A TREATISE

ON THE

MEASURE OF DAMAGES,

OR AN

INQUIRY INTO THE PRINCIPLES

WHICH GOVERN THE

AMOUNT OF COMPENSATION

RECOVERED IN SUITS AT LAW.

"Cum pro *eo quod interest* dubitationes antiquæ in infinitum productæ sint, melius nobis visum est, hujusmodi prolixitatem, prout possibile est, in angustum coarctare."

Cod. De sent. quæ pro eo quod. int. prof. Lib. VII. Tit. XLVII.

"Hoc opus, (erudite Lector,) in hac tempestate multorum aliorum instantium negotiorum emisi; ideoque (ut in votis mihi fuit) perpolire non potui."

Preface to Eleventh Part of Lord Coke's Reports.

BY

THEODORE SEDGWICK.

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DANIEL LORD, ESQ.

DEAR SIR:—

IF you find no fault, I am very sure that I shall not be elsewhere censured for placing your name, (although without any previous permission,) upon the dedication-page of this work.

Your opinion of the importance of the subject, is one of the circumstances that have most strongly urged me to proceed with it. But I have other reasons for requesting you to accept this volume.

You show us all by a teaching far better than barren precept, how much true dignity and usefulness, as well, if we may be allowed to judge, as real happiness attend a life assiduously, intelligently, and above all, honorably devoted to that profession of which we are the votaries.

I am, dear Sir,

With sincere regard and respect,

Your obedient servant,

THEODORE SEDGWICK.

New-York, January, 1847.

PREFACE.

THE subject of damages, in other words, the pecuniary compensation awarded by the tribunals of justice, in the widest acceptation of the term, embraces the whole field of redress by legal means; and in this sense, includes the entire philosophy of the Law, at least so far as it is distinguished from Equity. In taking this view of the matter, we should be led to consider questions, which lie at the very basis of our system of jurisprudence—to what extent compensation ought on principle to be carried—whether full and complete remuneration should be provided for every case of civil injury; or whether as now, the reparation should be confined within much narrower limits. Again, for what particular wrongs reparation should be provided; should the crime of seduction be punished by a civil action on a fiction of service? Should the injured husband have compensation in an action for criminal conversation? In what cases should redress be

furnished for slanderous or libellous publications? Ought the malicious refusal to fulfil contracts for the mere payment of money be more severely punished than honest incapacity?

These and similar inquiries would, as I say, embrace the whole philosophy of legal relief. But I have by no means in this volume intended to occupy ground so extensive. My aim has been much humbler; and if not more useful, at least more practical.

My purpose has been to examine those cases only, where a wrong having been done, or in more technical language, a right of action existing, the question remains, what is the amount of compensation to be awarded? In other words, what is the rule or measure of damages in courts of law?

In doing this, my principal purpose has been, to present the law as it is; while at the same time, I have thought it my duty to exhibit the contradictions and discrepancies, which exist in this as indeed in almost every part of our jurisprudence; and which must exist, so long as those changes take place in the administration of justice, which sometimes furnish a theme for well-grounded censure, but more frequently exhibit its capacity of self-adaptation to the perpetual fluctuations of our social and commercial condition.

In the execution of the work, I may be thought to have given the decisions of the courts too much at large. It is not unadvisedly, that I have adopted the course pursued in this volume. Our law

is so truly to be found in our reports, that it seems to me always better to give the very words of judicial opinions, than to attempt to put them in different language. In regard to the subject of damages, too, this course has seemed to me particularly expedient. It is in the course of a trial, that questions of this class generally present themselves, and my object has been to make a work which should be practically useful at nisi prius; while, at the same time, I have endeavored to clear the way to a correct appreciation of the whole subject.

I have found another reason for this course, in the unsettled state of this branch of the law. The contradictions are so numerous, the discrepancies so great, and the subject in a connected shape so new, that I have hesitated to affirm any position, without citing my authority at large. And in collating the decisions, I have found so much variance of opinion in the numerous tribunals which follow the course of the common law that it is with great difficulty in many cases that I have been able to do more than state the doubts as they exist.

I do not by any means flatter myself with the hope of complete success. But if this volume tend in any degree to reduce to greater certainty this department of our jurisprudence—to stimulate the inquiries, or to abridge the toil of those, who painfully devote themselves to the great science of justice—my labor will be abundantly repaid.

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A TREATISE

ON THE

MEASURE OF DAMAGES.

INTRODUCTION.

ATTENTION has of late been frequently called to the fact, that our libraries contain no sufficient work on the subject of the Rule or Measure of Damages. Indeed the only one which we have, is that by Sayer,* published nearly three quarters of a century ago, which covers but a very small portion of the ground now embraced by this branch of the law, and is of scarcely any value to the American student.† No serious attempt seems indeed to

* The Law of Damages, by Joseph Sayer, Serjeant at Law, London, 1770.

† The second Vol. of Mr. Greenleaf 's excellent work on Evidence, p. 209, contains a chapter on Damages, in which will be found far the best view of the subject, that has ever yet been taken, but the space allotted to it forbade any thing but a rapid and general survey. I think I cannot err in subjoining here a letter written by the late Mr. Justice Story, stating his opinion of the value of a work like the present, if properly executed.

Cambridge, November 7, 1844.

MY DEAR SIR :—

IN reply to your letter I beg to say, that I think a book on the Law and Rules of Damages would be of great utility to the profession, and would supply a deficiency which is constantly felt and lamented. I know of no book that treats of the subject at once fully, accurately, and with suitable distinctions and expositions of principles. The

have been made to reduce the rules of damages to principle, till a very recent period. Lord Kaims says in his Principles of Equity: "In the English "courts of common law, there is no accurate dis- "tinction made between damage certain and un- "certain. Damages are taxed by the jury, who "give such damages, as in conscience they think "sufficient to make up the loss, without regarding "any precise rule."* It is superfluous to say, that no such arbitrary discretion is now tolerated, except in a very limited class of cases, if indeed, it can be properly said to exist at all.

The following treatise is the result of such leisure as I have been able to devote to the consideration of the subject. I have not, however, intended to confine myself rigidly to the matter above designated, but have endeavored by including the kindred topics to give a general view of our law on the subject of damages.

In preparing the work, my chief embarrassment has arisen from the difficulty of making a proper and scientific division of the subject. The whole arrangement of our Anglo-American jurisprudence; the primary distinction between law and equity; and the subordinate divisions of the forms of action at law are so purely arbitrary and

authorities either in England or America, are not in entire harmony with each other; and different states have apparently adopted different rules in the same class of cases. We want a thorough analysis of the whole subject, with all the lights of the modern authorities.

I hope you will be persuaded to undertake the work, which I feel assured will meet a ready patronage from the profession.

Believe me, with the highest respect,

Yours truly,

JOSEPH STORY.

* 2nd edition, 1767, p. 78, in notes.

technical, that it is almost impossible to prepare a treatise on a subject as extensive, as that of the measure of damages, which shall be at once useful and logically arranged. To be useful, it must, to a very considerable extent, (at all events,) conform to those arbitrary divisions which are altogether independent of any scientific analysis, and very frequently are directly in conflict with logical order. Conscious of the difficulty, yet seeing no mode to avoid it altogether, I have endeavored as far as possible, to make my treatment of the subject correspond with that which Blackstone adopted, and which subsequent writers on our law have generally followed.

I have again been embarrassed by the extent of the subject. There is a very evident distinction between the cause of action and the measure of damages; and yet as most actions at law result in damages, it is by no means easy in all cases to define what properly belongs to each. "The "rules on the subject of damages," says one of the great French civilians with his usual clearness, "regard either whether they are due at all, "or in what they consist. The first question is "one of law, which depends on whether the party "charged is liable or not. This first question "being settled, the second remains, viz: to dis- "criminate with regard to the damages sustained "between that portion which is to be made good "and that which is to be borne by the sufferer."*

* Toutes les regles de la matiere des dommages et interêts regardent ou la question de scavoir s'il en est dû ou celle de scavoir en quoi ils consistent. La question s'il est dû des dommages et interêts est toujours une question de droit qui depend de scavoir si celui a qui on les impute doit en etre tenu. *—* Cette premiere question de scavoir s'il est dû des dommages et interêts étant décidée c'en est une seconde

This division, very clear and simple in theory, it will not always be found easy to reduce to practice.

Another source of difficulty has arisen from the fact that some parts of the subject have been already treated with great fulness and ability. Benecke's work on indemnity exhausts that branch of the law of damages which relates to insurance. The various books on set-off, among which is Mr. Barbour's valuable treatise, and the late Mr. Graham's work on New Trials, equally cover the whole subject so far as they go. And where I have found the ground thus occupied, I have contented myself with a very general survey.

In preparing the work I have endeavored, as far as possible, to extract some general and reasonable rule, from cases often conflicting and discrepant; but as the subject in any connected form is almost entirely new, I have thought that I should best serve the bar, and at the same time contribute most to a generalization of the whole matter, by giving the decisions sufficiently at large to show the principle which they seek to establish, instead of contenting myself with a brief reference. This course may undoubtedly, in some cases, lead to prolixity; but it seems to me to be attended by more than counterbalancing benefits.

I have endeavored to point out the analogies of this branch of the science, not only in our own system, but by going back to the great original of jurisprudence, the civil law, and also by refer-

de scavoir en quoi ils consistent, c'est a dire de discerner dans toute l'etendue du dommage qui est arrivé ce qui doit en etre imputé a celui qui est oblige de dedommager, et ce qui ne doit pas lui etre imputé." *Domat, Loix Civiles, Lec. III. Tit. 5, Sec. II.* § 2.

ence to the more eminent judicial writers of France; and I can only wish that I had leisure to make this part of the work more full and complete. I have had constantly in my mind the precepts and example of the late lamented Story;* but no one can be more sensible than myself of the immense disparity between the models of the master and the efforts of the pupil.

I suggest these various considerations by way of an anticipated excuse for the many errors and imperfections which I am but too sensible this work must present, and I throw myself upon the candid and indulgent consideration of a very learned and able profession.†

* "There is a remarkable difference in the manner of treating juridi-
"cal subjects between the foreign and the English jurists. The for-
"mer almost universally discuss every subject with an elaborate theo-
"retical fulness and accuracy, and ascend to the elementary prin-
"ciples of each particular branch of the science. The latter, with a
"few exceptions, write *practical* treatises, which contain little more
"than a collection of the principles laid down in the adjudged cases,
"with scarcely an attempt to illustrate them by any general reasoning,
"or even to follow them out into collateral consequences. In short,
"these treatises are little more than full indexes to the reports, arranged
"under the appropriate heads; and the materials are often tied together
"by very slender threads of connection. They are better adapted to
"those to whom the science is familiar, than to instruct others in its
"elements. It appears to me that the union of these two plans would
"be a great improvement in our law treatises, and would afford no in-
"considerable assistance to students in mastering the higher branches
"of their profession." *Story, Pref. to Com. on Bailments.*

† A very serious difficulty has arisen from the fact that the digests of the reports afford but little aid. There is, I believe, in no one of them any such head as "*Rule or Measure of Damages.*" Wharton's Pennsylvania Digest, (Ed. 1836.) has not even any head of "*Damages*;" and Harrison's, the most complete of all, has under the head of "*Damages*" only a very inconsiderable number of cases. It has been necessary, therefore, to go through the index to each volume of reports separately, which, considering our *multorum camelorum onus*, is not a holiday task. I hope our reporters and digesters may hereafter think it not improper to reserve one head for the Rule or Measure of Damages.

CHAPTER I.

General view of the subject.—Distinction between Common law and Equity as to the relief given.—Origin of damages.—Different principles on which different systems of jurisprudence act is awarding damages.—That of the English and American systems is Compensation.—Nature and extent of this compensation generally.—Difficulties arising from the Forms of action.

THE subjects of legal investigation when practically considered, generally resolve themselves into three great heads of inquiry. The right of the parties or the cause of action, the forms of proceeding, and the mode of relief. It is of the last of these three divisions alone, that these pages are intended to treat. The relief afforded by a legal tribunal, may be either preventive or remedial. If remedial it may again be either specific, or it may consist in the mere award of pecuniary remuneration.

The common law, as it exists in England, and in the United States, is generally remedial in its character, and its remedies are of a pecuniary description. It has few preventive powers, it can rarely compel the performance of contracts specifically; its relief consist in the award of pecuniary damages. Whether it punishes wrongs, or remunerates for breach of contract, in either case its judgment simply makes compensation, by awarding damages to the sufferer.

The rules which in this matter govern its action, the amount of compensation, or in other

words, the measure of damages will be the subject of this treatise.

A mere enumeration of the forms of action and proceedings at common law, is sufficient to show that the powers of these tribunals are almost solely remedial, and confined with few exceptions to the infliction of pecuniary damages.

Equity operates by injunction, she restrains the aggressor from the contemplated violation of right; she gives specific relief by decreeing the very thing to be done which was agreed to be done; she furnishes testimony by a bill of discovery; she executes trusts, expounds testaments, and generally adapts her plastic hand with ease, to the varied wants and complaints of man in a state of society.

But with the Common law the case is very different. The end at which it arrives is in all cases nearly the same; in the actions *ex contractu*, account, assumpsit, covenant, debt, the only object of the plaintiff is to obtain, and the only power of the court is to make a judgment awarding a certain amount of money by way of redress for the breach of the agreement. In the case of an action brought for the breach of a contract for the payment of money only, a suit for damages does indeed, as Lord Mansfield observed in *Robinson* v. *Bland*,* from the nature of the case, become a *suit for specific performance*. But this is almost the only case, where a suit at law compels the very thing to be done which the defendant agreed to do.

In the actions *ex delicto*, trover, case and trespass, replevin and detinue, the rule is the same,

* 2 Burr. 1077, 1086.

with the exception that in replevin and in detinue, (abolished with us in New-York by statute,) the law makes a feeble and partial attempt to enforce the return of the specific chattels, for the taking or detention of which, the suit is brought.

To this general rule, however, there are some further exceptions, which must be borne in mind.

In the action of ejectment and in the proceedings to recover dower as well as in cases of nuisance, by abating the grievance complained of, the common law gives a specific remedy. By the writs of quo warranto, mandamus and prohibition, and the ancient and now obsolete writ of *estrepement*, these courts also exercise powers very analogous to those of a court of equity. But of all these more particularly hereafter, and in their order. Of the great writ of habeas corpus, I do not speak at all, because it took its origin in a statute.

Blackstone in his Commentaries, ranks damages among that "species of property that is "acquired and lost by suit and judgment at law." "The primary right to a satisfaction for injuries, is given by the law of nature, and the suit "is only the means of ascertaining and recovering that satisfaction." "The injured party has "unquestionably a vague and indeterminate right "to some damages or other, the instant he receives the injury, and the verdict of the jurors, "and the judgment of the court thereupon, do "not, in this case, so properly vest a new title in "him, as fix and ascertain the old one. They "do not give, but define the right."*

* Book II, chap. 29, p. 438.

