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."

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BY

THEODORE SEDGWICK.

SECOND EDITION.

REVISED AND GREATLY ENLARGED.

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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

TO

SECOND EDITION.

In preparing the Second Edition of this work for the press, I have done all in my power to show my sense of the favorable manner in which it has been received, and to increase its utility. I have examined the numerous volumes of Reports which have appeared both in England and this country, and have availed myself, as far as possible, of the increased attention which has been latterly paid to the subject. This has led not only to a great increase of matter, but to changes so considerable in the arrangement of the work, that I have found it impossible to preserve the original paging. The two last chapters are entirely new.

The principal difficulty which I encountered in preparing the first edition—the difficulty of adapting any scientific arrangement of the rules of compensation to the technical forms of action of the common law—has been somewhat increased by the great changes that have been introduced into legal proceedings within the last few years. New York, and several of the sister States, have adopted a system of pleading which amounts to a total subversion of the common law procedure; and Massachusetts has made very serious innovations on it. We are evidently in the midst of a revolution which, in our

own time, will not only efface most of the distinctions between law and equity, but will completely sweep away the common law so far as its forms of proceeding are concerned, and in so doing work a change in the administration of justice, far more complete than was ever before effected in so short a period. Our example and influence are already making themselves felt in England; and the alterations there, though perhaps they will be more cautiously made, bid fair to be not much less sweeping.

Convinced, as I have long been, that these changes—although attended by the evils which always wait upon great and sudden modifications of existing arrangements, evils aggravated in this case in our country by our tendency to act rather with energy and vigor than with caution and deliberation—still, that these changes will finally establish our jurisprudence on a basis more intelligible, more harmonious, more beneficial, I cannot in any sense regret their introduction.

For the time being, however, in regard to the order and arrangement of this work, I have felt the full inconvenience resulting from the present chaotic state of our procedure. I have endeavored to avoid it as far as possible by keeping steadily in view what is manifestly the inevitable result of the experiments now going on, viz.; the final and total abrogation of the forms of the common law both in England and America. When that end is at length attained, and when the application for redress shall be made to depend solely on the right, then, and not till then, it will be easy to classify and arrange the rules governing the measure of relief in a manner that shall be at once legal and logical; that shall satisfy the technical demands of the mere practitioner, and at the same time gratify that love of reason and justice which animates the mind of him who desires to find something in the law besides a mere collection of abstract and arbitrary rules.

New York, July, 1852.

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A TREATISE

ON THE

MEASURE OF DAMAGES.

INTRODUCTION.

THE only work which our libraries contain on the subject of the Rule or Measure of Damages, is that by Sayer,* published in the last century; it covers, however, 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 have been made to reduce the rule of damages to principle, till a comparatively recent period. Lord Kaims says, in his Principles of Equity: "In the English courts of common law, there is no accurate distinction made between damage certain and uncertain. 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."‡ This was written less than a century ago. In an action for an escape, tried in 1776, Lord Ch. J. Wilmot said, "in actions on the case the damages are totally uncertain and at large."§ It is almost 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 tribunals of justice, both in England and America, have for some time assiduously labored to reduce this branch of our

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

† The second volume 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 anything but a rapid and general survey.

‡ 2d edition, 1767, p. 78, in notes.

§ Ravenscroft *vs.* Eyles, 2 Wils, 295.

‖ "It is desirable," says the Supreme Court of Massachusetts, "to have as definite and precise rules upon the subject of damages as are practicable."—Batchelder *vs.* Sturgis, 3 Cush., 201. "A proper administration of justice," says the Supreme Court of Louisiana, "requires that the rules established by law for the assessment of damages, should be adhered to."—*Arrowsmith* vs. *Gordon;* 3 *La. Ann. R.*, 105.

law to fixed rules; and in the present condition of our jurisprudence it may be considered surprising that the subject has not received more attention from our text writers.

The amount of Damages, or, in other words, the pecuniary compensation awarded by tribunals of justice, in the widest acceptation of the term, embraces almost the whole field of legal redress; and a treatise on the subject of the rules which govern the amount of damages, if considered in their largest and most general sense, would include nearly the entire philosophy of the Law. I use here the term Law, in contradistinction to Equity. In taking a broad and general view of the matter of damages, we should necessarily 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 founded 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 fulfill contracts for the mere payment of money be more severely punished than honest incapacity? Should there be any reparation for a frivolous and vexatious suit beyond the costs, or should further redress, as now, be confined to cases of malicious prosecution? Should a merely false representation as to the credit of a third party, be allowed to be made with impunity, or should it be necessary, as now, to show also a fraudulent intent? In what cases should provision be made for the counsel fees of the prevailing party?

These and similar inquiries would, as I say, embrace almost the whole philosophy of legal relief. But I have by no means in this volume intended to occupy ground so extensive, or to discuss questions so theoretical. My aim has been more limited; and if much humbler, at least I hope more practically useful.

My purpose has been to examine those cases only, where a wrong having been done, or, in 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 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 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 in direct 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 originally 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; in other words, between the right of recovery and the amount of compensation; 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 of what they consist. The first question is one of law, which depends on whether the party charged is liable or not. This being determined, the second question remains; namely,

to discriminate, 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."*

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 fullness and ability. Benecke's and Stevens's works on indemnity and average exhaust 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 most efficiently contribute 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 counter-balancing benefits.

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 while I have endeavored to clear the way to a correct appreciation of

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

the whole subject, my especial object has been to make a work which should be practically useful at nisi prius.

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 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 reference 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 precept 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.†

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* "There is a remarkable difference, in the manner of treating juridical subjects, between the foreign and the English jurists. The former almost universally discuss every subject with an elaborate theoretical fullness and accuracy, and ascend to the elementary principles 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 inconsiderable assistance to students in mastering the higher branches of their profession."—*Story, Pref. to Com. on Bailments.*

† A 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, there-

I do not at all 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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fore, 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.

* I think I cannot err in subjoining here an extract from 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 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.

JOSEPH STORY.

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 in 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 only of these three divisions, that these pages are intended to treat; nor are they intended to discuss the whole topic of redress; on the contrary, they will be confined to a single branch of this extensive subject.

The relief afforded by a 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, for the most part, consists 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 awarded by Common Law tribunals, or, in

* And all the questions growing out of these subjects are investigated in one and the same proceeding. "It is incident to every Common Law complaint of injury and damage, that the existence of the injury, the right to compensation, and the amount of damage alleged to have been sustained, are tried and decided in one proceeding and upon one trial."—*East and West India Docks* vs. *Gattke;* 15 *Jur.*, 261.

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; it restrains the aggressor from the contemplated violation of right; it gives specific relief by decreeing the very thing to be done which was agreed to be done; it compels the unwilling party to give testimony; it executes trusts, expounds testaments, and adapts its plastic hand with ease, to the varied wants and complaints of man in a state of society. But, as a general rule, it refrains from awarding pecuniary reparation for damage sustained.*

With the Common Law the case is very different. The end at which it arrives is, in almost all instances, one and the same; in the actions founded upon contract, 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 has observed,† from the nature of the case, become a *suit for specific performance.* But this is almost the only instance where a suit at law compels the very thing to be done which the defendant agreed to do.

In the actions of tort, case and trespass, trover, replevin and detinue, the rule is the same, with the exception that in the two latter 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.

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* It is true, that a Court of Equity will sometimes give damages in lieu of the specific performance of a contract, but that is only, as a general rule, where it has obtained jurisdiction of the cause on other grounds.—*Wiswall* vs. *McGown*, 2 *Barb. S. C. R.*, 270.

† Robinson *vs.* Bland, 2 Burr. 1077, 1086.—"Where *assumpsit* proceeds on a demand of money, it is in truth and substance, and so taken in some of the cases a more special action of Debt; for where the demand is for the payment of a sum of money, it is a technical fiction to call the sum recovered *Damages;* it is the specific debt, and the jury give the specific thing demanded."—*Lord Loughborough in Rudder* vs. *Price*, 1 *H. Bl.*, 547.

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 proceedings of quo warranto, mandamus and prohibition,* and the great writ of habeas corpus also, these tribunals exercise powers very analogous to those of a court of equity. But of these, so far as they belong to our subject, more particularly hereafter.

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."†

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, and the Tribunals by which they are now imposed. The general principles by which they are regulated. The Measure of Damages in particular cases. Set-off, Recoupment and Mitigation, of Damages. The rule of Damages under special statutes. The control exercised by the Court over the Jury in regard to Damages. Pleading, Practice and Evidence, as applicable to the subject.

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 of Rome, were carefully protected in regard to the matters of which we now speak. But when that beautiful and elaborate

* And the ancient and now obsolete writ of *estrepement*.

† Book II., chap. 29, p. 438.

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 retarded, and during that period the earlier processes of civilization had necessarily to be worked out anew.

English jurisprudence finds its earliest monument in the sixth century, in the laws of Ethelbert, king of Kent; and this code known as *Leges Æthelbirhti* illustrates our present subject too curiously to be unnoticed here.

In this code we find the attention of the law giver confined almost exclusively to wrongs, or, as we would now say, to actions of tort; and the *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 our jurisprudence. The antiquity of compositions for murder is illustrated by Homer, where, in the description of the shield of Achilles, two disputants are represented wrangling before the judge for the weregild or price of blood, *ειvεκα ποινης ανδρος αποφθιμενου.**

"The passion of revenge," says Mr. Hallam, "always among the most ungovernable in human nature, acts with such violence upon barbarians that it is utterly beyond the control of their imperfect arrangements of polity. It seems to them no part of the social compact to sacrifice the privileges which nature has placed in the arm of valor. Gradually, however, these fiercer feelings are blunted, and another passion, hardly less powerful than resentment, is brought to play in a contrary direction. The earlier object of jurisprudence is to establish a fixed atonement for injuries, as much for the preservation of tranquility as the prevention of crime. Such were the weregilds of the Barbaric Codes."†

"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

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* Hallam's Middle Ages, Vol. I., p. 154, Chap. II., Part II.

† Hallam ut Supra. "La Composition," says Guizot, "est le premier pas de la legislation criminelle hors du regime de la vengeance personnelle. * * La composition est une tentative pour substituer un regime legal a la guerre; c'est la faculte donnee a l'offenseur de se mettre, en payant une certaine somme a l'abri de la vengeance de l'offensé; elle impose a l'offensé l'obligation de renoncer a l'emploi de la force."—*Hist. de la Civilization en France, Tome* 1, *pp.* 275 *and* 276.

Alfred enacts that the seduction of the wife of a Twelf Hændman, or an Eorl, is to be compensated by payment of one hundred and twenty shillings; of the wife of a Six Hændman, 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 for personal trespasses,† the other 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 delictis 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 tthe middle of the sixth century to the Norman conquest. Of he se, 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

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* 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, as 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 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 *wergild* annexed to his rank in the community." "Previously to paying 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's English Silver Coins, p. 18.

in compensation. If the scalp be cut to the bone [of the scull] so that the latter appear, let compensation be made by payment of three shillings.

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 compensation 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 sceattas 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 '*Assythments for Slaughter*' of the Scots. An intermediate stage is denoted by the laws of the Continental Saxons. Their weres are fixed in *solidi*, or shillings. But the *solidus* was an imaginary denomination; and instead of counting down the coin, the offending party might drive his legal tender into the farm of the plaintiff. An ox passing sixteen months old, represented 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

* 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*."

of wheat, being each its equivalent; 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 regulated prices."†

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* 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 Were 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. As to the value of the *Solidus*, Gibbon says: "Till the twelfth century we may support the clear account of twelve *denarii*, or pence, to the *solidus*, or shilling, and twenty *solidi* to the pound weight of silver, about the Pound Sterling. Our money is diminished to a third, and the French to a fifteenth of this primitive standard." *Hist. Ch.* 58, *note.*

The use of cattle as a measure of value is of very great antiquity,—thus Homer:

> The third bold game Achilles next demands,
> And calls the wrestlers to the level sands;
> A massy tripod for the victor lies,
> Of twice six oxen, its reputed price;
> And next, the losers' spirits to restore,
> A female captive, valued but at four.
>
> *Iliad, Book* 23, l. 815.

It seems probable 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, 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 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 A 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 [illegible] ats belong to the same race, from which our ancestors sprang, although

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 application of the *Were*, but in none,

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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 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 *Camlwrw*, a fine of three kine, or nine score pence.

