad damnum*, or general allegation of damages, at the end of the declaration; for the defendant must be presumed to be aware of the necessary consequences of his conduct, and therefore cannot be taken by surprise in the proof of them. Some damages are always presumed to follow from the violation of any right or duty implied by law; and therefore the law will in such cases award nominal damages, if none greater are proved. But where the damages, though the *natural* consequences of the act complained of, are *not* the *necessary* result of it, they are termed *special damages;* which the law does not imply; and therefore, in order to prevent a surprise upon the defendant, they must

---

[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.

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 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.[4]

§ 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. 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

---

[1] 1 Chitty on Plead. 328, 346, 347, (4th ed.); 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.

[2] Carrington *v.* Taylor, 11 East, 571; Keeble *v.* Hickeringill, Ib. 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.

[4] Feize *v.* Thompson, 1 Taunt. 121.

ground for a claim of damages.[1] So, where 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.[2]

§ 257. In cases of contract, if the parties themselves have *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.[3] This

---

[1] Ashley *v.* Harrison, 1 Esp. R. 48; 2 Stark. on Slander, p. 64, 65. And see Armstrong *v.* Percy, 5 Wend. 538, 539, per Marcy, J.

[2] Vickars *v.* Wilcocks, 8 East, 1. See also 1 Smith's Leading Cases, p. 302–304, and cases there cited; 1 Stark. on Slander, p. 205.

[3] 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.

intent is to be ascertained from the whole tenor and subject of the 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.[1]

§ 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.[2] (2.) Where it is *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.[3] (3.) Where the agreement was evidently made for the attainment of another object, to which the sum specified is *wholly collateral.* This rule has been applied, where the principal agreement was, not to trade on a certain coast;[4] to let the plaintiff have the use of a certain building;[5] or, of certain rooms;[6] and, not to sell brandy, within certain limits;[7] 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.

---

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

[2] Astley *v.* Weldon, 2 B. & P. 346, 250; Smith *v.* Dickenson, Ib. 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; Dennis *v.* Cumming, 3 Johns. Cas. 297; Brown *v.* Bellows, 4 Pick. 179.

[3] 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.

[4] Perkins *v.* Lyman, 11 Mass. 76.

[5] Merrill *v.* Merrill, 15 Mass. 488.

[6] Sloman *v.* Walter, 1 Bro. Ch. C. 418.

[7] Hardy *v.* Martin, 1 Bro. Ch. C. 419.

Thus, where the agreement was, to play at Covent Garden, and to 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.[1] (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.[2]

§ 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;[3] for each year's neglect to remove a lime-kiln;[4] for not marrying the plaintiff;[5] for running a stage on a certain road, in violation of contract;[6] for breach of a contract not to trade, or practice, within certain limits;[7] and for not resigning an office, agree-

---

[1] Kemble *v.* Farren, 6 Bing. 141; Boys *v.* Ancell, 5 Bing. N. C. 390; 7 Scott. 364; Charrington *v.* Laing, 6 Bing. 242. 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. 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.

[2] 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.

[3] Fletcher *v.* Dyche, 2 T. R. 32.

[4] Huband *v.* Grattan, 1 Alcock & Napier, R. 389.

[5] Lowe *v.* Peers, 2 Burr. 2225; Cock *v.* Richards, 10 Ves. 429.

[6] Leighton *v.* Wales, 3 M. & W. 545; Pierce *v.* Fuller, 8 Mass. 223.

[7] Noble *v.* Bates, 7 Cow. 307; Smith *v.* Smith, 4 Wend. 468; Crisdee

ably 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

---

v. Bolton, 3 C. P. 240. In this case, the sum was declared by the parties to be liquidated damages.

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

[2] See the observations of Best, C. J. in Crisdee *v.* Bolton, 3 C. & P. 240; 2 Story on Eq. § 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.

[6] Ponsonby *v.* Adams, 6 Bro. P. C. 418.

[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. 257; Cutler *v.* Johnson, Ib. 266; Baxter *v.* Wales, 12 Mass. 365.

the value of goods tortiously taken, beyond the value alleged in the body of the count.[1] So, under a count for a total loss of property insured, it is sufficient to prove an average or partial loss.[2] And in covenant, or *assumpsit*, proof of part of the breach alleged, is sufficient to entitle the plaintiff to recover.[3]

§ 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 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.[4] 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;[5] but if the vendee has already paid the price in advance, he may recover the highest price of such goods in the same

---

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

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

[3] 1 Chitty on Pl. 297; Sayer, Law of Dam. p. 45; Van Rensselaer *v.* Platner, 2 Johns. 18.