It is of the rules which govern this species of property that I propose to treat in this volume, under the name of the Measure of Damages; and I arrange the subject in an order, of which the following is a general outline. The origin of Damages under the English system. The Tribunals by which imposed, and the general principle by which they are governed. The Measure of Damages in particular cases. Set-off, Mitigation and Recoupment of Damages. The Rule of Damages under special statutes. The Remedy for the infliction of excessive Damages. Pleading and Practice as applicable to Damages.

In investigating the origin of our present system of pecuniary compensation, it is not difficult to trace it back to those Anglo-Saxons, whose marked and peculiar character has so deeply impressed itself on every quarter of the globe.

Under the civil law we shall see hereafter that the rights and remedies of the subjects of the Imperial Government, were carefully protected in regard to the matters of which we now speak. But when that beautiful and elaborate structure shared the fate of its creators, the rules of right sank with it, and the law but slowly emerged from the wreck and chaos of empire.

For nearly ten centuries the intellectual progress of Europe was arrested or impeded, and during that period all the earlier processes of civilization had necessarily to be worked out anew.

The English jurisprudence finds its earliest monument in the sixth century, in the laws of Ethelbert, king of Kent, and this code known as the *Leges Æthelbirhti* illustrates our present

subject too curiously to be altogether unnoticed here.

In this, the earliest mention of damages in the English law, we find the attention of the law giver, limited almost exclusively to wrongs, or as we would now say, to actions of tort.

The Saxon *were*, Weregildum, or Weregild, literally a man's money, or the price of a man, is the earliest award of damages to be found in the English jurisprudence.

"Damages," says Sir Francis Palgrave, "recovered in a civil action for an assault, or any "personal injury not being a felonious act, correspond to the Anglo-Saxon Were.

"When Alfred enacts that the seduction of the "wife of a Twelf Haendman, or an Eorl, is to be "compensated by payment of one hundred and "twenty shillings; of the wife of a Six Haendman, by payment of an hundred shillings; and "of the wife of a Ceorl, by payment of forty "shillings; he does nothing more whatever, than "fix and declare the amount of the verdict, instead of leaving the assessment of damages, "as we do, to the direction of the judge and "the discretion of the jury."*

The *Were* is not to be confounded with the *Wite*, the one answering to our civil damages,† the other

* Palgrave's Rise and Progress of the English Commonwealth, Vol. I. pp. 205 and 32.

† "The *Wite* was a penalty paid to the crown by a murderer. "The *Were* was the fine a murderer had to pay to the family, or relatives of the deceased, and the Wite was the fine paid to the magistrate who presided over the district where the murder was perpetrated. Thus the Wite was the satisfaction to be rendered to the community for the public wrong which had been committed, and the Were "was to the family for their private injury." Bosworth's Anglo-Saxon Dictionary, in voc. *Were* and *Wite*. Dr. Lappenberg, in his history of

to our criminal mulct or fine. It is to both the *Were* and the *Wite* that Tacitus refers; when speaking of the Germans, he says: "*Sed et levioribus de-*
"*lictis pro modo pœna; equorum pecorumque*
"*numero convicti multantur, pars multæ regi vel*
"*civitati, pars ipsi qui vindicatur, vel propinquis*
"*ejus exsolvitur.*"*

It is a curious fact, that the laws of remote and barbarous periods, show the most minute care in fixing the amount of compensation to be recovered by way of damages.

We have the laws of twelve Anglo-Saxon monarchs, from the middle of the sixth century, to the Norman conquest. Of these, the earliest, as I have said, are those of Ethelbert, in the latter part of the sixth century, and his application of the *Were*, or in other words, his rule of damages, is singularly minute.

"If the hair be plucked, or pulled, let fifty
"sceattas† be paid in compensation. If the scalp
"be cut to the bone [of the scull] so that the lat-
"ter appear, let compensation be made, by pay-
"ment of three shillings."

England, under the Anglo-Saxon Kings, (see B. Thorpe's Translation, London, 1845, Vol. II. p. 336, *Particular and Penal Laws*,) mentions several other fines imposed, besides the Were and the Wite, in cases of homicide. He says: "The relations of the slain received the whole "*weregild* annexed to his rank in the community." "Previously to pay-"ing the wergild, the king's *mund*, a fine to the king, for the breach "of his protection was to be levied—after which, within twenty-one "days, the *healsfang* (apprehensio colli, collistrigium,) a mulct in "commutation of the pillory, or some similar punishment, was to be "discharged, and after that within twenty-one days, the *manbot* or "indemnity to the Lord of the slain for the loss of his man. In addition to "all these, there was still the *fyht wite* due to the crown for the breach "of the peace, which as well as the *manbot* could never be remitted."

* De Moribus, c. 12. Palgrave, I. p. 99.

† A silver coin, weight 19 gr. Vide Hawkins' English Silver Coins, p. 18.

"If an ear be cut off, let compensation be "made by payment of twelve shillings."

"If a piece of the ear be cut off, let compensa- "tion be made by payment of six shillings."

"Whoever fractures the chin bone, let him "forfeit twenty shillings for the offence."

"For each of the front teeth, six shillings."

"For the tooth that stands by the front teeth, "(on either side,) four shillings."

"For every (finger) nail, one shilling."

"If the great toe be cut off, let a fine of ten "shillings be incurred."

"If the great toe nail be cut off, let thirty sce- "attas be paid for compensation. For every "other toe nail, ten sceattas."*

It will be noticed that the Were or damages in the laws of Ethelbert, is assessed in money. But says Sir Francis Palgrave, "until a metallic "currency was introduced, the legal fines and "penalties were paid in kind: in the laws of "Hoel Dda all such fines are reckoned in cattle, "and the same mode of computation prevails in "the *Brehon* laws of Ireland, and the '*Assyth-* "*ments for Slaughter*' of the Scots. An inter- "mediate stage is denoted by the laws of the

* I have taken the above extract from Sir Francis Palgrave, Vol. II. page CVII. The last Latin translation of the Anglo-Saxon laws was by Wilkins in 1721. The recent Record Commission, among its most valuable and important labors in the field of early English jurisprudence, have published, under the direction of Mr. Thorpe, the first English translation of these curious codes. The history of no part of the law should be written without giving them a careful examination.

Besides the folio edition of the Anglo-Saxon laws, published by the Record Commission, there is an edition in two volumes, 8vo., which I have now before me; the translation of the passage above is substantially the same as that of Palgrave, with the exception that, in the former, "*Bote*" is used for its equivalent "*compensation*."

"Continental Saxons. Their weres are fixed in "*solidi*, or shillings. But the *solidus* was an "imaginary denomination; and instead of count- "ing down the coin, the offending party might "drive his legal tender into the farm of the plain- "tiff. An ox passing sixteen months old, repre- "sented the greater solidus; the lesser solidus "was a yearling ox, or a ewe and her lamb. "Amongst some Saxon tribes, the solidus was "reckoned in corn; thirty bushels of oats, forty of "rye, and sixty of wheat, being each its equiva- "lent; and it is most probable that the necessity "of adjusting the ancient fines to the standard of "Roman Britain, was the cause which produced "the enactment of the Kentish laws."* "The "coined money in England," says Mr. Serjeant Heywood, speaking of the Saxon period, "was so "trifling in quantity, that most of the transactions "of commerce, and all buying and selling, were "carried on by barter, and cattle obtained the "name of *Viva Pecunia*, from being received as "money upon most occasions, at certain regu- "lated prices."†

* Palgrave's History, Vol. I. p. 44.

† The Ranks of the People under the Anglo-Saxon Government, by Samuel Heywood, Serjeant, Introd. p. lii.. "*In Wera reddere poterit "quis.*" says the law of the Conqueror. § 10. "*equum non castratum "pro XX. solidis et taurum pro X. solidis et jumentum pro V. solidis.*" And see Lex Saxonum. Tit. XVIII. De Solidis.

It seems not improbable that money became the general measure of value in England not long after the Norman Conquest.

The old feudal services were all originally rendered in kind; the reliefs in horses and arms—military service in person. But in the reign of Henry II., "the humour of the times being," says Mr. Sullivan, "that every thing should be paid in money," (Lectures on the Laws of England, by F. S. Sullivan. Lect. 31. p. 290.) the reliefs were commuted for a specific sum, and personal service was exchanged by the same king for escuage and scutage, and the same thing took place in regard to rents; (p. 288 and 289.) See also Heywood on Ranks.

The laws of the Anglo-Saxon monarchs which we have from the period of Ethelbert of Kent, to the Norman Conquest, contain all, more or less,

The civilized Romans recognized the metallic currency as the measure of value; *qui non facit quod promisit, in pecuniam numeratam condemnatur, sicut evenit in omnibus faciendi obligationibus.* L. 13 in f. ff: de re: judic; and says *Domat*, Vol. I. p. 271, *Des Interets*; "*L'argent* "*tient lieu de toutes les choses qu'on peut estimer.*" Liv. III. Tit. V. § II.

The laws of the Saxons, and those of Hoel Dda, both noticed in the above extract from Sir Francis Palgrave, may not be without sufficient interest in connection with our present subject to permit a brief note. The date of the *Leges Saxonum et Frisionum* has been the subject of great controversy among the antiquarians; [See An Historical Treatise on Trial by Jury, Wager of Law, &c., by Thorl Gudm. Repp. Edinburgh, 1832, p. 23;] some ascribing them to Charlemagne, and others to Harold Blue Tooth of Denmark, whose reign closed A. D. 984. The latter opinion would seem the better; in either case these laws are of interest to the scholar of English jurisprudence, as they at all events belong to the same race, from which our ancestors sprung, although after they had left the parent land. Nothing can exceed the simplicity and brevity of these codes.

In Christi nomine incipit Legis Saxonum. Liber de Vulneribus.

1. De ictu nobilis solid. XXX. vel si negat, tertia manu juret.
2. Livor et Tumor LX. solid. vel sexta manu juret.
3. Si sanguinat cum CXX. solid. vel cum undecim juret.
4. Si os paruerit CLXXX. solid. vel cum undecim juret.
7. Si per capillos alium comprehenderit, CXX. solid. componat vel XII. a manu juret.

The two bodies of law, the *Lex Saxonum* and the *Lex Frisionum* may be found at length in the *Codex Legum Antiquarum* of Lindenbrog, a most curious collection of the legislation of the middle ages.

Hoel, or Howell Dda, Howell the Good, was a King of South Wales in the 10th century—the date of his compilation, which consists of three codes, the Venedotian, Dimetian and Gwentian, is between 914 and 942, and it appears that laws of a similar character are traceable as far back as the 6th century. The republication of these statutes forms one of the great labors of the Record Commission. These laws exhibit the most minute particularity in the estimation of damages. They speak of various sorts of compensation for,

I. *Saraad*, or a disgrace.

II. *Galanas*, or murder.

And these terms, *saraad* and *galanas*, are also used for the mulct imposed for the offence or crime. There were also two other fines; the *Dirwy*, (from Dir force) a fine of twelve kine, or three pounds; and *Camlwric*, a fine of three kine, or nine score pence.

the application of the *Were*, but in none, with the exception of those of Alfred, between A. D. 871 and 901, do we find the same minute classification

The following extracts illustrate this legislation. Venedotian Code, p. 115.

§ 27. In three ways *Saraad* occurs to every person in the world; by striking, assaulting, and taking by violence from him; and if it be a man, if his wife be violated, it is *saraad* to him; if it be a woman, if she find another woman with her husband, it is *saraad* to her; and so nobody escapes without being subject to *saraad*.—

§ 27. The *Gabuas* of a steward, a chief of a kindred, a canghellor, and a chief huntsman, is nine score and nine kine, once augmented; and the *saraad* is nine kine and nine score of silver, once augmented.—

P. 108, § 12. A *dirwy* is due for fighting; fighting is assault and battery, and blood and wounds—the three things that constitute fighting; and therefore it is right to pay *dirwy* for them. The amount of the *dirwy* is twelve kine, or three pounds; the amount of the *camlwrw* is three kine, or nine score pence.—

P. 125, § 38. For a dog, or for a bird, or for any thing of that kind, there is neither *dirwy* nor forfeiture of life; but *camlwrw* to the lord, and amends to the owner of the property.—

P. 137. Of the worth of fowls.

1. A hen is one penny in value.
2. A cock is two hens in value.—

P. 140. Of skins this treats.

1. The skin of an ox is eight pence in value.
2. The skin of a hart, eight pence.—

P. 141. Of the worth of trees this treats.

1. The worth of an oak, six score pence.
2. The worth of a knurled oak, on which there is no fruit, four legal pence.—

P. 142. Here Iowerth, the son of Madog, son of Raawd, saw it to be expedient to write the worth of the building, and the furniture, cotillage, and corn damage, together with the proof book.—

P. 145. An iron pan, a legal penny.
A flail, a farthing.—

P. 149. Wadded boots, four legal pence.—

P. 151. Every other thing whatsoever, on which there is no legal worth, *is to be appraised*.—

§ XXIII. Now of the members of the human body.—

P. 157. Of corn damage this treats.—

§ 16. If a horse be found stretching his neck over a hedge, eating the corn, it is not right to take him, but to obtain compensation for damage, unless he be exculpated.—

of wrongs and remedies which we have just had occasion to notice.

In the laws of Alfred, the rates are higher, whether owing to a better appreciation of personal rights, or to the increase and consequent depreciation of the currency. In the laws of the Conqueror, the Weres become very few.

Perhaps this is evidence of a civilization gradually increasing, and a jurisprudence slowly improving; for feeble certainly and unreliable must be the tribunal charged with the task of imposing damages in civil suits, if the legislator considers it unsafe to be trusted with the assessment of the amount. This elaborate and minute specification therefore, though on its face it appears to indicate the care and watchfulness of the lawgiver, on a closer examination furnishes stronger proof of his distrust of the judiciary. Arbitrary rules, especially when used to fix values, are always a misfortune and a defect in jurisprudence; they should never be adopted, unless on account of some peculiar difficulty in arriving at the merits of the particular case.

What the judiciary was under the Anglo-Saxon government, it is now apparently impossible to learn. Sir Francis Palgrave says,* "some kind of adjudication probably took place amongst the

Anomalous Welsh Laws.

P. 708, § 5. Three punishments for ferocious acts; the payment of galanas for the slain: death to him who does the deed, and harrying spoliation of the property of the murderer."

As I have said, I take these extracts from the *Ancient Laws of Wales*, published in one of the folios of the Record Commission; the valuable labors of that Commission, and their munificent liberality to the literary institutions of this country, cannot be too frequently nor honorably noticed.

* Vol. I. p. 205.

Anglo-Saxons before the Were could be required." But any inquiry into this subject, even if practicable, would lead us far beyond our proper limits.

We now come to the examination of the tribunals, which, under our present system, are charged with the duty of assessing the amount of damages.

Various modes of trial in civil suits have obtained at different periods of English jurisprudence; trials by battle, wager of law, ordeal and trial by jury.