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 *Galanas* 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

with the exception of those of Alfred, between A. D. 871 and 901, do we find the same minute classification 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, which do not bend to the justice of the particular matter, especially when used to fix values, are always a misfortune and a defect in jurisprudence; they should never be tolerated, unless on account of some peculiar and extraordinary difficulty in arriving at the truth of the individual 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

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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.—

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.

the Anglo-Saxons before the were could be required." But any inquiry into this matter, even if practicable, would lead us far beyond our proper limits. It may not, however, be foreign to our subject to notice, that if the were or the wite could not be paid, it seems slavery was the consequence. "The criminal whose own means were insufficient, and whose relatives or lord would not assist him to make up the legal fine he had incurred, was either compelled to surrender himself to the plaintiff or to some third party, who paid the sum for him by agreement with the injured party. Such a serf was called criminal slave. These are the *servi redemptione* of Henry the First."*

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 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 originally 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.§

* The Saxons in England, by J. M. Kemble, 1849, Vol. I., p. 197. In the continuation of this work, which the preface informs us is to discuss, among other things, the law of descent, contracts, and the forms of judicial process, a very valuable addition may be expected to our knowledge of the Anglo-Saxons.

† Palgrave's Rise and Progress, Vol. I., p. 229.

‡ "Ainsi," says M. Guizot, "s'est introduit dans la legislation le combat judiciaire, comme une regularization du droit de Guerre, une arene limitée ouverte à la vengeance. Guizot, Hist. de la Civilization en France, Tome 1, p. 294.

§ Although singular as it appears, the appeal of death was not abolished in Eng-

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 till a very recent period,* may claim a more reasonable origin. A party accused of an offense, 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 ordinary practice of our modern courts of justice. Evidence has been given by which a presumption is raised against the accused, but not being conclusive, it is rebutted by the proofs of general good character."†

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 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

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land till within the last thirty years. See *Ashford* vs. *Thornton*, 1 B. & Ald., p. 405, which resulted in an act of Parliament.

* 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. 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. "La veritable origine des *Conjuratores*," says Guizot, "c'est que tout autre moyen de constater les faits etait a peu pres impraticable. Pensez a ce qu'exige une telle recherche, a ce qu'il faut de developpement intellectuel, et de puissance publique pour le rapprochement et la confrontation des divers genres de preuves, pour recueillir, et debattre des temoignages, pour amener seulement les temoins devant les juges et en obtenir la verité en presence des accusateurs et des accusés. Rien de tout cela n'etait possible dans la societe que regissait la Loi Salique; et ce n'est point par choix ni par aucune combinaison morale, c'est parcequ'on ne savait et ne pouvait mieux faire qu'on avait recours alors au jugement de Dieu et au serment des parens."—*Guizot, Hist. de la Civilization en France, Vol. I., p.* 285.

‡ "The ancient jurymen were not empanelled to examine into the credibility of

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 ...bility, 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 damages 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 cases, 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."§

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 significa-

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the evidence; the question was not discussed and argued before them; they, the jurymen, were the witnesses themselves, and the verdict was substantially the examination of these witnesses, who of their own knowledge, and without the aid of other testimony, afforded their evidence respecting the facts in question to the best of their belief. In its primitive form, therefore, a trial by jury was 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. 15, 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.* Those, also, who desire a philosophical view of the Barbaric Codes, cannot be better referred than to Mr. Guizot's Histoire de la Civilization en France, the 9th and 10th lessons of the first volume, and Mr. Hallam's History of Europe during the Middle Ages, Vol. I., Chap. II., on the Feudal System.

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

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

§ See Barrington's Observations on the Statutes, p. 109. "After verdict given of the principal cause, the jury are asked touching *costs* and *damages*."—*Jacobs's Law Dict. in voc.*

‖ Rep., Part X., p. 115.

tions, the one properly and generally, the other *relative* and *stricte.* Damna *pro injuria illata*, and *expensæ 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.

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 is 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, unequal and 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 of fact.‖ The origin of this curious division of power it is now impossible to trace with accuracy. A similar or analogous distinction existed in the Republican age of the Roman law under the procedure by *formula;* but that feature of their jurisprudence disappeared when the formula, together with the office of the Judex or Referee, was abolished, and the magistrates, under the despotic innovations of the Empire, disposed of the entire litigation *extra ordinem.* To this we shall have occasion hereafter to advert; suffice it for

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* The origin of the word *Damnum* is thus given by Grotius: "*Damnum forte a demendo dictum. Ita Varro, libro v. Damnum a demptione, cum minus re factum quam quanti constat. Alii magis probant derivare a Græco* δαπανη, *ut sit dapnum, deinde damnum; ut* υπνος, *sopnus, somnus. Nec absurde deducas a Græco* δαμνω, *quod est* βιαζω, *aut ex* ζημια, *damia, damnum; ut regia, regnum.* De Jure Bell. et Pac, Lib. II., Cap. 17. The Digest says: *Damnum et damnatio ab ademtione et quasi deminutione patrimonii dicta sunt.* De Damno Infecto, L. 39, Tit. 2, § 3.

† "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. V. Sullivan's Lec., 32, p. 300. Bl. Com., B. 3, ch. 4, § 6.

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

the present to say that since the period to which we have referred, the maxim has generally held good in the English law, "*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 from the outset generally left with the jury. But we are not to suppose that the limits of their power over the amount of remuneration were at first as clearly defined as they have since become. In one case, as late as the reign 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. So an early text writer puts the case of sheep passing the Severn, and one of them be forced into the water, and all the rest follow and be injured, and asks whether he shall have damages for all or for one; but the only solution he can find for the difficulty is, that the "jury must well consider of it."† 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 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 are about to consider.§

Before commencing the more practical part of this treatise, however, it will be well to bear distinctly 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.

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* Sir Baptist Hixt's case, Rolles Abr. II., p. 703; Trial. pl. 9.

† Shepherd's Epitome, p. 70.

‡ Rolles Abr., Tit. Damages. The Queen's Bench has still the power to assess damages, on demurrer, or default, without the intervention of a jury.—*Whitaker* vs. *Harold*, 10 *Jur.*, 1004, 12 *Jur.*, 396.

§ For a very full and able description of the powers and duties of court and jury under our system, see Commonwealth *vs.* Porter, 10 Met., 263, and many cases there cited.

We have seen in the early laws of the Anglo-Saxons, that with the most minute care, specific damages were arbitrarily assessed 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 defendant. 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.*

When we come to the Roman Law, we find the subject elaborately, but not very clearly nor very harmoniously treated. To understand its provisions, it is necessary to bear in mind the fact to which we have already adverted, that until the despotic centralization of the Empire had completely subverted the early institutions of the Republic, the same line was drawn in their administration of justice, as with us, between questions of law and questions of fact. The magistrate who heard the statements of the parties did not decide the cause. He turned the litigants over to a *Judex*, or Referee, or single Juror, as he may be regarded, giving him at the same time a *formula* or charge by which his decision was to be controlled. This control was, however, not an absolute one, and in some aspects of the cause, and particularly the extent of the liability of the defendant, and the *Litis æstimatio*, or Measure of Damages, the *Judex* seems

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

to have been clothed with a large discretion. This discretion was, however, restrained and limited to a certain extent, by several special statutes.*

The general definition of damages, the *id quod interest* or *utilitas* of the civil law, in the Code of Justinian, is the actual loss sustained and the profit which might have been made—*in quantum mea interfuit, id est quantum mihi abest, quantumque lucrari potui.*† A more distinct subdivision of the subject is into *damnum emergens*, or loss arising, and *lucrum cessans*, or profit prevented.‡ But how far in each case the party is liable, when for *damnum emergens* only, when for *lucrum cessans*, and to what extent, the texts of the Roman Law leave us greatly in doubt. They inquire in each case whether the party is to be considered guilty of *dolus*, fraud or evil design, or of *culpa* only; if of *culpa*, whether *culpa lata*, or *culpa levis* merely, and the nice shades of distinction which they attempt to define, have at once excited and baffled the ingenuity of modern commentators. In all these questions the Judex appears to have exercised a very considerable discretion.§

In the award of compensation, or damages as we term it, the *litis aestimatio*, the Judex seems also to have been little bound by any settled rules. In cases of fraud or gross negligence, which is as near as we can render *dolus* and *culpa lata*, the plaintiff or *actor* was permitted himself to swear to the amount of injury sustained; and there seems originally to have

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* See, as to the three stages of the Roman procedure, the *Legis actiones*, the *Formula* introduced about 650 A. U. C., and the forms of the Empire, Das Römische Privat Recht von Wilhelm Reim, Book 5.

† Rat. Rem Hab. Dig., Lib. 46, Tit. VIII., § 13.

‡ Dig. de Damno Inf., Lib. 26, (39. 2.)

§ "Ueber die Frage wie weit in einem jeden Falle das Interesse praestirt werde, ist in dem Römischen Rechte wenig vorhanden, woraus sich bestiimmte Grundsätze ableiten liessen. Doch geht die gewöhnliche Meinung dahin, dass in Fallen wo *Dolus* oder *Culpa lata*, oder *contumacia insignis* die Ursache des Schadens sey, sowohl *damnum* als *lucrum;* hingegen wo nur eine gewöhnliche culpa zum Grunde liege, bloss das *damnum emergens* vergütet werde."—*Haenel, vom Schadenersatze, Leipzig*, 1823. § 81. The books of the German scholars are numerous; one of the most recent is *Die Culpa des Romischen Rechts*, von J. C. Hasse, edited by Bethmann Holweg, Bonn: 1838. But the writers of this class, though profound scholars and acute reasoners, appear to me to lose themselves in a maze of contradictory and obscure citations from the vast storehouse of the Pandects, and in a perhaps still more hopeless metaphysical labyrinth of abstract discussions on the different shades of fraud and fault. Nothing do they less resemble than the clear and practical manner of our writers. The best manual of the subject that I have seen is the work from which the above citation is made.

been no check on this prerogative, *in infinitum jurari potuit;* but this license was restrained by positive provisions, which gave the power of assessment to the Judex.* To check still more effectually the abuses which would necessarily flow from such a state of things, various statutory provisions were introduced, and an effort was made to obviate the difficulty by fixed valuations not to be departed from.†

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 injuriæ 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 remedy given by the Lex Aquilia may be considered as very analogous to our actions of trespass and case;¶ but it was limited to wrongs actively perpetrated, and mere acts of non-feasance did not come within its scope.** In consequence, other enactments were made and

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* D. de in Lit. J ., L. 4, § 2, (12. 3); L. 5, § 1 eod. Haenel, § 95, p. 110.

† Rat. Rem. Hab. Dig. Lib. 46, Tit. VIII., § 18.

‡ Inst., Lib. IV., Tit. III. De lege Aquilia, Dig. Lib. IX., Tit. II., Ad Legem Aquiliam. This law is said to have been passed as early as 467 A. U. C.

§ 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., § 14.

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

** "Zuvörderst waren alle Beschädigungen ausgeschlossen die in einem blossen Nichtthun bestehen."—*Hasse Culpa des Römischen Rechts*, § 6, *p.* 21.

the same principle of arbitrary and fixed valuation was applied to matters of contract for sums certain,* in which 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.*†

The civil law, as introduced into modern Europe, seems to have retained the early features of its original, in the respect of which we are now speaking, and instead of laying down any fixed or arbitrary rule, to have left the matter very much to the discretionary consideration of the tribunal which has cognizance of the cause.

So, under the civil law, as established in France, and previous to the adoption of the Code Napoleon, damages were divided into interest and damages, *interêts* and *dommages-interêts. Interêt* 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 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 undefined, and are increased or diminished, according to the discretion of the judge, dependant upon the facts and circumstances of the particular 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

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* 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 endo deposito dolo malo factum escit duplione luito. Si depositarius in re deposita dolo quid fecerit in duplum condemnetur.*" See Pothier's Pandects, by Bréard Neuville. Vol. I., p. 332—364—366.

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

§ Loix Civiles, Liv. 3, Tit. V., Vol. I., p. 259. "Les autres sortes de dommages sont *indéfinis* et ils s'étendent ou se bornent différemment par la prudence du juge, à plus ou à moins selon la qualité du fait et des circonstances. Ainsi un locataire qui manque aux réparations qu'il doit par son bail, un entrepreneur qui manque de faire l'ouvrage qu'il a entrepris ou qui le fait mal doivent *indefiniment* les dommages et les interets qui peuvent suivre du defaut d'avoir executé leur engagement; et on les regle différemment, selon la diversité des pertes qui arrivent, la qualité des faits qui les causent et les autres circonstances."

contract, or performs it ill; in either case they owe an indefinite amount of damages resulting 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 according to the circumstances and the particular usages, if there are any."* And again,† "It results from all the preceding rules, that as questions of damages depend on the attendant facts and circumstances, 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 exercise a certain degree of moderation in estimating 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 considerable in amount, they

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* P. 262, "Il doit dépendre de la prudence du juge d'arbitrer et de moderer quelque dédommagement selon les circonstances et les usages particuliers s'il y en avoit."