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

[5] 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.* McAlister, 3 Cranch, 298; Chitty on Contr. 352, n. (2), by Perkins; Dey *v.* Dox, 9 Wend. 129.

place, at any time between the stipulated day of delivery, and the time of trial.[1] If in the latter case, the market price is lower at the stipulated time of delivery, than at the date of the contract, the measure of damages is the money advanced, with interest.[2] 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.[3] And in all cases of breach of contract, it is to be observed, that, if the party injured can protect himself from damage at a trifling expense, or by any reasonable exertions, he is bound to do. He can charge the delinquent party only for such damages, as, by reasonable endeavors and expense, he could not prevent.[4]

§ 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.[5] 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.[6] If they have been received

[1] 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.

[2] Ibid.; Bush *v.* Canfield, 2 Conn. 485.

[3] 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.

[4] Miller *v.* The Mariners Church, 7 Greenl. 57. So, in trespass. Loker *v.* Damon, 17 Pick. 284.

[5] 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.

[6] Bridge *v.* Wain, 1 Stark. R. 504.

back by the vendor, the plaintiff may recover the whole price he paid for them; otherwise, he may re-sell them, and recover the difference between the price he paid and the price received.[1] 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.[2]

§ 263. In *debt on bond*, interest, beyond the penalty, may be recovered as damages.[3] 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.[4] 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

---

[1] Caswell *v.* Coare, 1 Taunt. 566; Buchanan *v.* Parnshaw, 2 T. R. 745.

[2] Lewis *v.* Peake, 7 Taunt. 153; Armstrong *v.* Percy, 5 Wend. 535.

[3] 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.

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

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.[1]

§ 265. In general, as we have already seen, damages are estimated by the *actual injury* which the party has received. But to this rule there are some *exceptions*. Thus, 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

---

[1] The consideration money and interest, is adopted as the measure of damages, in *New York;* Staats *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, 4 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, Ib. 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. 381; — and in *Louisiana;* Bissell *v.* Erwin, 13 Louis. R. 143. See also 4 Kent, Comm. 474, 475.

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 trespass on

---

[1] See 3 Amer. Jurist, p. 288; Lindon *v.* Hooper, Cowp. 419; Parker *v.* Norton, 6 T. R. 695; Lamine *v.* Dorrell, 2 Ld. Raym. 1216; Laugher *v.* Brefitt, 5 B. & Ald. 762; Bull. N. P. 32; Jacoby *v.* Laussatt, 6 S. & R. 300; Pierce *v.* Benjamin, 14 Pick. 356, 361; Barnes *v.* Bartlett, 15 Pick. 78; Otis *v.* Gibbs, MSS. cited 15 Pick. 207; Whitwell *v.* Kennedy, 4 Pick. 466; Johnson *v.* Sumner, 1 Met. 172; Rogers *v.* Crombie, 4 Greenl. 274.

[2] Bonafous *v.* Walker, 2 T. R. 126; Porter *v.* Sayward, 7 Mass. 377; 3 Am. Jur. 289.

[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 Theron Metcalf, Esq. in 3 Amer. Jur. 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 the one case than in the other; but points of mere sensibility and mere casuistry are not allowed to operate in judicial

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. 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. Thus, if the plaintiff himself provoked the assault complained of by words or acts so recent as to constitute part of the *res gestæ*;[2] or, if the

---

tribunals; and if they were so allowed, still it would be difficult to show, that a plaintiff ought to receive a compensation beyond his injury. It would be no less difficult, either on principles of law or ethics, to prove that a defendant ought to pay more than the plaintiff ought to receive. It is impracticable to make moral duties and legal obligations, or moral and legal liabilities, coextensive. The same principles will apply to the mitigation of damages. If the law awards damages for an injury, it would seem absurd (even without resorting to the definition of damages) to say that they shall be for a part only of the injury." 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.

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

injury were an arrest without warrant, and he were shown to be justly suspected of felony;[1] 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;[2] these circumstances may well be considered as reducing the real amount of the plaintiff's claim of damages.

§ 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. These results include all the damage to the plaintiff, of which the injurious act of the defendant was the efficient cause, though, in point of time, such 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.[3] 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.[4]

§ 269. The *character* of the parties is immaterial; except in actions for slander, seduction,[5] 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

---

[1] Chinn *v.* Morris, Ry. & M. 24.

[2] See *ante*, tit. ADULTERY, § 51.

[3] Dickinson *v.* Boyle, 17 Pick. 78. See Ante, § 55, 56.

[4] Wilcox *v.* Plummer, 4 Pet. 172, 182; 3 Com. Dig. 343, tit. Damages, D. See Post, § 271.

[5] See *post*, § 274.

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 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

---

[1] See Lefft, R. 774, Ld. Mansfield's allusion to Berkeley *v.* Wilford. See also Stout *v.* Prall, Coxe, N. J. Rep. 80; Coryell *v.* Colbaugh, Ib. 77, 78; 6 Conn. R. 27; Ante, § 265.

[2] Bennett *v.* Hyde, 6 Conn. R. 24, 27; Shute *v.* Barrett, 7 Pick. 86, per Parker, C. J. See Ante, § 89.