The trial by battle was the natural growth of the period at which we find it existing. "Man," says the learned and sagacious writer, whom I have already several times quoted, "never begins "by introducing any law which is entirely unreasonable, but he very frequently allows a law to "degenerate into folly, by obstinately retaining it "after it has outlived its use and application."* We should naturally expect in a barbarous and disturbed state of society, where every man's house was a castle, and the whole structure of society upon a martial basis, that questions of right would be decided by an appeal to force, and that the first efforts of the legislator and the jurist would only be to systematize and solemnize this mode of determining a controversy by subjecting it to fixed rules, and decreeing the result to determine the right forever. This mode of trial naturally gave way, before the advancing spirit of order.†

* Palgrave's Rise and Progress, vol. i. p. 229.

† Although singular as it appears, the appeal of death was not abolished in England till within the last thirty years. See *Ashford* v. *Thornton*, 1 B. & Ald., p. 405, which resulted in an act of Parliament.

The trial by ordeal, finally prohibited in the early part of the thirteenth century, was the creature of a superstitious age. It was the offspring of the clergy, and perhaps one among their many efforts to counteract the violence of the military portion of the community. In this aspect it may not have been without its uses.

The wager of law, or trial by compurgators, of which we see constant traces in the Anglo-Saxon laws, and which existed with us till a very recent period,* may claim a more reasonable origin.

A party accused of an offence, exonerated himself from the charge, by the oaths of a certain number of witnesses, and as Sir Francis Palgrave well observes: "In criminal cases, the whole "theory of this trial resolves itself into the ordi- "nary practice of our modern courts of justice. "Evidence has been given by which a presump- "tion is raised against the accused, but not being "conclusive, it is rebutted by the proofs of general "good character."† This analogy applies however, only to those cases, where the evidence is presumptive, and not positive, as in the latter class, testimony to character is admitted only in mitigation of the sentence.

Of the four modes of trial of which we have spoken, then, the one that has survived them all, after undergoing, however, very material modifications in its construction, is the *trial by*

* 3 Black. Com. Ch. 22. p. 345. In New-York, by II Revised Statutes, p. 410, Part III. Ch. VII. Tit. IV. Art. 2, § 4, "trials by battle, "and by the grand assize and all other modes of trial, except by a jury "or by referees, are forever abolished." Wager of law existed in England till very recently. It was abolished in all cases by 3 and 4 W. 4. c. 42, § 13. Chitty on Pleadings, Vol. I. p. 142.

† Vol. I. p. 233.

jury. But it is not within the scope of our present subject, to trace the gradual formation of this institution. Suffice it to say, that trial by jury, originally a trial by witnesses, the jury being themselves the witnesses,* gradually supplanted the various modes of trial by battle, ordeal and wager of law, and from the time of the reign of Henry II. seems to have begun to acquire stability, if not its present form.†

At all events, at the period of the earliest systematic records of judicial proceedings in England, the jury had become the tribunal which disposed of the question of fact, and the amount of damages became a principal part of their jurisdiction.

All hope of discovering how early this period was, is now perhaps lost, with the date of still greater interest, that of the origin of parliamentary representation.‡ But it is certain that dama-

* "The ancient jurymen were not empanelled to examine into the "credibility of the evidence, the question was not discussed and argued "before them, they, the jurymen, were the witnesses [illegible] and "the verdict was substantially the examination of these witnesses, who "of their own knowledge, and without the aid of other testimony, af-"forded their evidence respecting the facts in question to the best of "their belief. In its primitive form therefore, a trial by jury was, "therefore, only a trial by witnesses." Palgrave, Vol. I. p. 244.

† The ordeal was prohibited by the 18th Canon of the Fourth Lateran Council, A. D. 1215. Palgrave, Vol. I. p. 66. See, also, Repp on Ancient Trial by Jury, already cited, (p. 14, in notes,) an ingenious treatise to illustrate the gradual formation of the jury, from the wager of law and the trial by battle. To Sir Francis Palgrave's work I acknowledge great obligations. Indeed, to the legal student who desires an acquaintance with the origin of our jurisprudence, it is indispensable. Mr. Petheram says, in his Sketch of Anglo-Saxon Literature, that at its appearance it was not pecuniarily successful; but he well adds, "that for many "years to come, it must form the basis of our knowledge respecting "the frame work of the Anglo-Saxon government." *Petheram's Sketch*, p. 146.

‡ Turner's Anglo-Saxons, Book VIII. Ch. IV. Vol. III. p. 185, and Appendix III. Ch. IX. Vol. II. p. 536.

ges by their present name, were known at a very early period of the English law. The statute of Gloucester, passed 6 Edward I., A. D. 1278,* after giving damages in certain real actions in which they were not previously recoverable, goes on to give costs in the same case and closes, by enacting that the act shall apply to all cases where the party is to recover damages. "Et tout ceo soit tenu en tout cas ou homme recover damages."†

"After verdict given of the principal cause, the jury are asked touching *costs* and *damages*."‡

The jury in its present form dates, as has been already said, from the period of the reign of Henry II, (1150.)§ Previous to that time the great mass of business was transacted in the county-courts, where the freeholders were judges of both law and fact. The Aula or Curia Regis, of which the King's Bench remains a remnant,‖ disposed of the causes of the great Lords only. The exchequer already existed, but was a part of the Aula Regis.¶

It would seem that this freeholder's court became very obnoxious as ignorant of law, rendering it multiform and unequal, and frequently unjust, and these abuses were remedied by the appointment of justices in eyre, who settled the questions of law, leaving to the jury the questions

* Stat. at Large, by Ruffhead, Vol. I.

† See Barrington's Observation on the Statutes, p. 109.

‡ Jacobs' Law Dict. in voc.

§ "Although Henry II. was not in strictness the inventor of that "legal constitution which succeeded to the Anglo-Saxon policy, yet "*Trial by the Country* owes its stability, if not its origin, to his jurisprudence." Palgrave, Chap. VIII. Vol. I. p. 243.

‖ Bl. Com. b. 3, ch. 4, § 6, p. 41.

¶ Hale's History C. Law, c. 7. Sullivan's Lec. 32, p. 300. Bl. Com. b. 3, ch. 4, § 6.

of fact.* Since this period the maxim has generally held good: "*ad questiones legis respondent judices, ad questiones facti juratores.*

The quantum of damages being in most cases intimately blended with the questions of fact, must have been generally left with the jury. But we are not to suppose that the limits of their power were at first as clearly defined as they have become in later days. In one case, as late as the 13th of James I.,† it is said that "*the jury are chancellors,*" and that they can give such damages as "the case requires in equity," as if they had the absolute control of the subject; while on the other hand the old books are full of cases, where, on judgment by default and even on demurrer, the courts themselves fix the amount of damages,‡ and the remains of this we shall see in the power still exercised by the English courts in cases of *mayhem.*

Indeed, for a long time after the distinction between law and fact was clearly established, and the separate province of judge and jury defined with considerable accuracy, there appears to have been an almost total want of any clear and definite understanding of those rules of damages which we have now to consider.

Before commencing the more practical part of this treatise however, it will be well distinctly to bear in mind the general principle which the English law has in view in this matter, and how in this respect it differs from other systems of jurisprudence.

* Sullivan's Lectures, Lect. 32, p. 296. Hale's Hist. of Com. Law, Ch. VII. Vol. I. p. 246.

† Sir Baptist Hixt's case. Rolles Abr. II. p. 703. Trial. pl. 9.

‡ Rolles Abr., Tit. Damages.

We have seen in the early laws of the Anglo-Saxons, that with the most minute care, specific damages were arbitrarily assigned in each class of cases, without reference to the actual injury sustained in the particular case. We find in codes still more ancient, rules equally arbitrary in this respect. In the Jewish law, (Exodus, chap. xxi. v. 32,) various provisions of a similar nature are incorporated; thus, "If a man's ox push "(gore,) a man servant or maid servant, he shall "give unto their master *thirty shekels of silver*, and "the ox shall be stoned." So again, chap. xxii. v. 9: "For all manner of trespass, whether it be "for ox, for ass, for sheep, for raiment, or for any "manner of lost thing which another challengeth "to be his, the cause of both parties shall come "before the judges, and whom the judges shall "condemn, he shall *pay double* unto his neighbor." So again by a rough equity, xxi. v. 35, "If one "man's ox hurt another's that he die, then they "shall sell the live ox, and divide the money of it, "and the dead ox also shall they divide." The same principle is to be found in the laws of the Hindoos: "Where a claim is proved, the person "who gains the suit is put in possession, and the "judge exacts a fine of equal value from the de-"fendant. And if the plaintiff loses his cause, "he in the like manner pays double the sum sued "for." And in regard to torts, the same principle was applied.*

The definition of damages, the *id quod interest* of the civil law, in the code of Justinian, is very general—the loss sustained, and the profit

* Ayeen Akberry, by Gladwin, Vol. II. p. 498, 504.

prevented—*in quantum mea interfuit, id est quantum mihi abest, quantum què lucrari potui.**

An arbitrary rule of a very singular character was established by the Lex Aquilia,† which provided by its first chapter, that in case of the killing of any slave or cattle, unless by mere chance, the trespasser should pay the master as much as the property had been worth at any time within the year.

Damni injuria actio constituitur per legem Aquiliam cujus primo capite cautum est ut si quis alienum hominem alienamve quadrupedem 'quæ pecudum numero sit, injuria occiderit quanti ea res in eo anno plurimi fuerit tantum domino dare damnetur.‡ So that if a slave was killed who at the time of his death was a cripple, but within the year had been sound and valuable, his full value as sound was to be paid.

By the second chapter of this law, other kinds of intentional or negligent injury to property were punished; but in these cases, the estimate of damages was limited to the highest value of the thing injured within thirty days previous. *Non quanti in eo anno, sed quanti in diebus triginta proximis res fuerit, obligatur is qui damnum dederit.*§ The action given by the Lex Aquilia may be considered as very analogous to our action on the case; but it appears that without

* *Ra. Rom. Hab.* Dig. Lib. 46. Tit. VIII. § 13.

† Inst. Lib. IV. Tit. III. De lege Aquilia. Dig. Lib. IX. Tit. II. Ad Legem Aquiliam.

‡ See, on this subject, in the works of Molinæus (Dumoulin, Ed. 1681, Vol. III. p. 422,) his *Tractatus de eo quod interest.* It is frequently referred to by Pothier, as one of the most valuable expositions of the civil law on the measure of damages.

§ Inst. IV. Tit. III. § 11.

reference to the question of malice, the law was considered a penal one.*

The provisions of the law are very curious, and worthy of a more careful examination than the scope of this work permits.

The same principle of arbitrary and fixed valuation was applied by the civil law to matters of contract for sums certain,† and in these cases it was provided that damages should not be given beyond the double of the amount in question; *hoc quod interest dupli quantitatem minime excedere.*‡

A different course has been adopted under other systems of jurisprudence; instead of laying down any fixed or arbitrary rule, they leave the matter to the discretionary consideration of the tribunal which has cognizance of the cause; and this seems the case to a considerable extent, with regard to the civil law, as introduced into modern Europe.

Under that system, as established in France, and previous to the adoption of the Code Napoleon, damages were divided into interest and damages, *interêts* and *dommages-interêts*. *Interet* answers precisely to our interest, and is the measure of damages inflicted for the breach of a mere pecuniary obligation, as in the common cases of bills and notes.

Dommages-interêts correspond with our term

* Inst. IV. Tit. III. § 9. Brown's Civil and Admiralty Law, B. III. Ch. I. Vol. II. p. 401. Cooper's Justinian, in notes. Hugo. § 238.

† Code Lib. VII. Tit. 46. De Sent. quæ pro eo quod. int. prof.

‡ The original of this rule is, probably, to be found in the Twelve Tables. "*Si quid ends depositio dolo malo factum esset duplione luito. Si depositarius in re deposita dolo quid fecerit in duplum condemnetur.*" See Pothier's Pandects, by Breard Neuville. Vol. I. p. 332—364—366.

damages in its application to all other forms of action; and in this respect it is that the system appears loose and uncertain.*

After laying down the rule in regard to interest which as with us is limited to a fixed rate, Domat says:† "The other kinds of damages are un-"defined, and are increased or diminished, accor-"ding to the discretion of the judge, dependant "upon the facts and circumstances of the particu-"lar case; thus, in the case of a tenant who omits "to make the repairs to which he is bound by his "lease, or of a contractor who does not perform his "contract, or performs it ill; in either case they "owe an indefinite amount of the damages re-"sulting from the default, and these damages are "differently regulated according to the loss which "has happened, the nature of the facts and the "attendant circumstances."

And he illustrates these rules by one or two cases as to profits claimed as loss where he says, "It must be left to the discretion of the judge "to arrive at some measure of compensation ac-"cording to the circumstances and the particular "usages if there are any."‡

* In addition to the two heads of Interest and Damage-Interest, Domat makes a third of *Restitution des Fruits*, which we shall consider under the head of Mesne Profits and is fairly a branch of the great subject of damages.

† Lois Civiles, Liv. 3. Tit. V. Vol. I. p. 278. "Les autres sortes de dommages sont aussi divers et se reglent differemment par le prejudice qui arrive plus ou moins selon la qualité du fait et les circonstances. Ainsi un locataire qui manque aux reparations qu'il doit par son bail, un entrepreneur qui manque de faire l'ouvrage qu'il a entrepris ou qui le fait mal doivent *aussi finement* les dommages et les interets qui peuvent suivre du defaut d'avoir executé leur engagement; "et on les regle differemment, selon la diversité des pertes qui arrivent, la qualité des faits qui les causent et les autres circonstances."

‡ P. 262, "Il doit dependre de la prudence du juge d'arbitrer et de

And again,* "It results from all the preceding "rules, that as questions of damages depend on "the facts and circumstances of the case, they "must be decided by a sound discretion, exercised "as well with regard to the circumstances of the "case as to general principles."

And so says Pothier,† "It is necessary to ex- "ercise a certain degree of moderation in estima- "ting the amount of damages, according to the "particular case."

And again,‡ "Damages are to be moderated "where they would otherwise be excessive, by "leaving the computation to the arbitrament of "the judge."

So again,§ "Where the damages are conside- "rable in amount, they should not be rigorously "assessed, but with a certain degree of modera- "tion."

And again, even in cases of fraud,‖ "It must "be left to the discretion of the judge, even in

"modérer quelque dédommagement selon les circonstances et les usages particuliers s'il y en avoit."

* [illegible] "Il résulte de toutes "ces règles prescrites que comme les questions des dommages et intérêts laissent toujours des faits que les circonstances diversifient, "c'est par la prudence du juge qu'elles se décident, en joignant aux "connoissances que les principes doivent donner, le discernement des circonstances et des égards qu'on doit y avoir."

† Traité des Obl. Part I. Chap. II. Art. [illegible] "Il faut même "selon les différens cas, apporter une certaine modération à la taxation "et estimation des dommages dont le débiteur est tenu."

‡ 1615. "Nous devons modérer les dommages et intérêts lorsqu'ils se "trouvent excessifs en laissant cette modération à l'arbitrage du juge."

§ "Quand les dommages et intérêts sont considérables, ils ne doivent "pas être taxés et liquidés en rigueur, mais avec une certaine modération."