† Book III., Tit. V., Sec. 2, Vol. I., p. 270. "Il résulte de toutes les regles precedentes que comme les questions des dommages et interets naissent toujours des faits que les circonstances diversifient, c'est par la prudence du juge qu'elles se decident, en joignant aux lumières que les principes doivent donner, le discernement des circonstances et des égards qu'on doit y avoir." I find in an old French work, 1637, *Recueil des Arrests Notables*, a curious illustration of the looseness of the old French law, in this respect. It says: "En estimation des Dommages et Interets quand les experts sont discordans, le juge d'office doit prendre un tiers, et s'ils ne s'accordent le *juge ne doit suivre ni la haute ny la moindre estimation*." So, again, in the Journal des Audiences, T. 6, p. 252, on the question whether a promise given by a female to marry under a *dédit*, or forfeit of a fixed sum was to be regarded as liquidated damages. "La proposition *stipulatio pœnae in contractu sponsalium apposita improbatur* est ecrite dans tous nos livres, qui ont traite de la matiere—Dans la jurisprudence on ne s'arrete point a ces stipulations de peine—Les Dommages-interets ne sont adjugez que *ad arbitrium boni viri*—suivant que le meritent les cas de mauvaise foi, de la condition des personnes, de la depense, perte, ou deshonneur."

‡ Traité des Obl., Part I., Chap. II., Art. 3, § 160. "Il faut même selon les differens cas, apporter une certaine moderation à la taxation et estimation des dommages dont le debiteur est tenu."

§ § 164, "Nous devons modérer les dommages et interêts lorsquils se trouvent excessifs en laissant cette modération à l'arbitrage du juge."

‖ "Quand les dommages et interêts sont considerables, ils ne doivent pas etre taxés et liquidés en rigueur, mais avec une certaine moderation."

should not be rigorously assessed, but with a certain degree of moderation." And again, even in cases of fraud:* "It must be left to the discretion of the judge, even in 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 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 amount of this compensation is a question of law, not governed by any arbitrary assessment, nor, on the other hand, left to the fluctuating discretion of

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* § 168, "Il doit etre laissé à la prudence du juge, même en cas de dol d'user de quelque indulgence sur la taxation des dommages et interêts."

† *Repertoire; Dommages et Interêts*, 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 fondé, étant un principe qui émane de l'equité naturelle on doit s'y conformer, et en conséquence, modérer les dommages et inte[illegible] lorsquils se trouvent excessifs en laissant cette modération á l'arbitrage du juge."

‡ 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.

§ Smith *vs.* Sherwood, 2 Texa[illegible], 460.

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, which are awarded according to established rules; and these rules form what is called 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," says the Supreme Court of New York, "that wherever it recognizes or creates a private right, it gives a remedy for the wilful violation of it."‡

"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." "Damages—*damna* in the common law," says Lord Coke,¶ "hath a special signification for the *recompence*, that is given by the jury to the plaintife, 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 commensurate to the injury sustained." "It is a natural and legal principle," said Shippen, Chief Justice of the Supreme Court of Pennsylvania,†† "that the compensation should be equivalent to the injury." "The general rule of law," said Story, J., to the jury on the

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* Com., III., Ch. VIII., p. 123.

† Ashby *vs.* White, 1 Salk., p. 19.

‡ Yates *vs.* Joyce, 11 J. R., p. 136. See, also, Lamb *vs.* Stone, 11 Pick., p. 527. Allison *vs.* McCune, 15 Ohio, 726; and Webb *vs.* Portland Manuf. Co., 3 Sum. 192.

§ Com., II., Ch. 29, p. 438.

‖ Ferrer *vs.* Beale, 1 Lord Raym., p. 692.

¶ Co. Litt., 257, a.

** Rockwood *vs.* Allen, Ex'r., 7 Mass., p. 254.

†† Bussy *vs.* Donaldson, 4 Dallas, 206.

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 property, or the person, or the rights or the reputation 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., on 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 regard to the rate of damages on a foreign bill of exchange, the New York Court of Errors said "In this, as in other cases of contract, the rule by which the amount or extent of redress should be ascertained, is a question of law."‡

It is not, however, to be understood that legal relief is to be had for every species of loss that individuals sustain by the acts of others. It is undoubtedly true that damage resulting from fraud, deceit or malice, always furnishes a good cause of action.§ "This principle," says the Supreme Court of Ohio, "is one of natural justice long recognized in the law."‖ But where the injury is not to be traced to any evil motive, the rule is by no means universal that injury is always entitled to redress. 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 fault or the act beyond their control. In these cases the law does not seek to interfere.**

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* Dexter *vs.* Spear, 4 Mason, p. 115.

† Walker *vs.* Smith, 1 Wash. C. C. R., p. 152.

‡ Graves *vs.* Dash, 12 J. R., p. 17.

§ Paisley *vs.* Freeman, 3 T. R., 51. Upton *vs.* Vail, 6 J. R., 182. Barney *vs.* Dewey, 13 J. R., 224.

‖ Bartholomew *vs.* Bentley, 15 Ohio, 659, 666.

¶ Paisley *vs.* Freeman, 3 T. R., p. 51.

** Such are the cases governed by the maxim *Salus populi suprema lex*. "There are many cases," says Mr. Broom, in his recent interesting and valuable work on Legal Maxims, p. 1, "in which individuals 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 defense of the kingdom against the king's enemies." Such, again, are those which fall within the maxim "*Necessitas inducit privilegium*

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.* So, if in the prudent and reasonable exercise, by an owner of property, of his right of dominion, another sustains damage, it is *damnum absque injuria.*† So it has been said in regard to a corporation charged with committing a nuisance. "If the defendants have only pursued the path presented for them by the laws from which they derive their existence, they have committed no wrongful act. Though the plaintiff may have sustained damage, it is *damnum absque injuria*, for the act of the law, like the act of God, works no wrong to any one."‡

There must, too, not only be *loss*, but it must be injuriously brought about by a violation of the *legal rights* of others. "No one, legally speaking," says the Supreme Court of New York, "is injured or damnified unless some *right* is infringed. The refusal or discontinuance of a favor gives no cause of action."§ The prosecution of this inquiry, however, would lead us directly into the great field of causes of action. Suffice it for our pre-

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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 necessity carries a privilege in itself." I beg leave very humbly to recommend Mr. Broom's work to those who desire to rivet in their minds, not only the rules but the reason of our jurisprudence.

* Ashby *vs.* White, 1 Salk., p. 20; S. C. 2 Ld. Raym., p. 955. Lamb *vs.* Stone, 11 Pick., p. 527. Broom's Legal Maxims, p. 93. "In point of law," said Rolfe B. in Davies *vs.* 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." "This is one of those unfortunate cases," says the same learned Judge, in Winterbottom *vs.* Wright, 10 Mees. & Wels. p. 109, a suit by a mail coachman against a contractor for supply of mail coaches, for injury resulting from a coach breaking down, "in which there certainly has been *damnum*, but it is *damnum absque injuria.*" So in Massachussetts, where the owner of land made an excavation therein near the street, and a person in the night time fell in; held, that the owner was not liable. "Where neither party is in fault," said the Supreme Court, "and an accident takes place, it is *damnum absque injuria.*"—*Howland* vs. *Vincent*, 10 *Met.*, 371.

† Gardner *vs.* Heartt, 2 Barb. S. C. R., p. 168; and Vide post, Ch. 3.

‡ First Baptist Church *vs.* Sch'y & Troy R. R. Co., 5 Barb. S. C. R., 79.

§ Mahan *vs.* Brown, 13 Wend., 261, where it was held that an action will not lie for obstructing a neighbor's lights, if they be not ancient lights, and no right has been acquired by grant or occupation and acquiescence.

sent 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 the infringement of a legal right, when unattended by any positive injury, furnishes no ground for other than nominal relief. It is not sufficient that an act unauthorized by law has been committed. For *Injuria sine damno* there is no compensation. Substantial loss to the party plaintiff must have ensued to entitle him to substantial relief. *De minimis non curat lex.** 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 *private* wrong."† And so the law is laid down by Lord 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 controversy 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,

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* Paul *vs.* Slason, 22 Verm. R., 231.

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

‡ Williams's case, 5 Rep., p. 72.

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 this country, as we shall have occasion to see when we come to treat of trespasses to real estate.§

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* Rose *vs.* Miles, 4 Maule & Sel., p. 101, which virtually overruled Hubert *vs.* Groves, 1 Esp. R., 148, and Paine *vs.* Partrick, Carth., 191; and the doctrine of Rose *vs.* Miles, was affirmed in Greasley *vs.* Codling, 2 Bing. R., p. 263, as to a highway. The authority of Hubert *vs.* Groves has also been denied in this country. Lansing *vs.* Wiswall, 5 Denio, 213.

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

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

§ Pierce *vs.* Dart 7 Cowen R., p. 609. Lansing *vs.* Smith, 8 Cowen, 152, S. C.; 4 Wend., 9. Mills *vs.* Hall, 9 Wend., 315. The Mayor, &c. *vs.* Furze, 3 Hill, 612, and Myers *vs.* Malcolm, 6 Hill, 292. Hay *vs.* Cohoes Co., 3 Barb. S. C. R., 42. Lansing *vs.* Wiswall, 5 Denio, 213. First Baptist Ch. *vs.* Sch'y & Troy R. R. Co., 5 Barb. S. C. R., 79. Baxter *vs.* Winooski Turnpike Co., 22 Vermont, 114. Stetson *vs.* Faxon, 19 Pick., 147. In the Proprietors of the Quincy Canal *vs.* 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 redress must be sought by a public prosecution. Where one suffers in common with all the public, although from his proximity to the obstructed 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 rule has been applied to an obstruction in the Big Schuylkill, which prevented the plaintiff's rafts from descending. Hughes *vs.* Heiser, 1 Binney, p. 463. In that State, when a private person suffers some extraordinary damage beyond other citizens, by a public nuisance, he shall have a private satisfaction by action, even if his special damage be merely consequential. Pittsburgh *vs.* Scott, 1 Barr, Penn. State Rep., p. 309. In Kentucky, it has been said that it is not enough that one be turned out of the way. Barr *vs.* Stevens, 1 Bibb's Kentucky Reports, p. 293. In Connecticut, see Bigelow *vs.* Hartford Bridge Co., 14 Conn., 565; and O'Brien *vs.* Norwich & W. R. R. Co., 17 Conn., 372; and see post., Ch. V. The doctrine is the same in regard to abatement: "The ordinary remedy for a public nuisance is itself public, that of indictment, and each individual who is only injured as one of the public, can

We shall be obliged to make a more minute examination of this subject when we come to speak particularly of the subject of Nuisances;* but we should not omit to notice here 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 of action and the rule of compensation are confounded and lost.

It is proper here to call attention to the distinction maintained between those cases of a criminal character, which can be compromised by the parties themselves, and those in which no such private interference is permitted. It was early held that a contract to withdraw a prosecution for perjury is founded on an unlawful consideration and void. If the party charged were innocent, the law was abused for the purpose of extortion; if guilty, it was eluded by a corrupt compromise, screening the criminal for a bribe.† The subject has been much considered in subsequent cases, and it seems now to be well settled that the right to compromise depends on the right to recover damages in a civil action. "The law permits a compromise of all offences, though made the subject of a criminal prosecution, for which offences the injured party might sue and recover damages in an action. It is often the only manner in which he can obtain redress. But if the offence is of a public nature only, no agreement can be valid that is founded on the consideration of stifling a prosecution for it." Therefore, although the party injured may lawfully compromise an indictment for a common assault, yet an agreement to pay the costs of a prosecution for an assault on the plaintiff, and riot, and of an action for a wrongful levy under a fi. fa., which agreement was founded partly on compromise of the prosecution, and partly on an undertaking to withdraw the execution, is altogether invalid as founded on an illegal consideration.‡

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 punish-

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no more proceed to abate than he can bring an action."—*Mayor of Colchester* vs. *Brooks*, 7 *Q. B. R.*, 339, 377.

* Post, Ch. V.

† Collins *vs.* Blantern, 2 Wils., 341, 349.

‡ Keir *vs.* Leeman, 6 Q. B. R., 308.

ment 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 minutely, 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, 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 are 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, as a general rule, 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 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

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* The Scotch law is the only one, so far as I am aware, which has endeavored 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 *vs.* Henderson, 1 Murray, p. 410, in assault and battery, the Lord Chief Commissioner Adam said, "There are first *special damages*, consisting of the surgeon's account, and the person being kept from his work. Second, the *solatium*, which is peculiarly within the province of the jury." So in Cameron *vs.* 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.