[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, 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.

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.[1] 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."[2] In all such cases of voluntary act, the intent is immaterial, the only question being, whether the act was injurious, and to what extent.[3]

§ 271. In certain other actions, such as case, for a *malicious prosecution*,[4] or, for *false representations* of another person's credit in order to induce one to trust him,[5] 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

---

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

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

[3] 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 general 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.

[4] 1 Chitty on Pl. 404, 405, (7th ed.); 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.

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

actionable in itself, the Jury must be cautioned not to increase the damages on account of them.[1]

§ 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,[2] 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 *quare clausum fregit*, as constituting part of the injury.[3] And,

---

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

[2] Churchill *v.* Watson, 5 Day, 140; Tilden *v.* Metcalf, 2 Day, 259; Johnson *v.* Courts, 3 Har. & McHen. 510.

[3] Bracegirdle *v.* Orford, 2 M. & S. 77; Cox *v.* Dugdale, 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 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 halfpenny 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.

generally, whenever the wrongful 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] Hence, 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.[2] 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.[3] 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.[4]

§ 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 or 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 matters in aggravation of the injury. 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

---

[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.

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

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

[4] Squire *v.* Hollenbeck, 9 Pick. 551; and see Pierce *v.* Benjamin, 14 Pick. 361.

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.[1] 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.[2]

§ 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, 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.[3] If, there-

---

[1] 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], Amer. Ed., 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 Ante, § 268.

[2] 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.

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

fore, 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 a 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.[1] 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.[2] 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;[3] 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.[4]

§ 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 conse-

---

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

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

[3] 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, p. 48 – 51, [54 – 57], Wendell's ed.

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

quently of much or little value, may be offered on either side, to affect the amount of damages.[1] But whether the defendant will be permitted, under the general issue, to prove *general suspicions*, and *common reports* of the guilt of the plaintiff, in mitigation of damages, is not universally agreed.[2] 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.[3] Evidence of any *misconduct of the plaintiff*, giving rise to the charge, such as, an *attempt* by him *to commit the crime*,[4] 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.[5] So, if, through the misconduct of the

---

[1] 2 Stark. on Slander, p. 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 acquaintance had ceased to visit him. Earl of Leicester *v.* Walter, 2 Campb. 251.

[2] In England, and in Connecticut, Pennsylvania, 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, 6 Munf. 465. See also Boies *v.* McAllister, 3 Fairf. 310.

[3] 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.

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

[5] 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.* Buffinton, 3 Mass. 553; Watts *v.* Frazer, 7 Ad. & El. 223;

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.[1] 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.[2] 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.[3]

§ 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.[4] It has been held in England, 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.[5] But in the United States, upon

---

Beardsley *v.* Maynard, 4 Wend. 336; 7 Wend. 560; Gould *v.* Weed, 12 Wend. 12.

[1] Larned *v.* Buffinton, 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. Bodwell *v.* Osgood, 3 Pick. 379.

[2] Larned *v.* Buffinton, 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.

[3] Dickinson *v.* Barber, 9 Mass. 225, 228; 3 Am. Jur. 297. But the defendant will not be permitted to offer in mitigation of damages, any evidence impeaching his own character for veracity. Howe *v.* Perry, 15 Pick. 506.

[4] 3 Campb. 477, per Ld. Ellenborough; Pierce *v.* Benjamin, 14 Pick. 356, 361; Parks *v.* Boston, 15 Pick. 198, 206, 207; Stone *v.* Codman, Ibid. 297, 300; Greenfield Bank *v.* Leavitt, 17 Pick. 1.

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

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.[1] Where the subject is a written security, the damages are usually assessed to the amount of the principal and interest due upon it.[2] If the plaintiff has himself recovered the property, the actual injury occasioned by the conversion, including the expenses of the recovery, will form the measure of damages;[3] 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 by the Jury as diminishing the injury and consequently the damages.[4]

§ 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.[5] And if several damages are assessed, the plaintiff may elect which sum he pleases, and enter judgment *de melioribus damnis*, against them all.[6] But if several trespasses are

---

[1] Greenfield Bank *v.* Leavitt, 17 Pick. 3; Baker *v.* Wheeler, 8 Wend. 505.

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

[3] Greenfield Bank *v.* Leavitt, 17 Pick. 3.

[4] Pierce *v.* Benjamin, 14 Pick. 356, 361.

[5] 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.

[6] 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 ed.); Halsey *v.* Woodruff, 9 Pick. 455.

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.[1]

§ 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, while 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 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

[1] Propr's of Kennebec Purchase *v.* Boulton, 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.

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 Ante, § 253.

[2] See the observations of Mr. Peake, Evid. p. 505, by Norris; Mr. Phillips, 2 Phil. Evid. 189, Cowen & Hill's ed.; and Mr. Starkie, 2 Stark. Ev. 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, Ib. 62.