‖ 168. "Il faut avoir la même prudence du juge, même en cas de "dol, pour user de quelque indulgence sur la taxation des dommages et "intérets."

"cases of fraud, to exercise a certain degree of "indulgence in fixing the amount of damages."

Merlin uses substantially the same language; he says,* "It is to be observed that the law of "Justinian, so far as it limits exorbitant or excessive damages to precisely double the value of "the thing in controversy, has not the force of law "with us, [and the Code has not incorporated it "among its provisions,] but the principle on "which it is founded, being one of natural equity, "it should be adhered to, by moderating the "damages wherever they are too great, by leaving them to the arbitrament of the judge."†

In the various systems of jurisprudence which we have thus cursorily examined, we see that the difficulty inherent in the subject, is sought to be avoided, either by fixing on an arbitrary valuation of the loss sustained applicable to all cases, or by leaving the whole matter largely to the discretion of the tribunal which has cognizance of the subject.

Our law differs very materially from all these systems. By it, in all cases of civil injury, or breach of contract,‡ with the exception of those

* *Repertoire: Dommages et Interets*, vol. 8, "Il faut observer que la loi "de Justinien en ce qu'elle reduit precisement au double de la valeur "de la chose les dommages et interets exorbitans, n'a pas force de loi "parmi nous. [et le Code Civil ne l'a pas remis en vigueur,] mais le "principe sur lequel elle est fondée, etant un principe qui emane de "l'equite naturelle on doit s'y conformer et en consequence, moderer "les dommages et interets lorsqu'ils se trouvent excessifs en laissant "cette moderation a l'arbitrage du juge."

† It is not to be understood, however, that by the French system the quantum of damages is a mere matter of judicial discretion—on the contrary as we shall hereafter see, in no jurisprudence are certain general principles more clearly laid down, or more rigidly adhered to.

‡ There is a single exception in regard to contracts—that of promise of marriage, which, as we shall see, is left largely to the discretion of the jury.

cases of trespasses or torts, accompanied by oppression, fraud, malice, or negligence so gross as to raise a presumption of malice, where the jury have a discretion to award exemplary or vindictive damages; in all other cases the declared object is to give *compensation* to the party injured, for the actual loss sustained. And the rule of this compensation is a question of law, not governed by any arbitrary amount, nor on the other hand left to the fluctuating discretion of either judge or jury. By the general system of our law, for every invasion of right there is a remedy, and that remedy is *compensation*. This compensation is furnished in the damages, and the rules which govern this compensation are the measure of damages.

"Wherever," says Blackstone, "the common "law gives a right, or prohibits an injury, it also "gives a remedy by action."* "If a statute gives "a right," said Lord Holt, "the common law will "give a remedy to maintain that right; *a fortiori* "where the common law gives a right, it gives a "remedy to assert it. This is an injury, and "every injury imports a damage."† "It is the "pride of the common law," said the Supreme Court of New-York, "that wherever it recog- "nizes or creates a private right, it gives a reme- "dy for the wilful violation of it."‡

In Robert Pilfold's case it is said,§ "It is to be known that this word *Damna* is taken in the law "in two several significations, the one properly

* Com. III. Ch. VIII. p. 123. † Ashby v. White, 1 Sa'k. p. 19. 1 Yates v. Joyce, 11 J. R. p. 139. See also Lamb v. Stone, 11 Pick. p. 527.

§ Rep. Part X. p. 116

"and generally, the other *relative* and *stricte*. "Damna *pro injuria illata* and *expensa litis*"—in other words damages and costs—"for damnum in "its proper and general signification, *dicitur a "demendo, cum diminutione res deterior fit.*"*

It is of the *Damna pro injuria illata*, or of damages as now known by that phrase in opposition to costs that we are here treating.

"Another species of property," says Blackstone,† "acquired and lost by suit and judgment "at law, is that of damages, given to a man by a "jury as a *compensation* and satisfaction for some "injury sustained." "Every one," said Lord Holt,‡ "shall recover damages in proportion to "the prejudice which he hath sustained."

"Dammages—damna in the common law," says Lord Coke,§ "hath a special signification for the "*recompence*, that is given by the jury to the plain- "tife, or defendant, for the wrong the defendant "hath done unto him."

"It is a general and very sound rule of law," said Sedgwick, J., delivering the opinion of the Supreme Court of Massachusetts,‖ "that where an "injury has been sustained, for which the law "gives a remedy, that remedy shall be commen- "surate to the injury sustained." "It is a na- "tural and legal principle," said Shippen, Chief Justice of the Supreme Court of Pennsylvania,¶ "that the compensation should be equivalent to

* *Damnum et damnatio ab ademtione et quasi deminutione patrimonii dicta sunt*; says the Digest. *De Damno Infecto*, L. 39, Tit. 2, § 3.

† Com. II. Ch. 29, p. 438.

‡ Ferrer v. Beale, 1 Lord Raym. p. 692.

§ Co. Litt. 257. a.

‖ Rockwood v. Allen, Ex'r., 7 Mass. R. p. 254.

¶ Busey v. Donaldson, 1 Dallas R. p. 206.

"the injury." "The general rule of law," said Story, J., to the jury in the Rhode Island circuit,* "is this, whoever does *an injury* to another, is "liable in damages to the *extent of that injury*. "It matters not whether the injury is to the pro- "perty, or the person, or the rights or the reputa- "tion of another."

And this compensation is awarded, except in those cases to which we have referred, according to certain rules of law which the jury are not at liberty to disregard, and which equally control the conduct of the court.

"In cases," said Washington, J., in the Pennsylvania circuit,† "where a rule can be discovered, "the jury are bound to adopt it. That rule is, that "the plaintiff should recover so much as will repair "the injury sustained by the misconduct of the "defendant."

In the Court of Errors of New-York, Sandford, Senator, said, "The supreme court have rightly "determined that in this, as in other cases of con- "tract, the rule by which the amount or extent of "redress should be ascertained, is a question of "law."‡ The case there was as to the rate of damages on a foreign bill of exchange.

It is not, however, to be understood that legal relief is to be had for every species of loss that individuals sustain. In addition to the great class of moral rights and duties which the law does not attempt to protect or enforce,§ there are many sufferings inflicted by human agency, where the immediate instruments of the injury are free from blame or the act beyond their control. In these

* Dexter v. Spear, 1 Mason, p. 115.
† Walker v. Smith, 1 Wash. C. C. R. p. 152.
‡ Pasley v. Freeman, 3 T. R. p. 51 and 63.
§ Graves v. Davis, 12 J. R. p. 17.

cases the law does not seek to interfere.* It is only legal injury that sets its machinery in operation, and this is meant by the maxim that *damnum absque injuria* gives no cause of action.†

There must not only be *loss*, but it must be injuriously brought about by a violation of the *legal* rights of others. The prosecution of this inquiry, however, would lead us directly into the great field of causes of action. Suffice it for our present purposes to say, that whenever loss is coupled with legal injury, the law gives compensation.

It is further to be borne in mind, that if loss without legal injury goes unredressed, the correlative proposition is equally true, that injury without loss furnishes no ground for other than nominal relief. It is not sufficient that an act

* Such are the cases governed by the maxim *Nul is prejudi suprema lex*. "There are many cases," says Mr. Broom, in his recent very interesting and valuable work on Legal Maxims, p. 1, "in which indi-"viduals sustain an injury for which the law gives no action, as "where private houses are pulled down, or bulwarks raised on private "property for the preservation and defence of the realm against the "king's enemies." Such, again, are those which fall within the maxim "*Necessitas inducit privilegium quoad jura privata.*" "As a "general rule," says Mr. Broom, in his work above cited, p. 6, "the "law charges no man with default where the act done is compulsory "and not voluntary, and where there is not a careful selection on his "part; and therefore, if either there be an impossibility for a man to "do otherwise, or so great a perturbation of the judgment and reason, "as in presumption of law man's nature cannot overcome, such neces-"sity carries a privilege in itself." I beg leave very humbly to recommend Mr. Broom's work to those who desire to fix in their mind, not only the rules but the reason of our jurisprudence.

† Ashby v. White, 1 Salk. p. 20; S. C. 2. Ld. Raym. p. 955. Lamb v. Stone, 11 Pick. p. 527. Broom's Legal Maxims, p. 93. "In point "of law," said Rolfe B. in Davies v. Jenkins, 11 Mees. & Wels. p. 755, where process had been by mistake served on the wrong person, "if "the proceedings have been adopted purely through mistake, though "injury may have resulted to the plaintiff, it is *damnum absque injuria*, "and no action will lie."

unauthorized by law has been committed. Substantial loss to the party plaintiff must also have ensued to entitle him to substantial relief.

But of this we shall have occasion to take notice again when we come to consider the subject of nominal damages.

To this general principle, that where loss and legal injury unite, relief will be given by suit, the law recognizes one exception, that where the wrong is on so great a scale that the whole community, or a large portion of them suffer from it. "Here," says Blackstone, "I must premise that the law "gives no *private* remedy for anything but a *pri-* "*vate* wrong."* And so the law is laid down by Coke in regard to nuisances on the highway. "A man shall not have an action on the case "for a nuisance done in the highway, for it is a "common nuisance, and then it is not reasonable "that a particular person should have the action, "for by the same reason that one person might "have an action for it, by the same reason every "one might have an action, and then he would be "punished a hundred times for one and the same "cause." In such case the remedy is by indictment. But Coke goes on immediately to make this distinction. "But if any particular "person afterwards by the nuisance done, has "more particular damage than any other, then "for that particular injury he shall have an action "on the case."†

The rule and the exception have both been repeatedly recognized in England and in the courts of this country, though there has been much con-

* Com. III. Ch. 13. p. 219. IV. Ch. 13, p. 167. Broom's Legal Maxims, p. 4.

† Williams' case, 5 Rep. p. 72.

troversy as to the nature and amount of the "particular damage," that will support the action.

It has been held in England, that an obstruction of a navigable creek by which the plaintiff's vessel was arrested in her course, was sufficient to maintain a suit,* and where a corporation bound to repair certain banks, mounds, sea shores and piers, neglected to do so, in consequence of which the plaintiff's house was injured, it was also held that the action lay.† So again where a bookseller, having a shop by the side of a public thoroughfare, suffered loss in his business in consequence of passengers having been diverted from the thoroughfare by the defendant's continuing an unauthorized obstruction across it for an unreasonable time, this was held a sufficient particular damage to be the foundation of an action.‡ The doctrine of these cases has been substantially adopted in New York, Pennsylvania and Massachusetts.§

A more minute examination of this point would be foreign to our subject; but we should not omit to notice that in cases like these, in which the right to relief depends upon the amount of injury, we may be said to approach a vanishing point, where all distinctions between the cause

* Rose v. Miles, 4 Maule & Sel. p. 101, which virtually overruled Hubert v. Groves, 1 Esp. R. 148, and Paine v. Partrich, Carth. 191; and the doctrine of Rose v. Miles was affirmed in Greasly v. Codling, 2 Bing. R. p. 263, as to a highway.

† The Mayor and Burgesses of Lyme Regis v. Henley, 1 Bing. N. C. p. 222.

‡ Wilkes v. Hungerford Market Company, 2 Bing. N. C. p. 281, where the authority of Hubert v. Groves was again denied.

§ Pierce v. Dart, 7 Cowen R. p. 609. Stetson v. Faxon, 19 Pick. R. 147.

of action and the rule of compensation are confounded and lost.

There is, as has already been said, a large class of cases where the common law in giving relief loses sight of the principle of compensation, and gives damages by way of punishment for acts of malice, vexation, fraud or oppression. In these cases it has been found difficult to set any fixed or precise limits to the discretion of the jury, or in fact, to prescribe any rule whatever. In other words they are left to what Domat, speaking of the court calls, as we have seen, "*la prudence du juge*," reserving only to the bench the right of control over verdicts which bear the evident impress of prejudice, passion, or corruption. But before considering this branch of the subject more particularly, it is necessary to have a more accurate idea of the legal meaning of the term compensation.

It has been said that the effect of our law is to give in damages what it calls compensation. When, however, we come to analyze this phrase,

In the Proprietors of the Quincy Canal v. Newcomb, (7 Met. p. 276.) it was said, "that if a party had suffered damage from the "filling up of a canal and want of cleansing, by means of which he "was unable to enter it, it would have been a damage suffered in "common with all other members of the community, and therefore re- "dress must be sought by a public prosecution. Where one suffers in "common with all the public, although from his proximity to the ob- "structed way, or otherwise, from his more frequent occasion to use it, "he may suffer in a greater degree than others, still he cannot have "an action, because it would cause such multiplicity of suits as to be "itself an intolerable evil. But when he sustains a special damage "differing in kind from that which is common to others, as where he "falls into a ditch unlawfully made in a highway, and hurts his horse "or sustains a personal damage, then he may bring his action."

In Pennsylvania, the same rule has been applied to an obstruction in the Big Schuylkill, which prevented the plaintiff's rafts from descending. *Hughes* v. *Heiser*, 1 Binney, p. 463. But in Kentucky it has been said, that it is not enough that one be turned out of the way. *Barr* v. *Stevens*, 1 Bibb's Kentucky Reports, p. 293.

we shall find its juridical interpretation a very restricted one. Injury resulting from the acts or omissions of others, free from any taint of fraud, malice or wilful wrong, consists:

First. Of the *actual pecuniary loss directly sustained;* as the amount of the note unpaid; the value of the property paid for, but not delivered.

Second. Of the *indirect pecuniary loss* sustained in consequence of the primary loss; the profits that might have been made if the contract had been performed, the derangement and disturbance produced by the failure of others to comply with their engagements, and the consequent inability of those who depend on them to adhere to their own; loss of credit; loss of business; insolvency.

Third. Of the *mental suffering* produced by the act or omission in question; vexation; anxiety.

Fourth. The *value of the time* consumed in establishing the contested right by process of law, if suit become necessary.

Fifth. The *actual expenses* incurred to obtain the same end—costs and counsel fees.

To these one further element is to be added in those cases where the aggressor is animated by a fraudulent, a malicious or an oppressive intention, and that is;

Sixth. The *sense of wrong, or insult,* in the sufferer's breast, resulting from an act dictated by a spirit of wilful injustice, or by a deliberate intention to vex, degrade, or insult. This constitutes the difference, and the only difference between the injury produced by inability, and that produced by design. All the other constituents are the same. The pecuniary loss, direct and indirect, the anxiety, the time and expense

is the same, whether a wrong be done through the honest inability, the wilful fraud, or the deliberate malice of the offending party. But in the two latter cases the last element is superadded; a sense of wrong or insult which does not exist in the former.*

All these items must therefore be taken into the account in any effort to make complete *compensation*, in the ordinary acceptation of the word. But we shall find that the legal meaning of the term is very different. We shall find that in cases of contract, the law takes no notice whatever of the motives of the defaulting party; that whether the engagement be broken through inability or design, the amount of remuneration is the same;† and that in these cases, as well as in those of torts or breach of duty of any kind, where there is no complaint of fraud, malice, nor wilful negligence, of all the heads of loss above enumerated, only the first and fifth are taken into consideration, and the latter but imperfectly.