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 controversey. 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* consequent on his failure to fulfill his promise. The general policy of the law does not admit of such 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 unforeseen, and could not easily be prevented, that interest is generally considered as compensation which must content the injured."

"It has been contended," said another eminent judge, "that the true Measure of Damages, in all actions of covenant, is the loss actually sustained. But this rule is laid down too generally. In an action of covenant for non-payment of money on a bond or mortgage, no more than the principal and legal interest of the debt can be recovered, although the plaintiff may have suffered to a much greater amount by the default of payment."†

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

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* Short *vs.* Shipwith, 1 Brock. R., 108 and 114.

† Tilghman, C. J., in Bender *vs.* Fronberger, 4 Dall, pp. 436, 444.

‡ Supra, p. 5.

must be borne by the sufferer." 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 inconvenience beyond what the costs will compensate him for."*

The only considerable exception that can be said to exist to the general principle here stated, is that in regard to patents, where it has been held, in some cases in the United States, that the plaintiff may have such reasonable damages beyond his taxable costs as shall vindicate his right, and reimburse him for all the expenditures necessarily incurred in order to establish his right, provided the jury, in the exercise of a sound discretion, see fit to give them. We shall consider this exception more fully when we come to treat of the question of the allowance of counsel fees.† It grows to some extent out of the language of the Patent Act.

Thus far we have been speaking of the great class of cases where no question of fraud, malice, gross negligence, or oppression intervenes. Where 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, as we shall see hereafter more at large,‡ seems settled in England, and in the general jurisprudence of this country.

There are other considerations as to the limits or boundaries of compensation, to which we shall be obliged hereafter to call

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

† Pierson *vs.* Eagle Screw Co., 3 Story, p. 402. See Post., Chap. III.

‡ Ch. XVIII.

the reader's attention, under the head of *Recoupment*, which embraces an interesting class of cases growing out of equitable deductions to be made from demands in specified cases; to this subject, or one closely connected with it, I shall now only very generally advert.*

Suppose the case of a plaintiff who has sustained positive injury, but whose loss has been made good by charitable contribution. Suppose a man beaten, and to incur a surgeon's bill, which is paid for him by some benevolent persons, can he still recover against the assailant? Cases of this kind have been put by eminent Judges, in a manner which implied they entertained no doubt that the charitable relief would be altogether thrown out of view in determining the legal rights of the parties.† And this seems the general rule in cases of tort. So in an action for collision, it was held in England that the defendant, by whose negligence the injury was sustained, could claim no deduction for the fact that the plaintiff had already recovered a large part of his claim from the underwriters‡ So in a case of false representation, the defendant is not allowed to defeat the action, by showing that the plaintiff had obtained for the property what he had paid for it.§ But, on the other hand, when we come to consider the subject of Recoupment we shall see that in cases of contract, as a general rule, the plaintiff can only recover to the extent of his actual injury, and that if that injury has been made good in any way, such compensation goes to reduce his claim.‖

Upon the whole, in review of this branch of our subject, 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 remu neration must be less; in cases of tort it may be more.

Having thus exhibited the general principles on which the law of this matter is based, we shall proceed to examine more minutely the amount of compensation awarded in particular

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* See Post, Chap. XVII.

† Tindal, J., & Park, J., Yates *vs.* Whyte, 4 Bing. N. C., 472.

‡ Yates *vs.* Whyte, 4 Bing. N. C., p. 472.

§ Medbury *vs.* Watson, 6 Met., 246. See to same point, Stiles *vs.* White, 11 Met., p. 356.

‖ Vide Post, Ch. XVII.

cases. In doing this, very considerable difficulty 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 to enforce remedies for the interruption or diminution of its enjoyment, and of those upon contracts relating to it. The first division embraces the action of ejectment, with its subsidiary, trespass for mesne profits and dower. The second, actions for trespass to lands; including proceedings in regard to nuisances and waste. The third, real covenants and contracts to convey land.

When we approach the subject of personal property, new difficulties, which grow out of the *forms of action*, present themselves in the way of any methodical arrangement of the subject. These forms have long been firmly established in the law of England; they exist in most of the States of the Union, and the rules of pleading, evidence, and of damages, have adapted themselves to their arbitrary and illogical arrangement.*

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* Great Judges have pronounced themselves strongly in favor of maintaining the forms of action; Lord Kenyon, in Savignac *vs.* Rome, 6 T. R., pp. 219, 180; Mr. J. Wilson, in Israel *vs.* Douglas, 1 H. Bl., p. 243; Eyre, C. J., in Turner *vs.* Hawkins, B. & Pull., p. 476; Abbott, C. J., in Orton *vs.* Butler, 5 B. & A., p. 654. See also, Chitty's Pleadings, Vol. I., p. 110, in note. "Settled forms of actions," said Tindal, C. J., in Williams *vs.* Holland, 10 Bing., 118, "adapted to different grievances, contribute much to the certain administration of justice."

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 considerable change would be expedient. It is not that we are insensible 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 inconveniences which in other systems of judicature are found to flow from the want

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.

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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 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 suits have been arrested, because a count in assumpsit was inadvertently joined with one in case. See Corbett *vs.* Parkington, 6 Barn. & Cres., p. 268; and Lovett *vs.* Pell, 22 Wend., p. 369. 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 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 there 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 damage, 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, on the count for money had and received, 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. *Vide Post, Ch. XIX., Trover.*

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, 1886, c. 273, § 8, the court has power to amend the plaintiff's proceedings, by giving him leave to change his form of action.—*Wiley* vs. *Yale*, 1 *Met., p.* 558. 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,

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

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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* vs. *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 bellissime posset; Fundus Sabinus meus est; immo méus; deinde judicium: 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.

Since the above was published in the first edition of this work, its prognostications have been justified in at least two of the States of the Union. In New York, in April, 1848, an act was passed entitled, "An Act to simplify and abridge the Practice, Pleadings, and Proceedings of the Courts of this State," the preamble of which is as follows: "Whereas, it is expedient that the present forms of actions and pleadings in cases at common law should be abolished, and that the distinction between legal and equitable remedies should no longer continue, and that a uniform course of proceeding in all cases should be established." And in accordance with this preamble, the act now known as the Code of Procedure goes on, in section 69, (62 of the Code of 1851,) to enact that "the distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing are abolished, and there shall be in this State hereafter, but one form of action for the enforcement and protection of private rights, and the redress of private wrongs, which shall be denominated a civil action." But though the forms of action are abolished, the distinction between legal and equitable remedies still remains. Linden *vs.* Fritz, 3 Code Rep., 164, 5 Prac. R., 188, 191. 3 Sandford, S. C. R., 668. By § 140, all the forms of pleading heretofore existing inconsistent with the provisions of this act are abolished, and hereafter the forms of pleading in civil actions in Courts of Record, and the rules by which the sufficiency of the pleadings is to be determined are modified as prescribed by this act." And the Code then goes on to define the functions and requisites of the new pleadings, the complaint, the demurrer, the answer, and the reply. § 156 provides that every pleading in a Court of Record must be subscribed by the party or his attorney, and when any pleading is verified, (by oath,) "every subsequent pleading except a demurrer must be verified." By § 168, every material allegation of the complaint not specifically controverted by the answer as prescribed in § 149, and every material allegation of new matter in the answer not specifically controverted by the reply as prescribed in § 153, shall, for the purposes of the action be taken as true." In regard to the subject of this treatise, the Code contains the following provision; § 276, (282 of the Code of 1848,) "Whenever damages are recoverable, the plaintiff may claim and recover if he show himself entitled thereto, any rate of damages which he might have heretofore recovered for the same cause of action." Under the system of the common law, as I have already said, and as we shall have frequent occasion to see in the progress of this work, the rule or measure of damages depends not only on the *cause*, but on the *form* of action—that is to say, the same right may be set up in different forms, and the amount of recovery will be dependent on the form employed. It will be necessary for the pleader to bear this in mind in setting out the relief he seeks under the new system.

In Massachusetts, too, an act passed on the 23d May, 1851; Sess. Laws of 1851, C.

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 against common carriers, by surety

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233; entitled, "An Act to amend some of the Proceedings, Practice and Rules of Evidence of the Courts of this commonwealth," has wrought very material changes in the procedure of that State. Among the most prominent sections of the act are the following:—§ 1. "There shall be only three divisions of *personal* actions. First, *Actions of Contract*, which shall include those now known as actions of Assumpsit, Covenant and Debt, except for penalties. Second, *Actions of Tort*, which shall include those now known as actions of Trespass, trespass on the case, trover, and all actions for penalties. Third, *Actions of Replevin*." § 2. declares, among other things, that no averment shall be made which the law does not require to be proved, and that only the substantive facts necessary to constitute the cause of action, shall be stated without unnecessary verbiage and with substantial certainty; one count and no more to be inserted for each cause of action, but any number of breaches may be assigned in each count, and abolishes the action of trover. § 6. "None of the provisions herein contained shall be deemed to change any of the rules of evidence or the measure of damages." § 20. "The general issue, as heretofore used in all actions except real and mixed actions is abolished, and in place thereof the defendant shall file an answer to the declaration." § 22. The answer shall deny, in clear and positive terms, every substantive fact intended to be denied in each count of the declaration separately, "or shall declare the defendant's ignorance of the fact, so that he can neither admit nor deny, but leaves the plaintiff to prove the same." § 28. Provides a replication to the answer. § 86. Any substantive fact alleged with substantial precision and certainty, and not denied in clear and precise terms, shall be deemed to be admitted, but no party shall be required or permitted to state evidence. §§ 98, 99, 100, 101 and 102, provide for interrogatories to be administered by either plaintiff or defendant to the opposite party to be answered under oath. There are other provisions in regard to real and mixed actions, and a schedule of forms for declarations and answers is attached to the act.

Thus in two considerable States of the Union the common law forms of pleading may be said to be done away; while, at the same time, the rights of parties remain substantially as they are established and declared by that body of jurisprudence. Equitable relief is still to be given on the settled principles of equity law; and, therefore, we are still obliged to keep in mind and to understand the fundamental division between common law and equity.

Nor do any forms of action, nor the distinction between law and equity exist in Louisiana or Texas. In the latter State, in Robbins's Adm'r *vs.* Walters, 2 Texas R., 130, the court says, "The common law forms have never been observed in our courts, and with us suits are brought by petition and answer; we recognize no distinction between law and equity, and have no such actions as trover and detinue."—*S. P. Carter, et al.* vs. *Wallace*, 2 *Texas R.*, 206.

against principal, those growing out of the contract of agency, and generally all agreements 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, and other sealed instruments.

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 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 persons and personal property, case, trover, replevin, and detinue, being included under this head. In this branch of the subject are embraced the actions of replevin, suits against sheriffs and public officers for breach of duty, and in general all those cases 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 coördinate 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, practice and evidence 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 those which deny relief for injury remotely resulting from the principal illegal act. 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 where both plaintiff and defendant are in fault—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, replevin, and detinue.*

The divisions of our system in this respect are arbitrary; for, as we have already had occasion to notice,† there are many actions nominally in tort, which, in respect to the measure of relief, are treated as virtually actions *ex contractu;* and in these cases a fixed rule 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.‡ So, there are many cases of tort where no question of fraud, malice, or oppression intervenes; and in those cases the measure

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* The old action of detinue is of comparatively 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.*—De Jur. Bell. et Pac., Lib. II., Cap. 17; vide, also, supra, 21.

† Supra, 335 and 355.

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

of compensation is matter of law. So the Supreme Court of New Jersey says, in an action of *trespass quare clausum fregit*, "In actions of trespass, where the plaintiff complains of no injury to his person or feelings; where no malice is shown; where no right is involved beyond a mere question of property; where there is a clear standard for the measure of damages, and no difficulty in applying it,—the measure of damages is a question of law, and is necessarily under the control of the court.* And so again in North Carolina, in an action of trespass for destroying a building by fire, the jury at nisi prius were directed that the measure of damage was not the value of the building, but the amount it would have taken to rebuild it if destroyed. But this, on review, was held wrong; and the court said, "the proper measure in actions of this kind is the real value of the property destroyed, unless the trespass is committed wantonly or maliciously, when the jury may, if they think proper, give vindictive damages. But whether they should have been given or not was a question which ought to have been submitted with proper instructions to the jury."† But, on the other hand, where circumstances of aggravation are made apparent, where the motive of the plaintiff is grossly fraudulent, malicious, or oppressive, the amount of relief is left largely 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 stated the rule to be, that where gross fraud, malice, or oppression appears, the jury are not bound to adhere to the strict line of compensation, but may, by a severer verdict, at once impose a punishment on the defendant and hold up an example to the community. I proceed now to a review of the cases in which this salutary doctrine has been maintained.

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* Berry *vs.* Vreeland, 1 Zabriskie's N. J. R., 183.

† Wylie *vs.* Smitherman, 8 Iredell, 236.

‡ Supra, 38. In addition to the cases cited in the text, others will be found bearing on the subject. Leland *vs.* Stone, 10 Mass., 459; Weld *vs.* Bartlett, 10 Mass., 470, 473; Stone *vs.* Codman, 15 Pick., 297; Larned *vs.* Buffington, 3 Mass., 546; Richards *vs.* Farnham, 13 Pick., 451. And 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*, 209.

That the intent of the defendant is material in regard to damages, has always been recognized in our law: "damages are graduated by the intent of the party committing the wrong."* Indeed, the rule is, that if the rights of another party are invaded, although without evil design, and even if the act be purely accidental, the trespass must be answered for in damages. The question of intention is only urged in mitigation or aggravation of damages. Thus in an early decision, a case of trespass *quare clausum fregit* is cited, where the defendant pleaded "he had an acre lying next the six acres (*locus in quo*), and on it a hedge of thorns: he cut the thorns, and they, *ipso invito*, fell upon the plaintiff's land; and the defendant took them off as soon as he could, which is the same trespass; and the plaintiff demurred, and it was adjudged for the plaintiff; for though a man do a lawful thing, yet if any damage do hereby befall another, he shall answer for it if he could have avoided it. As, if a man fell a tree, and the boughs fall on another, *ipso invito*, yet the action lies. If a man shoot at butts and hurt another unawares, an action lies. I have land through which a river runs to turn your mill, and I top the sallows growing on the river-side, which accidentally stop the water so as your mill is hindered, an action lies. If I am building my own house, and a piece of timber fall on my neighbor's house and breaks part of it, an action lies."† So in a recent case in the Common Pleas, when in an affray the plaintiff was struck by accident, Bosanquet, J., said to the jury, "The plaintiff is entitled to your verdict whether it was done intentionally or not. But the intention is material in considering the amount of damages."‡ So, also, in New York, in an action against a company for blasting negligently done by their agents.§ The principle that in trespass the intent is not conclusive, is carried so far that a lunatic is held liable for his tortious acts, as an insane justice in an action for false imprisonment.‖ On principle this should never have been permitted. In the case of the *compos mentis*, although

* Krom *vs.* Schoonmaker, 3 Barb. S. C. R., 651.

† Lambert *vs.* Bessie, Sir T. Raym, 421.

‡ James *vs.* Campbell, 5 Car. & Payne, 372.

§ Hay *vs.* Cohoes Co., 3 Barb. S. C. R., 42.

‖ Krom *vs.* Schoonmaker, 3 Barb. S. C. R., 647. Morse *vs.* Crawford, 17 Vern., 499. Bush *vs.* Pettibone, 4 Comstock, 300.

the intent be not decisive, still, the act punished is that of a party competent to foresee and guard against the consequences of his conduct; and inevitable accident has always been held an excuse. In the case of the lunatic it may be urged, both that no good policy requires the interposition of the law, and that the act belongs to the class of cases which may well be termed inevitable accidents.

It might be said, however, that the malicious or insolent intention does in fact increase the injury, and the doctrine of exemplary damages might thus be reconciled with the strict notion of compensation; but it will appear from the cases we now proceed to examine, that the idea of compensation is abandoned and that of punishment introduced. So in an action of trespass, assault, and imprisonment, the act complained of being an arrest of the plaintiff as printer of the North Briton, 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 Pratt, afterwards Lord 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 general'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 inconsiderableness 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, exercising arbitrary power, violating *Magna Charta*, and attempting 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 warrant 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.†

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* Huckle *vs.* Money, 2 Wils., 205.

† Beardmore *vs.* Carrington, 2 Wils., 244, was an action also growing out of these general warrants, where a verdict was found for the plaintiff in £1,000. As he had been

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."*

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 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 dueling, if juries are permitted to punish insult by exemplary damages."†

In a case in the King's Bench, which was trespass for break-

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imprisoned but six days, a motion was made for a new trial, on the ground of the excessiveness of the damages. But it was refused. Lord Campbell, in his Lives of the Chancellors, Vol. 5, 249, reports Lord Chief Justice Pratt to have said, "As to the damages, I continue of opinion that the jury are not limited to the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, and as a proof of the detestation in which the wrongful act is held by the jury." But I cannot find this language in the case as reported by Wilson.

* Tullidge *vs.* Wade, 3 Wils., 18.

† Merest *vs.* Harvey, 5 Taunt., 442.

ing the plaintiff's close, and laying poison upon it to destroy the plaintiff's poultry, the defendant contended that he was only liable for the value of the fowls destroyed; but Abbott, J., told the jury that they might consider not only the mere pecuniary damage, but also the intention, whether for insult or injury; and the verdict was £50.*

So, in a recent case,† the Court of Exchequer said: "In actions for malicious injuries, juries have been allowed to give what are called vindictive damages, and to take all the circumstances into consideration."

So in the Exchequer Chamber, Lord Denman recently said that the actions of trespass to real and personal property were an extension of that protection which the law throws around the person, and that substantial damages may be recovered in respect of such rights though no loss or diminution in value of property may have occurred.‡

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 on the Pennsylvania circuit, "I admit," said Washington, J.,§ "that in cases where merely vindictive damages are sued for, the jury act without control on the subject of damages; because 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 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 defamation, as well as in other actions for tort, can rarely be computed, and are never the sole

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* Sears *vs.* Lyons, 2 Stark., 282.

† Doe *vs.* Filliter, 13 Mees. & Wels., 47.

‡ Rogers *vs.* Spence, 13 M. & Wels., 571. See, also, Williams *vs.* Cruise, 1 Man. Gr. & Sc., 841.

§ Walker *vs.* Smith, 1 Wash. C. C. R., 152.

rule of assessment." And after reviewing the English cases, the court proceeded: "but it cannot be requisite to multiply instances in which the doctrine contained in this part of the charge has received the sanction of English and American courts of justice. It is too well settled 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 imprisonment, and a variety of others, it is always given in charge to the jury, that they are to inflict damages for example's sake, and by way of punishing the defendant."

So again, in another case,† where trespass was brought for beating a horse to death, the judge charged, that if they found for the plaintiff, 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 excessive 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 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 on 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, again, the same learned Judge, on the Maine Circuit, in an action for malicious prosecution used this language: "If in the present case there was on the part of the defendant a want of probable cause; yet if he acted under a mistaken sense

* Tillotson *vs.* Cheetham, 3 J. R., 56 and 64.

† Woert *vs.* Jenkins, 14 J. R., 352.

‡ Boston Manuf. Co. *vs.* Fiske, 2 Mason, R., 120.

of duty and without any intention of oppression, it was at most a case for *compensatory* and not for *vindictive* damages."*

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 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 *vindictive 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

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* Wiggin *vs.* Coffin, 3 Story, 1.

† Whipple *vs.* Walpole, 10 N. H. R., 130.

‡ Linsley *vs.* Bushnell, 15 Conn., 225; and Huntley *vs.* Bacon, 15 Conn., 267.

§ Pastorius *vs.* Fisher, 1 Rawle, 27; but it is to be noticed that the remark is obiter.

‖ Tracy *vs.* Swartwout, 10 Peters, 81.

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 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 unoffending neutrals, for all the injuries and losses actually sustained by them. And if this were a suit against the original wrongdoer, 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 libelants, but they are not bound to the extent of vindictive damages."*

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."†

So in Pennsylvania—"that with a view to promote the peace and quiet of society, and to protect every one in the full enjoyment of his rights, the jury are at liberty to give vindictive or exemplary damages."‡

In Alabama it has been recently said, in reference to the action for malicious prosecution, that "the common law in such cases allows the jury, if they choose, to make an example of the defendant when sued for redress, and will allow them to go beyond the actual damage the party has sustained."§

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 general rule has been repeatedly de-

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* Story, J., in the Amiable Nancy, 3 Wheaton, 546.

† Merrills *vs.* Tariff Man'g Co., 10 Conn., 384.

‡ Phillips *vs.* Lawrence, 6 Watts & Serg., 150.

§ Donnell *vs.* Jones, 13 Ala. N. S., 490, 502.

‖ Nelson *vs.* Morgan, 2 Martin L. R., 257.

clared. So, in an action for libel, it was said by the Chancellor in the Court of Errors, "The jury may not only give such damages as they think necessary to compensate the plaintiff for his actual injury, but they may also give damages by way of punishment to the defendants. This is usually denominated exemplary damages, or smart money."*

The subject has been again recently examined in the same State, and the general principle very clearly stated. It was an action for assault and battery, where it was insisted that the fact that the defendant had been punished criminally for the offense 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 damages when the injury is attended with circumstances of aggravation, and the rule is laid down without the qualification that we are to regard either the probable or the actual punishment 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 damages, and at the same time answers the purposes of punishment."†

In a still more recent case, in the Court of Errors of the same State, Mr. Senator Strong said, "In aggravated cases of this nature are not jurors daily charged, to give such damages as shall not only remunerate the plaintiff, but operate as a punishment to the defendant—as shall deter him and others in like case offending, from the perpetration of similar enormities?"‡

A very full discussion has been recently had of the subject

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* King *vs.* Root, 4 Wend., 113, 139.

† Cook *vs.* Ellis, 6 Hill, 465. See, also, Tifft *vs.* Culver, 3 Hill, 180. Auchmuty *vs.* Ham, 1 Denio, 495, and Brizsee *vs.* 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 received 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 *vs.* Bell, 3 Car. & Payne, 316.

‡ Burr *vs.* Burr, 7 Hill, 207, 217; and see the rule very strongly laid down in cases of slander of title, in Kendall *vs.* Stone, 2 Sandf. S. C., 269.

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 offenses 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 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 that the wrongdoer 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 suf-

fering, 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.*"*

But in an amicable action it is error to tell the jury they were not confined to the actual damage.† So in New York, in actions for the loss of service (not being for seduction), the father cannot recover more than actual damages, as the child may maintain his own suit.‡

In an exceedingly well reasoned case on the Pennsylvania Circuit, Mr. Justice Grier said—

"It is a well settled doctrine of the common law, though somewhat disputed of late, that a jury, in actions of trespass or tort, may inflict exemplary or vindictive damages upon a defendant, having in view the enormity of the defendant's conduct rather than compensation to the plaintiff. Indeed, in many actions, such as slander, libel, seduction, &c., there is no measure of damages by which they can be given as compensation for an injury, but are inflicted wholly with a view to punish and make an example of the defendant."§

So, also, it has been said in Illinois, "In vindictive actions the jury are always permitted to give damages, for the double purpose of setting an example and punishing the wrongdoer."‖ So, again, in an action of trespass for assault and battery, it was said, "In this class of cases the jury may give exemplary damages, not only to compensate the plaintiff, but to punish the defendant."¶ And in Texas the principle has been very recently recognized.**

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* McBride *vs.* McLaughlin, 5 Watts' R., 375. In Kentucky, see Morrison's Ex'r *vs.* Hart, 2 Bibb, 4, and Smith *vs.* Lush, 4 Bibb, 502. On the Massachusetts circuit, see Whittemore *vs.* Cutter, 1 Gall., 478, 482. In Conard *vs.* Pacific Ins. Co., 6 Peters, 262, 282, see a very strong charge at the circuit. Where, however, two persons are jointly sued for an assault or other trespass, only one of whom has acted from improper motives, the damages ought not to be assessed with reference to the act and motives of the most guilty or the most innocent party, but the true criterion of damage is the whole injury which the plaintiff has sustained from the joint act of trespass. Clark *vs.* Newsam, 1 Exch. R., 131.

† Amer *vs.* Longstreth, 10 Barr, 145.

‡ Whitney *vs.* Hitchcock, 4 Denio, 463.

§ Stimpson *vs.* The Railroads, Wallace, Jr., R., 164.

‖ Grube *vs.* Margrave, 3 Scammon, 378. See, also, Johnson *vs.* Weedman, 4 Scammon, 495.

¶ McNamara *vs.* King, 2 Gilman, 432, 436.