In all cases growing out of the non-performance of contracts, and in those of infringement of rights, or non-performance of duties, created

* The Scotch law is the only one, so far as I am aware, which has endeavoured practically to analyze the elements of injury. By the jurisprudence of Scotland, in actions for personal torts, the damages are divided into *special damages*, the actual pecuniary loss, and *solatium*, solace or recompense for the wounded feelings. So in *Forgie v. Henderson*, 1 *Murray*, p. 110, in assault and battery, the Lord Chief Commissioner Adam said, "There are first, *special damages*, consisting "of the surgeons account, and the person being kept from his work. Se-"cond, the *solatium*, which is peculiarly within the province of the jury." So in *Cameron v. Cameron*, 2 Murr. p. 232. "If no damages are proved, "you cannot find them, but there is a claim for *solatium*, and you must "consider what evidence there is of the injury to the mind and feelings."

† There is a single exception already noticed, the action for breach of promise of marriage, which we shall consider hereafter.

or imposed by the law, in which there is no element of fraud, wilful negligence, or malice, the *compensation* recovered in damages, consists solely of the *direct pecuniary loss* which includes, *in mere money demands*, interest for the detention of the amount claimed, and the *costs* of the suit brought for the recovery of the demand. No *indirect loss* is accounted for. No allowance is made for the *mental suffering* of the party who complains of the non-performance of his contract, or the infringement of his rights—which indeed, it may be said, the law possesses no scale to measure. This however is not the reason, for as little does it take into consideration the *time actually consumed*, and the *fees actually paid to counsel* for the establishment of the demand in controversy. In this class of cases, the *direct pecuniary loss*, and the *costs of the suit*, are all that the law means, when it speaks of *compensation*. In fact, unless the word is used in a technical sense, it is altogether inaccurate to speak of damages as resulting in *compensation*; and whatever restricted meaning this term may be supposed to have technically acquired, it is at all events entirely incorrect to say in the language which we have above seen used by various eminent judges, that "*the remedy is commensurate to the injury.*" This language attributes to legal relief a degree of perfection which it is very far from possessing.

"It would be going a great way," said Chief Justice Marshall,* "to subject a debtor, who "promises to pay a debt, to *all the loss* conse- "quent on his failure to fulfil his promise. The "general policy of the law does not admit of such

* Short v. Shipwith, 1 Brock. R. 103 and 114.

"strictness, and although in morals a man may "justly charge himself as the cause of any loss "occasioned by the breach of his engagement, "yet in the course of human affairs, such breaches "are so often occasioned by events which were "unforseen, and could not easily be prevented, "that interest is generally considered as compen- "sation which must content the injured."

In regard to the quantum of damages, instead of adhering to the term compensation, it would be far more accurate to say, in the language of Domat, which we have cited above,* "that the "object is to discriminate between that portion of "the loss which must be borne by the offending "party, and that which must be borne by the suf- "ferer." The law, in fact, aims not at the satisfaction, but at a division of the loss.

And it is to be borne in mind, that the same deficiency of compensation exists in the case of defendants as well as plaintiffs. If the party who receives the injury, is obliged to bear his proportion of the loss—so, on the other hand, the party wrongfully charged, only recovers his costs, and no allowance is made for his time, indirect loss, annoyance, or counsel fees. "Every defendant," says Mr. Broom, "against whom an action is "brought, experiences some injury or inconve- "nience beyond what the costs will compensate "him for."†

Thus far we have been speaking of the great class of cases wher no question of fraud, malice, gross negligence, or oppression intervenes. Where

* Supra, p. 3.

† Broom's Legal Maxims, p. 95. Davies v. Jenkins, 11 Mees. & Wels. pp. 755, 756.

either of these elements 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. This rule seems settled in England, and in the general jurisprudence of this country.

So in the Common Pleas in an action of trespass, assault and imprisonment, the act complained of being an arrest under a general warrant issued by Lord Halifax, then Secretary of State—no actual ill-treatment being alleged, the jury having found a verdict for £300, on a motion for a new trial on the ground of excessive damages, Lord Chief Justice Camden, said:

"I cannot say what damages I should have given if I had "been upon the jury; but I directed and told them they were "not bound to any certain damages, against the solicitor gene-"ral's argument. The personal injury done to the plaintiff "was very small; so that if the jury had been confined by "their oath to consider the mere personal injury only, perhaps "20*l.* damages would have been thought damages sufficient, "but the small injury done to the plaintiff, or the inconsidera-"bleness of his rank and station in life, did not appear to the "jury in that striking light in which the great point of law, "touching the liberty of the subject, appeared to them at the "trial; they saw a magistrate over all the king's subjects, exer-"cising arbitrary power, violating *Magna Charta*, and attempt-"ing to destroy the liberty of the kingdom, by insisting upon "the legality of this general warrant before them; they heard "the king's counsel, and saw the Solicitor of the Treasury, "endeavoring to support and maintain the legality of the war-"rant in a tyrannical and severe manner; these are the ideas

"which struck the jury on the trial, and I think they have done "right in giving exemplary damages."*

And the motion for a new trial was denied.

So in an action of trespass, for debauching the plaintiff's daughter, a verdict having been found for 50*l.*, on a motion for a new trial on the ground that the damages were excessive, Wilmot Lord Chief Justice, said: "Actions of this sort "are brought for example's sake; and although "the plaintiff's loss in this case may not really "amount to the value of twenty shillings, yet "the jury have done right in giving liberal "damages."†

So, in a recent case,‡ the Court of Exchequer said: "In actions for malicious injuries, juries "have been allowed to give what are called vin- "dictive damages, and to take all the circum- "stances into consideration."

So in the Pennsylvania circuit, "I admit," said Washington, J.,§ "that in cases where mere- "ly vindictive damages are sued for, the jury act "without control on the subject of damages, be- "cause there is no legal rule by which they can "be measured, and unless they are so extravagant "as to induce a suspicion of improper conduct, "the court will not interfere."

The rule is well settled in New-York. So in an action for libel, it was urged on a motion for a new trial, that the public character of the plaintiff as an officer of government, and the evil example of libels were stated by the judge to the jury, as considerations with them for increasing

* Huckle v. Money, 2 Wils. p. 205.
† Tullidge v. Wade 3 Wils. p. 18.
‡ Doe v. Filliter, 13 Mees. & Wels. p. 17.
§ Walker v. Smith, 1 Wash. C. C. R. p. 152.

the damages, but Kent, C. J., delivering the opinion of the Supreme Court said: "Surely "this is the true and salutary doctrine. The "actual pecuniary damages in actions for de- "famation, as well in other actions for tort, "can rarely be computed, and are never the sole "rule of assessment." And after reviewing the English cases the court proceeded: "But it can- "not be requisite to multiply instances in which "the doctrine contained in this part of the charge "has received the sanction of the English and "American courts of justice. It is too well set- "tled in practice, and is too valuable in principle, "to be called in question."*

Spencer, J., held still stronger language, "In "vindictive actions," he said, "such as for libels, defamation, assault and battery, false im- "prisonment, and a variety of others, it is always "given in charge to the jury, that they are to in- "flict damages for example's sake, and by way "of punishing the defendant."

So again, in another case† where trespass was brought for beating a horse to death. The judge charged that if they found for the plain- tiff, it was a case in which, from the wantonness and cruelty of the defendant's conduct, the jury had a right to give *smart money*. A verdict was found for $75. A motion was made to set aside the verdict for misdirection, and for ex- cessive damages, but the Supreme Court of New-York said, "great barbarity was proved "on the part of the plaintiff; we think the charge "of the judge was correct, and should have

* Tillotson v. Cheetham. 3 J. R. p. 56, and p. 64.
† Woert v. Jenkins. 14 J. R. p. 352.

"been better satisfied with the verdict if the "amount of damages had been greater and more "exemplary," and the motion was denied.

The same principle was recognized in the Massachusetts circuit, by Mr. Justice Story,* who said: "In cases of marine torts, or illegal captures, it is "far from being uncommon in the Admiralty to "allow costs and expenses, and to *mulct the "offending parties, even in exemplary damages,* "when the nature of the case requires it. Courts "of Admiralty allow such claims, not technically as costs, but on the same principle as "damages are often allowed in cases of torts by "courts of common law, as a recompense for injuries sustained, *as exemplary damages,* or as a remuneration for expenses incurred, or losses sustained by the misconduct of the other party."

So in New Hampshire. In an action on the case to recover damages, resulting from defects of a bridge, which the defendants were bound to repair, the jury were instructed that exemplary damages might be allowed in their discretion, in case they believed there had been gross negligence on the part of the defendants; and on a motion for a new trial for misdirection, the Superior Court reviewed the English and American cases, and closed by saying: "The principle being thus "established, that in actions for torts to the person and to personal property, the jury may give "liberal or exemplary damages in their discretion, damages beyond the actual injury sustained, for the sake of the example, the only "remaining inquiry is whether the present case

* Boston Manuf. Co. v. Fiske, 2 Mason R. p. 120.

"was proper for the exercise of that discretion." And it was held to be so.*

So in Connecticut, in an action on the case for gross negligence, it was said by Church, J., in delivering the opinion of the Supreme Court of Errors: "There is no principle better established, "and in practice more universal, than that *vindic-* "*tive damages or smart money* may be, and is "awarded by the verdict of juries, and whether "the form of action be trespass or case."†

So in Pennsylvania, Gibson, J., delivering the opinion of the court, said: "In cases of personal "injury, damages are given not to compensate but "to punish."‡

And the doctrine has been fully adopted by the Supreme Court of the United States. In an action of trover,§ brought for goods illegally seized by the collector of New-York under instructions from the Secretary of the Navy, his immediate superior, the circuit judge charged that the collector, having acted in good faith, should not be subjected to the payment of more than nominal damages. But the Supreme Court said, "Where a ministerial officer "acts in good faith for an injury done, he is not "liable to *exemplary damages*, but he can claim "no further exemption where his acts are clearly "against law. The good faith with which the "defendant seems to have acted, should not exempt him from *compensatory* damage."

So in a case of marine trespass, brought against

* Whipple v. Walpole, 10 N. H. R. p. 130.

† Linsley v. Bushnell, 15 Conn. R. p. 225; and Huntley v. Bacon, 15 Conn. R. p. 267.

‡ Pastorius v. Fisher, 1 Rawle R. p. 27; but it is to be noticed that the remark is obiter.

§ Tracy v. Swartwout, 10 Peters R. p. 81.

the owners of a privateer for an illegal seizure, the Supreme Court of the United States said: "This is a case of gross and wanton outrage. "The honor of the country and the duty of the "court equally require that a just compensation "should be made to the unoffending neutrals, "for all the injuries and losses actually sustained "by them. And if this were a suit against the "original wrong doer, it might be proper to go "yet farther, and visit upon them, in the shape of "exemplary damages, the proper punishment "which belongs to such lawless misconduct. "But it is to be considered that this is a suit "against the owners of the privateer; they are "innocent of the demerit of the transaction. "Under, such circumstances, we are of opinion "they are bound to repair all the real injuries "and personal wrongs sustained by the libel- "lants, but they are not bound to the extent of "vindictive damages.*

In review, therefore, it must be considered inaccurate to say that legal relief is commensurate with the injury sustained, or that the sole object is to furnish compensation. In ordinary cases of contract, the remuneration must be less, in cases of tort it may be more.†

* Story, J., in The Amiable Nancy, 3 Wheaton, p. 546.

† In Scotland the principle of compensation seems rigidly adhered to even in cases of flagrant wrong. So in an action of damages for defamation, sending a challenge, assault, and threatened battery, the Lord Chief Commissioner, Adam, one of the most eminent judges of the present century, said, "In all cases of damage, a fair, unprejudiced "discussion, *(avoiding in civil cases the converting compensation for a "civil injury into a matter of punishment,)* will lead to a rational, con- "scientious, and fair compromise of your different opinions, and bring "you to fix on one sum;" and the reporter adds, "in all cases of

Having thus exhibited the general principles on which the law of this subject is based, we shall proceed to examine more minutely the

"this sort, his lordship has been in the habit of repeating this doc-"trine." Hyslop v. Steig, 1 Murr. R. p. 15.

Again, in an action for defamation, the Lord Chief Commissioner said: "The question of damages, in case of an attack on a profes-sional "man, must always include both a question of loss and *solatium*. You "must consider it *as a question of reparation, not of punishment*; but "if a person of perfectly pure character is assailed in this manner, you "will consider whether a rich man ought not to pay a little more." Christian v. Lord Kennedy, 1 Murr. R. p. 428.

The same rule was laid down by the same judge in actions of crim. con.

In Baillie v. Bryson, 1 Murr. R. p. 317 and 337, an action of this class, the Lord Chief Commissioner said: "I cannot help thinking that Lord "Kenyon introduced into cases of this sort a principle, as to damages, "extremely dangerous in its consequences. He considered such ques-"tions not merely as calculated to *repair the injury* done to the one "party, but *as a punishment of the* other, and as intended to correct the "morals of the country. The morals of the country have not been "improved, and I am afraid its feeling has been much impaired. A "civil court, in matters of civil injury, is a bad corrector of morals; it "has only to do with the rights of parties."

I apprehend, also, that this doctrine of vindictive or exemplary damages, has been somewhat shaken in the State of Massachusetts, though I find no express decision to the effect. In Barnard v. Poor, 21 Pick. R. p. 378, an action on the case was brought for [illegible] a fire on defendant's own land, whereby plaintiff's wood was consumed. And it was held, that it was immaterial whether the plaintiff proved gross *negligence* or only want of *ordinary care*, inasmuch as he could only recover for the actual loss, and no more, whether claimed as vindictive damages or otherwise. If the negligence were so gross as to raise a presumption of malice, then, according to the law of the authorities in the text, I suppose it would be a case for exemplary or vindictive damages. But whether the principle of absolute compensation has been adopted or not by the courts of Massachusetts, it is certain that it has been systematically advanced by two very distinguished writers in that state. Mr. Metcalf, the reporter, in an able and ingenious article, 3d Amer. Jur., p. 387 and 313, first, I believe, advanced the theory that the Anglo-American law does not admit of any other than compensatory damages, or in his own words, "that the defendant ought not to pay "more than the plaintiff is entitled to receive." And Mr. Greenleaf, in his recent work on Evidence, has adopted this view to its fullest extent. Whatever may be the true principle of the matter, it seems to me not

amount of compensation awarded in particular cases. In doing this very considerable diffi-

difficult to show that the theory of compensation is not the theory of our law.

Mr. Greenleaf says, Vol. II., p. 209, "that the damages should be "precisely commensurate with the injury, neither more nor less." This language certainly is in direct conflict with the whole system of damages in cases of contract, and I apprehend that the denial of the right to vindictive damages is equally untenable. In addition to the authorities which I have cited in the text, how is this position to be reconciled with the uniform language of the courts, on motions for new trials in hard actions, that they will not interfere unless the verdict be evidently the result of corruption, prejudice or passion? The bench has uniformly refused to limit the damages to their own idea of compensation. There is a cloud of cases going to show conclusively, that although the court are entirely satisfied that the damages are excessive, and altogether beyond a compensation for the actual loss sustained, they will not, on motion for a new trial, interfere with the finding, unless the verdict is so extravagant as to bear evident marks of prejudice, passion, or corruption. Sharpe *v.* Brice, 2 W. Black. p. 942. Benson *v.* Frederick, 3 Burr. p. 184. Duberley *v.* Gunning, 4 T. R. p. 651. Sargent *v.* Denisten, 5 Cow. R. p. 106. Graham on New Trials, p. 410, and seq. Buller's N. P. p. 327.

Again, Mr. Greenleaf admits, p. 224, "that where an evil intent has "manifested itself in *acts and circumstances*, accompanying the prin-"cipal transaction, they constitute part of the injury; and p. 221, "that the defendant's wealth may be given in evidence." To admit testimony of this kind, to deny the power of the court to adjust the verdict according to the principle of compensation, and still to insist that the jury are bound to give a verdict strictly commensurate with the injury, seems to me practically incompatible and inconsistent propositions.

Nor, I confess, do I see the reason of the proposed rule; in cases of tort, the suit at law appears to have public as well as private ends in view; I can see no reason why the defendant should not, in a civil suit, be punished for his act of fraud, malice or oppression, nor why the pecuniary mulct, which constitutes that punishment, should not go into the pockets of the plaintiff, instead of the coffers of the state. A strong analogy will be found in qui-tam actions. Any attempt to limit the inquiry of the jury, in cases of this description, to a strict measure of compensation, will be, I think, to institute an investigation of a character distressingly metaphysical, and utterly impracticable. I have felt myself compelled to express these opinions, while at the same time I am bound to say, that I differ with hesitation from the eminent juridical writers to whom I have referred.

culty will be found to stand in the way of our efforts to make any arrangement of the subject, adapted to our system of jurisprudence, and at the same time logical and scientific.

In endeavoring to apply the rule of damages, to the different actions used among us, one broad line of distinction presents itself; that between real and personal property. This distinction deriving its origin from the feudal system, is so firmly established, and our rules of proceeding, and even the right itself, so dependent on it, that in no general consideration of our law can it be disregarded.

I have therefore, first treated of actions for the recovery of real property; of suits upon contracts relating to it, and of those to enforce remedies for the interruption or diminution of its enjoyment. The first division embraces the action of ejectment, with its subsidiary, trespass for mesne profits, dower, and waste. The second, all real covenants and contracts to convey land. The third, actions for trespass to lands; including proceedings in regard to nuisances.

When we approach the subject of personal property, new difficulties present themselves in the way of any methodical arrangement of the subject. Difficulties which grow out of the *forms of action*. These forms are firmly established in our law, and the rules of pleading, evidence, and of damages, have adapted themselves to their arbitrary and illogical arrangement.*

* Great Judges have pronounced themselves strongly in favor of maintaining the forms of action: by Lord Kenyon, in Savignac v. Rome, 6 T. R. pp. 129, 130; by Mr. J. Wilson, in Israel v. Douglas, 1 H. Bl. p. 243; by Eyre, C. J., in Turner v. Hawkins, B. & Pull.

It is therefore impossible to disregard them. At the same time I have endeavored to adopt an order somewhat different and more reasonable, than that which they suggest.

p. 476; by Abbott, C. J., in Orton v. Butler, 5 B. & A., p. 651. See also, Chitty's Pleadings, Vol. I. p. 110, in note.

More valuable testimony was borne to their importance by the English common law commissioners, the great reforms effected by whom, bear witness that they were not afraid to innovate. They say, Third Report, p. 6,—"We cannot persuade ourselves, that with respect to "the forms now in common use, (except that of ejectment,) any con- "siderable change would be expedient. It is not that we are insensi- "ble to certain imperfections and inconveniences incident to these "forms, for we feel that their classification is arbitrary and otherwise "defective. But in this, as in so many other cases, we are presented "with a choice of difficulties. To those who have observed the incon- "veniences which in other systems of judicature are found to flow from "the want of fixed forms of action, it will be scarcely doubtful that "they are an invention of real merit and importance. They tend most "naturally to secure that certainty in the right of action itself, which "is one of the chief objects of jurisprudence; they form a valuable "check to vagueness and prolixity of statement, and in this and other "respects, they are essential to the convenient application of the rules "of pleading, a system, the peculiar advantages of which, we have "elsewhere endeavored to illustrate."

With all that respect for the judgment of these commissioners, which their great reputation as lawyers, and their still greater reputation as law-reformers, is calculated to excite, it is difficult to yield assent to this reasoning on the forms of action. Two similar contracts are made; one is sealed, and the other not. It is evident that the right to relief, or in other words the *right of action* is in both cases precisely the same. How then does it tend to secure "certainty in that right," to declare that on the sealed instrument covenant must be brought, while assumpsit only will lie on the other? The *right of action* against an agent is the same, (provided fraud or malice do not intervene,) whether considered as a breach of contract or a violation of duty, and yet how many judgments in such cases have been arrested, because a count in assumpsit was inadvertently joined with one in case. See Corbett v. Parkington, 6 Barn. & Cres. p. 268; and Lovett v. Pell, 22 Wend. p. 368. As to "vagueness and prolixity," the former will always be checked by the fundamental rules of evidence, that the proofs must follow the allegations; and as to the latter, it never would exist, if not fostered by the pernicious system of taxing costs by the folio. Our chancery jurisprudence well illustrates this. A bill in equity is *prolix* because it is paid for by the folio. It is *not* vague; on the contrary, the precise

One distinction presents itself too plainly to be overlooked; that which separates those cases where the damages are wholly at large, and

grievance complained of can almost always be ascertained with infinitely more certainty than from a common law declaration. For after all, the proposed ends are not attained. What more vague than a declaration in trover, or on the money counts? What more prolix than a declaration in covenant, with a dozen breaches and a count for every breach. As to the rules of pleading, the experience of the English system is itself proof, that the forms of action are in no wise wanted to secure the logic of that system. The arbitrary pleadings for the *defence* are entirely abandoned—the general issue has given way to rational and intelligible statements of the real cause of defence. When the forms of *pleas* are abandoned, why should the forms of *declarations* be retained? If the general issue is not essential to the rules of pleading, why are the forms of debt or trover? In fact, the forms of action are, in my humble judgment, the greatest barrier to the proper application of the best part of the science of pleading, that which is directed to the singleness and certainty of the issue. In regard to the rules of damages, the results of the system are eminently illogical; thus for instance, take the case of a tortious removal, conversion, and sale of personal property—the plaintiff has three distinct remedies, and in each the rule of damages is different. If he adopt assumpsit, he can only recover the amount of the actual proceeds of the property. If trover, he will be allowed the highest value at any time before trial; and if trespass, he can have vindictive damages for the wrong. Greenleaf's Evidence, Vol. II. p. 218.

It seems to me very plain, from the course of legal reform both in England and in this country, that we are rapidly tending towards the abolition of all arbitrary forms of action. Thus, in Massachusetts, by the provisions of a statute, 1836, c. 273, § 3, the court has power to amend the plaintiff's proceedings, by giving him leave to change his form of action. Wiley v. Yale, 1 Met. p. 553. What is this, however, but to leave the trap-set for the unwary, to be opened or not, according to the discretion of the tribunal. And no one who ever has had his rights dependent on discretionary power will forget Lord Camden's glowing words: "Discretion is the law of tyrants: it is always "unknown; it is different in different men; it is casual, and depends "on constitution, temper and passion. In the best it is oftentimes "caprice; in the worst, every vice, folly and passion, to which human "nature is liable." *Argument in Hindson v. Kersey.*

But the controversy is as old as the time of Cicero; no lawyer can be ignorant of the ridicule with which, in his oration for Murena, he overwhelms the verbiage and formulas of that day. *Hoc fieri bel issime posset; Fundus Sabinus meus est; immo meus: deinde judicium.*

under the control of the tribunal, from those where, under the name of a penalty or of liquidated damages, the parties have endeavored either to fix the precise amount of compensation for the breach of contract, or at least to define some limit beyond which that compensation shall not go. The first class comprehends the great heads of assumpsit and covenant, so far as neither liquidated damages nor penalty are named in the contract, because in no case of personal actions is the rule of damages affected by the mere addition or omission of the seal, and includes suits on notes and bills of exchange, policies of insurance, on contracts for the sale and warranty of chattels, actions by surety against principal, and generally all contracts whether under seal or otherwise, which do not attempt to fix the damages for their violation.

A subordinate division of this class includes those cases where covenant (still without penalty or liquidated damages,) must be brought, and where assumpsit will not lie, as on charter parties, assignments of judgments, &c.

The second class comprehends the actions of assumpsit, debt and covenant, as controlled by penalties or liquidated damages stated in the contract. In this branch of the subject, I have treated first of the penalty and the weight given to it in fixing the measure of damages—where they fall short of it, and where they may exceed its amount, and secondly, of those cases where

noluerunt.—Nam cum permulta præclare legibus essent constituta, ea jureconsultorum ingeniis pleraque corrupta ac depravata sunt—Iisdem ineptiis fucata sunt omnia—totum est contemptum et abjectum. Orat. pro Murena.

the agreement of the parties is conclusive on the quantum of compensation.

This disposes of the subject of actions arising upon contracts, and the remainder of the work treats of torts to personal property, case, trover, replevin, and detinue, being included under this head. In this branch of the subject are embraced actions by principal against agent or attorney for negligence, against common carriers on their general liability, against sheriffs and public officers, for breach of duty, and in general all those where, though the form of the action is in tort, a precise measure of damages has been adopted, or at least approached.

It will be seen that this division is very far from being altogether satisfactory. Assumpsit and case proper, assumpsit and trover, are very often co-ordinate remedies. The same is true of debt and assumpsit, debt and covenant; trover and trespass may often be brought indifferently, and the rule of damages, as I shall have occasion to show more fully hereafter, differs with the form of action adopted. I still hope that this arrangement will be found at once substantially convenient of reference, and adapted to the principles of the matter before us. The various heads of interest, when allowed as damages, recoupment, pleading and practice with reference to the subject of this treatise, and damages with reference to special statutes, will be found separately discussed.*

* I have made one exception to the complete separation of actions affecting real and personal property, and in treating of actions for fraudulent representations on sales, have discussed both branches of the subject together.

Before entering, however, on the examination of the measure of compensation in the various cases above referred to, it will be proper to obtain a general idea of the boundaries of this branch of our jurisprudence, by investigating the rules which allow nominal damages, and which prohibit remote or consequential damages. Having thus ascertained what damages are given in cases where no substantial injury is done, and the general limitations imposed on the right to relief, where actual loss has been sustained, we shall be better able to enter upon the more minute inquiry which awaits us. We are, therefore, first to speak of the subject of NOMINAL DAMAGES.

CHAPTER XVIII.

THE RULE OF DAMAGES IN ACTIONS FOR TORTS GENERALLY.

Forms of Action prescribed for Wrongs.—Trover—Case.—Trespass.—Replevin. Unless Aggravation is proved, the Measure of Damages in actions of Tort is matter of Law.—Where Aggravation is shown, the Jury have a discretion to give Exemplary or Vindictive Damages beyond compensation for actual Loss.—All the attendant circumstances may be proved.—Rule in Collision.—In Cases of Felony.

HAVING thus disposed of the subject of contracts, we proceed now to the consideration of wrongs. The forms prescribed by the English law for the redress of wrongs, or as they are technically termed, actions *ex delicto*, are trover, case, trespass, and replevin.*

* The old action of detinue is of rare occurrence, and in New-York is abolished by statute.

Grotius thus begins his chapter *De Damno*. *Supra diximus ejus quod nobis debetur fontes esse tres; pactionem—maleficium—legem. De pactionibus satis tractatum. Veniamus ad id quod ex maleficio naturaliter debetur. Lib. II. Cap.* 17, § 1, *De Jure Belli et Pacis.* Grotius treats only of *Damnum*, under this head of *Maleficium*; and of the origin of the word he thus speaks: *Damnum forte a demendo dictum. Ita Varro libro v. Damnum a demptione cum minus re factum quam quanti constat. Alii magis probant derivari a Graco* δαπανη, *id sit dapnum, deinde damnum; ut* υπνος, *sopnus, somnus. Nec absurde deducas a Graco* δαυνω, *quod est* βιαζω, *aut ex* ζημια, *damid, damnum; ut regia, regnum.* De Jur. Bell. et Pac. Lib. II. Cap. 17; vide also supra, p. 29.

The division of our system in this respect is arbitrary; for as we have already had occasion to notice,* there are many actions nominally in tort, which are treated as virtually actions *ex contractu*; and in these cases a fixed measure of damages is adhered to. So in an action of trespass without any circumstances of aggravation, the Supreme Court of the United States said that the case not being one which called for vindictive or exemplary damages, the plaintiff was only entitled to recover for his actual injury;† while, on the other hand, where circumstances of aggravation are made apparent, the amount of relief is left to the discretion of the jury.

In regard to these latter cases, we have already observed the general disregard of the principle of compensation by which they are marked.‡

And I have only here to notice some of the decisions which could not so properly have been elsewhere reviewed. In an action in the English Common Pleas, of trespass *quare clausum fregit*, it appeared that the plaintiff, a gentleman of fortune, was shooting on his own estate, when the

* Supra, p. 346 and 369.

† Conard *v.* The Pacific Ins. Co. 6 Peters, 262, 282. See also Bell *v.* Cunningham, 3 Peters, 69; Tracy *v.* Swartwout, 10 Peters, 80, 95.

‡ Supra, p. 39. In addition to the cases already cited, others will be found bearing on the subject. Leland *v.* Stone, 10 Mass. 459; Weld *v.* Bartlett, 10 Mass. 470, 473; Stone *v.* Codman, 15 Pick. 297; Larned *v.* Buffington, 3 Mass. 546; Richards *v.* Farnham, 13 Pick. 451. I have already had occasion to notice, (supra, p. 45,) the efforts of Mr. Greenleaf and Mr. Metcalf to establish an opposite rule on grounds of policy and justice, but the doctrine of our law is supported by writers of more than mere judicial authority. Thus, says Mr. Rutherforth: "Indeed, in many instances of gross fault, it is so difficult to distinguish between a 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."—Rutherforth's Institutes of National Law, book i. ch. 17, Reparation, p. 209.

defendant, a banker, magistrate and member of parliament, forced himself on the plaintiff's land, fired at game several times, and used very intemperate language. The jury found a verdict for £500, and on a motion to set it aside for excess, Gibbs, C. J., said,

"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 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 half-penny for you, which is the full extent of all the mischief I have done?' Would that be a compensation? I cannot say that it would be." And Heath, J., said, "I remember a case where the jury gave £500 damages for merely knocking a man's hat off: and the court refused a new trial. There was not one country gentleman in a hundred who would have behaved with the laudable and dignified coolness which this plaintiff did. It goes to prevent the practice of duelling, if juries are permitted to punish insult by exemplary damages."*

In the United States generally, the power of the jury to give exemplary damages where circumstances of aggravation render it impossible to apply any fixed rule of law, has been steadily maintained.