** Smith *vs.* Sherwood, 2 Texas R., 460.

So, also, recently in the State of Alabama, in an action of trespass *quare clausum fregit.** In a case of deceit, in South Carolina, the court said that the jury were at liberty to compensate the plaintiff, and punish a palpable fraud.† And in another case in the same State, where a trespass having been committed, the actual damage was very trifling, not exceeding, as was admitted, twenty dollars, and the jury gave three thousand dollars; the court said that if it had rested with them, they should not have given more than five hundred, but they refused to disturb the verdict.‡

In North Carolina the principle of vindictive damages has been distinctly declared, but has been held not to apply to suits against the representatives of a deceased party who had committed the act complained of.§

In many cases of 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.¶

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* Mitchell *vs.* Billingsley, 17 Ala., 391, Jan'y, 1850. Ivey *vs.* McQueen, 17 Ala., 408.

† Spikes *vs.* English, 4 Strobhart, 34.

‡ Johnson *vs.* Hannahan, 3 Strobhart, 425.

§ Rippey *vs.* Miller, 11 Iredell, 247.

‖ Starkie on Slander, Prel. Dis., 26.

¶ I am not aware that the Roman law knew any thing of exemplary or vindictive verdicts, but perhaps the heaviest claim for damages on record is that urged by Cicero against Verres, for his abuse of power in Sicily. He first rates it at *millies*, £800,000, (*Div. in Cæcil*, c. 5); then at *quadringenties*, £320,000, (1 *Act. in Verr.*, c. 18); and was finally content with *tricies*, (£24,000). "After a triennial indulgence of lust, rapine, and cruelty," says the "luminous" historian, "Verres, the tyrant of Sicily, could only be sued for the pecuniary restitution of three hundred thousand pounds sterling. And such was the temper of the laws, the judges, and perhaps the accuser himself, that on refunding the thirteenth part of his plunder, Verres could retire to an easy and luxurious exile." Gibbon is not to be forgiven for perpetuating this gossiping slander of Plutarch against the integrity of Cicero. Gibbon, Hist., Ch. 44.

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, conscientious, and fair compromise of your different opinions, and bring you to fix on one sum;" and the reporter adds, "in all cases of this sort his lordship has been in the habit of repeating this doctrine." Hyslop *vs.* Staig, 1 Murr. R., 15.

Again, in an action for defamation, the Lord Chief Commissioner said: "The

The necessary result of this rule is, that all the attendant circumstances of aggravation which go to characterize the

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question of damages, in case of an attack on a professional 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 *vs.* Lord Kennedy, 1 Murr. R., 428.

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

In Baillie *vs.* Bryson, 1 Murr. R., 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 questions 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 *vs.* Poor, 21 Pick. R., 378, an action on the case was brought for setting 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., 387 and 318, 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 difficult to show that the theory of compensation is not the theory of our law.

Mr. Greenleaf says, Vol. II., 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 *vs.* Brice, 2 W. Black., 942. Benson *vs.* Frederick, 3 Burr., 184. Duberley *vs.* Gunning, 4 T. R., 651. Sargent *vs.* Deniston, 5 Cow. R., 106. Graham on New Trials, 410, et seq. Buller's N. P., 327.

In Thurston *vs.* Martin, 5 Mason, 497, on the Rhode Island circuit, where a motion was made for a new trial on the ground of excessive damages, Story, J., said: "The damages are certainly higher than what, had I sitten on the jury, I should have

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 fixed and uniform rule of damages can be declared, 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 of mitigation, and to a definition of the line between direct and consequential damage.

We have already† had occasion to advert to the principle, that the party seeking legal redress must not only show his adver-

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been disposed to give, and I should now be better satisfied if the amount had been less;" but on the ground that "nothing appeared inconsistent with an honest exercise of judgment," the motion was denied. See, also, Wiggin *vs.* Coffin, 3 Story Rep., 1; and Fisher *vs.* Patterson, 14 Ohio, 418.

Again, Mr. Greenleaf admits, 224, "That where an evil intent has manifested itself in *acts and circumstances* accompanying the principal transaction, they constitute part of the injury;" and, 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, seem to me practically incompatible and inconsistent propositions.

Nor, I confess, do I understand the wisdom 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. In the Appendix to this volume will be found two articles discussing this question, which the interest and importance of the subject induce me to place there.

Mr. Chancellor Kent, in his Commentaries, Part 4, Sec. XXIV., Vol. I., 618, 7th edit., 1851, thus reviews and decides this controversy: "In the Law Reporter, April, 1847, there is an elaborate review of the cases in matters of tort, on the subject of exemplary damages, endeavoring to show that the decisions do not, on a strict examination and construction of the language of them, amount to authorities for going beyond compensatory damages. On this subject it appears to me that the conclusions in Mr. Sedgwick's Treatise are well warranted by the decisions, and that the attempt to exclude all consideration of the malice and wickedness, and wantonness of the tort in estimating a proper compensation to the victim, is impracticable, visionary, and repugnant to fine feelings of social sympathy."

I take pleasure in recording the approbation of an eminent man, whom it is a happiness to have known; whose life was one of uninterrupted and useful activity; and whose old age presented one of those beautiful pictures that we are sometimes permitted to behold—as satisfied in its retrospect as the imperfections of humanity allow; as hopeful of the future as an unwavering confidence in a higher power, and a consciousness of faculties neither wasted nor abused, may warrant.

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

† Supra, 93, 143.

sary to be in the wrong, but must also be prepared to prove that no negligence of his own has tended to increase or consummate the injury. "A party in an action on the case for negligence, cannot recover damages which have resulted from his own negligence and want of care. He must show himself in the right and the defendant in the wrong, that he has performed his duties, and that the defendant has neglected his, and that the damages are the legitimate consequence of the negligence of the defendant.*

So in Massachusetts, an action for an injury received from a collision of carriages passing on a public road, cannot be maintained by a plaintiff who, at the time of the collision, was guilty of negligence, although the other party was also negligent, and even though he was on the wrong side of the road.† "It is a well settled principle," said the court, "that to entitle the plaintiff to recover, he must show the injury to have been attributable to the imprudence of the defendant, and under such circumstances as to exonerate himself from all neglect of duty on his part."‡ So in the same State, in an action against towns for neglecting to keep the roads in repair, the plaintiff does not entitle himself to a verdict by establishing the fact of a defective highway and damage resulting therefrom, unless he also show that he was using ordinary care and diligence in traveling upon the road.§ But it is not necessary in the declaration to aver the exercise of ordinary care;‖ it is sufficient if the fact so appear, and this burden of proof he assumes.¶ So in Massachusetts, if the accident happen on a Sunday, when traveling

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* Persons *vs.* Parker, 3 Barb. S. C. R., 249. Carlisle *vs.* Holton, 3 La. Ann. R., 48. Moshier *vs.* U. & S. R. R. Co., 8 Barb. S. C. R., 427. Murphy *vs.* Diamond, 3 La. Ann. R., 441. Rathbun *vs.* Payne, 19 Wend., 398. Spencer *vs.* Utica & Sch'y R. R. Co., 6 Barbour S. C. R., 337. Pluckwell *vs.* Wilson, 5 Car. & Payne, 379. Williams *vs.* Holland, 6 Car. & Payne, 23. Hawkins *vs.* Cooper, 8 C. & P., 473. Brand *vs.* Troy & S. R. Co., 8 Barb. S. C. R., 368.

† Parker *vs.* Adams, 12 Met., 415.

‡ See, also, Halderman *vs.* Beckwith, 4 McLean, 286; and Lane *vs.* Crombie, 12 Pick., 177. Also, Moore *vs.* The Mayor of Shreveport, 3 La. Ann. R., 645. See, also, in Maine, Kennard *vs.* Burton, 12 Shipley, 39; and in Vermont, Rice *vs.* Montpelier, 19 Verm., 471.

§ Thompson *vs.* Inhab. of Bridgewater, 7 Pick., 188. Adams *vs.* Inhabitants of Carlisle, 21 Pick., 146.

‖ May *vs.* Inhab. of Princeton, 11 Met., 442.

¶ Tourtellot *vs.* Rosebrook, 11 Met., 460. Adams *vs.* Inhab. of Carlisle, 21 Pick., 146.

is forbidden except for necessity or charity, the plaintiff is bound to show that the traveling was of that character.* And in England, the rule has been carried so far, that one who sustains an injury from a carriage or vessel, cannot maintain an action against the owners of such carriage or vessel if negligence either on his own part or on the part of those having the guidance of the carriage or vessel in which he is a passenger, conduced to the accident, and if such injury might have been avoided by the exercise of reasonable care either on his or their part.†

This general principle applies to all cases where injuries to person or property arising from negligence form the subject of inquiry. Of these, cases of collision between carriages, and vessels, form a considerable class. And in these as in other cases, where negligence or infringement of the rights of others is complained of, the general rule appears to be that at law the plaintiff, in order to recover, must be able to show that he has not in any way contributed to the accident; on the other hand, although he may have been in the wrong, still, if his error did not aggravate the difficulty, his right to relief will be unprejudiced. But the mere fact of the conduct of the plaintiff not being strictly regular, is immaterial; the inquiry is whether his irregularity has augmented the mischief; if so, as the law is inadequate to apportion the wrong, there can be no recovery.

So in another 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 contributed to the injury by their improper or negligent conduct, the defendant would be entitled to a verdict; but if the injury was occasioned by the improper or negligent conduct of the defendant's servants, and the plaintiff's servants did not substantially contribute to produce it, then the plaintiff would be entitled to the verdict."‡

So said the English Exchequer in a recent case: "There may have been negligence in both parties, and yet the plaintiff

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* Bosworth *vs.* Inhab. of Swansey, 10 Met., 363.

† Thorogood *vs.* Bryan, 8 Man. Gr. & Scott, 114, and Catlin *vs.* Hills, ib., 123. I confess this seems to me an indiscreet extension of the rule, as when both the carriers are in fault, all redress is practically denied.

‡ Sills *vs.* Brown, 9 Car. & Payne, 601.

may be entitled to recover. The rule is, that although there may have been negligence on the part of the plaintiff, yet unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover; if by ordinary care he might have avoided them, he is the author of his own wrong.*

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 himself from an injury which he has committed, because the party injured was in the wrong, unless such wrong contributed to produce the injury."‡

Whether this doctrine, in its broad extent, is applicable to infants of tender years, may be considered uncertain. In England it has been held, in a suit brought by the guardian of an infant injured by the defendant's negligence, that though the carelessness of the child was a coöperating cause of his misfortune, still he could recover, as his misconduct bore no proportion to that of the defendant.§ But in New York, in a very similar case, it was said that infants could not be exempted from legal rules when suing for redress, and the right to recover was denied.‖ In Connecticut and Vermont, however, the case of Lynch *vs.* Nurdin has been cited with approbation; and in the former State it has been said, "what would be but ordinary neglect in regard to one whom the defendant supposed a person of full age and capacity, would be gross neglect as to a child, or one known to be incapable of escaping danger."¶

Another modification or qualification of the general rule, that the concurrence of the plaintiff's negligence with that of the defendant, will defeat the claim for redress has been laid down in New York; and it has been said that "where one in the lawful use of his property put it in an exposed or hazardous position, and in more than ordinary danger from the lawful acts of others, as for instance, if he build near a railroad, still he

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* Bridge *vs.* Grand J. R. Co., 3 Mees. & Wels., 244. S. P., cited in Davies *vs.* Mann, 10 Mees. & W., 546. Marriott *vs.* Stanley, 1 Man. & Gr., 568.

† New Haven Steamboat & T. Co. *vs.* Vanderbilt, 16 Conn., 420. See, also, Beers *vs.* Housatonic R. R. Co., 19 Conn., 566, S. P.

‡ See, also, Raisin *vs.* Mitchell, 9 Car. & Payne, 613.

§ Lynch *vs.* Nurdin, 1 Q. B., 29.

‖ Hartfield *vs.* Roper, 21 Wend., 615.

¶ Robinson *vs.* Cone, 22 Verm., 213. Birge *vs.* Gardiner, 19 Conn., 507.

does not lose his remedy for an injury caused by the culpable negligence of others."* And the same principle has been recently declared in England, where it has been said that the defendant is not excused merely because the plaintiff knew that some danger existed, and voluntarily incurred such danger, provided the defendant's negligence was the cause of the damage, the whole matter being for the consideration of the jury.†

So, also, it has been said in New York, that the plaintiff's negligence does not excuse injuries inflicted by design. "A wrongdoer is not necessarily an outlaw, but may justly complain of wanton and malicious mischief."‡

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,§ as well as the fundamental principles of the feudal system. By that system, the commission of a felony worked a forfeiture of the feudatory's grant and the forfeiture extending to the whole property of the felon, and the crime being capital and punished by death, nothing remained to satisfy a private demand, and no person against whom the action could be brought. But it seems that such is not the law in this country.‖

The subject of remote and consequential damages in cases of tort, we have already considered elsewhere.¶ And we have also had occasion to call attention to cases bearing on this point, in which it has been held, that the fact of the plaintiff being indemnified by charity or otherwise, cannot be set up by a wrongdoer in diminution of the amount which he is liable to pay.**

In closing this branch of our subject, it ought to be observed, that while, where circumstances of aggravation are

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* Cook *vs.* Champlain Transport'n Co., 1 Denio, 91.