So in Connecticut it has been said, that in actions for injuries to personal property, "the jury "are not restricted to the pecuniary loss of the "plaintiff."†

* Merest v. Harvey, 5 Taunt. 442.

† Merills v. Tariff Man'g Co. 10 Conn. 384.

So in Pennsylvania, "that with a view to pro- "mote the peace and quiet of society, and to pro- "tect every one in the full enjoyment of his rights, "the jury are at liberty to give vindictive or ex- "emplary damages.*

So in Louisiana, that damages are to be measured by the extent of injury, except where the defendant has been guilty of gross misconduct, and then vindictive damages may be sometimes given by a jury.†

In New-York the subject has been recently examined, and the general principle very clearly stated. It was a case where it was insisted in an action for assault and battery, that the fact that the defendant had been punished criminally for the assault and battery should be received in evidence to mitigate damages in the civil suit. The court held otherwise, saying—

"In vindictive actions, and this is agreed to come within that "class, jurors are always authorized to give exemplary dama- "ges when the injury is attended with circumstances of aggra- "vation, and the rule is laid down without the qualification "that we are to regard either the probable or the actual punish- "ment of the defendant by indictment and conviction at the "suit of the people. * * * We concede that smart money "allowed by a jury, and fines 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 da- "mages, and at the same time answers the purposes of punish- "ment."‡

* Phillips v. Lawrence, 6 Watts & Serg. 150.

† Nelson v. Morgan, 2 Martin L. R. 257.

‡ Cook v. Ellis, 6 Hill, 465. See also Tifft v. Culver, 3 Hill, 180. Auchmuty v. Ham, 1 Denio, 495, and Brizsee v. Maybee, 21 Wend. 144, where it is suggested that the jury may give smart money in replevin.

In England, however, it has been held that a party not suffering any actual injury, who has preferred an indictment, and succeeded and re-

A very full discussion has been recently had of the subject in Pennsylvania, when the following language was held, and the doctrine well maintained on principle.

"In trespass, the *quo animo* is certainly not material to the question of liability; nor is it so even to the quantum of damages, in order to bring it below the actual injury. The common law rejects the compromising principle of the civil law, which divides the loss betwixt parties equally blameless; and acts on a sterner, but more exact rule of justice, by casting the whole on him who occasioned it, and requiring him to bear the consequences of his own acts and his own mischances. But though mitigant circumstances may not reduce the compensation below actual loss, may not circumstances of aggravation be suffered to enhance it? Whatever be the speculative notions of fanciful writers, the authorities teach that damages may be given in peculiar cases, not only to compensate, but to punish. There are offences against morals, to which the law has annexed no penalty as public wrongs, and which would pass without reprehension, did not the providence of the courts permit the private remedy to become an instrument of public correction. Such, in a signal degree, is the function of an action for debauching a daughter, in which the consequential loss of service—the legal and technical injury—is compensated a thousand fold, though its value is as capable of accurate estimation as that of any other commodity. It is idle to say that loss of service is not the real gravamen. The law tolerates no anomaly so monstrous as a count for one cause of action, and a recovery for another. Were damages given not to castigate, but to remunerate for loss of prospects, comfort and honor,—if haply there could be an equivalent for these—the count and the evidence would conform to the grievance; instead of which, it is indispensable to assert the evidence of servitude, and to prove it. As regards the plaintiff, then, the ostensible wrong is the real one; but as regards the public, it may be a very different thing. On no other principle could more be given than is commensurate with what the law admits to be an injury. On what other principle are the circumstances of the defendant put

ceived from the treasury a portion of the fine imposed on the defendant, is not entitled in an action against the same defendant to recover more than nominal damages. Jacks v. Bell, 3 C. & Payne, 316.

before the jury for the purposes of aggravation or mitigation, in perhaps all cases of personal tort? The ability of the plaintiff legitimately enters into the estimate of compensatory damages, because a dollar is worth less to a rich man than to a poor one; but the extent of an injury has no imaginable relation to the means of him who is to repair it. In actions whose end is clearly compensation, and no more—trover and debt for example—the law inquires not into the ability of him who has converted my chattels, or withheld my money, but gives me the same damages or interest, whether he be rich or whether he be poor, or whether the wrong were more or less excusable in a moral view; and the converse shows that where the defendant's circumstances are brought into the account, something else than individual reparation is contemplated. Nor can it be said the wrong doer is to suffer in order to appease the resentment of the injured: and that even vindicatory damages are in truth compensatory. The purposes of the law are more elevated than the gratification of revenge. Mental or bodily pain is doubtless a legitimate subject of amends, produced, however, not by the infliction of suffering, but by a pecuniary equivalent. The enhancement of damages, by the ability of the defendant, not being designed for the benefit of the plaintiff, must consequently be for something beyond compensation. That corrective damages may be given for the sake of example, *is as old as the law itself.*"*

In slander and libel, indeed, the law even steps beyond the line here drawn, and requires no proof of actual injury whatever, to entitle the plaintiff to such amount as the jury see fit to give;† the only restriction in all these cases being the power exercised by the courts over corrupt, partial and passionate verdicts.

The necessary result of this rule is, that all the at-

* McBride v. McLaughlin, 5 Watts' R. 375. In Kentucky, see Morrison's ex'r v. Hart, 2 Bibb, 4, and Smith v. Lush, 4 Bibb, 502. On the Massachusetts circuit, see Whittemore v. Cutter, 1 Gall. 478, 482. In Conard v. Pacific Ins. Co. 6 Peters, 262, 282, see a very strong charge at the circuit.

† Starkie on Slander, Prel. Dis. 26.

tendant circumstances of aggravation which go to characterize the wrong complained of, may be given in evidence, and so it has been held both in England and in this country.*

Indeed it may be said that in cases of tort, where no rule of damages can be declared, that the functions of the court at the trial of the cause are mainly limited to the reception and exclusion of evidence when offered either by way of aggravation or mitigation; and to a definition of the line between direct and consequential damage.

The relief in cases of collision has furnished an extensive subject of inquiry. The general rule appears to be that at law the plaintiff, in order to recover, must show that he has not in any way contributed to the accident; and that although he may have been in the wrong, still, if his error did not aggravate the difficulty, his right to relief will be unprejudiced.

So in a case in England, where the defendant undertook to excuse himself by throwing the blame of the accident on the plaintiff, this language was held:

"If the plaintiff's servants substantially contri-
"buted to the injury by their improper or negli-
"gent conduct, the defendant would be entitled to
"a verdict; but if the injury was occasioned by
"the improper or negligent conduct of the defen-
"dant's servants, and the plaintiff's servants did
"not substantially contribute to produce it, then
"the plaintiff would be entitled to the verdict."†

* Bracegirdle v. Orford, 4 Maul. & Sel. 77; Bateman v. Goodyear, 12 Conn. 575; Smith v. Lush, 4 Bibb, 502.

† Sills v. Brown, 9 Car. & Payne, 601.

This doctrine has been approved by the Supreme Court of Connecticut, in a case* where it was said, "the defendant shall not be permitted to shield him-"self from an injury which he has committed, "because the party injured was in the wrong, un-"less such wrong contributed to produce the in-"jury."†

In England, it has been declared to be the general rule, that a party has no right to sue for damages in a civil action for any act which amounts to felony, until the felon is prosecuted and acquitted or convicted; and the reason assigned is a desire to prevent the criminal justice of the kingdom from being defeated.‡ But it is very doubtful whether such be the law in this country.§

The subject of remote and consequential damages in cases of tort, we have already considered elsewhere.‖

In closing this branch of our subject, it ought to be observed, that while, where in circumstances of aggravation are proved, the jury are the necessary as well as the rightful judges of the amount of relief, on the other hand, where no such fact is presented, too much care cannot be taken to apply settled rules to the subject of compensation. It can make no difference whether the action be one nominally *ex contractu* or *ex delicto*, whether for the breach of a contract or the viola-

* New Haven Steamboat and T. Co. v. Vanderbilt, 16 Conn. 420.

† See also Raisin v. Mitchell, 9 Car. & Payne, 613, and Bridge v. Gr. J. R. Co. 3 Mees. & Wels. 244, where Mr. Baron Parke said, "There may have been negligence in both parties, and yet the plaintiff may be entitled to recover."

‡ Crosby v. Leng, 12 East, 409.

§ Boardman v. Gore, 15 Mass. 336; Ocean Co. v. Fields, 2 Story, 59.

‖ Supra, p. 91. Vide on this subject, Molinaeus *De eo quod Int.* § 177.

lation of a right; in either case, if no evil motive be imputed, the amount of compensation is as much a matter of law as the right itself, and can, with no greater safety, be submitted to the vague and fluctuating discretion of a jury.

We shall, in discussing the cases which arise under the present branch of our subject, first consider those where, though the proceeding be nominally in tort, no circumstance of aggravation is proved, and where the law undertakes to apply a fixed measure of compensation.

CHAPTER XXIV.

OF DAMAGES WITH REFERENCE TO PLEADING AND PRACTICE.

Damages, General and Special.—Special Damage to be averred in the Declaration.—Misjoinder of Counts and Assessment of entire Damages.—Jurisdiction of the Courts of the United States with reference to Damages. Damages with regard to Costs.

THE most important remark to be made on this part of our subject, is as to the necessity of distinctly averring in the declaration the particular cause of any special damage of which the plaintiff complains.

"Damages," says Mr. Chitty,* "are either general or special. General damages are such as the law implies or presumes to have accrued from the wrong complained of. Special damages are such as really took place, and are not implied by law; and are either superadded to general damages arising from an act injurious in itself, as where some particular loss arises from the uttering of slanderous words, actionable in themselves, or are such as arise from an act indifferent and not actionable in itself, but injurious only in its consequences, as where words become actionable only by reason of special damage ensuing. It does not appear necessary to state the former description of damages in the declaration;† because presumptions of law are not in general to

* Chitty on Pleading, vol. i. 428.

† "The damages sustained are matter of evidence, and need not be alleged; nor are they scarcely ever stated but in a general manner." Barruso v. Madan, 2 J. R. 149.

"be pleaded or averred as facts. But when the law does not "*necessarily imply* that the plaintiff sustained damage by the "act complained of, it is essential to the validity of the declara- "tion that the resulting damage should be shown with particu- "larity; and when the damages sustained have not necessarily "accrued from the act complained of, and consequently are not "implied by law, then, in order to prevent the surprise on "the defendant, which might otherwise ensue on the trial, the "plaintiff must in general state the particular damage which "he has sustained, or he will not be permitted to give evi- "dence of it.*

So in the Queen's Bench, in an action on the case for an excessive distress; it was held that, no mention being made in the declaration of the *sale*, either for damage or by way of substantive complaint, the plaintiff could only recover damages in respect to the detention of the property, and not for the sale.†

An important question in regard to the subject of damages, as connected with pleading, is that in relation to the misjoinder of counts. The jury may assess entire or distinct damages on each of the counts when separate injuries have been proved. If distinct damages be assessed, judgment may be given on either of the counts; but if the jury find entire damages on all the counts, the judgment must be entire; and in this case, if one of the counts be insufficient, judgment will be arrested, or a writ of error be sustainable.‡

* See also Chitty on Pleadings, vol. i. 370. et seq. same subject.

† Thompson v. Wood, 4 Q. B. 493. In Driggs v. Dwight, 17 Wend. 71, in New-York; and Ward v. Smith, 11 Price, 19, in England, special damage was allowed, though not stated in the declaration. In Leland v. Tousey, 6 Hill, 328, it was intimated that an averment of consequential damage, though too remote and ineffectual, is no ground of demurrer.

‡ Chitty on Pleadings, vol. i. 447; Eddowes v. Hopkins, Doug. 376; Grant v. Astle, Doug. 752. In this case Lord Mansfield, while he main-

But this difficulty, and the remedies for it, more properly belong to practice than to pleading.

In regard to the amount of damages to be averred, it is only necessary to lay them so high as to cover the injury, for no recovery can be had beyond the amount in the declaration. It was indeed anciently held, both in actions of *indebitatus assumpsit* and *insimul computassent*, that the plaintiff could not recover any less amount of damages than the precise sum laid in the declaration.* But it is now well settled otherwise, and thus, even in an action on a policy of insurance averring a total loss, a recovery may be had for a partial loss.†

An important question as to damages in this connection is presented in the United States, in regard to the jurisdiction of those courts which are prohibited from taking cognizance of any cases unless a certain pecuniary amount is in controversy. As in regard to the Circuit Courts which do not exercise their jurisdiction over cases involving less than five hundred dollars, and the Supreme Court of the United States, the appellate

tained this doctrine, declared the rule "inconvenient, ill-founded and absurd," and called attention to the fact, that it did not apply to criminal prosecutions. But in O'Connell v. Reginam, 9 Jurist, 25, the same principle was applied to an indictment for conspiracy. Cheetham v. Tillotson, 5 J. R. 430. The rule in civil actions has been recently affirmed in England. Eliot v. Allen, 1 Man. Gr. & Scott, 18. Where a breach gives no data to regulate the assessment of damages, though it negative the words of the condition of the bond, it is not well assigned. People v. Russell, 4 Wend. 570. But if so assigned that the plaintiff would be entitled to nominal damages only, it is enough. Albany Dutch Church v. Vedder, 14 Wend. 165; Backus v. Richardson, 5 J. R. 476.

* Sayer on Damages, Ch. X. p. 43, et seq.; Bagnall v. Sacheverel, Cro. Eliz. 292; Ramsden's Case, Clayton, 87.

† Chitty on Pleadings, vol. 1, p. 371; Marshall on Insurance, 629.

jurisdiction of which in like manner commences at the sum of two thousand dollars. And it has been frequently decided "that the damages claimed in the writ and declaration are the sum in controversy." Even if the plaintiff recover less than $500 it cannot effect the jurisdiction of the court, if a greater sum be claimed in his writ.*

And so on a writ of error, though the verdict in the Circuit Court be for less than $2000, but more than that sum is claimed in the declaration, if the plaintiff bring error, the Supreme Court has jurisdiction, for the judgment may be reversed, and the whole amount claimed recovered;† but not if the writ of error is brought by the defendant.‡

And where the demand is not for money, and the nature of the action does not require the value of the thing demanded to be stated in the declaration, the recognized practice of the courts of the United States has been to allow the value to be given in evidence.§

If the rules of pleading are correctly followed, the only remaining questions in regard to damages, are those which present themselves in the progress of the trial of the cause. These come properly under the head of practice.

The most important of these questions is that

* Gordon v. Longest, 16 Peters, 97 and 104.

† Gordon v. Ogden, 3 Peters, 33.