† Clayard *vs.* Dethick et al., 12 Q. B., 437.

‡ Tonawanda R. R. Co. *vs.* Munger, 5 Denio, 255.

§ Crosby *vs.* Leng, 12 East, 409.

‖ Boardman *vs.* Gore, 15 Mass., 336. Ocean Co. *vs.* Fields, 2 Story, 59. Plummer *vs.* Webb, Ware Rep., 78.

¶ Supra, 57, et seq. See, too, on this subject, Molinæus, *De eo quod Int.*, § 177.

** Vide ante, 39.

proved, the jury are the necessary as well as the rightful judges of the amount of relief, on the other hand, where no such facts are 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 violation 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.

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* Vide post, Ch. XXII.

In an action on the case for fraud in the sale of personal property, it is said to be the well settled doctrine in Kentucky, that vindictive damages cannot be given. Singleton's Adm'r *vs.* Kennedy & Co., 9 Ben Monroe, 222. And the court considered that they could not be given in like cases in Louisiana. But they may be given in Kentucky, where a trespass is committed willfully and in a high handed manner. Jennings *vs.* Maddox, 8 B. Monroe, 430.

The precise demarkation of the cases in which exemplary or vindictive damages are allowed, has not yet been made in any distinct manner. In all actions of tort accompanied by violence, malice, or oppression, they are undoubtedly recoverable; but how far in cases of tort, mere fraud will found a claim for them is not yet determined. In many cases of fraud the courts have declared a fixed and uniform rule, which, of course, excludes all idea of vindictive or exemplary damages. But there are many other cases where fraud, though unattended by violence, is accompanied by gross malice and manifest design to injure; and in these it would seem that they should be allowed.

CHAPTER XXVI.

POWER OF THE COURT OVER THE SUBJECT OF DAMAGES.

Respective powers of court and jury over the subject of damages—General division of their functions—The Roman system in this respect—Curious analogies between it and the English system—General rule with us is that the court decides questions of law, and the jury questions of fact—Exceptions—Verdicts against the weight of testimony—Setting aside verdicts on account of excessiveness of damages—Power of the court exercised with hesitation and reluctance—Measure of damages a question of law.

We have thus stated the general principles which control the subject of compensation, when redress is governed by strict rules of law; and when the matter is said to be left to the discretion of the jury.

An important branch of the subject, however, still remains. As the final decision of every case involving an issue of fact, is pronounced by the jury in giving their verdict, and as that verdict also expresses the amount of compensation which the party in fault is to make, it is plain that unless the court retain to itself some control over the action of the jury, their power over the subject of remuneration would be practically unlimited. We have, then, yet to see what remedy is provided if the jury disregard the rules laid down for their government; and this necessarily brings us to a consideration of the relative powers of the judge and the juror.

One of the most marked peculiarities of the Anglo American system of jurisprudence, perhaps its most striking feature, is that division of power by which the decision of questions of law is given to the court, and that of questions of fact to the jury. It is an error to suppose that this division is altogether peculiar to our system, or that it is exclusively of English origin. The recent labors of the German scholars, assisted by the dis-

covery of Gaius in 1816, have disclosed the true nature of the procedure by the *formula* in the republican period of the Roman jurisprudence; and the analogies that it furnishes on the present branch of our subject, are too striking to be overlooked.

The despotism of Augustus and his successors introduced changes into the administration of justice analogous to those which it wrought in the general frame-work of the imperial government. Its peculiar characteristics were centralization and despotism; it established in all branches of the system a gradation of ranks, deriving their existence from and dependent upon the will of the emperor alone, and it destroyed every vestige of popular action. The first and most important of these changes in the machinery of the law, was, by abolishing the *judices* or jurors, to make the judges absolute masters of the whole cause, subject only to the right of appeal, which, in all cases I think, might carry the suitor before the Cæsar himself; and this led directly to the adoption of written and secret instead of oral and public discussion. Thus was produced the system which in its general outline, ruled continental Europe almost exclusively till the adoption of the Code Napoleon.

But the plan on which justice was administered at Rome in the time of Cicero, perhaps the most truly great period of its development, was very different. The Romans during their republican epoch were too jealous of power to give to the judiciary an uncontrolled authority over questions both of law and fact. The judicial functions were divided as with us, by an analogous, and in some cases by an identical line. The suit was instituted before a magistrate, usually the Prætor, and the proceedings before him were termed *in jure*. Here the cause of action was stated, the defense set up, and the issue whether of law or of fact formed. In other words, the pleadings were put in. To this issue was then joined the instructions proper for its trial, and the issue and instructions together were termed the *formula*. A *judex* or referee was then appointed. This were called *datio judicis*. The cause was then turned over to him, and he decided the question submitted to him according to the instructions contained in the *formula*. The proceedings before him were termed *in judicio*.

The *formula* succeeded the old *legis actiones*, which by

their technical severity had become odious. These forms were abolished and the *formula* introduced by the *Lex Æbutia;* the precise date of which is uncertain, but the better opinion would seem to be that it was passed early in the seventh century of the city, or not long before the period of Cicero.*

The *formulæ* were of two kinds according as they turned on questions of law or questions of fact, *formulæ in jus conceptæ*, and *formulæ in factum conceptæ.* A single instance of the latter kind, will sufficiently exhibit their character. *Judex esto; si paret A. Agerium apud N. Negidium mensam argenteam deposuisse, eamque dolo malo N. Negidii A. Agerio redditam non esse, quanti ea res erit tantum pecuniam judex N. Negidium A. Agerio condemnato; si non paret, absolve.* Which may be thus rendered: Let this cause be referred to —— If it shall appear that A. Agerius deposited a silver table with N. Negidius, and that through the fraud of the latter, it has not been returned to the owner, let the judge condemn N. Negidius to pay to A. Agerius its value. If it shall not so appear, let him decide for the defendant. This is precisely such a charge as might be given to a jury any day in an English or American court.

There is a passage in Cicero, where, while denouncing the perversion of the administration of justice under Verres in Sicily, he gives a very striking picture of the uses and abuses of this division of the judicial functions.† "No one," he exclaims, "can hold or recover his house, his estate, his paternal property, if, when they are sued for, a dishonest prætor from whom there is no appeal, appoints any one whom he pleases judge; or if a profligate and worthless judge decides what the prætor orders; or if, again, the prætor so frame the order (*formula*) that not even the wisest and best judge can decide otherwise. If, for instance, he appoint L. Octavius (an unexceptionable man) judex, with the formula, *if it shall appear that the property in controversy belongs to P. Servilius, order him to deliver it to Catulus*,—is not Octavius forced to compel Servilius to deliver the property to Catulus, although it do not belong to him?" This is precisely what might occur under our procedure,

* Gaius by Heff., cap. VII., 23.

† In Verr. II., L. 2, § 12.

if the judge were corrupt; and, without any corruption, it is precisely the error which the system of exceptions to the charge is intended to correct.

The formula thus took the place of our charge to the jury. As that charge does, it stated hypothetically the verdict or judgment to be rendered, and gave the instructions according to which the issue should be decided. The only material difference is, that it was in some cases given before the witnesses were heard. The state of facts was therefore assumed to appear correctly in the allegations of the parties; and the instructions of law arising on these facts were given before the testimony was taken. This may now appear awkward and inconvenient, but does not in principle differ from our own mode.

This system was, as has been already said, effaced by the despotism of the empire. The independence of such a judiciary was, of course, hostile to that centralization which was the essence of the imperial organization; the *judices* were abolished, and the decision of the entire cause given to the court alone. This resulted in the abolition of all oral discussion; and such was the system in force at the time when the Institutes of Justinian condensed and embodied the Roman law. Such, too, was the system which was adopted when civilization resumed its progress in continental Europe, and so it remained till the French reforms introduced the jury in certain cases.

In the meantime, however, in that island and among that great people from whom we derive our origin, a system analogous to the Roman system in its best days had grown up; a system of unknown origin, whether a relic of Roman or a child of German liberty it is perhaps impossible now to say, but marked by very peculiar and distinct features, and claiming as its chief merits two great principles, oral and public discussion, and a division of the judicial functions between the court and the jury. It is of this latter system and its changes that I now propose to speak.*

It is very plain from the early records of our jurisprudence,

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* Nor is the division of power between the magistrate and the *judex* the only important analogy between the Roman and the English systems of jurisprudence. Two different and distinct bodies of law, as distinct and different as common law and equity with us, existed in the early days of the Roman system. "La civilization Romaine," says Troplong, "s'est developpée sous l'influence de deux elemens qu' on pourrait en

imperfect as they are, that the relative powers of the court and the jury were at first very loosely defined, and that many important changes and modifications have been from time to time introduced. So, originally, the jurors were the witnesses themselves, and found their verdict on their own knowledge of the facts. So the court in many cases of default and demurrer, took the disposition of the facts of the case to themselves and pronounced the judgment. And on the other hand in a very large class of cases, not falling within those in which exemplary damages may be claimed, the jury exercised an almost unlimited control over the subject of remuneration.

Thus it was at one time held that the court could dispose of the case if the plea were sent to be tried in a foreign country, for the jury there had not full knowledge of the fact.* And so where the court could increase damages, it was held they could mitigate them.† So also, in an early author it is said, that "though the justices use to award inquest of damages when they give judgment by default, yet they themselves may

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quelque sorte appeler de première et de seconde formation, et qui ont vecu ensemble dans une longue alternative de lutte et de rapprochement, jusque ce que le tems ait amené leur fusion plus ou moins complète. * * Sa formule la plus large et la plus haute c'est le *jus civile* et *l'æquitas* sans cesse opposés l'un à l'autre comme deux principes distincts et inegaux." De l'Influence du Christianisme sur le Droit Civil des Romains, par M. Troplong, Chap. III.

We are sadly in want of some competent work on the procedure of the Roman system, showing its curious analogies with our own. The subject has been elaborately treated by several German authors, among the best of whose works are Das Römische privat Recht, by Rein; Geschichte des Römischen Rechts, by Walter; Gerichts Verfassung und Prozess des sinkenden Römischen Rechts, by Bethman Hollweg; but neither in England nor this country has the subject received any careful attention since the discovery of Gaius, in 1816; if I except the excellent articles of Mr. Long, in the recently published Dictionary of Antiquities. Mr. Long has evidently made himself master of the subject, but his articles are only *disjecta membra;* and I could wish to see it systematically and elaborately discussed by some person equally familiar, if possible, with the Roman and English jurisprudence. It is one full of interest to the general as well as the legal scholar; it is calculated to throw much light on many of the most interesting questions in the annals of Rome, and is worthy of the attention not less of the historian than of the jurisconsult. But it cannot be done without a very thorough familiarity with the actual operation of both systems as well of the common as of the civil law. And, perhaps, other things being equal, it would be most satisfactorily treated by one who was acquainted with the practical working of popular institutions in a state of extreme development, who had seen and understood their defects and their advantages; their irregular and often convulsive action; their fierce passions; their vast energies and generous impulses.

* 1 Rol., 572, l. 50.

† 1 Rol., 572, l. 25-28; 573, l. 7.

tax the damages if they will.* So, too, from another early case where judgment was given by default, it seems clear that the judges originally might award damages without the intervention of a writ of inquiry.† So, too, on demurrer, and in actions of debt, the sum being certain, this power seems to have been exercised at a much later day.‡

The following case shows the unsettled condition of the law in the respect we are now considering. A motion being made to increase damages, because the jury had only given 12 pence, whereas the plaintiff's arm was broke; Rolles, C. J., refused because it did not appear by the declaration what manner of maiming it was that he received.§ It was early decided, however, that the justices of nisi prius could not increase the damages,‖ nor the court on the certificate of the justices of nisi prius.¶ And we have seen other cases, where the jury were declared to be chancellors and to have entire power over the subject of relief. But the fluctuations and oscillations of the system have been gradually corrected and brought under fixed rules. The progress of time and the accumulation of experience, enable us now to draw the lines of demarkation with great clearness, and the complication of the machinery disappears when carefully examined.

The first leading proposition on which the whole structure of our system depends is, that the court decides all questions of law. Statutes are expounded, contracts interpreted, written instruments construed, evidence admitted or excluded by the

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* Viner Abr., Dam. I.