‡ Smith v. Honey, 3 Peters, 469. See also, Wilson v. Daniel, 3 Dall. 401; United States v. McDowell, 4 Cranch 316; Course v. Stead's Ex'r, 4 Dall. 22; Brown v. Barry, 3 Dall. 365; United States v. Brig Union, 4 Cranch, 216; Peyton v. Robertson, 9 Wheat. 527; Ritchie v. Mauro, 2 Peters, 243; Cooke v. Woodrow, 5 Cranch, 13; Scott v. Lunt's Adm'r. 6 Peters, 349; United States v. McDaniel, 7 Peters, 1.

§ Ex parte Bradstreet, 7 Peters, 634; United States v. Brig Union, 4 Cranch, 216; Course v. Stead's Ex'r, 4 Dall. 22.

in regard to the right to begin, as it is called; or in other words, in what cases does the necessity of proving damages give the plaintiff a right to open and close the cause, where the affirmative of the issue is with the defendant?

In England, it has at length been settled by a rule of all the judges, that the plaintiff shall begin in all actions for personal injuries, libel and slander, though the general issue may not be pleaded, and the affirmative be on the defendant. In actions of contract, also, it is now there settled in accordance with the same rule.*

In this country, says Mr. Greenleaf, in his very valuable work on evidence, "it is generally "deemed a matter of discretion to be ordered by "the judge at the trial as he may think most "conducive to the administration of justice, but "the weight of authority as well as the analogies "of the law, seem to be in favor of giving the "opening and closing of the cause to the plain- "tiff, whenever the damages are in dispute, un- "liquidated, and to be settled by the jury upon "such evidence as may be adduced, and not by "computation alone."†

We have already seen that an important question may arise as to the assessment of entire or several damages.‡ Where a good count is joined with a bad count, or where a bad assignment of breaches is joined with good, and general damages are assessed, the practice has been

* Greenleaf on Evidence, § 76, 3d ed. 149; Mercer v. Whall, 9 Jur. 576.

† Greenleaf on Evidence, § 76, p. 150, 3d ed., where cases will be found.

‡ Supra, p. 576.

different. If the verdict can be amended, and applied to the good counts, this in some cases will be done.* But if not, then the question is whether the cause should be tried again, or the judgment entirely arrested. In some cases the judgment has been arrested,† but the more reasonable rule now seems to be that a new trial will be awarded.‡

The better mode, of course, is where any difficulty of this kind is apprehended, to assess the damages severally on each count. In such case the judgment will be arrested only on the count that is bad.§

So part of a count may be bad; and in such a case, where,‖ in an action of covenant for quiet enjoyment, the plaintiff had averred, by way of special damages, after setting out an eviction that he had lost divers large sums of money, expended on and about improving the premises, it was insisted that, as part of the special damage did not fall within the covenant, and the jury had assessed general damages, the whole was erroneous. But Abbott, C. J., intimated that the whole declaration consisting of one count, *after verdict*, it was to be presumed that the judge at the trial directed

* Chitty on Pleadings, vol. i. p. 448.

† Com. Dig. Damages, E. 5. Corner v. Shew, 4 Mees. & W. 163; Gordon v. Kennedy, 2 Binn. 287; Lewis v. Whitham, 2 Strange, 1185.

‡ Leach v. Thomas, 2 Mees. & W. 427; Emblin v. Dartnell, 12 M. & W. 830; Hopkins v. Beadle, 1 Caines, 347; Lyle v. Clason, 1 Caines, 581.

§ Hayter v. Moat, 2 M. & W. p. 56. In the case of Gregory v. The Duke of Brunswick, 7 Scott's New Rep. 972, the jury having found a general verdict for the defendants, the court refused to award a *venire de novo* on the ground that they had not assessed damages on the issue at law.

‖ Campbell v. Lewis, 3 Barn. & Ald. 392.

the jury to confine their attention to that part of the special damage only which was relevant to the covenant broken.

In regard to the verdict, the question of severance is important in another point of view. If several persons are jointly charged in an action of assault, battery, and false imprisonment, who either plead jointly, or sever in their pleas, or one suffer judgment to go by default, if the jury assesses several damages, the verdict is wrong, and the judgment will be erroneous,* for the trespass being jointly charged, and the jury finding them jointly guilty, the damages cannot be separated. But in such a case, the difficulty can be remedied by entering a *nolle prosequi* against all but one, and taking judgment against him only.†

But on the other hand, if the charge is several, the rule is the reverse. So, in an action against divers persons found guilty of several takings or offences, damages ought to be assessed against them severally; as in trespass for battery and goods, if one be found guilty for the battery, and the other for the goods taken.

So, if against three defendants, one demurs, another makes default, and a third joins issue; on the trial, several damages shall be assessed against those who demur and make default.‡

There was formerly in England a charge on

* Salmon *v.* Smith, 1 Saunders, 207, n. 2; Hill *v.* Goodchild, 5 Burr. 2790; Mitchell *v.* Milbank, 6 T. R. 199; Bohun *v.* Taylor, 6 Cowen, 313; Wakely *v.* Hart, 6 Bin. 316, 319; Bostwick *v.* Lewis, 1 Day, 34.

† Holly *v.* Mix, 3 Wend. 350.

‡ Com. Dig. Damages, E. 5. Chapman *v.* House, T. 13 G. II. Str. 2 1140.

Many curious cases, as to assessing several damages, may be found in Viners Abr. *tit. Damages, C.* and *D.* But the actions being obsolete, or the cases in themselves peculiar and extraordinary, it would be out of place to take further note of them here.

the plaintiff's judgment called *damage clear*, which was a payment required to be made of twelve pence in the pound: but it seems to have been long since abolished; for in an early case it appears that the court "thought it hard that the plaintiff should be stopt of his judgment till he had paid his damage clear, and they resolved to amend it."*

The other questions in regard to damages relate principally to the subject of costs; and indeed, in the early periods of the English jurisprudence, damages and costs, *damna et custagia*, were convertible terms;† but the questions which regard the relation of damages to costs, though extremely important, are so local in their character, and depend so much on statutes, that it would be inexpedient here to do more than advert to them.

As to writs of inquiry for assessment of damages, much law is to be found in Vin. Ab. Damages, D. a., but it does not properly belong here.

In New-York, in an action against several, if one pleads to issue and another suffers judgment by default, damages must be assessed against both at the same time, by the jury who try the issue. Van Schaick *v.* Trotier, 6 Cow. 599.

On a *venire tam quam*, to try an issue as to one count, and assess contingent damages on demurrer to others, if the plaintiff be non-suited as to the issue, he cannot proceed to assess contingent damages on the counts demurred to. Packard *v.* Hill, 7 Cow. 434.

In the same state, the damages can be assessed by the clerk, on promissory notes, bills, &c., but not on the common counts nor unliquidated demands; and in regard to this, several cases have been decided. Burr *v.* Waterman, 2 Cow. 36; Colden *v.* Knickerbacker, 2 Cow. 31; Rogers *v.* Coleman, 3 Cow. 62; Beard *v.* Van Wickle, 3 Cow. 335; Seeber *v.* Yates, 6 Cow. 40.

* March's Reports. 76.

† Zink *v.* Langton, Doug. 751.

CONCLUSION.

We have in the preceding pages taken a survey of the subject of compensation as awarded by the legal tribunals known to the English and American jurisprudence. But much of the subject of legal relief still remains unexplored. The Courts of Admiralty of narrow jurisdiction, but broad and liberal doctrines, and the Courts of Equity, with their vigorous and complete specific performance, have not been even touched in these pages.*

*It would seem that we do not owe our doctrine of specific performance to the Roman law. "According to the principle, "*aliud pro alio invito creditori solvi non potest,*" the plaintiff by the civil law must, as a general rule, bring his suit for the specific performance which constitutes the object of a debt, and the court is to give its judgment and to issue execution accordingly. Still there being no other means of execution recognized by the later civil law than such as are directed against the debtor's *property*, a specific performance cannot be compelled except in the case of things due *in specie*, which, if requisite, are taken from the debtor forcibly, (*manu militari*,) while, in all other cases, if the debtor refuses to obey, the execution can only be turned against his property. The latter is done, either by sale at auction of personal or real estate (even rights or claims) belonging to the debtor, for the purpose of satisfying the creditor by paying him off; or by ejecting the defendant and putting the defendant into possession, (*ex missio et immissio*,) in order to enable the creditor to make himself paid by means of the possession and enjoyment of real estate, or in order to secure him on account of his claims or rights. See Gaius III. 168. fr. 176, D. 50, 16; fr. 13, § 4, D. 36, 1; fr. 17, § 2; fr. 44, D. 40, 4; fr. 36, D. 40, 12; fr. 68, D. 6, 1; fr. 15, D. 42, 1; fr. 3, D. 43, 4; const. 2, 7, C. 7, 53; fr. 5, § 6, D. 7, 6; fr. 12, D. 8, 5; fr. 4, § 1, D. 39, 2; fr. 15, D. 39, 1;

We have here only examined the subject of redress as awarded by the courts of law, or, as it may

const. 11, C. 8, 6. Hence if the specific object be lost or deteriorated, or if for some reason or other it cannot be furnished by the debtor, its value (*æstimatio*) is exacted; and the same is the case where the debtor is prevented from performing the *purely personal* act, or where its performance would be no longer of any use to the creditor, or where it is refused by the debtor altogether or at the due period and in the due manner. For the Romans very justly regarded compulsion in such cases as inconsistent with personal freedom, and could not resolve to restrict the latter, when the creditor is amply protected by his right to full compensation for the non-fulfilment ("*si non facit debitor, quod promisit, in pecuniam numeratam condemnatur, sicut evenit in omnibus faciendi obligationibus;*") and thus they adopted the principle, "*ad faciendum nemo precise cogi potest.*" And it would seem to be always safest and best to take the side of freedom and of the debtor, wherever there be a doubt. With regard to such acts, however, as may be performed by another person as well as by the defendant himself, compulsion is applied, either by forcible fulfilment in his name and place, (*e. g.* delivery of the thing adjudged and transfer of title,) or by having some other person perform the act at the debtor's expense. Fr. 14, 68, 72: fr. 82, § 1; fr. 84, fr. 91, § 3; fr. 113, 114, D. 45. 1; fr. 3, D. 13, 3; § 4, J. 2, 20; fr. 71, § 3. D. 30; fr. 1. pr. D. 19, 1; fr. 13, § 1; fr. 15, § 10, D. 42, 1; const. 4. C. 4, 10.

"These principles are retained in the canon law, cap. 2, x. 3, 21, ("*Homo liber pro debito non tenetur* (i. e. *non pignoratur,*) *etsi res defuerint, quæ possint pro debito addici;*") and so too, with only a few modifications, in the French law. C. Civ. art. 1142—45, art. 1146. seq. C. Proc. art. 552, 780—805, C. Com. art. 636—38.

"According to the German law, on the other hand, the debtor may not only be compelled in case of a negative act (an omission promised or otherwise due) by means of fines gradually increased, but the German practice applies a direct or absolute compulsion, by means of personal arrest, civil imprisonment, military watch placed in his dwelling, by taking him to a work-house, and even by whipping, also in all those cases where the specific performance of any obligation whatever is refused by the debtor, and cannot be made at his expense by another person, or where the debtor fails to perform merely from lack of good will. Yet, from what has been said above, it will be evident that it is altogether without any foundation, that some older and later jurists have made the assertion, that the application of absolute compulsion to enforce any obligation, whether it have for its object a doing or giving, could be justified by the later Roman law." I am indebted for this note to the learning and courtesy of Dr. Kauffman. As to where compensation and damages are decreed in equity, see 2 Story's Equity Jurisprudence, ch. xix. § 794.

strictly be termed, *legal* relief; and the general result of our inquiry will be, I think, that the compensation obtained by the process of litigation, is partial and irregular. Its partial or incomplete character arises from the imperfect nature of all human administration, and the impossibility to do more than approach correct results. Tribunals able to carry their inquiry beyond the reach of our investigation, to scan the motive of each act, to determine how much is due to malice, how much to neglect, and how much to honest incapacity, would be alone fit to make complete compensation in each particular instance. As our jurisprudence is administered, we must content ourselves with dividing the loss between the contending parties.

The irregularity of legal relief is a very different matter. This arises mainly, as it appears to me, from the technical character of our forms of action; and would be removed by their removal. When there shall cease to be two actions against an agent, one on the case and the other on the contract; when it shall no longer be possible to bring trover, trespass, or assumpsit, upon the same facts; when the suit for mesne profits shall cease to be based on the fiction of a forcible entry; when the action for seduction shall no longer be grounded on a pretence of service, then and not till then, will it be easy to reduce the subject of relief to order, system and harmony.

There are, however, other irregularities entirely independent of the forms of action. Such are those connected with the questions, whether actual injury must in all cases be proved, or whether a suit at law may be brought, *quia timet*, as by a

surety, who has given his note for the principal's debt; the discrepancy between suits on warranties of chattels, where the price paid is only evidence of the value, and on sales of land, where the consideration money is the absolute limit of recovery: the contradiction between the rule in trover, where the value is taken at the time of the conversion, and on sales of chattels, where, if the price is paid, the damages are estimated at the day of trial. These difficulties, and others which we have noticed in the course of the preceding pages, can only be removed either by decisions pronounced after a careful survey of the whole subject, and with a view to a complete classification of this branch of the law; or by legislative interference.

The importance of fixed rules in this branch of jurisprudence, cannot be overrated. Where the law and the facts are disposed of by the same persons, as under the civil law, no particular evil, perhaps, results from the exercise of an arbitrary authority over the subject of compensation. But where, as with us, the cognizance of matters of fact is separated from that of the questions of law: and where the arbiters of the former are avowedly incompetent to pass upon the latter, to give them an uncontrolled discretion over the amount of relief would lead to incalculable mischief. The judicial authority to settle legal questions would be utterly nugatory, if the amount of relief were a mere matter of discretion with the jury; and hence, the settled tendency of our law, as well as of all sound reasoning on the subject, is to reduce the measure of damages as far as possible to fixed legal rules; excepting only in those

cases of flagrant outrage where the law steps in, not merely to compensate but to punish.

And here I cannot better close this volume than by adopting the words used by old Molinæus, in terminating his discussion of the same subject: "*Jam tempus est manum tollere de tabula, et reliqua quæ plura occurrunt, suis locis reservando, finem hinc syntagmati imponere.*"*

* Dumoulin, De Eo Qod Int. § 2 9.

NOTE.—While these sheets are passing through the press, my attention has been called by a very learned friend to what is incidentally said of the subject of compound interest, at page 408. The language of the text is, perhaps, strictly correct, but it is certainly not free from ambiguity, and it would better read as follows:

"Compound interest was rigorously prohibited by the civil law. *Nullo modo usuræ usurarum a debitoribus exigantur.* With us the severity of the rule is somewhat modified. An agreement to pay interest, on interest which is due, is valid; and an original contract to pay interest upon interest, if not paid when due, is perhaps valid at law, though the execution of such an agreement would not be enforced, and might possibly be restrained, in equity." Cod. 4, 32, 28. Lord Ossulston *v.* Lord Yarmouth, 2 Salk. 449. Connecticut *v.* Jackson, 1 J. Ch. R. 13.