† So says Brooke, Dam. Pl. 55, le def fist defaut et le pl. recouer dam. a 1111, l. taxe p. la court et ne dam come il court, quod nota q. le court m taxa les Damages.

‡ P. 56, car sur demur. in ley le court poet agard damag sans inquire de ceo p. curiam qd. nota. Vide, also, pl. 59–68, 194. See Sayer on Damages, Ch. XX., 105. Holdip *vs.* Otway, 2 Saund., 207; 21 Car., 2; Sayer, 107.

§ Jervis *vs.* Lucas, Styles, 345, 1652.

There seem to be some cases in England where the court still exercises a direct control over the verdict. So, in some instances, on bills of exchange, the court assesses the damages without the intervention of a jury. Robinson *vs.* Reynolds, 2 Adol. & El. N. S., 207; and see Clement *vs.* Lewis, 3 Br. & B., 297.

So in cases of mayhem, the courts exercised the power of altering and even increasing the verdict. Thus, where a verdict had been found for the plaintiff of £150, and it was moved to increase the damages, Lee, C. J., said, "there is no doubt but the court can increase the damages in this case, even upon view of the party maimed." But they held the £150 sufficient, and discharged the rule. Brown *vs.* Seymour, 1 Wilson, 5. See, also, Baynes *vs.* Haydock, 1 Rol., 572.

‖ 1 Rol., 573, l. 30.

¶ 1 Rol., 572, l. 20.

court and by the court alone.* And it necessarily follows from this that if the jury disregard the instructions of the court on any question of law, their verdict will be set aside. It is by the exercise of this power alone that the control of the court over questions of law can be preserved.

The correlative proposition to this is, that the jury decides all questions of fact. Where the facts are admitted the rights of the parties must depend on a pure question of law, and they are of course under the control of the court; but the instant that an issue of fact is presented the decision of the cause passes from the court to the jury. The principle is, indeed, carried so far, that in some States of the Union, as in Texas, the court is not even allowed to charge them as to the weight of testimony.† The rule giving the jury the decision of all questions of fact, if no exception were admitted, would, as has been said, effectually make the jury masters of the whole matter in controversy. Various modifications have therefore been introduced to it, which we now proceed to consider. In the first place, a verdict may be set aside because it is against the weight of testimony. This power is, however, very sparingly exercised, and on mere questions of fact the court always interferes with great hesitation and reluctance. So, a verdict will not be disturbed merely because it appears that the jury have reasoned incorrectly. In a recent case in the English Common Pleas, Maule, J., said, "We are not, however, to set aside a verdict because the jury one *or all* of them may have reasoned inconclusively. If such a doctrine were to prevail scarcely any verdict would stand. The trial by jury is not founded upon a supposition so absurd as that the whole twelve will reason infallibly from the premises to the conclusion."‡

So again, where the judge who tries a cause in trespass, recommends a verdict for nominal damages, but the jury give substantial damages (£5) such a verdict will not be set aside as perverse.§ And this rule has been repeatedly affirmed in this country. So in Mississippi, it has been decided that a verdict will always be permitted to stand unless it is opposed by a decided

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* U. S. *vs.* Hodge et al., 6 Howard, 279.

† Nels *vs.* The State, 2 Texas, 282.

‡ Smith *vs.* Dobson, 3 Scott N. R., 336.

§ Chilvers *vs.* Greaves, 5 Man. & Gr, 578

preponderance of the evidence, or is based on no evidence whatever;* and in Texas, that the verdict of a jury founded on conflicting testimony will not be set aside unless it be very apparent that they decided wrong.†

The court again holds itself at liberty to set aside verdicts and grant new trials, in that class of cases where there is no fixed legal rule of compensation, whenever the damages are so excessive as to create the belief that the jury have been misled either by passion, prejudice, or ignorance. But this power is very sparingly used, and never except in a clear case. So in an action for malicious indictment of the plaintiff for perjury, where a verdict of £400 was obtained, on a rule for new trial it was insisted that the verdict was excessive. But it was refused, and Lord Mansfield said, "New trials are not to be granted in this class of cases without very strong grounds indeed, and such as carry internal evidence of intemperance in the minds of the jury."‡

The doctrine has been repeatedly affirmed in this country. So Mr. J. Story has decided, that in cases of *tort* the verdict will not be disturbed unless it is so excessive or outrageous with reference to all the circumstances of the case, as to demonstrate that the jury have acted against the rules of law, or have suffered their passions, their prejudices, or their perverse disregard of justice, to mislead them.§ So again, the same sagacious Judge has said, "A court of law will not set aside a verdict upon the ground of excessive damages, unless in a clear case, where the jury have acted upon a gross mistake of facts, or have been governed by some improper influence or bias, or have disregarded the law."‖ Again, in another case Mr. Justice Story said, "The damages are certainly higher than what, had I sitten on the jury, I should have been disposed to give, and I should now be better satisfied if the amount had been less. * * It is one thing for a court to administer its own measure of damages in a case properly before it, and quite another thing to set aside the verdict of a jury merely because

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* Cicely *vs.* State of Mississippi, 13 Smede & M., 202.

† Perry *vs.* Robinson, Adm'x, 2 Texas R., 490.

‡ Gilbert *vs.* Burtenshaw, Cowper, 230.

§ Whipple *vs.* Cumberland Man'g. Co., 2 Story, 661.

‖ Wiggin *vs.* Coffin, 8 Story, 1.

it exceeds that measure. The court, in setting aside a verdict for excessive damages, should clearly see that they are excessive; that there has been a gross error; that there has been a mistake of the principles upon which the damages have been estimated, or some improper motives, or feelings, or bias which has influenced the jury. * * Upon a mere matter of damages, where different minds might and probably would arrive at different results, and nothing inconsistent with an honest exercise of judgment appears, I, for one, should be disposed to leave the verdict as the jury found it."*

So in New Jersey, too, it has been declared that the court, in actions of trespass for personal torts, where damages can be gauged by no fixed standard, but necessarily rest in the sound discretion of the jury, interferes with a verdict on the mere ground of excessive damages with reluctance, and never except in a clear case.†

The forbearance of the court to interfere with the jury is so great that, in actions of tort, the general rule is, that a new trial will not be granted for smallness of damages.‡ But it seems that if the jury so far disregard the justice of the case as to give no damages at all where some redress is clearly due, the court will interpose. So where, in case for negligence for defendant's servant driving against the plaintiff, it appeared that the plaintiff's thigh was broken, and considerable expense incurred for surgical treatment. The plaintiff obtained a verdict; damages *one farthing*. A new trial was granted on payment of costs, and Lord Denman said, "A new trial on a mere difference of opinion as to amount may not be grantable, but *here* are no damages at all."§

Although it is conceded that the courts have the power of granting a new trial in cases of *crim. con.*, still it seems that the power has never been exercised.‖ Even in cases where rules of

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* Thurston *vs.* Martin, 5 Mason, 197.

† Berry *vs.* Vreeland, 1 Zabriskie, 183.

‡ Lord Townshend *vs.* Hughes, 12 Mod., 150. Rendall *vs.* Hayward, 5 New Cases, 424. Mauricet *vs.* Brecknock, 2 Doug., 509. Hayward *vs.* Newton, 2 Strange, 940. Barker *vs.* Dixie, 2 Strange, 1051. 21 Vin. Abr., 486, Trial, Y. G. Lord Gower *vs.* Heath, Barnes' Notes, 445. Regina *vs.* Justices of West Riding, 19 B., 624, 631.

§ Armitage *vs.* Haley, 4 Q. B., 917. See, also, Cook *vs.* Beal, I. Ld. R., 176; S. C., 3 Salk., 115. Brown *vs.* Seymour, 1 Wils., 5. Austin *vs.* Hilliers, Hard., 408.

‖ Duberly *vs.* Gunning, 4 T. R., 656. Smith *vs.* Masten, 15 Wend., 270.

law have been disregarded, or where for any reason the verdict cannot be supported, the power of the court to set aside the decision of the jury will not be exercised without regard to the justice of the case. So, where a verdict was obtained for principal and interest, as to which latter the defendant was clearly liable, but there being no count adapted to it the verdict was not strictly regular, the court nevertheless refused to set it aside, saying, "In motions for new trials, the court may fairly endeavor to do that which advances the justice of the case; and by refusing this rule we only save the defendant from paying with the tremendous amount of accumulated costs, what he is in justice bound to pay at once."*

Thus, again, where the jury have given such excessive damages that the court feel bound to set aside the verdict, they will, instead of simply ordering a new trial, give the plaintiff the option of reducing the verdict to the sum which the court considers reasonable, and on his remitting the excess will deny the motion for a new trial, and this in actions of tort as well as on contract.† Or the court may send the cause back to a second jury on the quantum of damages alone.‡

A question has presented itself as to the mode in which the jury may arrive at the quantum of damages in cases where they are greatly divided on the question of amount; and it has been decided that if they *agree beforehand* that each juror shall mark the sum to which he conceives the plaintiff entitled, and that the total of these amounts divided by twelve (the number of jurors) shall be the verdict, the whole proceedings will be void, and a new trial will be ordered, for the reason that the whole thing is a mere matter of chance. So in New York, it has been decided that the jury will not be allowed to arrive at a verdict by each of the jurors marking down a particular sum and then dividing the whole amount by the number of jurors, and on assignment of error in fact, the judgment for this cause will be reversed.§ So in England, the court will not permit the jury to arrive at a verdict by splitting a difference.‖ But if

* Harrison *vs.* Allen, 2 Bing., 4.

† Diblin *vs.* Murphy, 3 Sandford S. C., 19. Guerry *vs.* Keston, 2 Rich. R., 507. Young *vs.* Englehard, 1 Howard Miss. R., 19.

‡ Boyd *vs.* Brown, 17 Pick., 453.

§ Harvey *vs.* Richell, 15 J. R., 87, and Roberts *vs.* Failis, 1 Cowen, 238.

‖ Hall *vs.* Peyser, 13 Mees. & W., 600.

the same course be taken in order to ascertain with more accuracy how the jury stands, the rule is different and it has been held not improper for them to arive at their verdict by each marking a sum and dividing it by twelve, provided they do not previously bind themselves to adhere to the result of the arithmetical computation.*

To the other rules which we have thus briefly enumerated, intended to maintain the dignity of the law and the harmony of the administration of justice, is finally to be added that to which we have had so frequently to refer in these pages—that the measure of damages is a matter of law to be decided by the court; and that whenever it shall appear that the jury have disregarded the instructions of the bench in this respect the verdict will not be permitted to stand.

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* Fowler *vs.* Colton, Wisconsin Reports by Burnett, 178.

CONCLUSION.

We have in the preceding pages taken a survey of the subject of compensation as awarded by the legal tribunals known to English and American jurisprudence. But much of the great demesne of justice 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.*

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* 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 may, 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 directed 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 creditor into possession (*exmissio et immissio*), so as to enable the creditor to pay himself by means of the possession and enjoyment of real estate, or so as to secure him through the debtor's 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; const. un, C. 8, 6. Hence, if the specific object be lost or deteriorated, or if, for some reason or other, it cannot be produced by the debtor, its value (*æstimatio*) is exacted; and the same is the case where the debtor is prevented from performing any act *purely personal*, 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 præcise 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

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

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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, 49.

"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.

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—when anomalies of this kind shall have disappeared, then, and not till then, will it be easy to reduce the subject of relief to order, system, and harmony.

I am happy to find these views sustained by the opinion of a very accomplished judge, delivered in New York since the abolition of the English system of pleading in that State: "The arbitrary distinctions which were permitted to flow from a difference in the forms of action are abolished, and the time has arrived when general and uniform rules upon the subject of damages, rules so just and comprehensive as to be susceptible of universal application, may be adopted."*

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 declared incompetent to pass upon the latter, to give them an uncontrolled discretion over the amount of relief

* Suydam *vs.* Jenkins, 3 Sandford, 646, per Duer, J.

would lead to incalculable mischief and confusion.* "It is desirable," say the Supreme Court of Massachusetts, "to have as definite and precise rules on the subject of damages as are practicable."† "A proper administration of justice," says the Supreme Court of Louisiana, "requires that the rules established by law for the assessment of damages should be adhered to."‡ The judicial authority to settle legal questions would be utterly nugatory, if the amount of compensation were a mere matter of arbitrary 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 huic syntagmati imponere.*" §

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* For a very able discussion of the relative powers and duties of court and jury under our system, see Commonwealth *vs.* Porter, 10 Metcalf, 263, and many cases there cited.

† Batchelder *vs.* Sturgis, 3 Cush., 201.

‡ Arrowsmith *vs.* Gordon, 3 La. Ann. R., 105.

§ Dumoulin, *De eo quod Int.*, § 219.